



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. 5284-22
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 16 March 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. The Board also considered the 10 February 2023 advisory opinion (AO) from a medical professional and your response to the AO.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 12 March 1984. On 7 January 1985, you commenced a period of unauthorized absence that lasted until your surrender on 24 January 1986. On 24 January 1986, you submitted a request for an Other Than Honorable (OTH) discharge in lieu of a trial by court-martial based on your unauthorized absence. On 22 April 1986, the separation authority granted your request to be discharged in lieu of trial by court-martial. On 2 May 1986, you were evaluated for a kidney ailment and referred to the Central Physical Evaluation Board. On 4 May 1986, you were released from Naval Hospital, ■■■■■, and directed to return to your command. However, instead of returning to duty, you commenced another period of unauthorized absence and never returned to the Marine Corps. In light of your absence, you were discharged with an OTH characterization of service on 18 July 1986.

In your petition, you request that your discharge be changed to medical. In support of your request, you contend that you were diagnosed with a kidney condition while you were on active

duty. You explained that you thought you were going to die and you thought that if you were to die, you would do so in the company of your family.

Because you claimed a mental health condition contributed to your misconduct, the Board obtained the 10 February 2023 AO, which was considered unfavorable to your request. The AO stated in pertinent part:

The Petitioner contends that he went UA because of his medical issues (which caused him to become depressed) and that he should have been offered Physical Evaluation Board (PEB). A medical note dated May 2, 1986 notes that the Petitioner was diagnosed with Berger's Disease, asymptomatic and referred to PEB. The Petitioner submitted evidence of a Social Security Benefit letter dated May 2022 and a medical note dated April 2021 indicating that he had a kidney transplant in 1997. There is no evidence that he was diagnosed with a mental health condition in military service, or that he exhibited any psychological symptoms or behavioral changes indicative of a diagnosable mental health condition. It is certainly plausible that being diagnosed with potentially serious physical conditions would cause depressive symptoms, however it appears from the records that the Petitioner went UA prior to his medical condition being diagnosed. Unfortunately, his personal statement is not sufficiently detailed to establish clinical symptoms or provide a nexus with his misconduct. Additional records (e.g., post-service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) would aid in rendering an alternate opinion.

The AO concluded, "it is my considered clinical opinion 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."

You responded to the AO by arguing that the AO was incorrect because you actually did not leave on your unauthorized absence period until after your diagnosis. Your response did not appear to address the fact that you had recently returned from a period of unauthorized absence in excess of an entire year and that you had specifically requested a discharge under OTH conditions to escape a trial by court-martial.

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. 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 reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the disability evaluation system at the time of your discharge. In reaching its decision, the Board observed that you were already pending an OTH discharge based on your unauthorized absence – which lasted for longer than a year – when you were diagnosed with a kidney condition. You were ultimately never evaluated by a medical board because, after your diagnosis, you commenced another period of unauthorized absence and you never returned to naval authority. Even assuming, arguendo, that you had stayed under naval control long enough to be observed by a medical board, your misconduct discharge would have taken precedence over a disability evaluation system. In making this finding, the Board concurred with the AO that there is insufficient evidence that your misconduct could be attributed to a mental health condition. 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,

4/6/2023

