



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

Docket No. 7156-22
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER MEMBER [REDACTED]

Ref: (a) Title 10 U.S.C. § 1552
(b) MARADMIN 135/19
(c) Official Military Personnel File (OMPF)

Encl: (1) DD Form 149 w/attachments
(2) Advisory Opinion

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected by reflected that he was retired under the reference (b) Temporary Retirement Authority (TERA); or, in the alternative, he be placed on the Permanent Disability Retired List (PDRL) with at least 30% disability or that he be referred to an MEB for evaluation as to whether he should be medically retired. He also requested that he be granted any other relief that is equitable and just.

2. The Board, consisting of [REDACTED] reviewed Petitioner's allegations of error and injustice on 4 January 2024, and, pursuant to its regulations, determined that the corrective action indicated below should be taken. Documentary material considered by the Board consisted of Petitioner's application together with all material submitted in support thereof, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies. Additionally, the Board also considered the enclosure (2), an advisory opinion (AO) furnished by qualified mental health provider and Petitioner's response to the AO.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. According to the reference (c), Petitioner enlisted in the Marine Corps Reserve and served an initial period of active duty from 12 June 2001 to 22 November 2001, after which he was released from active duty due to completing his required service. Petitioner served several additional periods of active duty, from 14 January 2002 to 23 June 2002, 12 June 2005 to 23 May 2006, and 6 May 2008 to 5 June 2011, and 7 October 2011 to 15 December 2011. Subsequently, Petitioner was commissioned an officer in the Marine Corps, and began his final period of active duty on 16 December 2011. As described more fully below, during this latter period of active duty, Petitioner was placed into the Integrated Disability Evaluation System (IDES) and was evaluated by the Physical Evaluation Board (PEB), which found that Petitioner

had an unfitting condition, and that he should be separated with severance pay. Petitioner, however, waived his PEB findings and benefits conditional on his authorization to retire via TERA. However, Petitioner's request to retire via TERA was denied because he was pending separation from service due to his failure of selection for promotion. Thereafter, Petitioner was discharged before his PEB process was completed and he was ultimately separated on 1 June 2022 due to his non-selection for promotion.

c. In support of his request, Petitioner contends that he is entitled to a TERA retirement per MARADMIN 135/19. He also asserts that while he was on active duty, on or about 28 April 2022, an IPEB found him to be unfit for duty due to "Low Back Pain (Stable)" with a rating of 20%. He argued that he first accepted the PEB findings, but then on 3 May 2022 he waived his rights in the PEB in order to seek a TERA retirement in lieu of the PEB. He states that, on 5 May 2022, his command forwarded his TERA package with a negative endorsement. Thus, in light of the negative endorsement of his TERA request, he submitted a new PEB election form dated 16 May 2022, in which he indicated he did NOT agree with the IPEB findings and requested a formal PEB hearing. With respect to his request for a disability retirement, Petitioner argued that the PEB erred in its decision concerning his back condition and also in its decision concerning his adjustment disorder, as discussed more fully in the AO.

d. In order to assist the Board in reaching a decision in this petition, it obtained the enclosure (2) AO. As described in the AO, during Petitioner's last period of active duty, Petitioner was placed into the IDES, as follows:

-4/28/2022 Informal PEB (IPEB) Findings: Petitioner found Unfit at 20% disability rating for Low Back Pain (Stable) VA Diagnostic Code 5243 with Category III Condition of Radiculopathy, Lumbar Region. Recommended to be Separated from Active Duty with severance pay. Medical Officer stated:

"The member has a confirmed condition of LOW BACK PAIN (referred as INTERVERTEBRAL DISC DISORDERS WITH RADICULOPATHY, LUMBAR REGION) with supporting imaging studies and clinical progress note documentation. Treatment consisting of therapy and medication did not resolve the symptoms sufficiently so that the member can perform the duties of their rank/rate/MOS at sea or in a deployed status, the facts of which are supported by the NMA. Of special note, the member cannot perform the following duties: no heavy lifting, no PFT/CFT, no field duty, and no deployment. Therefore, the condition above is unfitting as it interferes significantly with the member's ability to carry out the duties of their office, grade, rank or rating."

e. After review of the available medical documentation, the AO concluded primarily in Petitioner's favor as follows:

Petitioner's in-service diagnosis of Low Back Pain (Stable) (referred as Intervertebral Disc Disorders with Radiculopathy), and the long history of multimodal treatments without relief, is well documented in his service medical record. As is the Category III condition of Radiculopathy, Lumbar Region. The PEB found him unfit for continued service and recommended separation with

severance pay at a 20% disability evaluation. Petitioner waived his PEB findings and benefits, conditional on authorization to retire via TERA. When that was denied he petitioned for a Formal PEB, contesting the findings and contending his condition warranted a higher disability rating. However, he was discharged before the PEB process was completed.

Regarding Petitioner's request for a higher disability rating for his Intervertebral Disc Disorders, and inclusion of his Radiculopathy, Lumbar Region as a ratable, unfitting condition, in my medical opinion, the available evidence and testimonials from Petitioner did not support a change to the PEB's original decision.

Regarding Petitioner's request to include Adjustment Disorder with anxiety and depressed mood as a ratable, unfitting condition, in my medical opinion, the available clinical records, and testimonial from Petitioner, do support this request. Petitioner was diagnosed with Adjustment Disorder during his military service arising from occupational and social stressors, chief amongst them his ongoing chronic pain from his multiple musculoskeletal and neuromuscular conditions. His treatment included psychotherapy, psychotropic medication, and coordination between mental health providers and his medical providers to aggressively manage his chronic pain conditions, though with only minimal success. The physical and occupational stressors behind his Adjustment Disorder condition remained unabated during his course of illness. Petitioner's range of symptoms included include depressed mood, disrupted sleep and appetite, anhedonia (loss of interest), decreased energy, reduced concentration, psychomotor agitation, anxiety, excessive and pervasive worry, difficulty soothing or controlling anxiety/worry, inability to relax/stays tense, restlessness, reduced task efficiency/productivity, and irritability/poor frustration and anger tolerance. These symptoms remained active during his military service and even post-discharge, resulting in mild moderate chronic occupational and social impairments, which substantially interfered with his ability to perform his military duties.

* * *

Should consideration of Petitioner's request for relief be granted, the recommended correction of the record would result in the following, applied to the time of discharge (01 June 2022):

Unfit for the following conditions with placement on the Permanent Disability Retired List (PDRL):

1. Lower Back Pain (Stable), VA Code 5243, rated at 20%, permanent and stable, not combat related (NCR), non combat zone (NCZ)
2. Chronic Adjustment Disorder (with depressed and anxious mood), VA Code 9440, rated at 10%, permanent and stable, not combat related (NCR), non combat zone (NCZ)

This results in a combined rating of 30%.

f. The AO concluded, “in my medical opinion, the preponderance of objective clinical evidence provides sufficient support for Petitioner’s contention that at the time of his discharge he was unfit for continued military service and qualified for medical retirement.”

CONCLUSION

In its review of the entirety of Petitioner’s materials as described above, the Board concluded that the Petitioner is not entitled to receive a TERA retirement per reference (b). The Board determined that Petitioner did not merit such a retirement because he was otherwise not eligible to continue in service due to his failure of selection for promotion.

With respect to Petitioner’s alternative requested relief, that he be granted a service disability retirement, the Board determined that Petitioner is entitled to relief in the form of being granted a service disability retirement with a 30% disability as described in the AO. In reaching its decision on this portion of Petitioner’s request, the Board substantially concurred with the findings of the AO, which the Board found to be well-reasoned and rational, and determined that is contained a fulsome and complete discussion of the relevant factors applicable to the IDER.

With respect to Petitioner’s request for “any other relief that is equitable and just,” the Board determined that no additional relief was justified.

RECOMMENDATION

In view of the above, the Board recommends the following corrective action.

Petitioner’s naval record be corrected by being placement on the PDRL as unfit for the following conditions effective the date of his discharge (1 June 2022) as follows:

1. Lower Back Pain (Stable), VA Code 5243, rated at 20%, permanent and stable, not combat related (NCR), non combat zone (NCZ)
2. Chronic Adjustment Disorder (with depressed and anxious mood), VA Code 9440, rated at 10%, permanent and stable, not combat related (NCR), non combat zone (NCZ)

This results in a combined rating of 30%.

The DFAS shall audit the Petitioner’s pay account for payment of back pay to the date of Petitioner’s placement on the PDRL and any lawful monies owed.

The Petitioner shall be issued a new final Certificate of Release or Discharge from Active Duty (DD Form 214), or a DD Form 215, whichever is deemed appropriate, with changes as follows: narrative reason for separation: Disability, Permanent; separation program designator: as appropriate; reentry code: RE-3P.

And no other action.

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4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

1/30/2024

[REDACTED]