



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

██████  
Docket No. 481-22  
Ref: Signature Date

██████ ████████ ████████  
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Dear ██████ ██████:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the U.S. Court of Federal Claims (COFC) (Case No. 20-1388C), remanding your case to the Board for Correction of Naval Records [hereinafter referred to as the Board] to “address all issues and claims for relief [you] asserted” to the Court. After careful review and consideration of all of the relevant evidence of record, the Board continued to find insufficient evidence of any material error or injustice warranting relief. Accordingly, your application has been denied.

A three-member panel of the Board, sitting in executive session, reconsidered your application on remand on 31 March 2022. 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 COFC Order and the administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board included the above referenced COFC Order, filed on 10 January 2022; your Complaint and Amended Complaint to the COFC, signed on 9 October 2020 and 17 April 2021 respectively; the entire case file for Docket No. 9629-18, the decision for which was the subject of your complaint to the COFC; the entire case file for Docket No. 8042-15, in which the Board granted you partial relief by directing that your case be reviewed by a Physical Evaluation Board (PEB); 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. Accordingly, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

The background of your case was discussed in detail in the Board’s decision letters for Docket Nos. 9629-18 and 8042-15, both of which have previously been provided to you. Accordingly, the background discussion from those decisions is incorporated by reference herein. The Board also carefully reviewed and considered the background facts stated in the COFC Order of 10 January 2022. As noted in these documents, the Board previously found in Docket No. 8042-15 that the Navy did not diagnose your narcolepsy condition while you were on active duty, and that as a result of this oversight you were not referred to a medical evaluation board (MEB) and/or

the PEB. As a result, the Board directed that the PEB to review your medical record, to include the Department of Veterans Affairs (VA) Compensation and Pension (C&P) examination records, “to determine whether [you] would have been [deemed] unfit for continued naval service prior to your discharge,” and if so to “issue an appropriate disability rating consistent with regulations.” Pursuant to this decision, an informal PEB (IPEB) found that you would have been found fit to serve on 13 September 2017. After the IPEB decision was issued, with the assistance of legal counsel, you requested a formal hearing. However, your request was ultimately denied by the PEB President because a finding of fit for duty is not considered adverse, and without an adverse finding there is no right to a formal hearing. On 24 October 2018, you appealed the PEB decision to the Board, requesting placement on the Permanent Disability Retired List (PDRL) with at least an 80 percent disability rating and a change to the reason for your removal from the Nuclear Machinist Mate (NMM) Navy Enlisted Classification (NEC) code to “medical disqualification.”<sup>1</sup> In this petition, you alleged that the IPEB’s decision was based upon another service member’s medical records. By letter dated 12 April 2020, the Board denied your application in Docket No. 9269-18, finding no error or injustice in the IPEB determination that you would have been found fit for duty despite your post-service narcolepsy diagnosis or in the removal of your NMM NEC following your receipt of non-judicial punishment (NJP).

After receipt of the Board’s decision in Docket No. 9269-18, you filed suit in the COFC on or about 13 October 2020.<sup>2</sup> You made the following claims in this complaint:

1. That the Board’s decision in Docket No. 9269-18 not to grant you placement on the PDRL for narcolepsy with at least an 80 percent disability rating was arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with the law. This argument relied in part upon the guidance of the so-called “Kurta Memo,”<sup>3</sup> and alleged that certain evidence was not reviewed or considered by the Board.<sup>4</sup> You further asserted that “the overwhelming weight of the evidence clearly shows [that you] had narcolepsy [sic] while on active duty,” so the Board’s decision was therefore arbitrary and capricious and not based on any substantial evidence.

2. That the Board’s decision in Docket No. 9269-18 not to grant your request to amend the reason for your NMM NEC removal was arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law. In support of this claim, you asserted that you were prescribed Ambien for other than jet lag, and that this prescription required the Navy to process a waiver or removal of your NMM NEC per OPNAVINST 1220.1E. Because the Navy neither sought a waiver nor removed your NMM NEC for medical reasons, you argued that the reason for the removal of your nuclear NEC should be changed to reflect “medical disqualification.”

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<sup>1</sup> You stated that you had previously sent an application to the Board dated 12 March 2018, but no such application was received.

<sup>2</sup> Your Complaint was signed on 9 October 2020, but the complaint reflects a filing date of 13 October 2020.

<sup>3</sup> Under Secretary of Defense for Personnel and Readiness Memorandum, “Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment,” 25 August 2017.

<sup>4</sup> You alleged that the Board did not consider the statements submitted by 20 service members detailing the effect of your narcolepsy on your ability perform the duties of your office grade, rank or rating, or the watch logs which reportedly would demonstrate how difficult it was for you to stand watch and record readings.

You also asserted that if you NMM NEC had been removed when you were prescribed Ambien that you “would not have been subject to a forced separation.”

3. That the IPEB findings were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and that the IPEB violated your right to due process by not following its own procedures and not providing you the assistance required. Specifically, you asserted that you were not provided with a PEB Liaison Officer (PEBLO) for your entire PEB process, and therefore were not provided any of the PEBLO services listed in SECNAV M-1850.1.<sup>5</sup> You further asserted that the IPEB made factually incorrect findings, and that its findings were based upon other service member’s medical records.<sup>6</sup> You also claimed that the IPEB did not review the entire record, to include the evidence that you asserted that the Board failed to consider as discussed above.

4. That the Board’s decision in Docket No. 8042-15 did not grant you the full relief you requested.

5. That your 2011 discharge without placement on the PDRL for narcolepsy with at least an 80 percent disability rating was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

6. That the removal of your NMM NEC was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

On or about 17 April 2021, you amended the above referenced complaint. This Amended Complaint provided more detail to support the fourth, fifth, and sixth claims discussed above.

By Order of the COFC filed on 10 January 2022, your case was remanded to the Board because you “raised procedural, evidentiary, and substantive issues that should be addressed by the Board in the first instance.” The Order directed this Board to “address all issues and claims for relief” that you asserted.

The Board conducted a de novo review of your application for relief in light of the issues raised in your complaint, but continued to find insufficient evidence of any error or injustice warranting further relief. Accordingly, the Board reaffirmed its previous decision in Docket No. 9269-18 denying such relief.

As the Board informed you in its decision letter for Docket No. 9269-18, the Kurta Memorandum does not apply to applications requesting a medical discharge or retirement. Your assertion to the contrary is erroneous. By its title, history, and content, the Kurta Memorandum applies to requests to upgrade an adverse or unfavorable discharge. Your request for a medical retirement is not analogous to such a request. The analysis for discharge modification which is dictated by the Kurta Memorandum is completely different from and inapplicable to the analysis

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<sup>5</sup> Department of the Navy Disability Evaluation System Manual.

<sup>6</sup> You asserted that the IPEB stated that your 2010 sleep study showed sleep apnea and that you were on a CPAP, which was juxtaposed by the denial of your request for a formal PEB which stated that your sleep study showed no abnormalities.

required for medical discharge/retirement requests. Accordingly, the Board did not apply liberal consideration in your case.

The Board found your contention that the removal of your NMM NEC was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, to be entirely without merit. You received NJP for violating orders in violation of Article 92, UCMJ, and making a false official statement in violation of Article 107, UCMJ.<sup>7</sup> These are not the types of offenses which are mitigated or explained by a sleeping disorder like narcolepsy. You subsequently you're your NMM NEC code due to "having demonstrated unreliability and lack of integrity" as evidenced by your NJP. This was supported by your 31 January 2011 Evaluation Report and Counseling Record, which stated that your "disregard for Navy Regulations and our Navy Core Values is unacceptable" and specifically recommended that you not be retained or advanced due to your misconduct. Further, your contention that you should have been medically disqualified and therefore removed from your NMM NEC before your misconduct caused you to lose it under adverse circumstances is entirely without merit. Contrary to your contention, the prescription of Ambien did not disqualify you from the NMM NEC under Navy regulations. You were not diagnosed with narcolepsy or any other condition which would have disqualified you for NMM duties. You did not present sufficient evidence to convince the Board that your NMM NEC should have been removed for medical reasons. Finally, your contention that the removal of your NMM NEC was discriminatory and disproportionate to other Sailors was not supported by any evidence. Accordingly, the Board affirms its previous refusal to change the basis for the removal of your NMM NEC.

The Board also affirms both the PEB result and its previous denial of your request. The evidence simply does not support your contention that you should have been transferred to the PDRL. In this regard, whether you had a narcolepsy condition while on active duty is largely irrelevant, because the existence of a narcolepsy or narcolepsy-like condition is not, by itself, sufficient to justify a finding of medical unfitness. The preponderance of the evidence simply does not establish that you were incapable of performing the duties of your office, grade, rank, or rating due to narcolepsy or any other condition. This conclusion is supported by both the medical evidence and the circumstantial evidence in your record. Your medical records reflect that you were evaluated by a sleep specialist twice in 2010. These visits included sleep studies, and resulted in no limitations upon your performance of duties.<sup>8</sup> The only limitation placed upon you by the sleep specialist was to avoid driving when drowsy, which is an inherent limitation that could be placed upon every Sailor. The Board considered your post-service VA C&P examination results in this regard, but found it to be far less persuasive than your in-service evaluations. The results of your VA C&P examination do not constitute a diagnosis, as the purpose of a C&P examination is to determine whether there is sufficient evidence to support your claim for compensation from the VA, and it has minimal value in assessing your in-service capacity. As such, it is far less reliable than a diagnosis (or lack thereof) issued in the course of medical evaluations conducted by provider responsible for properly assessing and treating your medical condition. The fact that no medical provider ever placed any duty restrictions upon you

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<sup>7</sup> The evidence reflects that you failed to accomplish periodic maintenance and then misrepresented that the maintenance had been complete.

<sup>8</sup> The Board does not consider the prescription of Ambien, or the associated warning regarding the performance of certain tasks for a period of time after its use, to be a "medical restriction" in this regard, as you suggested in your rebuttal to the CORB advisory opinion in Docket No. 9269-18.

while you were on active duty was compelling evidence that whatever condition you may have had did not render you unable to perform the duties of your office, grade, rank or rating.

Besides the medical evidence, the circumstantial evidence also does not support a finding that you were unable to perform the duties of your office, grade, rank or rating. First, the Board found it noteworthy that you applied to service as a civilian Marine Machinery Mechanic in October 2015, which suggests that you believed yourself capable of performing the duties of the office, grade, rank, and rating that you held in 2012. The Board also noted that your last three evaluations suggested that you were fully capable of performing your duties, despite the fact that your misconduct diminished your ratings.<sup>9</sup> These were not the evaluations of an individual who demonstrated any inability to perform the duties of his office, grade, rank, or rating due to a disabling medical condition. You also continued to serve satisfactorily after your NJP and the removal of your NMM NEC, before being honorably discharged. Finally, the fact your command did not take action to remove your NMM NEC prior to your NJP for misconduct was compelling evidence that you were fully capable of performing your duties. Navy ship commanders have a compelling and career-related self-interest in ensuring the safety of the ships and personnel under their commands. While you described the command's inaction with regard to your NMM NEC in light of your demonstrated symptoms as a failure in paragraph 115 of your Complaint to the COFC, the Board found the absence of such action to be far more likely due to the absence of indications that you were incapable of safely performing your duties. The fact that your command never took action to remove you from your critical nuclear-related functions was compelling, if not conclusive, evidence for the Board that you were fully capable of performing those duties.

As it did in its previous review of your case, the Board considered the statements of your shipmates that you provided. They are not nearly as persuasive in this regard as you believe them to be. While these statements do reflect your coworkers' observations that you had trouble remaining awake, they also reflect that you were a contributing, reliable, and respected member of the team. Compared to the weight of the evidence suggesting otherwise, these statements were not sufficient to overcome the preponderance of the evidence that you were capable of performing the duties of your office, grade, rank, and rating.

The Board did not consider the watch logs that you claimed to be crucial to your claim because you did not provide them for review. This Board is not an investigating body, and except under limited circumstances mandated by statute it does not seek out evidence to support applications for relief. The burden is on you, the applicant, to prove the existence of an error or injustice. You are free to seek these logs, if they still exist, from the Department of the Navy through the Freedom of Information Act, and to request reconsideration from the Board based upon new material pursuant to 10 U.S.C. § 1552(a)(3)(D) if you are successful.

Finally, the Board found no merit in your contention that you were denied due process in the PEB consideration of your case. You contend that the IPEB based its decision upon another individual's sleep study, but provided no evidence of this fact. Regardless of whether this was true, however, the evidence is clear that the final decision by the PEB in your case was based

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<sup>9</sup> Despite your misconduct, these evaluations stated that you “[c]onsistently assist[ed] the rest of the work center with complex maintenance items to ensure completion” and that you “complete[d] tasks with little to no supervision.” They also stated that you “[had] the potential to excel at a level of a First Class Petty Officer.”

upon your own records. After the IPEB made its recommendation, the PEB reviewed the case and concurred with the IPEB recommendation. In conducting this review, the PEB had the benefit of your request for a formal PEB, which included your claim that the IPEB relied upon another individual's sleep study. As reflected in the PEB's denial of your request for a formal PEB hearing, the PEB considered your actual sleep study and not that of the other individual that you identified. The Director of the Secretary of the Navy's Counsel of Review Boards concurred with this recommendation, denying your formal PEB hearing. As the PEB informed your attorney by e-mail dated 15 February 2018, the IPEB considered your post-service narcolepsy diagnosis and reviewed all of the available evidence, not simply a single test. As discussed above, that decision was clearly supported by the evidence.

Your contention that the Board directed or intended for your case to be reviewed as if you had an in-service narcolepsy diagnosis is erroneous. It is not the Board's role to replace medical providers by providing medical diagnoses. Rather, it is the Board's role to fashion appropriate relief to correct errors or remove injustices. It did that in Docket No. 8042-15 by correcting your record to ensure that your case was reviewed by the PEB so that you received fair consideration of whether a medical retirement was warranted. By doing so, the Board granted you extraordinary equitable relief, advancing your case through the Integrated Disability Evaluation System (IDES) to the final review phase without going through all of the intervening steps to get there. Given the evidence, it is far from certain that your case ever would have been advanced to the PEB phase even if a narcolepsy condition had been identified while you were on active duty. As such, you were afforded extraordinary relief that would not normally be afforded to other individuals in your position. Accordingly, there was no error in the PEB noting that you did not have a diagnosis for narcolepsy at the time of your discharge. Even if it were the Board's intent to assign a medical diagnosis that it is not qualified to assigned, however, the PEB's findings would continue to be supported by the fact that the evidence did not establish that you were medically unfit, as discussed above.

You were not assigned a PEBLO for your PEB because you were not entitled to a PEBLO. SECNAVINST 1850.4,<sup>10</sup> SECNAV-M 1850-1, and DOD Manual 1332.18-V1<sup>11</sup> are clear that PEBLOs provide services to service members. You were not a service member when the Board granted you the extraordinary relief described above in Docket No. 8042-15. The Board could have directed that you be restored to active duty, but purposefully did not do so because there was no error or injustice in your voluntary discharge. As such, you were not entitled to a PEBLO. More significantly, the lack of an assigned PEBLO had no effect upon your case. In accordance with SECNAV-M 1850-1, "PEBLOs are primarily responsible for informing and assisting Service Members or their designated representative, to include legal counsel, as applicable, during the [IDES]. PEBLOs help manage process expectations, coordinate medical appointments related to the disability process, and oversee and provide access to the Service Member's case file upon appropriate release." The function of a PEBLO is to ease the service member through the IDES process, which is the function that the Board served in your case by enabling you to skip virtually the entire IDES process before the PEB. In fact, of the 18 PEBLO services described in SECNAV-M 1850-1 that your Complaint asserts were denied to you, 16 were rendered unnecessary by either the automatic advancement of your case to the PEB stage or

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<sup>10</sup> Department of the Navy Disability Evaluation System.

<sup>11</sup> Disability Evaluation System (DES) Manual: General Information and Legacy Disability Evaluation System (LDES) Time Standards.

your status as a separated service member. The remaining services were provided by the attorney that was assigned to you after the IPEB recommendation. Almost all of the 18 services provided by PEBLOs that your complaint asserts were denied were unnecessary due to the extraordinary relief that the Board provided you by moving your case directly to the PEB, as most of those services occur while the PEBLO guides a service member through the IDES. The remainder of the services were provided to you by the attorney assigned to assist you after the IPEB. In this regard, the Board notes that you did not explain how the assignment of a PEBLO would have produced a different result. Accordingly, the Board concluded that lack of a PEBLO had no impact upon your case.

Finally, the Board acknowledges that you did not have the same opportunity to review or to perfect your case file prior to its consideration by the IPEB as you would have had if your case had gone through the entire IDES. Unfortunately, such review was impossible under the unique and extraordinary circumstances of your case, as the Board did not find it appropriate to restore you to active duty for the sole purpose of completely the IDES. However, the Board is satisfied that the opportunities provided to you to review and correct your record sufficiently replicated the opportunity that you otherwise would have had. Specifically, following the IPEB recommendation, you submitted a request for a formal PEB with the assistance of your detailed attorney. In this request, you identified all of the deficiencies in the record that you otherwise would have identified and submitted additional evidence for consideration. This request and the evidence that you submitted was reviewed by the PEB, and was clearly taken into account by the voting members who ultimately denied your formal PEB request. The Board also acknowledges that there was no non-medical assessment prepared in your case since the normal IDES process was not applicable. However, it is clear that the PEB considered the objective non-medical evidence in your case. You were not entitled to a formal hearing before the PEB and would not have been granted one if you had been on active duty, so there was no error or injustice in the denial of such a hearing. Finally, in addition to the PEB review, your case has now been reviewed by this Board on three separate occasions. Your case has received a far more thorough review than most service members receive through the IDES, and you have not been deprived of any rights in this regard. The objective evidence simply does not support relief that you seek.

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,

4/27/2022

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Deputy Director

Signed by: