



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. 5725-22
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 was 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 26 October 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 reviewed a 19 September 2023 advisory opinion (AO) from a qualified medical professional. Although you were provided an opportunity to respond to the AO, you chose not to do so.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 18 July 2016. On 4 February 2019, you were reviewed by an Informal Physical Evaluation Board (IPEB), which found that you had the unfitting condition of Degenerative Disc Disease at 40%, and you were recommended to be placed on the Temporary Disability Retired List (TDRL). On 5 February 2019, you submitted your election of options and accepted the findings of the IPEB. On 7 March 2019, you were notified that, effective 30 March 2019, you

were to be transferred to the TDRL. On 30 March 2019, you were released from active duty and transferred to the TDRL.

While you were on the TDRL, you were reviewed by an IPEB. On 8 July 2021, the IPEB found that your Degenerative Disc Disease had become stable at 20%. On the same day, you accepted the finding of the IPEB. On 27 July 2021, President, PEB, informed the Commandant of the Marine Corps of the findings of the IPEB and that you were to be discharged from the TDRL. Thereafter, you were discharged from the TDRL with severance pay.

In your petition, you request you be placed on the TDRL to evaluate your conditions of Sciatic Nerve Radiculopathy, left lower extremity (claimed as numbness) and Sciatic Nerve Radiculopathy, right lower extremity (claimed as numbness). In support of your request, you contend that these conditions were not factored when the PEB made the severance determination of 20%. You further assert that an evaluation from the Department of Veterans Affairs (VA) prepared while you were in the Integrated Disability Evaluation System identified the Radiculopathy of both the right and left sciatic nerve.

In order to assist it in reviewing your petition, the Board obtained the 19 September 2023 AO. According to the AO, which was considered unfavorable to your request:

Petitioner's in-service diagnosis and treatment of Degenerative Disc Disease, Lumbar Spine, adjudication for unfitness through the PEB, temporary medical retirement to the TDRL, and subsequent separation with severance from the TDRL, are well documented in his service medical record. The objective clinical evidence does not support petitioner's request for inclusion of Right and Left Lower Extremity Sciatic Nerve Radiculopathy as an unfitting/disabling condition.

The existence of intermittent radiating pain down both legs, described in a "nonanatomic distribution" by the orthopedic surgeon in the TDRL Periodic Physical Examination (PPE), is noted in the 9/26/2018 Sports Medicine Evaluation, MEB NARSUM, IPEB findings, TDRL PPE, and final IPEB findings resulting in separation with severance for Degenerative Disc Disease, Lumbar Spine at 20% disability rating.

However, the evaluating physicians consistently did not include radiculopathy in the listing of disabling and unfitting conditions that rendered Petitioner unable to carry out the duties of his military specialty, exclusively identifying the Degenerative Disc Disease condition as the sole unfitting condition. Notably, the evaluating orthopedic surgeon for the TDRL PPE, specifically diagnosed Petitioner with Spondylosis without [emphasis mine] myelopathy or radiculopathy, lumbosacral region.

In the MEB NARSUM and initial IPEB findings, the DVA C&P Rating Decision Letter is cited as reviewed. The listing of VA service-connected disability conditions included Right and Left Lower Extremity Radiculopathy with 10% disability evaluations individually. The responsible physicians for the MEB

NARSUM [narrative summary] and the PEB indicated they had reviewed the VA service-connected disabling conditions, and likely did not consider the radiculopathy condition as unfitting or contributory to Petitioner's unfitness for service, therefore exclusively designating the Degenerative Disc Disease as the unfitting condition and adjudicating his case accordingly.

The AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that he should have been considered for additional unfitting conditions of Right and Left Lower Extremity Sciatic Nerve Radiculopathy."

In its review of your petition, and the entirety of the materials you provided, the Board did not agree with your rationale for relief. In reaching its decision, the Board substantially concurred with the findings of the AO. In particular, the Board observed that the AO carefully evaluated the findings of treating physicians, including the evaluating treating orthopedic surgeon for the TDRL Periodic Physical Examination. The AO also noted, among other things, that the VA findings that you cite were in fact specifically mentioned in the Medical Evaluation Board NARSUM as well as the PEB as having been reviewed. Thus, the Board found the AO to be well-reasoned in determining that the PEB findings in your case remain correct. 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,

11/8/2023

