



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
701 S. COURTHOUSE ROAD, SUITE 1001
ARLINGTON, VA 22204-2490

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Docket No. 6506-21
Ref: Signature Date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 7 November 2022. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record and applicable statutes, regulations, and policies. The Board also considered the 29 September 2022 advisory opinion (AO) from a qualified medical professional and your 25 October 2022 rebuttal to the AO.

The Board determined that a personal appearance with or without counsel would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 6 November 2006. In August 2013, you reported that you were injured in a training accident in which your head struck a tree branch while you were standing in the turret of a vehicle and sought medical treatment as a result of this incident. As described in the AO, throughout your enlistment, you received numerous clinical evaluations and courses of treatment for different medical conditions. Other than short periods of light duty/rest in quarters, you were not placed on any periods of Limited Duty. You were never considered by a medical evaluation board for possible referral to the Physical Evaluation Board. According to the AO, this was because your primary care and specialty health care providers did not assess your ongoing

medical conditions, with periodic exacerbations, as rendering you unfit for continued service. You had been found fit for deployment and successfully performed your military duties in arduous afloat, overseas, and operational settings. During your separation physical examination, the examining physician reviewed your military health record and performed a medical assessment and he did not find any of your medical conditions disqualifying/unfitting for military service or separation from the service. On 27 January 2015, you were released from active duty at the completion of your required service.

In your petition, you seek a correction of your naval records to reflect you were placed on the permanent disability retired list (PDRL). In support of your request, you contend that your post-discharge findings by the U.S. Department of Veterans Affairs (VA) of service-connected medical conditions with associated disability ratings were indicative of medical conditions that rendered you unfit for service and should have resulted in referral to the Integrated Disability Evaluation System (IDES) prior to your end of service discharge. Specifically, in your petition, you state that the VA found the following service connected disabilities, dated to the day after your discharge: right shoulder strain with impingement syndrome, rotator cuff tendonitis with tear, rated at 10%; cervical sprain or strain, rated at 10%; lumbosacral sprain or strain, rated at 10%; traumatic brain injury (TBI) with headaches, rated at 10%, and anxiety disorder, rated at 50%.

In order to assist it in rendering a decision on your petition, the Board obtained the AO. The AO was considered unfavorable to your position, and it reasoned as follows:

Petitioner's in-service clinical history and diagnoses of right shoulder pain/strain with impingement syndrome, neck and back pain, head injury with concussion/headaches, and anxiety symptoms are documented in his service medical record. He also reported a pre-enlistment history of significant head injury at age 14 that reportedly resulted in 6 months hospitalization, induced coma, placement of burr holes in the skull to relieve pressure, and sequelae of headaches and migraines. He also reported, in two other clinical evaluations, pre-enlistment right shoulder trauma/pain to include dislocation playing football in 2005. Notably, he did not disclose these injuries during his enlistment processing or enlistment physical evaluation.

Throughout his enlistment, Petitioner received numerous clinical evaluations and courses of treatment for his service-connected medical conditions. Other than short periods of light duty/rest in quarters, Petitioner was not placed on any periods of Limited Duty, nor considered for a Medical Evaluation Board for possible referral to the Physical Evaluation Board as Petitioner's primary care and specialty health care providers did not assess his ongoing medical conditions, with periodic exacerbations, as rendering him unfit for continued service. Notably, he was continually found fit for deployment and successfully performed his military duties in arduous afloat, overseas, and operational settings. During his separation physical examination, the examining physician reviewed his military health record and performed a medical assessment. He did not find any of his medical conditions disqualifying/unfitting for military service or separation from the service.

Review of the available objective clinical and non-clinical evidence documented Petitioner successfully executed the full range of responsibilities of his rate and rank up through his discharge in January [REDACTED]. His USMC Fitness Reports up through [REDACTED] consistently rated him "Highly Qualified" with recommendations for promotion, retention, assignment to billets with increasing responsibility, and resident PME courses. Petitioner successfully completed demanding MOS and Career milestone courses to include SNCO Career Course [REDACTED] and Corporals Course [REDACTED]). Though Petitioner's contention his ongoing medical conditions resulted in duty limitations and occupational impairment, his evaluations throughout his career (with the exception of a non-observed evaluation after his NJP for UA) were competitive and reflected his ability to adequately perform the range of duties commensurate with his rate and rank.

In summary, in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that at the time of his discharge he was unfit for continued military service and should have been medically retired.

You were provided a copy of the AO, and you provided a rebuttal dated [REDACTED]. According to your rebuttal, you set forth five points on which you found the AO to be insufficient. First, you assert that the AO did not properly give weight to the VA's findings; second, you state that the AO failed to address your duty limitations, and it improperly focused on the lack of being placed in limited duty status; third, you argue that the AO improperly relied on your separation physical as well as the fact that you were never referred by any of your treating or evaluation physicians to the Medical Evaluation Board; fourth, you contend that it was improper for the AO to refer to your prior service head injury, which resulted in a comatose state for approximately six months; and fifth, it was improper for the AO to rely on your fitness reports in determining whether you were fit to perform the duties of your military position.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition. The Board also reviewed the AO and your rebuttal to the AO. In review of all of these materials, the Board disagreed with your rationale for relief. In reaching its decision, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health of the member or to the welfare or safety of other members; the member's disability imposes unreasonable requirements on the military to maintain or protect the member; or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

Ultimately, the Board substantially concurred with the findings of the AO. The AO, as noted above, relied on several factors in reaching its conclusion that you did not suffer from an unfitting condition while you were on active duty. The comprehensive discussion set forth in the AO reflects that your case was considered by relating the nature and degree of your medical

condition to the requirements and duties that you may reasonably have been to be expected to perform in your office, grade, rank or rating.

Your rebuttal to the AO addresses several factors, which the Board evaluated closely. Notably, the factors you raised are the factors typically employed in determining the fitness of a member. For example, the AO found, among other things, that your fitness reports provided no indication that you were unable to perform your duties. You asserted that this was improper because the fitness reports did not extend through the end of your service. The Board determined that the AO's reliance on your fitness reports was reasonable because the fitness reports demonstrated that you were successfully working within the scope of your duties through the date of your last fitness report. The Board took into consideration that your final issued fitness report was issued approximately six months prior to your separation. However, the Board also observed that thereafter there were no other indications that you were unable to perform your duties. For example, there was no evidence that your command provided to you any non-medical assessment or other documentation describing that your medical conditions precluded you from performing your duties or recommending that you be referred to a medical evaluation board. To the contrary, the AO explained that despite numerous medical contacts over your period of service, none of your medical providers that you saw determined you should be placed into a Limited Duty status or otherwise refer you to a medical evaluation board. As noted, the Board considered your opposition to this conclusion, but did not find your arguments persuasive.

You also found fault with the AO by asserting that the AO did not focus on your duty limitations, and instead focused on you not being placed into a limited duty status. The Board did not agree with your assertion here. The AO specifically found that you were "continually found fit for deployment and successfully performed his military duties in arduous afloat, overseas, and operational settings."

Similarly, the Board concurred with the AO's finding that the presence of a medical condition corresponding to a disability rating contained in VA's Schedule for Rating Disabilities (VARSD) is not sufficient to warrant a finding of unfitness for naval service. As the AO explained, eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated. In your rebuttal to the AO, you assert that the VA's findings should be considered because it was determined close in time to your separation from service. The Board determined, however, that the VA's findings were made in connection with your application for Compensation and Pension and they were not made in connection with the Integrated Disability System (IDES). Thus, they were made using a different standard. Importantly, the findings were not intended to make a determination as your fitness for duty as contemplated within the Disability Evaluation System. Determinations as to fitness under the Disability Evaluation System always lies with the military service and not the VA.

In your rebuttal to the AO, you also fault the AO for relying on your separation physical, in which the examining physician found that you were fit for separation. In addition, you also disagreed with the AO's reliance on the fact that you were never referred to a medical evaluation board. The Board observed that these are important factors in considering whether you were suffering from an unfitting condition during your active service. Indeed, your service medical

record reflects that, despite your multiple contacts with medical providers over your period of service, none of your providers referred you to a medical evaluation board and you were found fit for separation at your final, formal, military medical examination. These facts are more pronounced in light of the fact that there was no indication you were unable to perform your duties as reflected in your fitness reports up until at least six months prior to your separation. Thereafter, there is no indication from your command that you were suffering from any unfitting conditions. And, as noted, near the end of your service, one of the last naval service physicians with whom you made contact, found that you were fit for separation. While any of these factors alone, depending on their severity, may or may not be dispositive on the issue of your fitness for duty under the Disability Evaluation System, these factors taken together provided sufficient evidence to the Board that there was no error or injustice at play in your separation from service.

In conclusion, the Board based its decision on its independent review of the entirety of the documentation, and its decision was informed by the AO, which the Board found to be factual and reliable. The AO properly focused on the appropriate standard of fitness, and it reviewed and considered several important factors, including, but not limited to: (1) your ability to perform your duties, which included a review of your fitness reports and your service record, (2) lack of referral to a medical evaluation board by any of your treating or evaluating providers, (3) your final fitness for separation physical. The AO, and this Board, also considered whether there existed any documentation from your command that would weigh in favor of finding that you were unfit to perform your duties in the meaning of the Disability Evaluation System, and it observed none. The Board also fairly considered your assertion that this Board should give weight to post-service findings of the VA in a Compensation and Pension exam. Accordingly, despite careful and complete review of your entire petition, its enclosures, and your rebuttal to the AO, the Board was unable to find any error or injustice in your service record and it denied your petition.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

12/6/2022

