



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

█
Docket No. 7435-21
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 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 20 November 2022 advisory opinion (AO) of a qualified medical professional as well as your 19 December 2022 response in rebuttal to the AO.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 27 January 1987. During your service, you sought treatment for back pain and reported that you had chronic pain since you were injured in a motor vehicle accident about eighteen months earlier. You also disclosed a pre-service history of scoliosis. On 8 September 1987, a medical board diagnosed you with thoracic kyphoscoliosis, which existed prior to your entry into service and which was not aggravated by your service. The medical board recommended that you be discharged. On 8 October 1987, you were discharged due to a physical disability that existed prior to your entry as determined by a medical board. In 2010, you filed a petition with this Board seeking a disability retirement. The Board denied your petition, explaining that it was not persuaded that you sustained a significant injury to your back while you were serving on active duty.

In your petition, you request to be placed on the permanent disability retired list (PDRL) with a rating of 100%. In support of your request, you contend that you learned you should have been

placed in the Disability Evaluation System as a result of going to the U.S. Department of Veterans Affairs (VA), which you contend found you to have a combined 90% service connected disabilities.

In order to assist it in reviewing your petition, the Board obtained the 20 November 2022 AO. According to the AO:

Review of the available objective clinical and non-clinical evidence documented Petitioner successfully executed the range of responsibilities of his rate and rank up through the two months prior to his discharge. His performance evaluations were competitive and reflected the lack of significant occupational impairment or inability to meet his military obligations and responsibilities. Except for intermittent periods of light duty towards the end of his enlistment, Petitioner continued to function successfully in his assignment as a student in his MOS training curriculum.

Petitioner did not provide any new or material clinical evidence in support of his contentions for review. Petitioner did provide a statement from his mother supporting his personal statement he did not have a pre-existing back condition, or diagnosis of scoliosis, before entering military service. However, after giving consideration of Petitioner's contended issues and provided evidence, I ascribe greater weight to the objective clinical and non-clinical evidence contemporary to his military service, vice the non-clinical testimony offered thirty years distant to Petitioner's military service.

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 was erroneously separated for a condition existing prior to enlistment that was not aggravated by his military service and should have been placed on the disability retirement list."

You were provided a copy of the AO, to which you provided the rebuttal on 19 December 2022. According to your rebuttal, you contend that you have been "service connected for in-service injuries both documented and rated and that these resulted in unfitting for further naval service and documented at 90% VA combined rating." You assert that if these findings were "done at time of discharge as they should have been, would of resulted in a combined rating of 30% and placement on the TDRL at that time, continued chronology from service have progressed these disabilities further resulting in increase of rating and placement on PDRL."

The Board carefully reviewed your contentions and the material that you submitted in support of your petition, as well as your response in rebuttal to the AO, and 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 or 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.

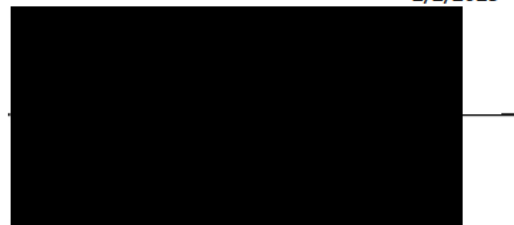
In reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met any of the criteria for unfitness at the time of your discharge. At the outset, the Board concurred with the AO's opinion and affirmed the prior Board's decision. The Board found that the AO provided a careful analysis of the relevant medical factors and concluded that there is no basis for placing you on the PDRL. Indeed, as noted by the AO, the Board found no evidence contemporaneous to your service that tended to support the applicability of a basis for placement on the PDRL. The AO noted that you were able to function successfully in your training assignment. The Board credited the medical board findings contemporaneous to your service, which clearly stated that you had a physical disability that existed prior to entry and that was not aggravated by your service and you were appropriately discharged on that basis.

With respect to your assertion concerning findings by the VA, the fact that the VA may have 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. Accordingly, based on all of 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,

2/2/2023

A large black rectangular redaction box covers the signature area. A horizontal line extends from the right side of the box, indicating the end of the signature line.