



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. 1864-22
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 you did not file your application in a timely manner, the statute of limitation was waived 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 9 May 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 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) (collectively the "Clarifying Guidance"). The Board also considered the 9 March 2023 advisory opinion (AO) prepared by two different qualified mental health professionals. Although you were provided an opportunity to respond to the AO, you chose not to do so.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 9 August 2001. On 20 March 2002, you received nonjudicial punishment for being drunk on duty. That same day you were issued a formal written warning concerning your misconduct. After completing a period of Honorable service, you immediately reenlisted and commenced another period of active duty on 15 December 2008.

On 26 September 2009, you received nonjudicial punishment due to unauthorized absence, failure to obey a lawful general order, and drunk and disorderly conduct.

Unfortunately, the documents pertinent to your administrative separation are not in your official military personnel file (OMPF). Notwithstanding, the Board relies on a presumption of regularity to support the official actions of public officers and, in the absence of substantial evidence to the contrary, will presume that they have properly discharged their official duties. Your Certificate of Release or Discharge from Active Duty (DD Form 214), reveals that you were separated from the Navy on 18 February 2010 with a General (Under Honorable Conditions) characterization of service, your narrative reason for separation is "Pattern of Misconduct," your separation code is "JKA," and your reenlistment code is "RE-4."

In 2015, you filed a petition with this Board seeking a disability retirement. On 21 December 2015, this Board denied your petition, explaining that there was insufficient evidence that you had an unfitting condition while you were on active duty. In addition, the Board found that your misconduct would have taken precedence over any potential disability processing.

In 2018, you filed an application with the Navy Discharge Review Board (NDRB) seeking to have your discharge upgraded. According to the documents you provided with your petition, on 5 February 2018, the NDRB directed the correction of your Certificate of Discharge or Release from Active Duty (DD Form 214) to reflect the dates of your continuous Honorable service during prior enlistments.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. In your current petition, you seek relief in the form of upgrading your discharge characterization to Honorable, changing the reason for your separation to medical, and to be paid separation pay. In support of your petition, you contend that you served two full enlistments honorably, you earned two personal awards and good conduct medals, you suffered an unforeseen change in your mental health during your last enlistment, and you felt wronged from what happened to you during your third enlistment and assert that you were promised a 100 percent medical retirement, a medical discharge, and severance pay. For purposes of clemency and equity consideration, the Board noted you did not provide documentation describing post-service accomplishments or advocacy letters. However, in support of your petition, you provided documentation from the Department of Veterans' Affairs, including from a treating physician, as well as a copy of your 2018 NDRB decision.

To assist it in reviewing your petition, the Board obtained the 9 March 2023 AO, which was considered unfavorable to your petition. According to the AO:

Petitioner was appropriately referred for psychological evaluation during his enlistment and properly evaluated during an inpatient hospitalization. His substance use and personality disorder diagnoses were based on observed behaviors and performance during his period of service, the information he chose to disclose to the mental health clinicians, and the psychological evaluation performed. Substance use and problematic alcohol use are incompatible with military readiness and discipline and does not remove responsibility for behavior. A personality disorder indicates lifelong traits and by definition is pre-existing to military service. Post-service, the VA has provided treatment for PTSD and another mental health

condition. Post-service, a VA provider has suggested the symptoms conceptualized as a personality disorder may be better considered symptoms of TBI. Unfortunately, available records are not sufficiently detailed to provide a nexus with his misconduct.

Petitioner's performance following the purported head injury appears to have been unimpaired, as he received a NAM four years later. Petitioner's problematic alcohol behavior preceded the purported TBI and appears to have continued afterwards. Additional records (e.g., complete active duty or VA mental health records, including the Compensation and Pension Examination, describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The AO concluded, "it is my considered clinical opinion there is post-service evidence from the VA of TBI incurred during military service. 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 his misconduct could be attributed to TBI, PTSD, or another mental health condition other than his in-service diagnosed alcohol use disorder."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief and disagreed with your rationale for relief. With respect to your request for an upgrade of your discharge, the Board reviewed your request in light of the Clarifying Guidance and applied liberal consideration to your assertion that you suffered a mental health condition during your service. Notwithstanding this, the Board found insufficient support for your request. The Board noted that you had been appropriately issued a written warning after your first nonjudicial punishment, and, despite your written warning, you committed further misconduct. Further, notwithstanding your pattern of misconduct, you received a General (Under Honorable Conditions) characterization of service and not an Other Than Honorable characterization of service, which tends to indicate that, at the time of your discharge, your command either recognized your prior good service, or it applied some level of clemency. The Board also relied on the AO's finding that there was insufficient evidence that your misconduct while in service could be attributed to post-traumatic stress disorder, traumatic brain injury, or another mental health disorder. As a result, the Board concluded significant negative aspects of your service outweighs the positive aspects and continues to warrant a General (Under Honorable Conditions) characterization. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Wilkie Memo and reviewing the record holistically, the Board did not find evidence of an error or injustice that warrants granting you a discharge upgrade or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct.

With respect to your request for a medical retirement, 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 their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or 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 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 is no evidence in your record, nor did you provide any, that you were referred by any medical evaluation board to the disability evaluation system for the evaluation of fitness due to any potentially unfitting medical condition. In other words, in order to be eligible for a military disability retirement, there must be evidence of an unfitting disability condition that is contemporaneous to your service. Here, the Board did not find such a disability condition. The Board's decision in this regard is supported by the findings of the AO, which did not report its findings of any unfitting condition during your service. Finally, even if the Board had found such a condition, your misconduct discharge took precedence over any such disability evaluation processing. Therefore, even in light of the Kurta memo and considering the evidence liberally, the Board concluded insufficient evidence exists to support a change to your narrative reason for separation to disability. 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,

5/16/2023

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Deputy Director

Signed by: █