



**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. 0588-22  
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.

Although you did not file your application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 6 June 2023. The names and votes of the panel members 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, to include the Kurta Memo. The Board also considered the 23 March 2023 advisory opinion (AO) from a qualified medical professional, as well as your response to the AO.

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.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 12 February 2003. According to your brief in support of your petition, in October 2009, you were rear-ended in a motor vehicle accident, which you contend caused you to experience physical and mental difficulties. Thereafter, you continued in service, during which you received several personal awards. You reenlisted the Navy in 2013. As set forth in the AO, your service

health record documented an extensive history for evaluations by various medical providers from 15 May 2007 to 26 February 2018.

The AO described many of your medical encounters over these years as well as your diagnoses and treatments in detail. Notably, the AO described your retention physical examination, which was held on 23 October 2017. According to the AO, during this examination, you reported you were in “good health,” and “endorsed multiple somatic and mental symptoms or conditions including multiple incidents of head injury,” that you were “under the care of Psychiatry, Neurology, and Neuropsychology for several mental health and somatic conditions,” and that the “examining physician reviewed the medical records and evaluated patient noting the majority of endorsed symptoms or conditions did not have any acute presentation on examination.” The examining physician also noted that your “head injuries dating back to 2009 had undergone ‘extensive neurology work-up including Neuropsych testing – all were negative.’” Ultimately, the examining physician concluded that, you were “not fit for reenlistment given his mental health diagnosis that requires numerous mental health appointments” and that “numbers medical appointment[s] that prevent him from working full-time in his current rate/rank.”

The AO also described a medical encounter that you had with a mental health clinic on 15 December 2017, which was a little more than three months prior to your discharge. According to the AO:

Petitioner was seen by [ ], Psychiatrist, in a follow up session for psychotropic medication management. Petitioner also receiving psychotherapy with Dr. [ ]. Petitioner reported no change in symptoms and tolerating meds well. Petitioner continued to believe his TBI [traumatic brain injury] from his past car accident was not fully examined and his symptoms were due to TBI. He continued to see the Center for Neurorehabilitation [ ] and brought his current records for review and discussion of recommendations for treatment. Current stressor of recent Discipline Review Board (DRB) for cancelled/missed appointments with pending XOJ and possible NJP. He continued to prepare for his discharge and VA Separation Evaluations. Mental Status Exam was normal except for “concerned” mood.

His diagnoses were Somatic Symptom Disorder, With Predominant Pain, Persistent, Severe; Dysthymic Disorder (depressive and anxiety symptoms for years exacerbated by stressors, which appear to develop from problems managing anxiety and use of cognitive distortions); Unspecified Depressive/Anxiety/ADHD, and Obstructive Sleep Apnea. His medications were adjusted and he was discharged without limitations to his command, fit for full duty, psychiatrically fit for same.

As intimated in the above medical encounter, you received nonjudicial punishment on 9 January 2018 due to unauthorized absence. As part of your punishment, you were reduced in rate to IT2. On 16 February 2018, you underwent your separation physical examination. According to the AO’s description of this medical encounter, you “endorsed multiple somatic and mental health symptoms or conditions, documenting a long history of mental health evaluations and treatment

from 2011 – 2018.” Further, according to the AO, the “examining physician reviewed the medical records and Petitioner’s report of medical history and commented the majority of identified issues did not involve any acute symptoms or issues.” Ultimately, the “examining physician did not recommend Petitioner for any additional consultation or referrals.” The AO noted that, “the entirety of the examination did not identify any conditions as unfitting for service, nor indicate he was not physically qualified for separation.”

Thereafter, you remained in service until your discharge on 3 March 2018, at the end of your active obligated service. Your service was characterized as honorable and you were issued an RE-R1 reentry code, which represents that you were eligible for preferred reenlistment. There is no indication in your records that you sought to reenlist after your discharge.

In your petition, you request that the Board find that you were unfit for duty and medically retired due to TBI and PTSD at 40 and 70 percent disability ratings, respectively, consistent with your ratings from the Department of Veterans’ Affairs (VA). You have also requested the following specific changes to your Certificate of Release or Discharge from Active Duty (DD Form 214): (1) block 4a (“Grade, Rate, or Rank”), “IT2” should be deleted and replaced with “IT1” and in block 4b (“Pay Grade”), “E-5” should be deleted and replaced with “E-6; (2) block 23 (“Type of Separation”), “discharged” should be deleted and replaced with “retired;” (3) block 25 (“Separation Authority”), “MILPERSMAN 1910-104” should be updated to reflect that separation from the Navy was due to physical disability; (4) block 26 (“Separation Code”), “KBK” should be updated to reflect that you were medically retired; (5) block 27 (“Reentry Code”), “RI” should be deleted and replaced with “RE-2” to reflect that you were recommended for reenlistment but you were ineligible because you were retired; block 28 (“Narrative Reason for Separation”), “completion of required active service” should be updated to reflect that you were medically retired due to permanent physical disability.

In support of your petition, you contend that you were injured in an automobile accident in 2009, which caused you traumatic brain injury. You argue that your TBI and PTSD diagnoses were known to the Navy, and that, in particular, a medical provider found you unfit for reenlistment in October 2017. But, despite this, you believe it was an error or injustice that the provider did not refer you to be reviewed for entry into the Disability Evaluation System. Further, you believe it was an error or an injustice when the physician who completed your separation physical did not refer you for entry into the Disability Evaluation System. Thus, you assert your separation physical was invalid and, consequently, the Board should rely on your VA disability ratings effective as of the day after your discharge. In support of your petition, you included a 21 June 2018 letter from the VA, which reflected that the VA awarded you several service connected disabilities, including, as relevant here, TBI at 40% and post-traumatic stress disorder (PTSD) at 70%. You also provided materials from a medical doctor, which was all described and evaluated in the AO.

In order to assist it in reviewing your petition, the Board obtained the AO, which was considered unfavorable to your position. As described above, the AO reviewed and set forth the details contained in your service health record during the entirety of your service. After describing the background of your service and medical encounters, the AO did not find any evidence of a diagnosis of PTSD. As the AO explained:

Petitioner's in-service diagnoses of Somatic Symptom Disorder, With Predominant Pain, Persistent, Severe; Dysthymic Disorder; Unspecified Depressive and ADHD Disorders; Other Specified Anxiety Disorder (GAD/Panic); and Obstructive Sleep Apnea are well documented in his service medical record over the course of 210+ mental health evaluative and treatment appointments. Additionally, the service record summary notes appointments with Neurology, Neuropsychology, Primary Care, and Acute Care clinics that contained diagnoses of Concussion or Personal History of TBI, Mild. The service records do not contain any diagnoses for PTSD, with one comprehensive neuropsychological testing evaluation specifically ruling out PTSD. Additionally, psychiatrists and psychologists providing serial mental health evaluations and long-term psychotherapy formulated Petitioner's anxiety symptoms as an Other Specified Anxiety Disorder with characteristics of Generalized Anxiety Disorder and Panic Disorder, but not indicative of a PTSD diagnosis.

The AO also addressed your ability to function while you were on active duty. In particular, you link much of your claim on your assertion that your automobile accident in 2009 caused an onset of physical and mental health issues. The AO explained that:

Review of the available objective clinical and non-clinical evidence documented Petitioner successfully executed the full range of responsibilities of his rate and rank throughout his career, including following his MVA [motor vehicle accident] in 2009. Though Petitioner contended increased difficulty in performing his duties following the 2009 MVA, his evaluations throughout his career, including after his 2009 MVA, remained consistently competitive and reflected his ability to adequately perform the range of duties commensurate with his rate and rank. He was consistently lauded for his technical and leadership abilities and recommended for retention, promotion, and positions of increasing responsibility. He successfully passed his PFA and PRT requirements on a consistent basis, and twice successfully deployed aboard USS [REDACTED] after his MVA.

The AO further explained, with emphasis added:

Except for intermittent periods of light duty, Petitioner continued to function successfully without limitations to his full duty capacity throughout his military service. Petitioner's therapist initiated a Limited Duty Board on 9/6/2017 for a diagnosis of Undifferentiated Somatoform Disorder, seemingly more in order to facilitate stability in his clinical treatment than any consideration for unfitness for duty. *The Limited Duty Board did not refer the petitioner to the PEB.* The limitations to duty were notably preventive to disruptions to his mental health treatment such as recommending against assignment aboard ship, overseas, or field training, limiting his working hours to the regular business day, and precluding overnight watches. Though the Limited Duty Board was withdrawn due to proximity to his EAOS, the intent of the board appeared to be to optimize ongoing

treatment, rather than refer the Petitioner to the PEB for a fitness for duty determination. *It is notable that across all in-service medical and mental health specialties that evaluated and treated the Petitioner, none found the Petitioner's medical or mental health conditions of such severity as to render him unfit for service, or requiring referral to the PEB for a fitness determination.*

You were provided a copy of the AO, and, on 24 April 2023, you provided a response in rebuttal. In your rebuttal, you argued that the AO was arbitrary, capricious, and contrary to law. Specifically, you assert that the AO failed properly to evaluate evidence that was available to the Board, including extensive records documenting your TBI and PTSD symptoms. First, you argue that the AO failed to apply liberal consideration to your claims. Next, you argue that the AO failed to liberally consider the diagnosis and findings of the VA or of one of your physicians.

You also argue that the AO is arbitrary and capricious because several of its findings and conclusions lack a rational basis. In particular, you argue that you were recommended for limited duty due to a somatoform disorder and you fault the AO for concluding that you did not have an unfitting condition because the limited duty board did not refer you to the disability evaluation system. Thereafter, you were diagnosed with somatic symptom disorder (SSD) and found to be not fit for reenlistment. You argue that this should have triggered a referral to the disability evaluation system or an administrative separation based on a condition, not a disability. You also argued that the AO had no rational basis to conclude that your symptoms did not constitute evidence of TBI or PTSD.

Finally, you argued that the AO is not supported by substantial evidence. In support of this argument, you set forth seven reasons why the AO is not supported by substantial evidence. First, that substantial evidence does not support that you were fit for service at the time of your discharge. Second, that the AO failed to consider crucial evidence contrary to its conclusion and instead cherry-picked evidence. Third, that the AO failed to independently evaluate whether any of your conditions, whether those diagnosed by the VA or previously by Navy medical personnel, rendered you incapable of performing your specific job duties. Fourth, that the AO is based on part on erroneous reasoning concerning your performance evaluations by notably failing to consider your summary group average fell 10% from 2011 to 2015. Fifth, that the AO is not supported by substantial evidence because its conclusion is based, in part, on speculation into a medical provider's subjective intent. Sixth, the AO is not supported by substantial evidence because it failed to consider important changes to the DSM-5, despite citing it. Finally, you argued that the AO is not supported by substantial evidence because it failed to give the VA diagnoses the weight required by law.

The Board carefully reviewed your petition and the material that you provided in support of your petition, including your response to the AO, and disagreed with your rationale for relief. In keeping with the letter and spirit of the Kurta Memo, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced, and their possible adverse impact on your service, to include whether they qualified you for the military disability benefits you seek.

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 of 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 the criteria for unfitness as defined within the Disability Evaluation System at the time of your discharge from active duty or from the Navy Reserve. In reaching its decision, the Board observed that there is no evidence in your service record, and you provided none, describing that, while you were on active duty, you were evaluated by a medical board with a referral the Physical Evaluation Board. Indeed, the Board noted as well that you were not referred to the PEB by the Limited Duty board. Ultimately, the Board concurred with the conclusion of the AO that the available evidence did not clearly support a finding of unfitness for duty. The Board also considered that you emphasize that a cause of your TBI and PTSD was the automobile accident that occurred in 2009. The Board considered that, despite this accident, you later received personal awards, positive evaluations, and it appeared that you reenlisted at least one time after the accident, which is inconsistent with the accident having caused unfitting conditions.

In your rebuttal to the AO, you argued that you were diagnosed with somatic symptom disorder and thereafter you were found unfit to reenlist due to a mental health diagnosis. According to your rebuttal, you state this should have triggered either a PEB referral or an explanation why your mental health condition barred you from reenlistment but did not constitute an unfitting condition, as in the case of administrative separations for "physical conditions not a disability." The Board considered your argument and determined that it provided its own explanation. There was no need to administratively separate you due to a condition, not a disability, because you were pending your end of active service. Upon consideration, the Board observed that it was rational for your command to allow you to reach your end of active service without involuntarily separating you from service, which may carry a stigma. Significantly, the Board observed that you were eligible for reenlistment and issued a preferred reentry code upon your release from active duty. The Board also noted that you did not attempt to reenlist and voluntarily left active duty upon completion of your obligation.

Finally, concerning your assertion that you are deserving of a medical retirement based on a finding of VA disabilities, the award of such disabilities for conditions connected to your service in the Navy did not persuade the Board these conditions were unfitting at the time of your discharge from the Navy, 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. In sum, in its review and liberal consideration of all the evidence, the Board did not observe any error or injustice in your naval

records. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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,

6/13/2023

