



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. 5511-22
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although you did not file your application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 21 December 2023. The names and votes of the panel members will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, to include the Kurta Memo, the 3 September 2014 guidance from the Office of the Secretary of Defense concerning discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), the 24 February 2016 guidance from the Principal Deputy Under Secretary of Defense concerning discharge upgrade requests by PTSD or TBI (Carson Memo), and the 25 July 2018 guidance from the Under Secretary of Defense regarding application of equity, injustice, and clemency to discharge upgrade requests (Wilkie Memo) (collectively "the Clarifying Guidance"). The Board also considered the 5 October 2023 advisory opinion (AO) from a qualified medical professional as well as your 8 December 2023 response in rebuttal to the AO.

A review of your record shows that you enlisted in the Marine Corps on 15 March 1994 and served a period of active duty until 14 June 1998, at which time you were separated at the completion of your required active service and you affiliated with the Marine Corps Reserve. You served a period of active duty from 5 January 2004 until your release from active duty on 3 April 2005. You served another period of active duty from 1 June 2005 until your release from active duty on 8 April 2008. At the completion of each of your periods of active duty, you were assigned an RE-1A reentry code, which means that after your release from active duty, you were

considered fit to reenlist in the Marine Corps. Your fitness report through the date ending 10 January 2008, which was during your most recent period of active duty, rated you as one of the many highly qualified Marines. It also noted you engaged in “[d]iligent and assertive performance” and that you were “[m]ost enthusiastically recommended for promotion and positions of increased responsibility.” Your official military personnel file (OMPF) does not contain records describing your service status after your release from your latest period of active duty.

In your petition, you request that you be awarded a medical disability retirement. In support of your request, you contend that you served two combat deployments in Iraq, and that you injured your knee in Iraq. You assert that the Marine Corps never offered you the option of medical retirement for combat related injuries, that you processed dead bodies of U.S. military and enemy personnel, which you state had profound effect on how you live your life, and that you should have been medically retired for both your knee as well as combat PTSD.

The Board carefully reviewed your petition and the material that you provided in support of your petition, and disagreed with your rationale for relief. In keeping with the letter and spirit of the Clarifying Guidance, including the Kurta Memo, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced, and their possible adverse impact on your service. At the outset, the Board observed that service members are entitled to medical treatment for disability conditions that are incurred or aggravated while in a qualifying duty status. Pursuant to Department of Defense Instruction 1241.01 and Secretary of the Navy Instruction 1770.5, in order to qualify for such benefits, reservists are required to obtain a line of duty benefits (LODB) authorization to obtain medical and pay benefits from the military.

If a reserve member obtains an LODB, they may be referred to the Disability Evaluation System, which makes a determination as to whether the service member’s condition(s) renders the member unfit for continued service due to a qualifying disability condition. 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 or 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 order to assist it in reviewing your petition, the Board obtained the 5 October 2023 AO, which was considered unfavorable to your request. According to the AO:

Petitioner’s in-service history of Right Knee Injury during combat deployment to Fallujah, Iraq in January 2006 is well documented in his service personnel and medical records, as is the orthopedic surgery performed after his return from deployment and demobilization in September 2007. The available military and VA clinical records indicated he recovered from his right knee surgery and was not, at

any time during his treatment and recovery, considered for referral to a Medical Evaluation Board or Physical Evaluation Board. Available medical records seemingly indicate he was able to return to his former physical status and adequately perform the duties of his rank and specialty, though some episodic residual right knee pain remained. After his military service, the VA awarded service-connection for Limited Flexion of Knee (Right) at 10% effective May 17, 2010 and Superficial Scars at 10% effective May 20, 2013.

There was no clinical evidence Petitioner was diagnosed with PTSD during his military service, or experienced significant or debilitating psychological symptoms indicative of PTSD. There was no record of reports of PTSD symptoms, nor presentation to sick call or mental health during his military service for complaints that would have been indicative of PTSD. He did not present for treatment for any mental health symptoms or conditions, or receive a diagnosis of PTSD, until his VA Disability Compensation and Pension evaluation with a VA-referred QTC contract physician in 2010 which informed a VA Rating Decision granting service-connection for PTSD with Alcohol Use Disorder, moderate (also claimed as memory loss) at 70% disability evaluation effective 5/17/2010, which was later reduced to 50% effective 5/5/2015.

Review of the available objective clinical and non-clinical evidence showed Petitioner's post-deployment Performance Evaluations continued to evidence sustained superior performance during his two combat deployments, demobilization, and reserve duties with assessments to include "Highly Qualified marine" and Exceptionally Qualified Marine and recommendations for retention, promotion, in-resident professional military service schools, and positions of increasing responsibility. These performance evaluations were competitive and reflected his ability to adequately perform the range of duties commensurate with his rate and rank, even during recovery from his knee surgery within his prescribed duty limitations as set forth by his medical providers. Following his military service, he remained gainfully employed from 2008 to 2013 with law enforcement and then as a machinery operator until he began to evidence symptoms of PTSD. VA records indicated he also sought intermittent treatment for his right knee condition, which appeared to resolve between exacerbations.

The AO explained that, "[a]fter review of all available objective clinical and non-clinical evidence, in my medical opinion, at the time of discharge from military service, Petitioner did not suffer from any medical or mental health conditions that prevented him from reasonably performing the duties of his office, grade, rank, MOS, or rating." Thus, in light of the foregoing, the AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that at the time of his discharge he was unfit for continued military service and should have been medically retired."

You were provided a copy of the AO, and you provided a response to the AO dated 8 December 2023. In your response, you explained a head injury during an assault while on active duty in February 2008, which you assert aggravated your PTSD and that your medical condition was not

properly monitored by the Marine Corps. You also asserted that you were divorced in January 2008, which caused you distress.

In reviewing your record, despite its application of special and liberal consideration, the Board concluded that the preponderance of the evidence does not support a finding that you met the criteria for placement into the Disability Evaluation System at any time in during your Marine Corps service. At the outset, the Board determined as an initial matter that the evidence demonstrates that there is no evidence in your record, and you provided none, that you sought an LODB finding during any of your periods of active duty while you were in the Reserve. The Board observed that despite your assertions that you received medical treatment while you served on a period of active duty, there is no indication that you sought to apply for an LODB finding, which would have been required for you to do in order to seek treatment after you were released from active duty. In fact, prior to your release from active duty, you would have received a pre-separation physical, during which a medical professional would evaluate your physical and mental condition to determine if you were suitable for discharge, and there is no indication that you were found to be unfit for discharge. To the contrary, you served until the end of your enlistment and ultimately received a favorable reentry code. Your failure to obtain the LODB finding standing on its own results in the denial of your request.

Despite your failure to obtain an LODB finding, the Board nevertheless reviewed whether there was any evidence that you should have been found unfit during any of your periods of active duty. On this point, the Board concluded that there was insufficient support for your contention that at the time of your discharge you were unfit for continued military service and should have been medically retired. In reaching its decision, the Board substantially concurred with the findings of the AO, which the Board determined to be rational and based on the evidence. The Board also found it significant that you did not provide any evidence that, while you were on active duty, any medical provider determined that you had any conditions that warranted referral to a medical board for a determination of fitness for duty within the Disability Evaluation System. In addition, there is no indication that any leader in your chain of command prepared any non-medical assessment describing your inability to perform the duties of your rank. Rather, as described above, you received favorable fitness reports demonstrating your sustained superior performance, which is inconsistent with a Marine suffering from a condition that made him unfit to work within his specialty.

In addition, even assuming, *arguendo*, that you had been diagnosed with PTSD while you were on active duty, it would not necessarily result in a finding that you were unfit and the eventual placement on the Permanent Disability Retired List. Service members routinely remain on active duty with a diagnosis of PTSD without such condition considered to be unfitting. A diagnosis alone is not the standard for the award of a service disability retirement. Rather, as mentioned, to be eligible for a service disability retirement, a service member must have conditions that have been medically determined to be unfitting at the time of service. In your case, the proximate reason for your discharge was your release from active duty at the completion of your required service, at which time you were found to be fit for discharge with no roadblocks to reenlistment. In sum, in its review and liberal consideration of all of the evidence and its careful application of the Clarifying Guidance, the Board did not observe any error or injustice in your naval records.

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,

1/5/2024

