



**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. 1789-22  
Ref: Signature Date



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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 22 November 2022. The names and votes of the members of the panel 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, as well as the 22 September 2022 and 19 October 2022 advisory opinions (AOs) furnished by two medical professionals, and your response to the AO.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will 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.

The Board carefully considered your request to reinstate your pay grade to E-6. The Board considered your contention that your rank was reduced as a result of poor performance evaluations that contained derogatory remarks describing post-concussion syndrome symptoms. You assert that the traumatic brain injury (TBI) occurred when a tow hitch fell on your head and your TBI was not considered by your reporting officials. As evidence, you furnished your Veterans Administration (VA) claim and medical documents.

Based on the medical issues raised, the Board considered the aforementioned AOs. The 22 September 2022 AO stated in pertinent part:

There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. Post-service, he has claimed a diagnosis of TBI from the VA that is temporally remote to his military service, and attributed to a period of service prior to his entry in the Navy. There is no available medical evidence in support of his TBI claims. Unfortunately, his personal statement is not sufficiently detailed to establish a nexus with his substandard performance, as he performed successfully in the Navy for twelve years before he began to demonstrate substandard performance. Additional records (e.g., in-service or post-service medical records describing the Petitioner's diagnosis, symptoms, and their specific link to his performance) would aid in rendering an alternate opinion.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of TBI that may be attributed to military service. There is insufficient evidence that his substandard performance could be attributed to TBI."

In response to the initial AO, you provided rebuttal evidence that included a statement and additional VA evidence.

As a result, a second AO was issue on 19 October 2022. It stated in pertinent part:

This Advisory Opinion (AO) Rebuttal Response, like the previous AO, will only address the mental health claims by the Petitioner. Petitioner has provided additional medical evidence in support of his TBI claims and that he has moderate impairment in cognitive functioning that is temporally remote to his military service but attributed to his service-connected TBI. It is possible that his decline in performance after more than a decade of successful performance following the injury could be attributed to previously unrecognized symptoms that began to manifest over a slow decay of performance.

The second AO modified the original conclusion to state, "it is my considered clinical opinion there is some post-service evidence of a diagnosis of TBI that may be attributed to military service. There is post-service evidence his substandard performance may be attributed to TBI."

The Board noted the second AO's determination that it is possible that your decline in performance, after more than a decade of successful performance following the injury, could be attributed to previously unrecognized symptoms that began to manifest over a slow decay of performance. The Board also noted that there is post-service evidence of a diagnosis of TBI that may be attributed to military service and there is post-service evidence that your substandard performance may be attributed to TBI. The Board noted, too, that in addition to several substandard evaluations, you received non-judicial punishment (NJP) on 9 November 1989 for violating Uniform Code of Military Justice (UCMJ) Article 86 (unauthorized absence) and

Article 92 (disobeying a lawful order from a commissioned officer). Your Commanding Officer found you guilty at NJP and awarded reduction in rate to E-5. Contrary to your assertions, the Board determined that your reduction in rate occurred due to misconduct and was not based upon your documented substandard performance. The Board found no evidence of a nexus between your TBI and your misconduct that ultimately formed the basis for your reduction in rank to E-5. In making this finding, the Board found no evidence that you were not mentally responsible for your misconduct that formed the basis for the NJP. Therefore, based upon the foregoing, the Board concluded that there is no probable material error, substantive inaccuracy, or injustice warranting your reinstatement to paygrade of E-6. 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,

12/12/2022

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Executive Director

Signed by: █