

Docket No: 2313-22 Ref: Signature Date

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER, USMC, XXX-XX-

- Ref: (a) 10 U.S.C. § 1552
 - (b) 10 U.S.C. § 1214a
 - (c) DODM 1332.18 Volume 1, DES Manual: General Information and Legacy DES Time Standards, 5 August 2014
 - (d) DODI 1332.18, Disability Evaluation System, 5 August 2014 (incorporating Change 1, effective 17 May 2018)
 - (e) SECNAVINST 1850.4E, Department of the Navy (DON) Disability Evaluation Manual, 30 April 2002
 - (f) MCO P1900.16F, Ch. 2, Separation and Retirement Manual (MARCORSEPMAN)
 - (g) USD (P&R) Memo, "DoD Retention Policy for Non-Deployable Service Members, 14 February 2018
 - (h) MCO P1400.32D, Ch. 2, Marine Corps Promotion Manual, Volume 2, Enlisted Promotions (MARCORPROMAN, VOL 2, ENLPROM), 14 June 2012
- Encl: (1) Order, in the case of [*Petitioner*] v. *The United States*, in the United States Court of Federal Claims, Case No. ______, filed 28 February 2022
 - (2) DD Form 149 (w/enclosures)
 - (3) ASN (M&RA) Memo, subj: Overseas Integrated Disability Evaluation System (IDES) Policy Guidance, 15 August 2011
 - (4) NAVIG Triennial Disability Evaluation (DES) Review, Fiscal Years 2013, 2014, 2015 (excerpt)
 - (5) DON DESCP Director Memo, subj: Objection to Overseas Integrated Disability Evaluation System, 3 August 2018
 - (6) ASN (M&RA) Memo, subj: Update Disability Evaluation System (DES) Policy Guidance Concerning Overseas and Remote Duty Locations, 20 March 2020
 - (7) DD Form 4/1, Enlistment/Reenlistment Document, Armed Forces of the United States (20041210)
 - (8) Regional Medical Center Memorandum for Record , 27 February 2018
 - (9) DD Form 214
 - (10) DD Form 4/1 Enlistment/Reenlistment Document, Armed Forces of the United States (20120917)
 - (11) NAVMC 321A, Agreement to Extend Enlistment, 26 August 2015
 - (12) NAVMED 6100/5, Abbreviated Medical Evaluation Board Report, 24 August 2017
 - (13) NAVMED 6100/1, Medical Board Report Cover Sheet

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- (14) CORB Memo 1850 PEB/nem, subj: Recommendation for Referral into the Integrated Disability Evaluation System ICO [Petitioner], 7 December 2017
- (15) Petitioner's Memo, subj: Overseas IDES Referral Election of Options, 30 January 2018
- (16) NAVMED 6100/5, Abbreviated Medical Evaluation Board Report, 9 March 2018
- (17) Regional Medical Center Memorandum for Record subj: Narrative Summary, 24 January 2018
- (18) NAVMED 6100/1, Medical Board Report Cover Sheet
- (19) CORB Memo 1850 PEB/SSH, subj: Recommendation for Referral into the Integrated Disability Evaluation System ICO [Petitioner], 18 April 2018
- (20) Petitioner's Memo, subj: Overseas IDES Referral Election of Options, 30 April 2018
- (21) U.S. USMC Service Element CO Memo 1000, subj: Non-Medical Assessment (NMA) in the case of [Petitioner], 10 May 2018
- (22) CORB Memo PEB/msc, subj: Recommendation for Referral into the Integrated Disability Evaluation System ICO [Petitioner], 23 May 2018
- (23) NAVMC 321A, Agreement to Extend Enlistment, 20 August 2018
- (24) CMC Memo MMSR-4, subj: Disapproval; Agreement to Extend Enlistment in case of [Petitioner], 23 August 2018
- (25) NHCP DES Attorney Memorandum, subj: [Petitioner], 12 October 2018
- (26) NAVMC 118(11), Administrative Remarks, 4 October 2018
- (27) E-mail traffic
- (28) CORB Memo 5220 CORB: 002, subj: Request for Comments and Recommendations in the case of [Petitioner], 15 June 2022
- (29) OJAG Memo 5800 Ser 13/4BC0513.22, subj: Advisory Opinion in the case of [Petitioner], 7 July 2022
- (30) Petitioner's Counsel's Letter, RE: Advisory Opinions ICO [Petitioner], Court of Federal Claims Case No. **BCNR** Docket No: 2313-22, 10 August 2022
- (31) Petitioner's Counsel's Letter, RE: Advisory Opinions ICO [Petitioner], Court of Federal Claims Case No. **BCNR** Docket No: 2313-22, 10 August 2022

1. By Order dated 28 February 2022, the United States Court of Federal Claims (COFC) remanded the case filed by the Subject, hereinafter referred to as Petitioner, to the Board for Correction of Naval Records, hereinafter referred to as the Board, with instructions to "address all issues within its authority," and any other pertinent issues raised by the parties in writing within 30 days of the issuance of enclosure (1).¹ Specifically, the COFC directed the Board to "address, among other issues, whether [Petitioner] should have been placed into the Integrated Disability Evaluation System [(IDES)], whether [Petitioner] should have been provided counsel regarding the [IDES], whether [Petitioner] should be examined by any evaluation Board, and [to] determine whether [Petitioner] is entitled to any other relief, including correction of records and retirement pay, based upon any errors or injustices found."

2. Pursuant to reference (a) and in accordance with enclosure (1), Petitioner, through counsel, submitted enclosure (2) for consideration by the Board on 28 March 2022, asserting that she was improperly denied referral into the IDES, and requesting the following relief: (1) Restoration to

¹ Petitioner had not previously sought relief from the Board before seeking relief from the COFC.

active duty in the Marine Corps; (2) Review of her fitness for continued naval service under the appropriate Disability Evaluation System (DES); (3) Alternatively, early retirement pursuant to the Temporary Early Retirement Authority (TERA); (4) Retroactive pay and allowances dating back to her wrongful separation; (5) Reimbursement of all out-of-pocket medical expenses incurred which would not have been incurred but for her removal from TRICARE;² (6) Promotion to the rank of Master Sergeant; and (7) Any other relief which the Board deems just and proper under the circumstances of Petitioner's case. See Enclosure (2).

3. The Board reviewed Petitioner's allegations of error or injustice in accordance with enclosure (1) on 29 September 2022 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on Petitioner's naval records.³ Documentary materials considered by the Board included the enclosures, relevant portions of Petitioner's naval records, and applicable statutes, regulations and policies.⁴

4. The Board, having reviewed all of the evidence of record pertaining to Petitioner's allegations of error or injustice, finds as follows:

a. By memorandum dated 15 August 2011, the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN (M&RA)) implemented the Overseas IDES (OIDES) program, whereby Department of the Navy (DON) personnel assigned overseas would receive an initial screening by the DON Physical Evaluation Board (PEB) before being issued permanent change of station orders to a location in the continental United States (CONUS) for entry into and processing through the IDES.⁵ See enclosure (3). This review would not constitute the fitness determination that the PEB typically provides, but rather was limited to making a recommendation as to whether the Service member should be referred to the IDES and therefore reassigned to a CONUS-based location for that purpose. During its triennial review of the DON DES for Fiscal Years 2013, 2014, and 2015, the DON Inspector General (NAVIG) noted several problems with the OIDES. Specifically, NAVIG noted that the concept of a "quick look" by the PEB may negate a number of due process protections and undermine the physician's

 $^{^{2}}$ This requested relief is not within the Board's authority to grant. Petitioner may file a claim for such compensation through the Defense Health Agency.

³ The Board's findings were not unanimous with regard to the appropriate relief to be granted. The separate Majority and Minority findings and recommendations in this regard are detailed below.

⁴ The Board originally reviewed Petitioner's allegations of error or injustice on 8 September 2022, and recommended that Petitioner be granted "equitable" relief in the form of a "recall to active duty for the sole purpose of referral to the IDES." This relief was directed based upon the findings of the advisory opinion (AO) at enclosure (29), but specifically denied Petitioner the constructive service credit (CSC) requested. As such, the Board did not address Petitioner's contention that her discharge was void, or Petitioner's follow-on contentions that the CSC doctrine applied and that she was entitled to promotion consideration. During the post-Board review process, a legal review of the draft record of proceedings identified these deficiencies and opined that the Board's decision was arbitrary and capricious because it failed to address Petitioner's non-frivolous contentions. The legal review also noted that the relief directed by the Board would be ineffective since there was no authority to recall Petitioner to active duty for the purpose stated, and that the only methods to restore her active duty status would be through a correction of her record to reflect that she was never actually discharged (with appropriate service credit) or through her voluntary reenlistment. The case was therefore sent back to the Board for further deliberations, which occurred when the Board members reconvened on 3 October 2022.

⁵ Relocation to CONUS for processing through the DES was necessitated by the integration of the Department of Veterans Affairs (VA) in the IDES, as there are no VA systems at overseas military treatment facilities (MTF).

prerogatives within the system; that the OIDES introduces a possibility of abuse of the system if commands decide to administratively separate the service member when a medical board may have been warranted; that it introduces an inequity when a service member assigned overseas is able to avail himself or herself of a voluntary administrative separation when the CONUS-based service member may not; that the OIDES process places inappropriate burdens on overseas MTFs; and that the OIDES is not aligned with the intent of Congress since it creates a separate DES process. Accordingly, NAVIG recommended that the OIDES program be ended and that DON personnel stationed overseas be returned to a CONUS MTF for a definitive evaluation and appropriate entry into the DES. These findings and recommendations were forwarded by NAVIG to the ASN (M&RA) by memorandum dated 1 February 2016. See enclosure (4). Despite this recommendation and a subsequent objection to the OIDES by the Director, DON DES Counsel Program (DESCP),⁶ the OIDES policy was not cancelled until 20 March 2020. See enclosure (6).

b. Petitioner enlisted in the Marine Corps Reserve on 10 June 2004 and began her initial entry training on 24 June 2005. According to Petitioner, she incurred a repetitive use injury while in basic training, which a Medical Evaluation Board (MEB) recommended for referral to the PEB. Rather than delay her training and career progression, Petitioner elected not to pursue a PEB, and completed her initial entry training. She asserts that this injury continued to affect her throughout her career.⁷ See enclosures (2) and (7).

c. Petitioner was assigned to the Engineer Support Battalion as a reservist from 2006-2009. See enclosure (8). On 2 February 2007, Petitioner reports having sustained a concussion and mild traumatic brain injury (TBI) when she was involved in an in-line of duty vehicular accident while serving on active duty.⁸ She reported to Officer Candidate School in **Engineer**, **intervent**, on **the service**, but was reportedly unable to complete the training due to a service-connected medical condition and was returned to her normal reserve duties. See enclosure (2).

d. On 23 June 2009, Petitioner was augmented to active duty and began an extended period of active duty service. See enclosure (9).

⁶ See enclosure (5). By memorandum dated 3 August 2018, the Director, DESCP, informed the ASN (M&RA) that the OIDES deprives DON personnel stationed overseas of substantive rights. Specifically, the DESCP Director noted that reference (b) provides that service members cannot be involuntarily discharged or denied reenlistment due to unsuitability for deployment for any condition found "fit" by the PEB, so overseas personnel who are not formally found "fit" are in danger of being separated or denied reenlistment as a consequence of not having been referred into the IDES. The DESCP Director also noted that the OIDES deprives overseas personnel of the right to the assistance of legal counsel during the DES process, as required by reference (c). Accordingly, the DESCP Director recommended that the ASN (M&RA) immediately cancel the OIDES policy and require the Secretary of the Navy Council of Review Boards and the PEB to coordinate with the Bureau of Medicine and Surgery to properly refer and process wounded, ill, and injured service members assigned overseas through the IDES process.

⁷ The Board does not question that this injury affected Petitioner throughout her career, but notes that her subsequent lengthy and successful career strongly suggests that this injury did not render her unfit for continued service. As such, a PEB likely would have, or should have, found her medically fit if Petitioner had elected to pursue the PEB referral recommended by her MEB.

⁸ Petitioner claims that she was treated at a civilian medical facility, but her medical treatment is not documented in her military records.

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e. On 17 September 2012, Petitioner reenlisted for a period of 58 months. This enlistment was scheduled to expire on 16 July 2017. On 26 August 2015, Petitioner extended this enlistment for a period of 15 months, which adjusted her end of active service (EAS) date to 16 October 2018. See enclosures (10) and (11).

f. On 20 July 2015, reportedly while on a limited duty (LIMDU) status, Petitioner underwent an overseas screening to determine whether she was medically qualified to accept orders for overseas assignment. The Navy medical provider who conducted this screening reportedly found Petitioner medically qualified for overseas assignment, noting that although she was on LIMDU for a surgical procedure, she would likely complete her recovery without exceeding two LIMDU periods.⁹ She was subsequently assigned to **Magnetic Screening** in **Magnetic Screening**. See enclosure (2).

g. On 21 April 2017, Petitioner underwent surgery to repair ligaments on the outside of her left ankle and to correct a deformity in her left first toe.¹⁰ See enclosure (8).

h. On 24 August 2017, an MEB placed Petitioner on LIMDU from 25 August 2017 to 23 February 2018 for recovery related to the surgery referenced in paragraph 4g above.¹¹¹² According to the abbreviated MEB report, Petitioner suffered from chronic left ankle pain and instability as a result of previous twisting injuries/ankle sprains. She had a good prognosis to recover from her left ankle and left foot surgery, although it was noted that she would continue to have left forefoot pain due to Morton's neuroma.¹³ The assessment provided by Petitioner's medical provider indicated that Petitioner was healing well from the surgery to her left foot/ankle, but continued to suffer from chronic right foot pain resulted from two previous surgeries and that she would likely be on prolonged LIMDU due to her podiatric condition. Petitioner did not object to these findings. See enclosure (12).

i. On 19 September 2017, Petitioner's case was forwarded to the PEB for review pursuant to the OIDES policy. Only the conditions related to Petitioner's left foot and ankle were referred for consideration. See enclosure (13).

j. By memorandum dated 7 December 2017, the PEB determined that Petitioner's referral into the IDES was not warranted. See enclosure (14).

⁹ The Board had no independent evidence that Petitioner was in an extended LIMDU status directed by a MEB, as required by reference (e), or of the finding that she was medically qualified for overseas assignment. This finding is based upon Petitioner's own assertions in enclosure (2). The finding that she was medically qualified for overseas assignment, however, combined with the absence of a referral to the IDES while stationed in CONUS, suggests that none of Petitioner's conditions warranted such referral at the time.

¹⁰ This was labeled as a "Left hallux abductovalgus deformity." In layman's terms, this was a bunion removal.

¹¹ The limitation imposed upon Petitioner were "no running, no rucking, no jumping, and no other high impact activities." The MEB recommended physical training at the gym/pool for upper body weight training and other cardiovascular exercise.

¹² This MEB was directed in accordance with paragraph 1008a of reference (e) because Petitioner required more than 30 days of LIMDU to return to full military duty.

¹³ Morton's neuroma is a thickening of the tissue around a nerve leading to the toes.

k. By memorandum dated 30 January 2018, Petitioner indicated that she agreed with the PEB recommendation that she not be referred into the IDES. See enclosure (15).

1. On 9 March 2018, another MEB placed Petitioner on LIMDU from 8 December 2017 to 8 June 2018 for chronic left biceps tendinopathy, chronic right first toe pain, and left Morton neuroma pain.¹⁴ See enclosure (16). The supporting documentation for this MEB indicated a good prognosis for recovery for the latter two conditions. She had recovered from the surgical procedures to her left foot and ankle, and had responded well to injections for the left Morton's neuroma. As of 27 February 2018, she was on the waiting list for revision right foot surgery, and her provider believed that this surgery would help alleviate a majority of her pain and return her to normal activities. See enclosure (8). It also indicated that Petitioner had been treated for left shoulder pain (diagnosed as chronic left bicep tendinopathy) in multiple specialty clinics since 2014, and that the condition had not improved despite the use of oral/topical medications, participation in physical therapy, and multiple injection procedures. See enclosure (17).

m. On 28 March 2018, Petitioner's chronic left biceps tendinopathy, right toe pain, and left Morton's neuroma conditions were forwarded to the PEB pursuant to the OIDES policy. See enclosure (18).

n. By memorandum dated 18 April 2018, the PEB determined that Petitioner's referral to the IDES was not warranted. See enclosure (19).

o. By memorandum dated 30 April 2018, Petitioner indicated that she did not agree with the PEB's recommendation, and requested reconsideration of the decision not to refer her to the IDES. See enclosure (20).

p. By memorandum dated 10 May 2018, Petitioner's commander provided a revised nonmedical assessment (NMA) of Petitioner's condition to the PEB. This NMA commented favorably on Petitioner's duty performance and abilities, but noted her extended absences from the workplace due to medical issues and her inability to physically perform certain tasks associated with her military occupational specialty (MOS). It also noted that she was not worldwide deployable due to her continuing medical issues, and cited to reference (f) to suggest that she should be granted the opportunity for consideration by a PEB for full consideration of her injuries and medical issues.¹⁵ See enclosure (21).

q. By memorandum dated 23 May 2018, the PEB again determined that Petitioner's referral to the IDES was not warranted after review and reconsideration of its original decision and the additional materials provided by Petitioner.¹⁶ See enclosure (22).

¹⁴ The limitations imposed were no running, jumping, push-ups, pull-ups, overhead activities, and no Combat/Physical Fitness Test.

¹⁵ Petitioner's commander had submitted a NMA for the previous PEB review which made essentially the same comments regarding Petitioner's capabilities, but which did not include his suggestion that Petitioner be granted the opportunity for consideration by a PEB for full consideration of her injuries and medical issues.

¹⁶ The additional materials provided by Petitioner were her non-concurrence with the previous decision (enclosure (20)), and the new NMA (enclosure (21)).

r. On 20 August 2018, Petitioner requested to extend her enlistment by three months in order to have sufficient obligated service for transfer to the Wounded Warrior Regiment (WWR). See enclosure (23).

s. By memorandum dated 23 August 2018, Petitioner's request to extend her enlistment as discussed in paragraph 4r above was disapproved by Headquarters, U.S. Marine Corps (HQMC) (MMSR-4). The request was denied because her commander's recommendation indicated that the command would not support approval of the extension request if her transfer to the set of the the there was not approved, and the set of the set of the set of the transfer to the set of the there was not sufficient reason for her to be extended on active duty and transferred to the Additionally, MMSR-4 noted that in order to remain on active duty voluntarily for medical purposes, Petitioner would have to be properly referred into the DES or in a LIMDU status. As the PEB had already determined that her referral into the IDES was not warranted and she had spent so much time in a LIMDU status already, an additional LIMDU period would not be approved. See enclosure (24).

t. Petitioner was subsequently returned to CONUS in preparation for her EAS transition. Upon her return, Petitioner sought medical care at Naval Hospital **Constant (Constant)** for her ongoing medical conditions. On 24 September 2018, the **Constant** Podiatry Department referred Petitioner to a MEB, leading her to believe that she would be extended on active duty while the MEB/PEB proceeded. See enclosure (25).

u. On 4 October 2018, Petitioner was notified that she was not recommended for reenlistment because of not meeting physical/medical standards and that she had been assigned a reenlistment code of RE-3P. See enclosure (26).

v. By memorandum dated 12 October 2018, the DES Attorney wrote to the Director, Office of the Judge Advocate General (OJAG) Code 16, and the DESCP Director, requesting that Petitioner's 16 October 2018 EAS be stopped so that she may receive the due process protections afforded in the IDES. See enclosure (25).

w. By e-mail dated 15 October 2018, the DESCP Director raised this issue to the Secretarial level and to the Legal Assistance Head of the HQMC Judge Advocate Division. The latter reiterated the request that Petitioner's EAS be delayed in a subsequent e-mail to HQMC MMSR-4. See enclosure (27).

x. Despite these requests, Petitioner was discharged upon her EAS date on 16 October 2018. See enclosure (9).

y. Although no corroborating evidence was provided, Petitioner asserts that the VA granted her a 100 percent service-connected disability rating effective 17 October 2018.¹⁷ See enclosure (2).

¹⁷ Among the disabilities reportedly claimed which resulted in this disability rating were bilateral foot pain, left foot stress fracture, closed stress fracture of metatarsal bones, migraine headaches (with aa stand-alone 50 percent disability rating), left olecranon bursitis, left hip trochanteric pain syndrome, left ankle scar (from in-service surgical procedure), left shoulder strain with bicipital tendon tar, right knee strain (also claimed as tibia stress fracture, femur

z. On 10 September 2021, Petitioner filed suit in the COFC. As discussed above, the COFC remanded Petitioner's case to the Board over Petitioner's objection on 28 February 2022. See enclosure (1).

aa. On 25 March 2022, Petitioner submitted a signed DD Form 149 with additional matters for consideration pursuant to the COFC's Order. Specifically, Petitioner alleges that she was improperly denied the due process protection of the IDES due to her diversion into the unlawful OIDES.¹⁸ If she had been entered into the IDES and referred for a formal PEB, she asserts that she would have either been found fit for continued naval service, and therefore immune from denial of reenlistment per reference (b), or found medically unfit for continued naval service and medically separated or retired. Petitioner asserts that her placement in the IDES would have superseded her EAS, and that her discharge on 16 October 2018 was therefore void as a matter of law. Finally, Petitioner asserts that she is entitled to promotion to Master Sergeant because she would have been so promoted with her peers if she had remained on active duty, the PEB must evaluate her in her current condition and that she is eligible for early retirement under the TERA.¹⁹ If returned to active duty, Petitioner asserts that her records must be corrected to show continuing service since her date of discharge, promotion to Master Sergeant, and award of all pay and entitlement which she would have received. See enclosure (2).

bb. By memorandum dated 15 June 2022, the Director, Secretary of the Navy Council of Review Boards (CORB), provided an AO for the Board's consideration, which found insufficient support for Petitioner's request.²⁰ This opinion was based upon the evidence which demonstrated Petitioner's consistently effective performance of assigned duty related tasks and personnel record, along with other evidence touting Petitioner's extraordinarily highly valued professional talent and skills. It also found that the PEB acted within the scope of existing regulations (i.e., the OIDES policy), and that the evidence it considered emphasized Petitioner's favorable prognosis for recovery. None of the duty limitations imposed upon Petitioner for her conditions would have required a finding of unfitness, especially in light of the evidence reflecting her effective performance of duties. See enclosure (28).

cc. By memorandum dated 7 July 2022, the OJAG Administrative Law Division (Code 13) provided an AO for the Board's consideration. This AO found that, although neither Department of Defense (DOD) nor DON policy reflects an absolute right to counsel at all stages of DES

condition and femur stress fracture), right thumb strain, degenerative disc disease of the cervical spine, left wrist sprain, right hip trochanteric pain syndrome, left collateral ligament sprain status post-surgical procedure, Morton's neuroma with metatarsaligia (left foot), left knee strain with shin splints (also claimed as femur condition and femur stress fracture), hallux valgus right foot, scars, and post-traumatic stress disorder (combined with traumatic brain injury, which received a stand-alone disability rating of 70 percent).

¹⁸ Petitioner alleges that her third denial of entry into the IDES, upon her return to CONUS, was based upon her first two denials through the OIDES.

¹⁹ Petitioner asserts that such relief would obviate the need for any lengthy PEB proceedings, allow her to put these proceedings behind her, and provide an equitable remedy.

²⁰ The Board requested that the CORB provided "a narrow [AO] addressing the medical records, medical evaluations, medical standards of fitness and findings of fitness and whether Petitioner was unfit under the appropriate standards to be qualified for PEB disability retirement, or whether she was fit and her current disabilities were manifestation based."

processing, reference (d) required the DON to make counsel available to Petitioner upon referral of her case into the OIDES process based upon the requirement to make counsel available during the disability evaluation process. It further opined that the OIDES process did not comply with the requirements of reference (d), as a decision by the OIDES not to refer a case into the IDES was essentially final for Petitioner, who had no ability to seek further review with the assistance of counsel under either the IDES or the legacy DES, and that it had the effect of denying Petitioner the protection Congress intended to provide under the reference (b). See enclosure (29).

dd. By letter dated 10 August 2022, Petitioner, through counsel, responded to the CORB AO referenced in paragraph 4bb above. This response noted that the CORB AO did not cite to reference (e), and asserted that the AO arrived at its conclusion by repeating, and accepting, the systemic failures of the OIDES policy which gave rise to this case in the first place. Petitioner also described the CORB AO as disjointed and confusing, and noted that it failed to answer the questions asked of it by the Board.²¹ See enclosure (30).

ee. By separate letter also dated 10 August 2022, Petitioner, through counsel, responded to the Code 13 AO referenced in paragraph 4cc above, indicating her agreement with its conclusions. See enclosure (31).

MAJORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Majority of the Board found no error in Petitioner's EAS discharge, but did find that equitable relief is warranted as described below. The Majority considered the AO provided by the CORB at enclosure (28), but found it to be only marginally relevant.²² The Majority also generally agreed with the premise of the AO provided by OJAG Code 13 at enclosure (29) regarding the legality of the OIDES policy, but ultimately disagreed with the conclusions of this AO as they applied to Petitioner because those conclusions were premised upon the assumption that that Petitioner's referral to the OIDES equated to a referral to the DES. As discussed further below, the Majority did not accept this premise.²³

The Majority did not find any error in Petitioner's EAS discharge under the circumstances. In making this determination, the Majority generally agreed with the Code 13 AO and Petitioner that the OIDES policy would have denied certain service members of their due process rights under the IDES. The subsequent decision of the DON to discontinue the OIDES policy

²¹ As discussed further below, the Board did not rely upon the CORB AO in reaching its conclusions.

²² The CORB AO focused on the evidence as it pertained to Petitioner's medical fitness for continued service. The Majority determined that Petitioner's medical fitness had only marginal relevance, as the primary concern was whether she should have been referred to the PEB for a fitness determination in the first place. The assessment of Petitioner's medical fitness is relevant only as it pertained to the failure to refer Petitioner to the PEB upon her return to CONUS because paragraph 3202g of reference (e) provides that members who are being processed for separation for reasons other than physical disability shall not be referred to disability evaluations unless, among other reasons not relevant here, the member's physical condition reasonably prompts doubt that she is fit to continue performing the duties of her office, grade, rank, or MOS.

²³ The Majority notes that Petitioner, through counsel, stated in enclosure (30) that the OIDES was not part of the DES.

evidences its invalidity. The Majority did not, however, find the validity of the OIDES policy to be a relevant issue in Petitioner's case. Rather, the Majority found that Petitioner's case depends upon whether she should have been referred to the IDES under the circumstances.²⁴ Based upon the evidence presented, the Majority was not convinced that Petitioner met the criteria for such a referral.

Per reference (d), medical authorities will refer eligible Service members into the DES who (1) have one or more medical conditions that may, individually or collectively, prevent the Service member from reasonably performing the duties of their office, grade, rank, or rating including those duties remaining on a Reserve obligation for more than one year after diagnosis; (2) have a medical condition that represents an obvious medical risk to the health of the member or to the health or safety of other members; or (3) have a medical condition that imposes unreasonable requirements on the military to maintain or protect the Service member.²⁵ There was no evidence that Petitioner met any of these criteria. In fact, the assignment of only six months of LIMDU by both of the MEBs which reviewed Petitioner's conditions, as well as the medical evidence relied upon by those MEBs, suggests otherwise.²⁶ Further, per reference (e), "[a] case usually enters the [DON] DES when a [MEB] is dictated for the purpose of evaluating the diagnosis and treatment of a member who is unable to return to military duty because the member's condition most likely is permanent, and/or any further period of temporary [LIMDU] is unlikely to return the member to full duty"²⁷ and directs that "[c]ommanding officers of MTFs and individual medical... officers are to identify promptly for referral to the DES those members presenting for medical care whose Fitness for active duty is questionable."²⁸ There is no evidence that the MEBs in Petitioner's case were convened because her condition(s) were most likely permanent or that any further period of LIMDU was unlikely to return her to full duty,²⁹

²⁴ The Majority determined that if Petitioner did not meet the criteria for referral into the DES, the application of the OIDES would have been irrelevant.

²⁵ See paragraph 2 of Appendix 1 to Enclosure 3 of reference (d).

²⁶ The Majority acknowledges Petitioner's contention and other evidence which suggested that Petitioner had been on LIMDU for several years. However, none of those conditions had apparently warranted Petitioner's referral to the IDES prior to her assignment overseas, when she would not have been subject to the OIDES. Accordingly, none of these conditions, either individually or collectively, had apparently previously interfered with her ability to perform the duties of her office, grade, rank, or rating/MOS. Further, when MEBs were convened to adjudicate Petitioner's extended LIMDU status to recover from her conditions in August 2017 and March 2018 respectively, the findings and medical evidence considered suggested favorable prognoses for recovery with temporary LIMDU. The only condition considered which suggested potential recovery time of greater than one year was the chronic left biceps tendinopathy, for which the narrative summary at enclosure (17) stated that Petitioner had not improved despite several treatment techniques. Even this narrative summary, however, did not suggest that the condition prevented Petitioner from reasonably performing the duties of her office, grade, rank, or rating/MOS; it did, however, suggest that full recovery may require surgical intervention. None of these conditions, either individually or collectively, would necessitate Petitioner's referral to the IDES, regardless of where she was stationed at the time. ²⁷ See paragraph 3102a of reference (e).

²⁸ See paragraph 3106 of reference (e).

²⁹ The Majority acknowledges that reference (d) includes the MEB within the overall context of the DES. The MEB referred to in reference (d), however, is not necessarily the same as that referred to in reference (e). The purpose of an MEB under the former is to review all available medical evidence "of Service members who meet [the] referral eligibility criteria [discussed above] (see paragraph 2a of Enclosure 3 to reference (d))," while its purpose under the latter is to report upon the present state of health of any member of the Armed Forces and to serve as an administrative board by which the convening authority or higher authority obtains a considered clinical opinion regarding the physical status of service personnel. For example, reference (e) requires anyone who needs more than 30 days of LIMDU to recover from an injury or treatment in order to return to full military duty to be referred to an

and there was not real question of Petitioner's medical fitness for continued service at the time. To the contrary, none of Petitioner's conditions were considered to be permanent, and her eventual return to full duty was anticipated in all cases. Under these criteria, the evidence suggests that Petitioner did not meet the criteria for entry into the DES.

Petitioner's first MEB convened after her surgical procedure to address her left hallux abductovalgus deformity and left ankle pain and instability. This MEB convened not because these conditions were considered to be permanent or would likely prevent Petitioner's return to full duty, but rather because her recovery from the surgery required LIMDU in excess of 30 days.³⁰ At the time that this MEB convened, she was reportedly doing well in physical therapy with a good prognosis for recovery. There was no indication that her condition was permanent, or that she was unlikely to return to full duty after a period of temporary LIMDU. As such, the MEB recommended that she be placed on LIMDU for six months, with her duty limitations involving only insignificant modifications to her physical training regimen and no restrictions on her regular duty performance. The record reflects that this assessment was accurate, as Petitioner had recovered from these conditions by the time of her next MEB. This MEB was referred to the PEB for a determination of whether she should be referred into the IDES pursuant to the OIDES policy, but under the circumstances she would not have been so referred even if she had been assigned CONUS. Per reference (e), "[a]s a general rule, an active duty member... will be referred for disability evaluation only by a medical board that has found the member's fitness for continued naval service questionable by reason of physical or mental impairment."³¹ The MEB made no findings that would call into question Petitioner's continued naval service. Accordingly, Petitioner's first MEB did not warrant referral to the DES/PEB.

Petitioner's second MEB convened to consider her chronic left biceps tendinopathy, chronic right first toe pain, and left Morton's neuroma pain. As with the previous MEB, Petitioner had a good prognosis for recovery at the time. She was reportedly responding well to injections for her Morton's neuroma, and was on a waiting list for foot surgery which the Chief of Podiatry at Regional Medical Center believed would "alleviate a majority of her pain and return her to activities." Her shoulder condition was not responding to the treatments provided, but there was no indication that it was permanent or that she would be unlikely to return to full duty after proper treatment and a period of temporary LIMDU. As such, the MEB again placed her on LIMDU for six months. There was some overlap in this period of LIMDU relative to her previous period of LIMDU, and this period was for different conditions than was the previous LIMDU. Her duty limitations were minimal. This MEB was also referred to the OIDES policy, but like with the first MEB she would not have been so referred if she had been assigned in CONUS

MEB, which encompasses far more cases than the criteria discussed in reference (d). Accordingly, references (d) and (e) apply different scopes to the responsibility of a MEB, and the conduct of an MEB within the DON does not necessarily imply that the Service member has been entered in the DES. While a MEB convened pursuant to reference (e) certainly could be part of the DES depending upon the circumstances (i.e., referral to the PEB is warranted because the member's physical or mental fitness to continue naval service is questionable), it is not necessarily part of the DES unless the member's condition is most likely permanent and/or any further period of temporary LIMDU is unlikely to return the member to full duty. That was not the case for any of the MEBs convened to consider Petitioner's medical conditions.

³⁰ See paragraph 1108a of reference (e).

³¹ See paragraph 3201a of reference (e).

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and therefore not subject to the OIDES. Not every condition which warrants a period of LIMDU warrants referral to the DES or the PEB for a fitness determination. Only those conditions which are likely to be permanent or from which the individual is unlikely to recover after a period of temporary LIMDU are required, or even appropriate, for referral to the DES. Petitioner had several medical conditions, but there was nothing about these conditions which called into question her continued naval service. All of them were likely to be resolved through treatment and a period of temporary LIMDU. Accordingly, nothing about these conditions warranted referral into the DES.

Finally, Petitioner contends that she was referred to the DES by a MEB conducted at upon her return to CONUS. The Board was not provided and did not find any evidence of this referral apart from an e-mail in the record from the DES attorney. However, the Board does note that reference (e) provides that members being processed for separation for reasons other than physical disability are not to be referred to the PEB, unless the member was previously found unfit but retained on active duty in a permanent LIMDU status or the member's physical condition reasonably prompts doubt that she is fit to continue to perform the duties of her office, grade, rank or MOS.³² At the time of her return to CONUS, Petitioner was being processed for separation due to her EAS. She was not being processed for separation due to physical disability,³³ had not previously been found unfit but retained on active duty in a permanent LIMDU status, and there was no question regarding her ability to perform the duties of her office, grade, rank, or MOS. Accordingly, it was not only appropriate to deny Petitioner referral to the PEB under the circumstances, but such denial was required by Navy regulations. In addition to the fact that referral to the PEB is not appropriate while an individual was being processed for separation, the Majority notes that the occurrence of Petitioner's separation implies that her separation physical revealed no conditions which would warrant referral to the DES.

Petitioner's argument is based upon the premise that her rights under the IDES were undermined by her deferral to the OIDES. The Majority would have agreed with this argument if Petitioner was in or should have been referred to the IDES in the first place, but that is not the case. Petitioner was never in the DES, and nothing about her medical conditions warranted such referral. She did not meet any of the criteria for DES referral found in reference (d), and her consideration by the MEB was not dictated because she was unable to return to military duty because her condition(s) were permanent or because it was unlikely that she would return to full duty after a period of temporary LIMDU. Rather, her case was considered by an MEB because she required more than 30 days of temporary LIMDU to return to full military duties in accordance with reference (e).³⁴ Under such circumstances, the MEB is not part of the DES. Ironically, the OIDES policy that Petitioner complains of, and which the Majority generally agrees did not comply with Congressional intent or DOD policy, actually provided her more process than she was due under the circumstances, as she would not have been referred to the PEB to consider whether she should be referred to the IDES under identical circumstances if she had been assigned CONUS. The MEB findings support this conclusion. All of Petitioner's relevant conditions for which she was placed on LIMDU were treatable, and none of them raised

³² See paragraph 3202g of reference (e).

³³ The Majority interprets this to be separation pursuant to the authority of Chapter 8 of reference (f), as opposed to separation pursuant to the authority of paragraph 1005 of reference (f), under which Petitioner was discharged. ³⁴ See paragraph 1008a of reference (e).

doubts regarding her fitness for continued naval service. Under the standard suggested by Petitioner for referral to the DES/PEB, every Service member who undergoes a surgical procedure requiring more than 30 days of recovery, or who requires more than 30 days of LIMDU to fully recover from any medical condition, must be referred to the IDES (and in the case of members assigned overseas, returned to CONUS for the duration of the process). This is simply not the case.

Because Petitioner did not meet the criteria for referral to the DES under either reference (d) or (e), she was not entitled to the protections inherent in the IDES, to include the right to the assistance of a PEB Liaison Officer and/or a DES attorney. This is the reason for the Majority's disagreement with the conclusion of enclosure (29), as the AO's conclusion was premised upon the assumption that Petitioner's referral to the OIDES equated to referral to the IDES. Likewise, she was not entitled to the protection of reference (b). Absent the right to such referral, Petitioner's argument that the PEB would have either found her unfit for continued service and therefore granted her a medical retirement or separation (depending upon the disability rating assigned), or found her fit and therefore protected from the denial of reenlistment pursuant to reference (b), is moot. There was also no error in Petitioner's EAS discharge. In this regard, the Majority applied the presumption of regularity to establish that Petitioner was properly denied reenlistment in the absence of a right to the protections of the IDES or reference (b). Enclosure (24) suggests that the Marine Corps properly considered the factors listed in reference (f) in denying Petitioner's request to extend her enlistment for medical purposes.³⁵ As Petitioner did not assert any error in her EAS discharge other than her contention that she was improperly deferred into the OIDES and therefore denied the protections of the IDES, the Board had no other basis to find an error in this action. As such, Petitioner's contention that her discharge was void as a matter of law and that she is therefore entitled to CSC from the date of her discharge (and the back pay and allowances that would arise from it) was also without merit. Likewise, there is no basis to grant Petitioner the promotion to Master Sergeant that she contends was denied by her discharge. Finally, there is no basis to grant Petitioner early retirement under the TERA, as without CSC she does not have the 15 years of service required to qualify for such an early retirement.

While the Majority found no error in the failure to afford Petitioner the due process protections of the IDES or in her EAS discharge, it did find the denial of her request for reenlistment to be unjust under the circumstances. Based upon enclosure (21), it appears that Petitioner's was denied the opportunity to reenlist because of the guidance of reference (g) to either process for administrative separation or refer into the DES those Service members who have been non-deployable for more than 12 consecutive months for any reason. This guidance, however, was not absolute, as it specifically provided for waivers to this general rule. Petitioner's commander opined in enclosure (21) that it was not proper to process her for administrative separation when she had significant ongoing medical issues that have not been resolved, but his suggested solution to refer her to the PEB was not appropriate for the reasons stated above. As Petitioner was, by all accounts, a highly competent Marine who would have recovered from her medical conditions in due time, a waiver to permit her continued service would have been appropriate under the circumstances. The Board also considered the fact that Petitioner likely could not have

³⁵ See paragraph 8111 of reference (f).

been denied reenlistment per reference (b) if the PEB had issued the findings it did under the OIDES pursuant to the IDES. While the PEB's findings under the OIDES did not technically amount to a finding of fitness, the PEB's rationale suggests that it would have found Petitioner's to be fit for continued service under the circumstances if Petitioner was referred to the IDES.³⁶ While Petitioner was not entitled to the protection of reference (b) under the circumstances, the Board does find her denial of the opportunity to reenlist under the circumstances to be unfair, and therefore an injustice warranting relief.

Having found an injustice in the denial of Petitioner's opportunity to reenlist under the circumstances, the Majority recommends that Petitioner be given the opportunity to reenlist in the Marine Corps in the grade of E-7 if she chooses to do so and is otherwise qualified. If necessary, a medical waiver is to be granted to enable such reenlistment. Upon reentry on active duty, Petitioner may be referred to the DES if she meets the criteria for such referral, although the Majority makes no findings in regard to her current physical condition. To be clear, this relief is recommended pursuant to the Board's equitable relief authority, and not to correct any error in Petitioner's discharge. Accordingly, the Majority does not believe it necessary or appropriate to grant Petitioner the CSC or promotion that she requests. Petitioner may achieve such service and advancement in due course pursuant to her reenlistment if she chooses to do so.

MAJORITY RECOMMENDATION:

In view of the above, the Majority of the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner be offered the opportunity to reenlist in the Marine Corps in the grade of E-7 within 60 days of this decision.³⁷ Assuming that she is otherwise eligible for such reenlistment, the necessary medical waivers to enable Petitioner's reenlistment will be issued.

If Petitioner accepts the opportunity to reenlist under the conditions expressed herein, then the Defense Finance and Accounting Service (DFAS) should conduct an audit of Petitioner's finance records to determine what, if any, action this correction may entail. Likewise, the VA is to be notified that Petitioner has reentered active duty to take whatever action it deems appropriate with regard to Petitioner's continuing entitlement to disability compensation.

If Petitioner refuses the opportunity to reenlist under the conditions expressed herein, then no further corrective action is to be taken on Petitioner's naval record.

MINORITY CONCLUSION:

Upon careful review and consideration of all of the evidence of record, the Minority of the Board generally agreed with the conclusions of the Majority. Specifically, the Minority found no error in the failure to refer Petitioner to the IDES for the reasons stated above, and therefore no error

³⁶ This conclusion is also supported by the CORB AO at enclosure (28).

³⁷ This is the suspense to offer Petitioner the opportunity to reenlistment, and not necessarily her suspense to accept the offer. Petitioner is to be provided a reasonable time to act upon such offer, as she may need to resolve certain obligations.

in her EAS discharge. The Minority, however, found the decision not to permit Petitioner to extend on active duty upon her return to active duty to be tainted by the invalid OIDES policy, and therefore an injustice warranting more relief than that recommended by the Majority.

The Minority agreed with the Majority that Petitioner would not have met the criteria for referral to the IDES regardless because her eventual return to full duty and fitness for continued service was not in doubt. In this regard, the invalidity of the OIDES policy was not relevant. The Minority also agreed with the Majority that there was no error in the failure to refer Petitioner to the IDES upon her return to CONUS, because she was pending separation for other than a physical disability and such referral was prohibited under reference (e).

Although it found no error in the failure to refer Petitioner to the IDES upon her return to CONUS under the circumstances, the Minority did find a significant injustice in the basis for the denial of Petitioner's request to extend her extend her enlistment for medical purposes. Petitioner requested to extend her enlistment to provide her sufficient obligated service for transfer to the on 20 August 2018 in enclosure (23), and the Marine Corps denied this request in enclosure (24). The Minority acknowledges that this decision was within the authority of the Marine Corps and was in compliance with reference (f). However, the decision to deny the request was based in large part upon the PEB review conducted pursuant to the OIDES policy. Specifically, MMSR-4 stated in enclosure (24) that "[i]n order to remain on active duty for medical purposes, [Petitioner] must either be properly referred into the [DES] or in a [LIMDU] status," and relied upon the PEB findings under the OIDES to support its determination that her referral to the DES was not warranted. Absent the PEB review mandated by the OIDES policy, the Marine Corps would not have such review upon which to base its denial of her extension request, as Petitioner's CONUS-based medical providers at NHCP were apparently prepared to refer her to the IDES but for the prohibition against such referral for individuals pending separation. As discussed above, the OIDES policy was invalid because it was not in compliance with DOD regulations, so it should not have impacted Petitioner. In this regard, it clearly did. If Petitioner's enlisted extension request had been approved (absent the undue influence of the invalid OIDES PEB review), then her referral to the IDES (and all of the protections that it would have entailed) would not have been prohibited. This injustice imposed by the OIDES policy, combined with the other injustices identified by the Majority above, convinced the Minority that significant relief is warranted.

Petitioner correctly asserted that, if she had been referred to the IDES the end result would have either been a finding of medical unfitness, which would have produced either a medical retirement or separation, based upon the disability rating assigned, or, more likely, a finding of medical fitness, which would have guaranteed her the right to reenlist in accordance with reference (b). Absent the injustice described above, the Minority believed that Petitioner would not have been denied reenlistment, as the likely finding of fitness for continued service by the PEB would apply the protection of reference (b), and Petitioner would therefore not have reached her EAS date. Accordingly, the Minority determined that Petitioner should be immediately restored to active duty and is entitled to CSC dating back to her discharge date. Petitioner may be referred to the IDES upon her restoration to active duty if she currently meets the criteria and is properly referred. Despite finding that Petitioner likely would not have reached her EAS date but for the effect of the OIDES policy and that she is therefore entitled to CSC dating back to her discharge date, the Minority did not believe that her promotion was appropriate relief. In this regard, the Minority noted that promotion to Master Sergeant is highly selective and a competitive process, and that the likelihood of Petitioner's selection is impossible to determine. As such, her automatic advancement to Master Sergeant would represent an injustice for those who have had to compete for the advancement, and would not be in the best interest of the Marine Corps. Rather, the Minority determined that a continuity memorandum should be placed in Petitioner's record notifying any future selection boards that she was granted CSC by order of the Secretary of the Navy through the Board, and instructing that no negative inferences are to be drawn from the absence of assignments or fitness reports (FITREP) for the period in question. Further, upon the correction of her records and her return to active duty as directed below, the Minority recommends that Petitioner's record be referred to the Enlisted Remedial Selection Board (ERSB) in accordance with reference (h) to provide her fair consideration for promotion to master sergeant under the criteria for each regularly scheduled selection board for which she would have qualified but for her discharge.

It is not within the Board's authority to direct the repayment of medical expenses that would not have been incurred but for her EAS discharge. Petitioner may seek repayment of these expenses through a claim to the Defense Health Agency.

MINORITY RECOMMENDATION:

In view of the above, the Minority of the Board recommends that the following corrective action be taken on Petitioner's naval record:

That Petitioner's naval record be corrected to reflect that Petitioner was not discharged on her EAS date of 16 October 2018, but rather that she was properly reenlisted and continued to serve honorably on active duty after that date. Petitioner is to be restored to active duty as soon as practicable, and granted CSC from the date of her discharge.

That all references to Petitioner's EAS discharge be removed from Petitioner's record, including but not necessarily limited to, her DD Form 214, her NAVMC 321A requesting extension of her enlistment, and the memorandum from MMSR-4 denying her request to extend her reenlistment.

That a continuity memorandum be placed in Petitioner's record explaining that she was granted CSC from the date of her previous discharge until the date of her restoration of active duty by order of the Secretary of the Navy through the Board for Correction of Naval Records, and that no negative inferences are to be drawn by either the grant of such CSC or the absence of assignments or FITREPs for the relevant period.

That, upon her restoration to active duty and after correction of her records as directed herein, Petitioner's record be referred to the ERSB in accordance with reference (h) to provide her fair consideration for promotion to Master Sergeant under the criteria for each regularly scheduled selection board for which she would have been eligible during the period of her CSC.

That DFAS conduct an audit of Petitioner's finance records to determine what, if any, pay and allowances Petitioner may be due as a result of the corrections reflected herein, as well as any offsets for payments made pursuant to Petitioner's previous unjust discharge being corrected by this action.

That the VA be notified immediately upon Petitioner's restoration to active duty to take appropriate action with regard to Petitioner's continued and previous receipt of disability compensation in light of the corrections to her record reflecting that she remained on active duty continuously since the date of her discharge.

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 titled matter.

5. The foregoing action of the Board is submitted for your review and action.

	10/3/2022
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Executive Director	

ASSISTANT GENERAL COUNSEL (MANPOWER AND RESERVE AFFAIRS) DECISION:

<mark>X_</mark>	_ MAJORITY Recommendation Approved (Partial Relief – I approve and direct the relief recommended by the Majority of the Board, as reflected above.)
	MINORITY Recommendation Approved (Partial Relief – I approve and direct the relief recommended by the Minority of the Board, as reflected above.)
0	Board Recommendation Denied (I disagree with the Board's finding of injustice and direct that no corrective action be taken on Petitioner's naval record for the following reason(s):
)
	Other (I make the following alternative findings and direct the following alternative relief for the following reasons:

10/6/2022

)

Assistant General Counsel (M&RA) Signed by: