



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: 1881-22

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 6 May 2022. 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). Additionally, the Board also considered an advisory opinion (AO) furnished by a qualified mental health provider. You were afforded an opportunity to submit an AO rebuttal and did so.

The Board determined that your personal appearance, with or without counsel, would 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.

You enlisted in the Navy 20 September 1982. Your pre-enlistment physical examination on 1 September 1982 and self-reported medical history both noted no psychiatric or neurologic conditions or symptoms. On 20 September 1982, you signed the "USN Drug Abuse Statement

of Understanding.” On 12 October 1982, your submarine duty physical examination performed by a clinical psychologist noted no psychiatric or neurologic conditions or symptoms.

On 21 April 1986, you received non-judicial punishment (NJP) for the wrongful use of cocaine. Following your command’s receipt of the initial positive test results, you requested a retest of your urine sample and it still tested positive for cocaine. You did not appeal your NJP.

On 7 May 1986, your command notified you that you were being processed for an administrative discharge by reason of misconduct due to drug abuse. You consulted with military counsel and elected your right to submit a rebuttal statement, but you waived your right to request an administrative separation board. In the interim, your medical evaluation on 30 May 1986 determined that you were not drug dependent. Ultimately, on 23 June 1986 you were separated from the Navy for drug abuse with an under other than honorable conditions (OTH) discharge characterization and assigned an RE-4 reentry code.

On 1 November 2021, the VA granted you a service-connection for treatment purposes only for multiple non-mental health medical conditions all related to orthopedic issues. As part of the Board review process, the BCNR Physician Advisor who is a licensed clinical psychologist (Ph.D.), reviewed your contentions and the available records and issued an initial AO dated 25 March 2022. The Ph.D. initially observed:

There is no evidence that the Petitioner was diagnosed with a mental health condition during military service, and he denied substance use at the time. Substance use is incompatible with military readiness and discipline and considered amenable to treatment, depending on the individual’s willingness to engage in treatment. There is no evidence he was unaware of Navy regulations or was not responsible for his behavior. During his military processing, there is no evidence of concern of a mental health condition which would have warranted further evaluation. Unfortunately, his post-service medical records, which address mental health conditions that are temporally remote from his military service, do not provide support to his claims. Additional records (e.g., post-service mental health records describing the Petitioner’s diagnosis, symptoms, and their specific link to his misconduct) are required to render an alternate opinion.

The Ph.D. concluded, “[b]ased on the available evidence, it is my clinical opinion that there is insufficient evidence of a mental health condition that may be attributed to military service. There is insufficient evidence that his misconduct could be attributed to a mental health condition.” The Board also reviewed your rebuttal evidence from 25 April 2022.

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. These included, but were not limited to: (a) you currently receive VA health care but were instructed to request a discharge upgrade for additional benefits, (b) you had three outstanding years of active duty and then had two knee surgeries as a result of a torn ACL and

were on continuous pain medication which became addicting, (c) you hit your head on a metal stairway while on sub duty, (d) during your last six months of active duty you went to NJP for the use of pain meds that became addicting and that was your one error on active duty, (e) you have since had two knee replacements and one knee cap replaced, (f) you also suffer from a severe heart condition resulting in two heart attacks, (g) you have long-term mental illness you ignored and has now worsened, and (h) you are totally disabled and such conditions are service-connected. However, given the totality of the circumstances, the Board determined that your request does not merit relief.

In accordance with the Kurta, Hagel, and Wilkie Memos, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced and their possible adverse impact on your service. However, the Board concluded that there was no nexus between any mental health conditions and/or related symptoms and your drug-related misconduct, and determined that there was insufficient evidence to support the argument that any such mental health conditions mitigated the misconduct that formed the basis of your discharge. The Board also concluded that although you have post-discharge mental health diagnoses, your records contemporaneous to your service lacked sufficient evidence to establish a nexus between your mental health conditions/symptoms and your active duty misconduct. As a result, even under the liberal consideration standard the Board concluded that your cocaine use was not due to mental health-related conditions or symptoms. Even if the Board assumed that your misconduct was somehow attributable to any mental health conditions, the Board unequivocally concluded that the severity of your misconduct far outweighed any and all mitigation offered by such mental health conditions. The Board determined the record clearly reflected that your misconduct was willful and intentional, and demonstrated you were unfit for further service. The Board also concluded that the evidence of record did not demonstrate that you were not mentally responsible for your conduct or that you should otherwise not be held accountable for your actions.

The Board also took issue with your contention that an addiction to pain medication resulted in your NJP. The Board determined that it was pharmacologically impossible for you to test positive for cocaine through the use prescribed pain medication. The Board noted that the only drug that would test positive for cocaine at a Navy Drug Lab was cocaine itself. Thus, the Board unequivocally concluded that your cocaine use was knowing and willful, and any innocent/unknowing ingestion defense or outright denial was not persuasive and without merit.

The Board noted that there is no provision of federal law or in Navy/Marine Corps regulations that allows for a discharge to be automatically upgraded after a specified number of months or years. The Board did not believe that your record was otherwise so meritorious as to deserve a discharge upgrade. The Board noted that, although one's service is generally characterized at the time of discharge based on performance and conduct throughout the entire enlistment, the conduct or performance of duty reflected by only a single incident of misconduct may provide the underlying basis for discharge characterization. The Board determined that characterization under OTH conditions is appropriate when the basis for separation is the commission of an act or acts constituting a significant departure from the conduct expected of a Sailor. Lastly, absent a material error or injustice, the Board declined to summarily upgrade a discharge solely for the

purpose of facilitating VA benefits, or enhancing educational or employment opportunities. The Board carefully considered any matters submitted regarding your character, post-service conduct and accomplishments, however, even in light of the Wilkie Memo and reviewing the record holistically, the Board still concluded given the totality of the circumstances your request does not merit relief. Accordingly, the Board determined that there was no impropriety or inequity in your discharge, and even under the liberal consideration standard, the Board concluded that your misconduct clearly merited your receipt of an OTH.

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,

5/14/2022

[REDACTED]

Executive Director

[REDACTED]