



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. 7976-21
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, U.S. Code, and the Order of the United States Court of Federal Claims (COFC) (Case No. 17-1168C), filed 16 December 2021, remanding your case to the Board for Correction of Naval Records [hereinafter referred to as the “Board”] to address the statement in its decision memorandum for Docket No. 2587-18 that your disability rating from the Department of Veterans Affairs (VA) for lumbar spine stenosis and disc narrowing remained static throughout your period of reinstatement to active duty. Specifically, the Board stated in Docket No. 2587-18 that you “received a 20% rating for lumbar spine stenosis and disc narrowing that was suspended pending [your] active duty service and reinstated at 20% upon [your] release from active duty. The fact [your] VA rating remained the same even after [your] active duty period was evidence that [your] back condition remained the same even after [your] active duty period was evidence that his back condition remained relatively static during [your active duty period] and did not prevent [you] from performing [your] duties.” As explained in more detail below, this erroneous statement was the result of the Board’s misinterpretation of the language in your 2011 VA rating decision letter. The Board reconsidered its previous denials of your request in light of this erroneous finding, but continued to find insufficient evidence of probable material error or injustice. Accordingly, the Board affirmed its decision from Docket No. 7031-20 and denied your request for relief.

A three-member panel of the Board, sitting in executive session, reconsidered your application on 29 December 2021. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with the above-referenced Order of the COFC and the administrative regulations and procedures applicable to the Board’s proceedings. Documentary material considered by the Board included the above-referenced Order of the COFC; the case files for each of your previous applications to the Board in Docket Nos. 6810-16, 2587-18 and 7031-20, which included your original applications, the Board’s decision documents for each of these cases, the previous remand orders in your case, all material submitted in support of these previous applications, and the advisory opinions relied

upon for those decisions and your responses thereto; relevant portions of your naval record; and applicable statutes, regulations, and policies.

The Board determined that your 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.

The facts and procedural history of your case were discussed in detail in the decision documents for Docket Nos. 2587-18 and 7031-20. That discussion is incorporated by reference herein.

In Docket No. 7031-20, the Board adopted its previous findings and rationale from Docket No. 2587-18, which erroneously found that you were issued a 20 percent disability rating from the VA for a Lumbar Stenosis and Degenerative Disc Disease condition prior to your mobilization in 2013 that remained static during your period of active duty. Based in part upon this finding, the Board determined in both Docket Nos. 2587-18 and 7031-20 that you did not qualify for placement on the disability retirement list. As mentioned above, this erroneous finding was based upon the Board's previous misinterpretation of language contained within your 11 December 2015 VA rating decision letter upon the conclusion of your active duty service. Specifically, this letter stated that your compensation for lumbar spine stenosis and disc narrowing "*resumed* with an evaluation of 20 percent, effective from January 30, 2015 (*emphasis added*)." This language led the Board to mistakenly conclude that the 20 percent disability rating assigned by the VA upon the completion of your active duty service resumed, rather than increased from the 10 percent disability rating that had previously been assigned by the VA for this condition and had been suspended upon the commencement of your active duty service in 2013. The Board reconsidered your request to be placed on the disability retirement list in light of this corrected finding, but continued to find insufficient evidence of probable material error or injustice.

In order to qualify for placement on the disability retirement list, a member must be unable to perform the duties of their office, grade, rank or rating as a result of a disability condition. While the Board does not dispute that you suffered from multiple disability conditions, it found insufficient evidence to establish that any of them prevented you from performing your duties until the date of your retirement. As a result, the Board determined that the preponderance of the evidence does not support a finding that you were unfit for continued naval service at the time of your release from active duty or eligible for placement on the disability retirement list. In making this finding, the Board relied on several pieces of evidence, including the 13 November 2014 medical evaluation that determined you were "fit for full duty and demobilization from an orthopedics standpoint." Despite the evidence that your back condition may have worsened during your period of active duty, this medical determination conducted less than three months prior to your release from active duty was strong evidence that you were capable of performing the duties of your office, grade, rank, or rating. The Board also noted that eligibility for disability compensation from the VA is tied to the establishment of service connection of disability conditions, and is based upon the manifestation of the condition rather than upon the impact of the condition upon the individual's ability to perform their military duties. It also noted that you possessed a combined 80 percent disability rating from the VA prior to your

mobilization and active duty service in 2013, which demonstrates the relative lack of probative value of VA disability ratings with regard to fitness for duty determinations. Accordingly, the Board found that the November 2014 medical evaluation was far more probative of your fitness for duty at the time of your retirement than was your VA disability rating. In addition to the results of your November 2014 medical evaluation, the Board also considered your documented performance during your mobilization to conclude that you were clearly fit for duty. Your fitness reports reflect that you performed your assigned duties at or above fleet standards for your paygrade and designator. You earned marks of 4.0 and 3.0 for mission accomplishment, despite earning lower marks associated with your misconduct. This evidence reinforced that Board's conclusion that you were clearly capable of performing the duties of your office, grade, rank or rating despite the existence of your disability conditions. Finally, the Board considered the fact that you were able to commence law school studies upon your release from active duty as additional evidence of fitness at the time of your retirement. Considering the totality of the evidence, the Board found that none of your disability conditions rendered you incapable of performing the duties of your office, grade, rank, or rating up until the time of your retirement. Accordingly, you were clearly fit for duty, and therefore ineligible for placement on the disability retirement list despite the evidence that you possessed disability conditions that may have worsened during your period of active duty from August 2013 to January 2015.

In addition to reconsidering its previous decisions regarding your placement on the disability retirement list in light of the correct finding regarding your VA disability rating prior to reentering active duty, the Board also reviewed its previous determinations regarding your request for Line of Duty benefits. Unfortunately, the Board found nothing to change its previous determination in this regard, and confirmed its previous denial of the relief that you sought in Docket No. 7031-20. The analysis of this issue in Docket No. 7031-20 is adopted and incorporated by reference herein.

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,

1/6/2022

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Deputy Director

Signed by: █