



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. 6912-21
Ref: Signature Date

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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 application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 9 January 2023. 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 14 November 2022 Advisory Opinion (AO) from a qualified medical professional, which was provided to you on 14 November 2022. Although you were afforded an opportunity to submit a rebuttal, you did not do so.

A review of your record shows that you enlisted in the Marine Corps Reserve and commenced a period of active duty for training on 28 December 2006. On 9 June 2007, having completed your initial training, you were released from active duty and commenced your service in the Reserve. On 17 May 2008, you were activated and you deployed to Iraq in support of Operation Iraqi Freedom. You contend that you injured your shoulder while you were on active duty, and the Administrative Remarks (Page 11) that you signed on 30 April 2009 indicates you had an ongoing medical issue, as follows:

Per MARADMIN 259/04 par 5, I elect deactivation. My initial EAS was 20090620. I understand that I have ongoing medical issues that are not yet resolved and I am waiving my right to stay on active duty to finish my medical treatment.

I understand that relinquishing these rights will incur the loss of TRICARE benefits for family members if my issue is not resolved before my 180 days of Transition Assistance Management Program (TAMP) benefits expire. (This does not apply to TRI CARE Reserve Select (TRS) benefits.)

After deactivation, I have the option to request Line of Duty (LOD) Benefits which will cover medical treatment and in some cases, provide incapacitation pay. The LOD program is referenced by SECNAVINST 1770.3D. LOD benefits will continue until I am 'Fit for Duty', or the PEB has issued findings, or the case is terminated because of administrative action.

At your request, you were released from active duty. There is no indication that, as described for you in the Page 11, you sought an LOD Benefits finding. According to your petition, you returned to your Reserve unit and eventually you were placed in the medical retention review (MRR) process. You obtained the services of a Navy judge advocate, who provided you legal counsel throughout the MRR process. Despite being offered to remain on active duty to address any injuries, and despite being told how to obtain LOD Benefits, and while represented by counsel, there is no indication that you sought an LOD Benefits authorization, and you were eventually discharged from your Reserve unit. Your service records demonstrate that you accrued reserve drilling points through at least June 2011. Neither your petition, nor your service record, reflects that you took any action to address your alleged medical concerns over the past 11 years.

In your petition, you request a service medical retirement. In support of your request, you contend that, due to back and shoulder injuries incurred while deployed to Iraq in 2008, you satisfied the requirements to receive a medical retirement from the Marine Corps Reserve. You assert that your unit failed to follow correct discharge procedures, and despite the fact your injuries resulted from active-duty service, your unit did not submit you for a Notice of Eligibility. Further, you assert that your unit did not send you to a Medical Evaluation Board or the Physical Evaluation Board. Instead, your unit improperly administratively discharged you as Not Physically Qualified.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, and the Board disagreed with your rationale for relief. As an initial matter, the Board determined that you did not exhaust your available administrative remedies. In reaching this decision, the Board observed that, in order to qualify for military disability benefits members of the Navy and Marine Corps Reserve are required to obtain a line of duty (LOD) benefits determination. In your legal brief, you call this requirement a Notice of Eligibility, but the Board assumed in your favor that you sought to argue that your Reserve unit improperly failed to forward your materials in order to obtain an LOD Benefits authorization. Reservists who are injured on active duty are required to obtain LOD authorizations to obtain medical and pay benefits from the military. LOD authorizations are governed by Department of Defense Instruction (DODI) 1241.01 and Secretary of the Navy Instruction (SECNAVINST) 1770.5.

According to SECNAVINST 1770.5:

Navy and Marine Corps RC Service Members who incur or aggravate injuries, illnesses, or diseases during periods of Active Duty, Inactive Duty Training, Funeral Honors duty, while traveling directly to or from such duty or training, or while remaining overnight immediately before the commencement of or between successive periods of such duty, may be eligible for Line of Duty (LOD) benefits, unless such injury, illness, or disease is the result of the gross negligence or misconduct of the member. For purposes of this instruction, a determination that establishes a covered condition is an 'in-LOD determination.'

The Board observed that your petition does not provide any information supporting that you obtained, or sought to obtain an LOD. Your petition also provides no evidence that you sought to appeal any denial (or constructive denial) of an in-LOD determination to the Administrative Law Division of the Office of the Judge Advocate General (Code 13), as set forth in SECNAVINST 1770.5. Should you decide to proceed with seeking an LOD authorization, as noted SECNAVINST 1770.5 provides guidance in this regard.

The Board observed that you did not provide any medical documentation contemporaneous to your service that tended to show that the finding of the medical board while you were in-service was in error. Nor did you otherwise provide documentation that you suffered an unfitting condition while on active duty as that phrase is defined within the Disability Evaluation System. With respect to the material that you provided relating to findings by the VA, the fact that the VA rated you for a disability condition that it determined was service connected to your time in the service did not persuade the Board these conditions were unfitting at the time of your discharge from the Marine Corps because 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. Finally, the Board also did not observe any evidence of injustice in your records. Accordingly, based on the foregoing, the Board 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,

2/3/2023



Deputy Director

