



**DEPARTMENT OF THE NAVY**  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE ROAD, SUITE 1001  
ARLINGTON, VA 22204-2490

█  
Docket No. 6406-22  
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 application on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 2 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 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 10 September 1991. On 29 November 2001, you were medically reviewed for knee pain and you were placed on a six-month period of limited duty. On 27 March 2002, you were issued a formal written warning concerning your knee, as follows:

Counseled this date concerning my current medical condition: Diagnosed with Bilateral PFPS. Specific recommendations for corrective action: Continue with current medical treatment plan from █ assistance is available through: chain of command, Aviation Medicine, Family Service Center and chaplain. I am advised that failure to make progress or failure to take corrective action may result in administrative separation . . . .

On 25 April 2002, your squadron medical officer recommended that you discharged due to Patellar Femoral Pain Syndrome, explaining

Attending physician advises administrative separation for non-compatibility with Military Service/Unsuitability. Per references (a) and (b), member is not considered physically disabled. Member manifests a long-standing complaint of pain of such severity as to interfere with serving adequately in the military.

\* \* \*

Member has been followed by medical since March 1992 for knee pain. Work-up for this condition has included X-rays, MRI, Bone-Scan and rheumatologic testing (ESR/CBC). These tests were all within normal limits with the exception of the incidental finding of a Right Distal Femur Osteochondroma which appears benign and is not a contributing factor to the patients underlying knee pain. Osteochondroma is being followed by Orthopedics at NHCL. Patient was treated with NSAIDs, Physical Therapy and a 4 month Limited Duty Board without improvement in his symptoms. He had a trial of 'full duty' starting 27 March 02 but states he is unable to perform secondary to his underlying knee pain. I recommend based on his persistent complaint of pain and failed therapeutic options that he be administratively separated.

On 10 September 2002, you were notified of the initiation of administrative separation processing and your rights in connection therewith. You were informed that you were being processed for separation due to a condition, not a disability. The notification also informed you that the proposed separation was based on the medical report of 25 April 2002. You were provided the option to oppose the proposed separation and its basis at an administrative board. You sought legal counsel, and, after consulting with a lawyer, you waived your right to an administrative board. On 11 September 2002, your commanding officer transmitted his discharge recommendation to the separation authority. On 22 October 2002, the separation authority directed that you be discharged by copy of a letter to the Commandant of the Marine Corps. You were discharged on 30 October 2002.

You filed a petition with this Board in 2002 relating to the amount of your separation pay. Specifically, you asserted that you were paid half separation pay, but that you should have received full separation pay. This Board granted the relief that you requested by letter dated 5 June 2003.

In your petition, you request that you receive a disability discharge. In support of your request, you contend that, based on your years of Honorable service, the finding of the medical board, and the finding that there was no surgical rehabilitative options, your knees should have been classified as a disability and you should have received a medical retirement. You further contends that, post-service, the U.S. Department of Veterans' Affairs (VA) rated your knees at

20% service connected disabilities (10% for each knee). You provided your Certificate of Discharge or Release from Active Duty (DD 214) and VA documentation in support.

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. Notably, the Board observed no evidence that you had any unfitting condition while on active duty. Specifically, the Board observed that the medical records and findings contemporaneous to your service describe that your knees had been followed by medical starting in March 1992, which therefore includes nearly your entire time in service. At no time during your approximately eleven years of service were you ever referred by a medical evaluation board to be reviewed for potentially unfitting condition or referred to the disability evaluation system. In addition, there is no evidence that any of your commands provided any non-medical assessments setting forth your inability to perform your duties on account of any unfitting condition. To the contrary, according to your service records, your squadron medical officer evaluated you and diagnosed your knee condition as a condition, not a disability. You provided no medical evidence to counter the finding of the medical professional set forth in the medical report of 25 April 2002.

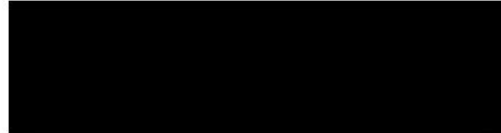
The Board further observed that you were appropriately notified of the reason and basis for your proposed separation, and you were afforded all of your rights in connection with your processing. You chose to seek counsel and to waive your right to an administrative board. If you had evidence contrary to the contemporary medical findings, you had a full and fair opportunity to provide that evidence at the relevant time. As noted above, however, the record reflects that there was no medical evidence contrary to the findings of in the 25 April 2002 medical report, and you never provided any contrary evidence.

Finally, the fact the VA rated you for service connected disability conditions that were diagnosed during your time in the Marine Corps did not persuade the Board these conditions were unfitting at the time of your discharge from the Marine Corps, because 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. 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,

3/21/2023



Executive Director

Signed by:

