

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

> Docket No: 743-22 Ref: Signature Date



Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 Board waived the statute of limitation 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 29 July 2022. 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 the 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 to the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice or clemency determinations (Wilkie Memo). The Board also considered the advisory opinion (AO) of a qualified mental health provider and your response to the AO.

You initially enlisted in the Navy and began a period of active duty on 30 September 1997. After serving honorably, you reenlisted on 4 April 2001. This period of continuous honorable service is documented in the Block 18 remarks of your discharge record as evidence that your service during your first period of enlistment was "Honorable."

You subsequently served without incident until 12 February 2004, when you were arrested for attempting to obtain Actiq (fentanyl) through a fraudulent prescription. You entered into a pre-trial intervention program which was legally deemed as being equivalent to admitting your guilt. On 23 April 2004, you received nonjudicial punishment (NJP) for a violation of Article 86 due to an unauthorized absence during your period of arrest and of Article 91 for insubordinate conduct towards a non-commissioned officer. You were then notified of processing for administrative

separation for the reasons of misconduct due to drug abuse, commission of a serious offense, and pattern of misconduct. You elected an administrative hearing with representation by legal counsel, which recommended that you be separated under Other Than Honorable (OTH) conditions for the reason of drug abuse. Prior to your discharge, you received a second NJP for violation of Article 112a for wrongful use and possession of a controlled substance after having three positive urinalyses for cocaine in a period of 3 weeks. Your discharge was approved by Commander, Navy Region Southeast, and you were discharged, on 18 November 2004, with an OTH characterization of service.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Wilkie Memo. These included, but were not limited to, your desire to upgrade your discharge and your contentions that you suffered from a painful, chronic medical condition during your second enlistment for which you were routinely prescribed opioid medications. You assert that you developed a physical addiction and, after your prescription medications ended, led to your subsequent drug abuse misconduct. Additionally, you contend you have found a way to maintain sobriety and live without drugs and alcohol through post-discharge rehabilitation. For purposes of clemency consideration, the Board noted you provided advocacy letters but no supporting documentation describing post-service accomplishments or treatment records.

Because you contend that post-traumatic stress disorder (PTSD) or another mental health (MH) condition affected your discharge, the Board also considered the AO. The AO states in pertinent part:

The Petitioner's complete service medical record was not available for review. Among the available documents, there is no evidence that he was diagnosed with a mental health condition during military service, although there is behavioral evidence of a potential substance use disorder. This is a condition that appears to have existed prior to enlistment, as evidenced by his pre-service substance use. Illegal substance use is incompatible with military readiness and discipline and considered amenable to treatment, depending on the individual's willingness to engage in treatment. While it is possible that his misconduct could be attributed to illegal substance use, there is no evidence he was unaware of the potential for misconduct or was not responsible for his behavior. His personal statement is not sufficiently detailed to establish an alternate clinical diagnosis or a nexus with his misconduct. Additional records (e.g., the Petitioner's service record or postservice mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) are required to render an alternate opinion.

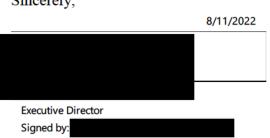
The AO concluded, "[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence of a diagnosis of PTSD or another mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to PTSD or another mental health condition other than a potential substance use disorder.

In response to the AO, you provided a statement stating you were gathering more information from your medical providers. However, you chose not to provide any further evidence.

Based upon this review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included multiple incidents of drug abuse. Although the Board found it compelling that your misconduct resulted from a medical condition that developed into a drug use disorder due to poorly managed prescription of medications, they noted you did not submit any medical records documenting your contended condition or your prescription history. Likewise, with respect to your contentions of postdischarge rehabilitation, the Board noted that, with the exception of character statements from your family, you did not submit any supporting records to document your substance use disorder or your efforts in achieving and maintaining sobriety. Additionally, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the purpose of facilitating veterans' benefits, or enhancing educational or employment opportunities. Finally, the Board concurred with the AO there is insufficient evidence that your misconduct could be attributed to PTSD or another mental health condition other than a potential substance use disorder. As a result, the Board concluded your conduct constituted a significant departure from that expected of a Sailor and continues to warrant an OTH characterization. After applying liberal consideration, the Board did not find evidence of an error or injustice that warrants upgrading your characterization of service or granting clemency in the form of an upgraded characterization of service. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

With respect to your contention that you desire to obtain benefits to assist in maintaining sobriety, the Board believes that you may be eligible for veterans' benefits that accrued during your first period of "Honorable" service. Whether or not you are eligible for benefits based on either period of service is a matter under the cognizance of the Department of Veterans Affairs (VA). If you have been denied benefits, you should appeal that denial under procedures established by the VA.

You are entitled to have the Board reconsider its decision upon the 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 is attached 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,