



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

█
Docket No. 7567-21
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF █
XXX XX █ USMC

Ref: (a) Title 10 U.S.C. § 1552

Encl: (1) DD Form 149 w/attachments
(2) Advisory Opinion, 6 Dec 22

1. Pursuant to the provisions the reference, Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected such that he receives a medical retirement due to post-traumatic stress disorder (PTSD) and traumatic brain injury (TBI) sustained in combat during his █ deployment.

2. The Board, consisting of █, █, and █ reviewed Petitioner's allegations of error and injustice on 19 December 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of naval records, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. Although Petitioner's 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 the case on its merits.

b. Petitioner enlisted in the Marine Corps and commenced a period of active duty on 9 September 2004. Petitioner deployed to █ in support of combat operations from 13 May 2011 to 5 May 2012. On 10 November 2011, he was Wounded in Action (WIA) with a Concussion with Loss of Consciousness. After the injury, Petitioner had several medical contacts. Petitioner's medical history following his injury, based on available records, is set forth in enclosure (2), the Advisory Opinion (AO). On 18 September 2012, Petitioner was separated at the completion of his required service.

c. Petitioner contends that while he was on active duty, he suffered from PTSD and TBI, that he continued to experience the symptoms of PTSD and TBI throughout the remainder of his

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enlistment, and that his symptoms impaired his occupational functioning during the rest of his deployment, during his return from deployment, and through his discharge processing. According to Petitioner, he experiences significant depression, short/long-term memory impairment, and inability to understand what was happening to him. He asserted that during his discharge processing, he was told to take his terminal leave and the U.S. Department of Veterans Affairs (VA) would take care of him after discharge. He stated the VA, which granted him disability benefits with 100% disability (70% PTSD, 40% TBI), deemed his injuries service-connected and that the Social Security Administration has found him to have "Total and Permanent" disability. Petitioner included letters of support from two Marine Corps officers who witnessed his trauma.

d. In connection with reviewing this petition, the Board obtained the enclosure (2) AO, which was considered favorable to Petitioner. According to the AO:

Petitioner was diagnosed in-service with Traumatic Brain Injury with continued residual symptoms of headache, photophobia, mild hearing loss R>L, insomnia, and tinnitus. Soon after discharge from service, he was diagnosed with PTSD (likely initially manifested as Petitioner's in-service diagnosis of 'Acute Reaction to Stress' with cited symptoms of hypervigilance, trouble sleeping, and 'possible panic attacks'). These conditions were clinically documented to have originated during his military service from an SVBIED attack and are not in question.

These symptoms were in evidence up through the last available clinical records. Petitioner was hospitalized for his TBI in-theater then treated on an outpatient basis for over two months in a no-duty or light-duty status before being discharged to his deployed unit to finish out the last months of his scheduled deployment and remain with his primary support group of his peers and chain of command.

There are no available clinical records documenting his discharge from [REDACTED] Wounded Warrior Program [REDACTED] medical status during the remainder of his deployment, or his medical status following redeployment through his discharge processing.

However, statements from Petitioner, as well as from officers and supervisors in his chain of command, indicated he continued to experience significant medical and psychological symptoms, which impaired his ability to function at his previously high level of performance. Petitioner described post-deployment, continuing to experience significant mental health conditions to include depression, sleep disturbance, memory impairment, and residual symptoms of his TBI.

* * *

In my clinical opinion, had Petitioner been appropriately referred for fitness determination by the PEB, he would have been likely have been found unfit for duty. The available in-service clinical evidence documented persistent TBI residual symptoms of headache, photophobia, sleep disturbance and tinnitus. These

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symptoms met criteria for a rating of 2 (three or more symptoms) in the subjective symptom facet of the VA Rating Schedule for TBI (VA Diagnostic Code 8045) corresponding to a 40% disability rating. Additional TBI residual symptoms meeting lesser criteria for disability included mild memory dysfunction and excitability (manifestation of irritability). The available in-service records did not contain sufficient evidence for a diagnosis of PTSD or evidence this condition rendered him unfit for continued service.

e. The AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides sufficient support for Petitioner's contention that at the time of his discharge he was unfit for continued military service and should have been considered for referral to the IDES for evaluation for unfitness for duty. Had Petitioner been referred to the IDES, he would likely have been found unfit for duty and placed on the Temporary Disabled Retired List with a Disability Rating of 40%."

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting relief. Specifically, the Board concurred with the findings of the AO. As described in the AO, adequate documentation exists that Petitioner exhibited symptoms while in service that were consistent with the potentially unfitting condition of TBI. As such, the documentary evidence demonstrates that Petitioner should have been reviewed for an unfitting condition determination. Accordingly, Petitioner should be reviewed by the PEB as set forth in the recommendation below.

RECOMMENDATION

In view of the above, the Board directs the following corrective action:

Within 60 days of this decision, Petitioner shall be referred to the PEB for a determination of his fitness to perform the duties of his office, grade, rank, or rating during the time that he was on active duty. Petitioner shall be afforded all of the rights afforded individuals within the Disability Evaluation System, including, but not limited to, the assignment of a Physical Evaluation Board Liaison Officer.

That part of the Petitioner's request for corrective action that exceeds the foregoing be denied.

That no further changes be made to Petitioner's naval record.

That a copy of this report of proceedings be filed in Petitioner's naval record.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and

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having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

1/18/2023

[REDACTED]

Executive Director

Signed by: [REDACTED]