



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. 1778-22
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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 9 March 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 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo).

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 4 January 1990. On 17 September 1990, you were seen by sick call for your shoulder. On 8 December 1990, you received nonjudicial punishment for a 19-day period of unauthorized absence. On 21 December 1990, you received a formal written warning concerning your nonjudicial punishment as for your involvement with civil authorities. On 6 February 1992, you received a formal written counseling explaining that you were eligible, but not recommended for, promotion to lance corporal due to lack of responsibility.

Your record also reflects that you were seen by the Physical Evaluation Board (PEB) for medical concerns relating to your shoulder. On 1 May 1992, you received notification of the PEB finding that you were unfit due to a condition that existed prior to your entry into service (EPTE). On 4 June 1992, the separation authority directed that you be discharged, and on 26 June 1992, you were discharged with a general (under honorable conditions) characterization of service.

In 1995, you filed an application with the Naval Discharge Review Board (NDRB) seeking to have your discharge characterization upgraded to Honorable. On 8 September 1995, the NDRB denied your application, basing its decision on your record of nonjudicial punishment as well as your final proficiency and conduct markings of 4.3/3.9. In denying your application, the NDRB provided you the type of information that you could provide for it to consider post-service clemency factors, as follows:

Although not raised as an issue, per Finding g., the Naval Discharge Review Board is authorized to consider post-service factors in the recharacterization of a discharge, the short period of time since discharge in this case does not illuminate the period of service under review and is insufficient to warrant an upgrade at this time. While it is true the applicant cannot go back and undo his prior mistakes, he does have the opportunity to contribute in a positive way to society and warrant clemency.

Those contributions that would be looked upon favorably by this, or any other Board, include educational pursuits, employment track record, being a contributing member of society and making a positive impact in the community through volunteer work. The applicant must prove that his postservice conduct has been above reproach and he is making a valid attempt at making amends for the misconduct he committed during the period of service under review. The 15 year window during which applicants may appeal their discharges was established to allow time for establishing oneself in the community and for making these substantial, documented life style changes and community contributions. The applicant is reminded that he remains eligible for a personal appearance hearing provided that an application is received within 15 years from the date of discharge.”

Despite this detailed explanation of materials upon which the NDRB “or any other Board” would look upon favorably, it does not appear that you later provided any of this type of information subsequent to the NDRB denial of your application. It also does not appear that you sought the personal appearance hearing despite the reminder by the NDRB.

In your petition, you have requested the award of a medical retirement as well as an upgrade of your discharge characterization from General (under honorable conditions) to Honorable. In support of your request, you contend that you were discharged strictly for medical reasons when you reinjured your shoulder while loading ammunition on your truck that you had originally hurt in high school football. You further explained that you served your country in the gulf war, you received many commendations, you always followed orders without asking questions, and when you were discharged, you believed that it was a medical discharge and you did not really understand the difference between a General and an Honorable discharge. You also asserted that after your service, you were able to get services through the U.S. Department of Veterans Affairs (VA), which helped you get your life on track, you have been an upstanding member of the community since you were hired with the company where you have worked for 28 years. You also state that you have been very successful, you have impeccable credit, and integrity in both job and family life. You provided a written personal statement as well as service and medical records in support of your petition.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, and the Board disagreed with your rationale for relief. 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 his or her office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if his or her 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 any the criteria for unfitness as defined within the disability evaluation system at the time of your discharge. In reaching its decision, the Board observed that there was no evidence in your record, nor did you provide any, that you incurred a qualifying disability condition while you were on active duty service in the Marine Corps. To the contrary, the only potential medical condition for which you were reviewed while you were in service was the medical board relating to your right shoulder condition. During your service, the PEB evaluated your medical condition and it came to the conclusion that your condition existed prior to your entry. There is no evidence in your service record, nor did you provide any, that you were diagnosed with an unfitting condition within the meaning of the disability evaluation system. You also did not provide any evidence that demonstrated the PEB was in error. In addition, the Board applies a presumption of regularity to the actions of naval authorities, and the Board found that you did not provide sufficient evidence to overcome the presumption of regularity in the evaluation of your shoulder condition and the processing of your discharge approximately thirty years ago.

The Board acknowledged your assertion that you are, or have been, obtaining treatment from the VA. Please note that the VA is a separate entity from the Navy Department, and should the VA award you a service connected disability, you should be aware that the award of such a disability for conditions connected to your service in the Marine Corps would not persuade the Board these conditions were unfitting at the time of your discharge from the Marine Corps, 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. Accordingly, in light of all of the foregoing, the Board denied your request for a medical discharge.

With respect to your request for an upgrade in your discharge, the Board also was unable to find a basis for relief. By way of background, upon review of the entirety of your service record, the Board noted that your record reflects the imposition of nonjudicial punishment as well as written warnings concerning your behavior. In addition, the Board observed that your proficiency and conduct marks were 4.0 and 3.9, respectively, which falls within the range of a General (under honorable conditions). In denying your requested relief, the Board applied the clemency factor set forth in the Wilkie Memo, but found your petition to lack supporting evidentiary information. Indeed, the Board observed that in 1995 the NDRB explained to you in detail the type of information that it, or any reviewing board, would look upon favorably. That would include

information demonstrating that your post-service conduct has been above reproach and that you have made a valid attempt at making amends for the misconduct you committed during the period of service under review. Such information may be demonstrated by, for example, letters of recommendation, documentary evidence of higher education or professional licenses or attainment, evidence of your employment, evidence that you have established yourself in the community, and the like. The Board carefully considered your written statement, but found that it, alone, was insufficient to reach the level for which the Board would grant an upgrade to your discharge characterization. Accordingly, the Board denied your request for an upgrade of your characterization of service.

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,

3/31/2023

