



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. 5095-22
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 your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 9 February 2023. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record and applicable statutes, regulations, and policies.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 27 March 2000, which you completed on 26 March 2004. Thereafter, you affiliated with the Marine Corps Reserve. You remained in the Marine Corps Reserve and executed several sets of orders, including from October 2005 to October 2007, February 2009 to March 2010, December 2010 to November 2011, and December 2013 to September 2017. You assert that you injured your back during your initial period of active duty. You also assert that in 2018, you re-injured or aggravated your back injury while performing your physical fitness test and combat fitness test. In April 2019, you sought line of duty benefits (LODB) for your back injury. Your command provided an endorsement to your request, explaining that you stated you did not have any source documentation supporting your aggravated/exacerbated injury, and that your original injury occurred in 2002.

In support of your LODB request, you provided a 9 May 2019 letter from your Officer in Charge in which he explained that you "informed me in May 2018 . . . that [you] had a previous injury(s)

from active duty during initial conversations during [your] check in as the new First Sergeant for [REDACTED].” He stated further that:

[t]his was prior to running the physical fitness test and combat fitness test, but he believed he could complete the tests without further injury. He stated he was receiving civilian treatment at the time. Sometime after the combat physical fitness tests his back pain escalated and he sought out civilian medical care. None of us were aware of Line of Duty (LOD) requirements needed to be submitted while undergoing civilian care and continuing to train each month.

On 10 May 2019, the Reserve Medical Entitlements Division (RMED) wrote to you, providing a detailed rationale explaining its denial of your request for LODB. You received a copy of this letter, and on 11 November 2019, you appealed the denial of the LODB. In your appeal, you included a copy of the aforementioned 9 May 2019 letter from your Officer in Charge, and you addressed each category of deficiency set forth in the RMED denial letter.

In review of your LODB appeal, the Command Physician, [REDACTED] provided a medical review, and opined as follows:

The witness statement submitted upon appeal does not speak to any reported or observed misadventure/injury occurring during [Petitioner’s] participation in the PFT. No documentation was found to support an injury occurring at this time. With [Petitioner’s] long history of chronic lower back pain, it is not surprising that he experienced pain with routine participation in physical activity, including PFT and/or CFT events. Pain as a result of a chronic condition does not constitute an injury. Continued and worsening symptoms, to include pain and radiculopathy, are expected and is why [Petitioner] is still receiving medical care.

Next, the Commanding Officer of [REDACTED] provided his endorsement to your appeal, explaining as follows:

In performing the medical case review, the Command Physician, Wounded Warrior Regiment and previous Senior Medical Officer (SMO), RMED, reviewed the case and recommended denial of the appeal based on the medical history and documentation reviewed as outlined per enclosure (28).

In summary, with the documentation (enclosures (1) through (28)) provided, the RMED section is unable to determine service re-aggravation for the acclaimed condition due to the lack of medical documentation to substantiate the member's claim the injury aggravation was the direct result of military service and the late submission of the initial LOD benefits request. This Headquarters is unable to determine if the member's chronic back injury has not been aggravated by the member during a period of time in which he was not in a military duty status. Therefore, the RMED section recommends denial of LOD benefits on the basis the member did not request LOD benefits in a timely manner per references (b) and (c)

and he has not proven by a preponderance of the evidence that the acclaimed back injury was aggravated by active duty service.

Finally, on 17 April 2020, your appeal was denied by the Administrative Law Division of the Office of the Judge Advocate General (Code 13). According to the Code 13 denial letter:

In accordance with references (a) through (c), a Marine Corps Reserve member who aggravates an injury during a period of military duty is eligible for incapacitation benefits. Although you claim that your back injury was aggravated during the physical fitness test (PFT) on 1 June 2018 and combat fitness test (CFT) on 8 September 2018, the administrative record does not contain conclusive medical documentation to support this position.

While the administrative record indicates that you experienced a back injury while on active duty in 2004 and since leaving active duty in 2007, you have experienced chronic left lower back pain radiating to the lower extremity, the record does not contain medical evidence demonstrating that the PFT and CFT aggravated your chronic back pain or problems over and above the natural progression of your condition. Moreover, shortly before both events, you were receiving medical care and treatment addressing your left lower back pain radiating to the lower extremity. As a result, you have not proven by a preponderance of the evidence that your injuries were aggravated as a direct result of military duty.

After your LODB appeal was denied, you were transferred to the Retired Reserve (awaiting pay) effective 31 July 2020.

In your petition, you seek award of a disability retirement at 100%, or in the alternative placement into the Integrated Disability Evaluation System. In support of your request, you contend that you should have been medically retired after developing on unfitting condition while on duty. You provided a legal memorandum, with attachments, which included a written affidavit from you, medical and service record documents, including documents relating to your pursuit of LODB. Although you requested to be awarded a disability retirement or to be placed into the IDIS, an LODB is required for the relief requested. In your case, the Board determined that your request for an LODB had been denied, and it reviewed your request as an appeal of the denial of an LODB.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, and the Board disagreed with your rationale for relief. At the outset, the Board observed that your legal brief and personal statement in support do not mention that you appealed your denial of LODB to Code 13, and the Board learned of this only upon receipt of your service records in the ordinary course of processing your petition.

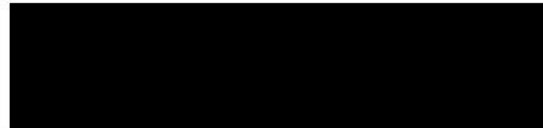
In fact, your legal brief, under its "Argument" section, sets forth a response to the original RMED denial, but ignores the administrative record that was developed through the Code 13 denial of your LODB. Further, the legal brief contains no argument or evidence to rebut the findings and endorsements of your chain of command through the Code 13 decision, which was

issued shortly before your transfer to the Retired Reserve. In review of the substance of the argument you did make, you included nothing new that had not previously been reviewed. Further, the documentation that you did provide is inconsistent, and failed to include any actual documentation supporting any specific injury. For example, your legal brief asserts you injured your back in a September 2018 physical fitness test, while your personal statement states that you injured your back in June 2018. There is some indication that you also asserted you injured your back in each June and September 2018, but also that you have no documentation of such injury. You also argue you first injured your back in 2003, but the review of your medical records by your Command Physician indicates your original injury occurred in 2004/2005, and your commanding officer's endorsement dated 26 April 2019, places your initial injury in 2002. These discrepancies serve to highlight your lack of evidence to support any of your assertions. As a result, ultimately, the Board concurred with the decision of Code 13 in denying your appeal and determined that you lacked evidence to support your request. 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,

3/9/2023

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Executive Director

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