



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. 6240-22
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 2 November 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 Board also considered the 25 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.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 20 November 1975. On 26 January 1976, you received nonjudicial punishment for stealing \$20. On 22 June 1977, you received nonjudicial punishment for being absent from your appointed place of duty. On 17 January 1978, you were convicted by a summary court-martial for stealing bank checks, forging a signature, and for altering an ID card.

According to the AO, which reviewed your medical records, on 20 June 1978, you were reviewed by a medical evaluation board (MEB), where you were evaluated for right knee pain with history of injury to right knee 12 years prior when you struck your patella and lacerated your knee. Further, according to the AO's review of medical records, you were diagnosed with Patellar Tendonitis, Right Knee and found not fit for active duty due to physical disability "which was neither incurred in nor aggravated by a period of active service and should be

discharged from the Marine Corps.” In addition, the AO cited a 29 June 1978 Certificate Relative to a Full and Fair Hearing Before PEB, which reflected that you acknowledged that the MEB found you unfit for further naval service by reason of Patellar Tendonitis, Right Knee, a physical disability which existed prior to enlistment and which has not been aggravated by service. The certificate also stated that you were provided the option to demand a hearing before the Physical Evaluation Board (PEB), that you had full knowledge of the MEB findings, and you waived your rights to a hearing before a PEB and requested to be administratively discharged from the naval service as soon as possible. The certificate ended by stating you were not required to waive your rights and that you signed the certificate voluntarily. You signed the certificate acknowledging the above issues and, thereafter, you were discharged on 12 July 1978.

In your petition, you have requested that your service status be changed to “retirement,” that you be granted a minimum of 50% rating for your injury, and that you be awarded retroactive pay. In support of your request, you contend that during your transition out of the Marine Corps, you experienced psychological trauma as the result several death threats to your life noted by a Naval Investigative Service (NIS) field report. You further assert that you were unaware of the PEB/MEB panel’s decision and you that their narrative is not supported clinically and ignores the law. Finally, you argue that the Disability Evaluation System process was not followed, and that the pre-existing condition was wrongfully invoked. The Board noted you checked the “PTSD” box on your application but chose not to submit any supporting evidence of your claim.

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 order to assist it, the Board obtained the 25 September 2023 AO, which was considered unfavorable to your position. According to the AO:

Petitioner’s in-service unfitting diagnosis of Patellar Tendonitis, Right Knee is documented in his service medical record, including diagnostic evaluation and treatment by orthopedic specialists. When he did not respond to treatment and was unable to perform his duties as a Marine Rifleman, he was appropriately referred to a Medical Evaluation Board. The history elicited from Petitioner (and as reflected in his enlistment physical examination) indicated he had originally injured his knee well before enlistment, and that there were no additional injuries in service, just regular expected physical stresses required by his rate and rank. His unfitting right knee condition was considered to have Existed Prior to Enlistment (EPTE) and was Not Service Aggravated (NSA) resulting in a recommendation by the MEB for discharge for his pre-existing condition. Petitioner signed an acknowledgment of these findings by the MEB, did not demand a full and fair PEB hearing, and requested administrative discharge as soon as possible.

The objective record did not support petitioner’s contention of an unfitting psychological condition at discharge. His claim of his life being in danger was investigated by NCIS, who found no evidence to support his claim. There was no evidence in the in-service record he experienced any symptoms indicative of mental health disorder, presented himself for mental health evaluation, or was ever diagnosed or treated for a mental health condition. Review of the available

objective clinical and non-clinical evidence documented Petitioner adequately executed the full range of responsibilities of his rate and rank during the majority of his Marine Corps service. There was no evidence of light duty or Limited Duty in his records; though there was a notation he had been excused from guard duty because of his knee pain, (duration of excusal from duty was not indicated in the record). The in-service medical record consistently evidenced he was returned to full duty with each clinical encounter, until his referral to the Medical Evaluation Board and finding of unfitness for continued service based on an EPTE, NSA condition.

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.”

In keeping with the letter and spirit of 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. 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 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 reviewing your record, the Board concluded that 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. At the outset, the Board substantially concurred with AO, which it found to provide a substantial analysis of your service medical records and that it provided a rational and reasonable conclusion. In its review of the entirety of your petition and available records, the Board observed the lack of any evidence that you had any unfitting condition while on active duty. In fact, the proximate reason for your discharge was the finding by the MEB that you had a condition that existed prior to your entry into service. In addition, despite your assertion that you were suffering mental health distress while on active duty, there is no indication of such, and the NIS report that you provided found that your assertion of a threat was found to be unsubstantiated. You otherwise did not provide any medical evidence, either contemporaneous to your service, or post-service, that tends to support your position. Your available medical records from your time in service demonstrate that you were aware of the findings of the MEB and that you were provided all rights at each stage of the medical process. In sum, in its review and liberal consideration of all the evidence, 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,

11/22/2023

