



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. 7229-21
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.

A three-member panel of the Board, sitting in executive session, considered your application on 12 December 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 16 November 2022 advisory opinion (AO) from a medical professional, as well as your response in rebuttal to the AO, received 25 November 2022.

A review of your record revealed that you enlisted in the Navy and commenced a period of active duty as an enlisted Sailor on 8 January 1968. On 24 August 1973, you were commissioned an Ensign. On 11 June 1974, a Medical Evaluation Board (MEB) convened at █ to review your chronic bilateral knee pain. In connection with a review of your fitness for continued service, on 26 June 1974 your Commanding Officer submitted a Non-Medical Assessment (NMA) that described that you could not stand watches, move rapidly about the ship, and had fallen down two ladders, and that he hoped remedial action would allow you to continue your career. On 23 June 1976, a second MEB convened to evaluate your continued knee pain. The MEB stated, "this member is incapacitated for the full duties of his rank by these medical problems," and recommended referral to the Physical Evaluation Board (PEB) for disposition. On 11 August 1976, the PEB convened and determined that you were unfit for duty due to your knee condition, and it recommended that you be placed on the Temporary Disabled Retirement List (TDRL). On 11 October 1976, pursuant to the findings of the PEB, you were placed on the TDRL.

On 22 May 1978, you underwent your first TDRL Periodic Physical Evaluation (PPE). The examiner maintained your current diagnoses. On 4 February 1980, you underwent your second PPE, with the same result. On 18 May 1981, you received a Rheumatology Evaluation, and the recommended that you be discharged from TDRL status. On 8 July 1981, an Informal PEB convened and found you were unfit for duty because of a physical disability and recommended that you be separated with a cumulative disability rating of 20%. Details on the specific medical findings are set forth more fully in the AO. You were subsequently separated from the TDRL severance pay but no other disability benefits.

In 2020, you filed a petition with this Board seeking similar relief (Docket No. 2429-20). The Board denied your petition in a letter dated 22 December 2020, as follows:

The Board carefully considered your arguments that you deserve to be placed on the disability retirement list and promoted to O3. You assert that the PEB erroneously rated your unfitting conditions in 1981 based on Department of Veterans Affairs ratings assigned at the time. Unfortunately, the Board determined the preponderance of the evidence does not support relief in your case. In reviewing your record, the Board was unable to locate your PEB record. As a result, the Board relied on the presumption of regularity. The Board relies on a presumption of regularity to support the official actions of Navy personnel and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. In your case, the Board was hampered by the lack of your PEB record to substantiate your claims. Regarding your request for a retroactive promotion, the Board considered the fact you were never promoted to O3 despite your assertion that a selection board selected you for promotion. As a result, the Board determined it was not appropriate to grant you a promotion without evidence that you were denied a promotion in contravention of Navy regulations or a federal statute. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your record.

In your petition, you request the award of a medical retirement at 75%, back pay retroactive to October 1981, interest compounded bi-monthly using the IRS rates, and compensation for four decades of unnecessary health insurance premiums, deductibles, and co-pays. In support of your request, you provided a Power Point presentation setting forth your naval background and your arguments in support of your petition, which the Board carefully reviewed. Your arguments included that the PEB's Proceedings and Findings form was unsigned by its President and Recorder, which you assert was required, that the findings were not reviewed by a Judge Advocate, that your disabilities were rated at a lower rating than they had been, even though you contend that they had worsened, and that you had other disabilities that were improperly left unrated.

To assist it in reviewing your petition, the Board obtained the 16 November 2022 AO. The AO was considered unfavorable to your position, finding as follows:

Petitioner's in-service diagnoses of Chondromalacia Patellae, bilaterally; Enthesitic Syndrome; and Fibrositis Syndrome is documented in his service medical and

personnel records. Additionally, petitioner's clinical history, diagnoses, treatments, and disposition recommendations were chronicled through his multiple Medical Evaluation Boards, Physical Evaluation Boards, and TDRL Periodic Examinations.

The clinical histories, diagnoses, and limitations to the performance of his duties were likewise detailed throughout his MEB and PEB proceedings leading to the final medical separation with severance pay at a 20% disability rating for his unfitting conditions.

Petitioner's contention that his final PEB determination of 20% disability was due to clerical errors and failed to document separate disability ratings for Enthesitic Syndrome and Fibrositis Syndrome (or include Enthesitic Syndrome, right wrist) presumes that the provided 7/8/1981 Notice of PEB Proceedings and Findings did not accurately reflect the deliberations of the PEB as complete, and the documented final results a product of the full and proper processes of the PEB.

Further review of Petitioner's contentions regarding the PEB's decision and documented findings cannot be undertaken, as the records of the PEB's deliberations were not able to be located, despite multiple attempts to find these files on the part of the PEB administrative staff.

Petitioner provided an in-depth explanation of his rationale for his petition in his personal statement and PowerPoint presentation. However, he provided no new clinical evidence in support of his contentions that was not already available in the medical and service records.

The AO concluded, "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 should have been awarded a higher disability rating and placed on the Permanent Disability Retirement List."

You were provided a copy of the 16 November 2022 AO, and you provided a response in rebuttal, which was received on 25 November 2022, and which the Board carefully reviewed in its entirety. In your rebuttal, you reiterated your argument that the final PEB resulting in your discharge from the TDRL was not signed and it was incomplete. You also requested that a different physician review portions of the AO. Upon review, although your rebuttal set forth your disagreement with the points made in the AO, you did not provide new clinical evidence.

The Board carefully reviewed your petition and the material that you provided in support of your petition and it disagreed with your rationale for relief. In its review of your materials, the Board did not observe any evidence that there was any error or injustice apparent in the findings of the PEB or of the medical professionals during your evaluations in the PPE and your eventual discharge from the TDRL with a 20% rating. To the contrary, the Board observed that you were appropriately evaluated by professionals during your evaluation by the MEB, the PEB, and PPEs, and those professionals made findings and recommendations that were supported by

medical evidence. You were appropriately evaluated during a PPE and subsequently separated with severance pay.

In reaching its decision, the Board also concurred with the findings of the AO, who did not find any irregularities in your medical processing. The Board also noted the AO's statement that you did not provide new or additional information that was not already reviewed. To the extent that your PEB file is incomplete, the Board acknowledged and concurred with its finding in your prior petition that it "relies on a presumption of regularity to support the official actions of Navy personnel and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties." In your case, the Board did not observe any evidence to the contrary, nor did you provide any such new and material evidence, including no new clinical documentation. In sum, in its review of all the materials, the Board did not observe any error or injustice in your naval records 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,

1/5/2023

