



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

[REDACTED]
Docket No. 1568-22
Ref: Signature Date

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

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

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) Advisory opinion, 12 May 2023

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected to reflect that he was retired due to a disability.

2. The Board, consisting of [REDACTED], [REDACTED], and [REDACTED], reviewed Petitioner's allegations of error and injustice on 23 May 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. Petitioner enlisted in the Navy and commenced a period of active duty on 19 June 2012. After approximately six years of service without incident, the Petitioner was in a severe motorcycle accident on 1 August 2018. Enclosure (2) describes in detail the Petitioner's treatment and condition after his motorcycle accident, which was significant and involved the Petitioner being placed into an induced coma.

c. As the Petitioner approached the end of his active obligated service, he underwent a separation physical. Enclosure (2) reviewed the report of the Petitioner's separation physical, and noted that the examining physician "commented extensively on Petitioner's multiple and significant symptoms at the time of the separation physical," but "the examining physician did not check off either the qualified/disqualified for service check boxes that would render a determination whether Petitioner was qualified/not qualified for service (and subsequently for separation from service)." In other words, in light of the Petitioner's various medical symptoms, the physician that performed his separation physical failed to note whether the Petitioner was fit or unfit for separation, which is an essential component of a separation physical.

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d. Thereafter, the Petitioner was released from active duty on 18 February 2019.

e. Petitioner requests that his naval record be changed to reflect that he received a retirement due to a disability. In support of his request, the Petitioner contends that his command and its flight surgeon mishandled his convalescence after a serious motorcycle accident and improperly had him “tough it out” to his EAOS instead of properly referring him into the Disability Evaluation System, which he contends was appropriate because his fitness was in question.

f. In order to assist it in reviewing this petition, the Board obtained the enclosure (2) AO. According to the AO, in part:

After review of all available clinical and non-clinical evidence, it is my medical opinion that at the time of his discharge from service, Petitioner continued to evidence significant occupational impairment from his TBI and orthopedic conditions that prevented him from reasonably performing the duties of his office, grade, rank, MOS, or rating and that continued service would have represented an obvious medical risk to the health of the member or to the health or safety of other members.

Rather than allowing Petitioner to be discharged at the end of his service, a more appropriate disposition would have been referral to a Medical Evaluation Board (MEB) to provide a full clinical evaluation of the extent of ongoing medical symptoms and subsequent occupational impairment or question of fitness for duty (or in Petitioner’s case, separation from military service).

Had Petitioner been referred to a MEB, it is likely his conditions of TBI residuals and orthopedic injuries would have resulted to referral to the Physical Evaluation Board (PEB) for a determination of fitness for duty for these conditions. Though it is purely speculative to estimate what the PEB may have determined regarding Fitness/Unfitness and possible Disability Rating, had the PEB found him Unfit, given his orthopedic injuries were within six months from the initial surgical repairs and he had undergone a surgical procedure as recent as 11/19/2018, it is likely he would have been placed on Temporary Disability Retirement List (TDRL) as an unstable condition (had not reached the state of full expected recovery for determination of residual disability).

The records do not contain sufficient information for an estimate of what the TDRL disability rating might have been for his orthopedic injuries. Given his TBI and Residuals of TBI from his MCA were only six months in the recovery process, it is likely had he been found Unfit, he would have been placed on the TDRL. In this case, the available medical information indicated his most likely PEB Disability Evaluation would be 40% (for levels of impairment of 2 for Memory/Attention/Concentration/Executive Function and Subjective Symptoms). By reference (c), the overall percentage for disability rating of Residuals of TBI is the overall disability percentage as assigned based on the level of the highest facet. In this case, Petitioner met assessment criteria of 2 for the above referenced facets

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of TBI (out of 7 facets total). An assessment of 2 correlates to a disability rating of 40%.

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 referred to a Medical Evaluation Board for determination if referral to the PEB for Unfitness was appropriate for his ongoing TBI and Residual of TBI, as well as his multiple orthopedic conditions."

CONCLUSION

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting relief. The Board concurred with the AO's finding that, at the time of the Petitioner's discharge from service, he evidenced occupational impairment sufficient that he should have been reviewed by a Medical Evaluation Board (MEB) for a full evaluation and potential referral to the Physical Evaluation Board (PEB). Accordingly, the Board recommended that relief be granted as described below.

RECOMMENDATION

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

Petitioner's naval record be corrected as follows: That within 60 days of this letter, the President, PEB, shall invite the Petitioner to be reviewed by the PEB. The PEB shall make a determination of the Petitioner's fitness at the time of his release from active duty, and, if found unfit, make a determination of the appropriate percentage of such unfitness. Should Petitioner accept a PEB review of his case, he shall be afforded the due process required under the Disability Evaluation System.

That no other changes be made to Petitioner's record.

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

6/5/2023

