



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

[REDACTED]
Docket No. 0801-22
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF FORMER [REDACTED], USN,
XXX-XX-[REDACTED]

Ref: (a) Title 10 U.S.C. § 1552
(b) Official Military Personnel File
(c) Petitioner's Physical Evaluation Board File

Encl: (1) DD Form 149 w/attachments
(2) Advisory opinion dtd 7 Apr 2023

1. Pursuant to the provisions of the reference, Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that he be placed on the permanent disability retired list with a 100% disability finding effective as of 25 April 2016, which was the date he was found fit by the Physical Evaluation Board (PEB), with a finding that he injuries were combat related, and with direction to the Defense Finance and Accounting Service (DFAS) to pay Petitioner the corresponding retroactive retirement pay from 25 April 2016 to present.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 13 April 2023 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.

b. A review of Petitioner's reference (b) Official Military Personnel File (OMPF) reveals that he enlisted in the Navy and commenced an initial tour of active duty service from January 2003 to October 2006, when he was released from active duty due to a Reduction in Force and transferred to the Navy Reserve with an Honorable Discharge. Petitioner continued in the Navy Reserve and served in support of Operation Iraqi Freedom from 15 May 2008 to 25 May 2009, during which he worked in detainee operations. He deployed to Afghanistan from 8 January 2010 to 14 September 2010, where he again worked in detainee operations. Thereafter, he remained in the Selected Reserve (SELRES).

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c. As provided in enclosure (1), on 9 April 2014, the Department of Veterans Affairs (VA) issued Petitioner findings of various service connected disabilities, including 70% for PTSD. As reflected in reference (c), the Petitioner sought line of duty benefits (LOD) due to his PTSD, which was granted on 23 April 2015, and he was placed into the Integrated Disability Evaluation System (IDES). Petitioner's officer-in-charge prepared a non-medical assessment, which stated that he had not "had the pleasure of getting to know [Petitioner] or seeing his work ethic, I can only provide the board with what I have observed in his record and the few times we have interacted while he was beginning his LOD process." He opined that with treatment he "saw no reason" why Petitioner would not be able to return to drilling status and get his career "back on track." He further stated, "[w]ith the proper medical treatment and care, I see no reason why ABH2 could not perform his assigned duties." He indicated his opinion was based on review of Petitioner's past evaluations, qualifications, and deployed performance.

d. The report of an Informal Physical Evaluation Board (IPEB), issued on 29 December 2015, contained in reference (c), found Petitioner fit to continue on active duty. The Petitioner was then reviewed by a Formal PEB (FPEB), which issued its formal rationale on 25 April 2016. The FPEB concluded that the Petitioner has a diagnosis of PTSD according to medical documentation, but that his condition does not preclude him from the reasonable performance of his duties and found him fit to continue naval service.

e. On 1 June 2016, the Petitioner filed a petition for reconsideration (PFR) with the Secretary of the Navy Council of Review Boards (CORB). The CORB denied the Petitioner's PFR on 7 July 2016, as follows:

After thorough review of your case, I have determined the PPEB's decision is correct and supported by a preponderance of the evidence as required by reference (b). In making my determination, I found insufficient evidence your conditions preclude you from performing duties appropriate for your 'office, grade, rank or rating.' Supporting my finding is the most recent Non-Medical Assessment from your Commanding Officer dated 28 October 2015, that recommended you for retention in the Naval Reserves and stated you were not working outside of your specialty because of your conditions. That NMA also opined that with medical care, there was no reason you could not perform your assigned duties. Your last observed performance evaluation (13Jul15-14Mar15) also demonstrates your fitness for duty as it described you as a model sailor and included a recommendation for early promotion. Finally, your ability to sustain full-time employment in a demanding civilian occupation shows you are capable of serving in a reserve shore command that involves clerical duties.

The evidence does suggest that your ability to serve as an Aviation Boatswain's Mate aboard an afloat unit may be compromised; however, the inability to deploy does not automatically compel an unfitness determination when the evidence indicates an individual can perform other appropriate duties. In your case, I found your conditions have not prevented you from performing valuable service in the past, and are unlikely to do so in the future. Therefore, your petition is denied.

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f. According to reference (b), on 1 December 2017, the Petitioner transferred to the Individual Ready Reserve (IRR). In 2019, the Petitioner filed a petition with this Board asserting the PEB went against the weight of the evidence. The Board denied his petition, essentially concurring with the findings of the IPEB, FPEB, and CORB's decision on Petitioner's PFR. The Petitioner was honorably discharged from the Navy Reserve effective 5 May 2021.

g. In his petition, the Petitioner seeks to be placed on the PDRL with a 100% disability finding effective as of the date the fitness for duty determination was made, 25 April 2016, with finding that it was a combat injury, with directions to DFAS to retroactively pay Petitioner the corresponding retirement pay backdated to 2016 April 25 to present. In support of his requests, the Petitioner contends that the FPEB erred in several different ways, including failing to apply the proper legal standard to fitness for duty, failing to consider the combined effects of PTSD and Depressive Disorder, relying on irrelevant evidence while not attributing any weight to relevant evidence, ignoring the severity of Petitioner's symptoms as had been evidenced by Petitioner's medical evaluation board (MEB), relying on "open source" information that was not evidence in Petitioner's case, mischaracterizing the testimony of witnesses, and failing to comply with SECNAVINST 1856.4E in making the fitness determination. Petitioner also argued that the FPEB erred in failing to find the Petitioner's conditions were combat related.

h. In order to assist the Board in reviewing this petition, the Board requested, and received the enclosure (2), an advisory opinion (AO) prepared by a qualified medical professional. According to the AO, which was considered partially favorable to the Petitioner:

Review of the available objective clinical and non-clinical evidence revealed that the findings by the IPEB and FPEB, as well as subsequent reviews by Director, SECNAV CORB and the BCNR cited clinical and non-clinical evidence in a manner that did not fully appreciate the range and severity of Petitioner's conditions, nor the severity of his functional impairment in reasonably performing the duties of his office, grade, rank, MOS, or rating.

* * *

Though he was not psychiatrically hospitalized, he experienced numerous acute exacerbations of his PTSD/Depressive symptoms, to include suicidal ideation, resulting in episodic admissions to hospital emergency medicine departments for evaluation and stabilization.

The 10/28/2015 NMA was frequently cited in the findings of Fit for service as the CO stated Petitioner had "good potential" for continued service, was recommended for PLD if found unfit, and endorsed him for retention. However, the CO admitted he had not "gotten to know" or "see his work ethic" but "I can only provide the board with what I have observed in his record, and the few times we have interacted while he was beginning his LOD process." In contrast, [REDACTED], USN, Ret, former Commanding Officer Naval Operational Support Center for several years while Petitioner was assigned and knew him well, testified at the FPEB that Petitioner exhibited increasing PTSD symptoms after his first deployment. He tried to persuade him not to deploy again to the same mission. He stated he did not believe

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Petitioner was fit for duty or continued service at the time of his separation from service due to his condition and treatment requirements.

* * *

After reviewing all available evidence, in my medical opinion, preponderance of evidence supports Petitioner's contention that at the time of his separation from Naval service, he was unfit for service for his unfitting conditions of PTSD and Unspecified Depressive Disorder, which prevented Petitioner from reasonably performing the duties of his office, grade, rank, or MOS. In my opinion, Petitioner exhibited occupational and social impairment with reduced reliability and productivity from PTSD (VA Diagnostic Code 9411) and Unspecified Depressive Disorder (VA Diagnostic Code 9435) commensurate with a disability rating of 50%.

i. 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 medically retired."

CONCLUSION

Upon review and consideration of all the evidence of record, the Board concluded that there was an error in Petitioner's naval record. Specifically, the Board substantially concurred with the findings of the AO in concluding that the "findings by the IPEB and FPEB, as well as subsequent reviews by Director, SECNAV CORB and the BCNR cited clinical and non-clinical evidence in a manner that did not fully appreciate the range and severity of Petitioner's conditions, nor the severity of his functional impairment in reasonably performing the duties of his office, grade, rank, MOS, or rating."

In terms of the relief to be provided, the Board reasoned that it would be most appropriate to place the Petitioner on the temporary disability retired list (TDRL) effective the date of the decision of the FPEB, which was 25 April 2016, with a rating of 50%, the rating level commensurate with Petitioner's exhibited occupational and social impairment with reduced reliability and productivity. The Board further determined that DFAS should be directed to audit the Petitioner's pay account and to pay Petitioner the appropriate amount of back pay based upon a 50% disability rating effective 25 April 2016.

The Board further determined that, had Petitioner been placed on the TDRL, his conditions would have been regularly reviewed by periodic physical examinations (PPE) to determine the level of his disability as well as stability of his conditions, among other things. Therefore, the Petitioner determined that the Petitioner shall be directed to a periodic physical examination to be scheduled by the PEB, at its earliest convenience, in order to determine the current level of disability rating and a determination whether he should be placed on the permanent disability retired list, or to be separated with severance pay, as it deems appropriate, based on the findings of the PPE in accordance with the PEBs usual processes for making such determinations.

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With respect to Petitioner's claim that his conditions be considered combat related, the Board determined insufficient evidence exists to support his claim that his PTSD is a combat-related injury as defined by 26 U.S.C. 104(b)(3). While the Board acknowledged the source of his PTSD was likely from his interaction with enemy combatants in captivity, they concluded this was insufficient to qualify under as combat-related based on the circumstances of his engagement with these prisoners. Based on the examples given in the statute, the Board determined the term "engaged" to mean involvement in armed conflict against enemy combatants. Based on this interpretation, in the Board's opinion, the fact Petitioner incurred his disability condition while deployed to an area of combat operations, while interacting and guarding with enemy prisoners, was insufficient to meet the standard of proof necessary to qualify under the statute. Regardless, the Board determined Petitioner still has the benefit of appealing any final PEB determination related to this matter to the Office of the Judge Advocate General. As such, regarding this matter, they concluded no injustice exists with his record.

In view of the foregoing, the Board concluded that Petitioner's requested relief shall be granted in part, as set forth below.

RECOMMENDATION

In view of the above, the Board recommends the following corrective action.

Petitioner's naval record be corrected by the Petitioner being considered unfit and placed on the TDRL due to PTSD (VA Diagnostic Code 9411) and Unspecified Depressive Disorder (VA Diagnostic Code 9435) commensurate with a disability rating of 50% effective 25 April 2016. Petitioner's unfitting condition did not result from a combat related injury as defined by 26 U.S.C. 104(b)(3).

The PEB shall direct the Petitioner to be reviewed by a PPE at its earliest convenience for further determination. Petitioner shall be afforded all the due process associated with the IDES process.

The DFAS shall audit the Petitioner's pay account for payment of back pay to the date of Petitioner's placement on the TDRL and any other lawful monies owed.

And no other action.

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. The foregoing action of the Board is submitted for your review and action.

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 having assured compliance with its provisions, it is hereby announced that the foregoing

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corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

[REDACTED]

Executive Director

Signed by: [REDACTED]