

16 March 2009, you were counseled that you were not recommended for promotion due to lack of maturity, initiative, among other things. On or about 28 June 2009, you were struck on your motorcycle by a drunk driver, and you described the medical treatment you received in aftermath of that accident in detail in your petition. On 15 September 2009, you were formally counseled that you were not recommended for promotion due your lack of judgment. On 26 January 2010, you received nonjudicial punishment for disrespect and for failing to obey an order. After this nonjudicial punishment, you received another written counseling concerning this misconduct. On 4 May 2010, you were formally counseled concerning being disrespectful to a first class petty officer.

As set forth in more detail in the AO, in May 2010, you were seen in the neurology department after you were complaining of imbalance and memory problems, and you were referred to the concussion clinic. You were also evaluated by mental health practitioners for “angry outbursts, antisocial behavior, and inability to ‘maintain military bearing.’” During the evaluation, you “reported that [you] had legal problems prior to [your] motorcycle accident Right after he returned from deployment . . . the command got a call from a Marine claiming . . . [you were] committing adultery. [You] denied the charges . . . remained friends with this woman and they were riding [your] motorcycle together After the accident . . . [your] command placed an MPO [Military Protective Order] on [you] to keep away from her. They talked on the phone . . . [and] the day he returned to duty in February 2010, they had [you] sign paperwork ‘for charges of violating the MPO.’”

Next, according to the AO, in June 2010, you completed a neuropsychological evaluation, which reported that you “presented with anger, irritability, impulsivity, and a depressed mood” and that these issues were likely “due to situational factors . . . rather than post-concussive in nature, although the concussion and stressors . . . could have contributed to some degree [You had] a long history of making poor choices and acting out (gang activity, illegal behavior, behavior problems in school) therefore, it is believed that [your] more recent activities and choices are more longstanding issues rather than brain compromise due to the concussion.”

On 12 January 2011, you were formally counseled that you were not recommended for promotion due to lack of responsibility. On 18 February 2011, you received nonjudicial punishment for use of marijuana. On this day, you were also formally counseled concerning your nonjudicial punishment for disrespect and for using marijuana. On 8 April 2011, you were formally counseled that you were not recommended for promotion due to violating drug policy and also advised that you would receive an RE-4 reentry code. In addition, you were formally counseled concerning your final proficiency and conduct marks would be 1.0/1.0 respectively. On 12 April 2011, you were discharged due to misconduct with an Other Than Honorable characterization of service. According to your Certificate of Release or Discharge from Active Duty (DD Form 214), you had a total of 100 days lost time due to unauthorized absences.

In 2015, you filed an application with the Naval Discharge Review Board (NDRB) seeking to have your discharge upgraded due to traumatic brain injury (TBI), as a result of the motorcycle accident. You raised four specific issues as warranting an upgrade: (1) an upgrade is warranted so that you can receive benefits from the Department of Veterans’ Affairs (VA), (2) your misconduct was caused by TBI, (3) PTSD should mitigate your misconduct, and (4) your good

in-service conduct warrants an upgrade. On 7 October 2015, the NDRB denied your application. In its decision, the NDRB addressed each factor that you raised in the negative and denied your application.

In 2020, you filed a petition with this Board seeking to have the misconduct in record removed, as well as an upgrade of your discharge characterization and narrative reason for separation. This Board issued its denial letter on 11 June 2020, explaining that it carefully considered your arguments that you deserve to have your misconduct removed from your record. The Board reasoned, in part, as follows:

Despite the opinion provided in the 6 March 2020 letter from your medical provider that your misconduct was caused by TBI incurred during your 2009 accident, the Board concluded the preponderance of the evidence does not support removing your documented misconduct from your record. First, the Board found no evidence that you did not commit the offenses documented in your record. Second, the Board relied on the 30 June 2010 medical report that determined that you did not meet the standard for a TBI diagnosis at that time and that you had a history of impulse and anger management issues prior to your 2009 accident. The Board also noted that, contrary to your assertion that you did not have misconduct issues prior to your 2009 accident, you were counselled for unauthorized absence, speeding in a motor vehicle, and failing to stop along in a motor vehicle with playing excessively loud music. In the Board's opinion, this documents a history of conduct issues prior to your 2009 accident that continued into 2010 and 2011. Based on these findings, the Board concluded that your misconduct is properly documented in your record and there is insufficient evidence of injustice to remove the documentation.

Regarding your request for an upgrade to your characterization of service, the Board also concluded the evidence does not support relief. Despite applying liberal consideration to the facts of your case based on your 2020 TBI diagnosis, the Board concluded there was insufficient evidence to form a nexus between your misconduct and current TBI condition. Utilizing the same analysis as above, the Board concluded the medical evidence at the time of your discharge did not support a TBI diagnosis and there was sufficient evidence of a history of pre-accident misconduct to discount that your post-accident misconduct was due to your 2009 injuries.

Therefore, the Board concluded you were properly assigned an Other than Honorable characterization of service based on the documented incidents of misconduct and seriousness of the offenses. In particular, the Board felt your continued insubordination toward senior noncommissioned officer, more likely than not, significantly impacted good order and discipline within your command. When combined with your wrongful use of marijuana, the Board felt your actions amounted to a significant departure of conduct expected from a Marine. Based on these findings, the Board concluded an Other than Honorable characterization of service remains appropriate in your case.

In your current petition, you request reconsideration of the prior petition to this Board. 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 your request that your Other Than Honorable characterization of service be upgraded and that you receive a service disability retirement. In support of your requests, you assert that your discharge characterization ignored the role that your traumatic brain injury and post-traumatic stress disorder played into your behavioral problems. You argue that your TBI and PTSD were incurred as a result of a blast impact during your service in Basra, Iraq as well as a motorcycle accident in which you were struck by a drunk driver, and that these medical conditions not only should mitigate your misconduct, but they also warrant the award of a service disability retirement. As your petition is for reconsideration, you stated the following information is new evidence: (1) your declaration, (2) the declaration of your fiancé, (3) a Social Security Administration Notice of Decision, (4) a letter from a physician, and (5) a letter from a painting business.

In order to assist the Board in reviewing your petition, it obtained the 15 March 2023 AO, which was prepared by two different medical professionals. You were provided a copy of the AO, which was considered unfavorable to your request, and provided a response dated 3 April 2023. According to the AO:

There is in-service evidence of TBI and residual symptoms, which have also been noted in post-service evaluations with the VA. He also was appropriately referred for psychological evaluation during his enlistment and properly evaluated. His in-service mental health diagnoses were based on observed behaviors and performance during his period of service, the information he chose to disclose to clinicians, and the psychological evaluation performed. Post-service, civilian and VA providers have provided treatment for PTSD, TBI, and other mental health conditions.

The Petitioner's diagnoses of PTSD and TBI have been attributed to military service. Some of the Petitioner's misconduct may be attributed to irritability and impulsivity following TBI and unrecognized PTSD symptoms. Disobedience and disrespect could be attributed to PTSD or TBI. However, there is less evidence to attributed marijuana use to PTSD or TBI, given his pre-service history that appears to have continued in service. It is difficult to attribute his poor judgement, particularly in romantic relationships, to PTSD or TBI given the timeline of events. Additional records (e.g., complete active duty or post-service mental health records, including the VA 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 in-service evidence of TBI incurred during military service. There is post-service evidence of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence all of his misconduct could be attributed to TBI, PTSD, or another mental health condition."

As noted, you provided a response to the AO. In your response, you made four distinct arguments. Specifically, you argued that there is no evidence in the record to support the statement that your marijuana use “appears to have continued in service,” which you contend implies that you continually used marijuana throughout service. Next, you argued that there is evidence in the record supporting a causal link between your PTSD and TBI and your use of marijuana as a coping mechanism. Next, you assert that, more generally, the increased use of marijuana by people suffering symptoms of PTSD and/or TBI is well-documented. Finally, you argue that Navy correction boards have implicitly recognized the link between marijuana use and PTSD and/or TBI when granting relief to former service members suffering from these conditions, even where the service members had used controlled substances or received nonjudicial punishments during their period of service.

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. The Board carefully reviewed the new materials that you provided, including your declaration, that of your fiancée, the documents from the Social Security Administration, the letter from your physician, as well as the information concerning your painting business. In reviewing your petition for reconsideration, with respect to your request for an upgrade to your characterization of service, the Board applied liberal consideration to your contentions in light of the Clarifying Guidance. In reaching its decision, the Board substantially concurred with the AO, which found that there was insufficient evidence that all of your misconduct could be attributed to TBI, PTSD, or another mental health condition. In fact, as it found before, the Board observed that you engaged in a wide variety of misconduct and you receive numerous written warnings from your command explaining to you in detail that you were on the wrong track and provided you specific guidance on conforming your behavior to acceptable standards. Further, as it found before, the evidence demonstrated that you engaged in misconduct prior to your 2009 accident. The Board thus concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization. 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 an upgrade as a matter of clemency or equity.

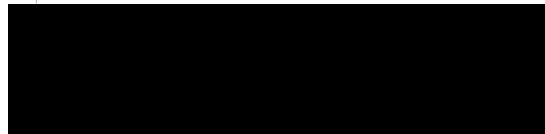
With respect to your request that you received a disability retirement, the Board also concluded that you are not entitled to relief. In reaching its decision, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System with a finding of unfitness, a service member must be unable to perform the duties of 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 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 denying your request for a disability discharge, the Board observed that there were no findings that you had a qualifying disability condition while you were on active duty. That is, the Board did not observe any records, nor did you provide any, contemporaneous to your service, which found that you were considered by a medical evaluation board (MEB) to be reviewed by the

Physical Evaluation Board or otherwise considered for the Disability Evaluation System (DES). In fact, the medical evidence described above, and in the AO, demonstrates that you were evaluated by medical professionals while you were in service, in May and June 2010, and neither of those medical encounters resulted in a referral to MEB. Further, the Board observed that your actual reason for discharge was based on misconduct. Even assuming, *arguendo*, that you were in the DES process, at the time of your discharge, administrative processing for misconduct would have taken precedence over disability processing. As a result, based on the foregoing, the Board found that your discharge for misconduct remains appropriate. 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,

A large black rectangular redaction box covering the signature of the Executive Director.

Executive Director

Signed by: 