



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. 5969-22
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.

A three-member panel of the Board, sitting in executive session, considered your application on 30 November 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 a 12 October 2023 advisory opinion (AO) from a qualified medical professional, as well as your 10 November 2023 response to the AO.

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 Navy and commenced a period of active duty on 19 May 2015. As described in the AO, near the end of your naval service, you received medical treatments for a variety of conditions. Additionally, as described in the AO, you underwent a virtual separation physical on 11 May 2021. At your separation physical, the examining physician determined you were fit for separation, stating: "No medical conditions preventing separation from the military after review of medical history . . . EMR reviewed with no medical concerns warranting extension of military service." You reached the end of your obligated service and you were discharged on 18 August 2021. You provided a rating decision from the Department of Veterans' Affairs (VA) dated 20 August 2021, which reflected that, post-service, the VA awarded you service connected disability ratings for a variety of conditions.

In your petition, you request to be granted either a medical disability retirement or to be referred to the disability evaluation system for a determination of your overall disability rating. In support of your request, you contend that you suffered from numerous unfitting conditions prior to your separation from service, when you state were incurred during special warfare training exercises and deployments. You aver that these injuries were evaluated on active duty, but that, instead of being referred to the Physical Evaluation Board (PEB), you were treated and placed on limited duty during the Covid-19 pandemic, where the majority of your treatment was conducted virtually. You further assert that, a treating physician recommended that you receive a nerve block and that after you expressed reservations toward the nerve block, the medical officer responsible for referring you to the PEB decided to find you fit for duty and you reached the end of your active obligated service. You describe that after your discharge, your symptoms and conditions have worsened, and you have rated at 100% disabled by the Department of Veterans Affairs.

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

Review of the available objective clinical and non-clinical evidence documented Petitioner successfully executed the full range of responsibilities of his rate and rank up through the 2020-2021 period, when his first period of LIMITED DUTY was initiated. Even then, his subsequent evaluations continued with 3.00 individual trait averages and his promotion recommendations were “promotable” and “early promote.” His narrative comments were positive including recommendations for positions of increasing responsibility.

Though Petitioner’s contention his post-concussional/mild TBI and migraine conditions resulted in occupational impairment, his evaluations throughout his career, including prior to, and inclusive of, his LIMITED DUTY periods, were competitive and reflected his ability to adequately perform the range of duties commensurate with his rate and rank within his prescribed duty limitations as set forth by his medical providers.

Though Petitioner was granted 100% service-connected disability by the VA for many conditions, this was based on evidence of symptom onset during military service. The VA findings do not address fitness for duty, only that the conditions manifested while in service. Post-discharge civilian and VA clinical records, as well as letters in support, document Petitioner’s clinical history of recurrent head trauma with sequelae of headaches/migraines, balance issues, visual concerns, mood symptoms, as well as neck and lower back pain, supporting his service-connected conditions. However, these only indirectly address the issue of fitness for duty, and are in my mind, out-weighted by the medical opinions of Petitioner’s in- service treating physicians and clinical providers.

After review of all available clinical and non-clinical objective evidence, in my medical opinion, Petitioner’s in-service conditions, primarily of Post-Concussional Syndrome (encompassing primarily, but not exclusively, headaches, cognitive/concentration/memory/balance/irritability/emotional lability symptoms), Migraine headaches, and neck pain were appropriately evaluated and treated via in-person and telemedicine encounters. The subsequent determination by Mental Health, Neurology, Chronic Pain, and TBI specialists that Petitioner’s conditions did not render

him unfit for duty but fit for return to full duty and separation appear appropriately derived from review of the clinical record. Their separate and collective opinion that referral to a Medical Board was not indicated also appears appropriate given the evidence.

The preponderance of evidence did not support Petitioner's contention that the above medical conditions, individually or collectively, prevented him from reasonably performing the duties of his office, grade, rank, MOS, or rating, represented an obvious medical risk to the health of the member or to the health or safety of other members, or imposed unreasonable requirements on the military to maintain or protect the Service member, and therefore rendered him unfit for continued military service. In my medical opinion, had Petitioner been referred to the Physical Evaluation Board, it is likely he would have been found fit for service.

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 provided a response to the AO, which the Board carefully reviewed. According to your response, you asserted that the AO provided a sequential history of Petitioner, and "based solely on the self-serving notes," determined that "while [Petitioner] was suffering from multiple medical conditions that those medical conditions did not sufficiently interfere with his ability to perform his duties of his MOS and rank." You argued that the AO did not "account for the non-medical assessment provided by [Petitioner] or the how the multiple VA rated disabilities would not have interfered with his ability in his MOS." You argued further that:

The Opinion did not explain why when a treatment for [Petitioner's] medical conditions was refused by [Petitioner] he was miraculously fit for duty. It is unfathomable to think a person with as many disabilities with 50% or better disability ratings was fit for further service. A PEB will have to consider each individual disability and the collective effect the disabilities may have on the Sailor's ability to perform his duties. The Opinion does delve into the collective effect [Petitioner's] disabilities and how his multiple disabilities collectively effected [his] ability to perform his duties.

In its review of your petition, including all of the materials that you provided, 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 DES 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.

The Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the DES at the time of your separation. At the outset, the Board substantially concurred with the finding of the AO, which the Board found to be a thorough review of your available medical records and all materials, and which provided a reasonable

conclusion based on the evidence. Further, in its comprehensive review of the entirety of your request, the Board determined that there is no evidence in your available records, and you provided none, that you suffered any unfitting condition within the meaning of the disability evaluation system when you were on active duty. In other words, there is nothing in your service record that reflects you were unable to perform your duties due to any medical condition. The Board noted that you referenced a “non-medical assessment” in your response to the AO, but in its review of all available records, the Board did not observe any recommendations by anyone in your chain of command that you be reviewed by a medical evaluation board during any of your periods of service by way of a non-medical assessment or otherwise. In addition, your petition as well as your rebuttal cite frequently to your rating decisions provided by the VA, but as explained in the AO, the VA does not make findings concerning fitness for duty. To the extent you rely upon findings by the VA to support your request for a disability retirement, the Board reiterated that the VA is a separate organization, and it does not make determinations as to fitness for service as contemplated within the service disability evaluation system. Rather, eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated. In your case, the Board found it persuasive that your performance evaluations in service were routinely positive and betrayed no inadequacies, with “promotable” and “early promote” recommendations. This factor, coupled with the lack of any contemporaneous medical evidence setting forth any unfitting conditions, in addition to a separation physical that found you fit for separation, seemed more insightful than findings by a different organization (VA) for a different purpose (compensation and pension vice unfitting condition), particularly when coupled with the comprehensive findings in the AO. Accordingly, in its review of the entirety of your petition and supporting documentation, 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,

12/17/2023

