



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

█  
Docket No. 7438-22  
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 case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 28 April 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 the 8 January 2020 advisory opinion (AO) from your previous case.

A review of your record shows that you originally entered active duty with the Marine Corps in October 1989. You served without incident, except for a non-judicial punishment in 2004 that was successfully appealed, until 2006. During that year, you were counselled for failing to follow orders and for your lack of production as a recruiter. In December 2006, you were removed from recruiting duties based on performance issues. As a result of these performance issues, you received nonjudicial punishment, on 1 March 2007, for dereliction of duty. You were reduced in paygrade and issued forfeitures, but all of your punishment was suspended for a period of six months. You were subsequently discharged, on 19 June 2007, at the end of your obligated active service.

In 2018, you filed a petition with this Board seeking to have the evidence of your nonjudicial punishment removed from your record as well as to be entered into the Disability Evaluation System (DES). In connection with reviewing your petition, the Board obtained an advisory opinion (AO) from a medical professional, which was considered to be unfavorable to your position. On 20 February 2020, the Board granted your request with respect to your request to

remove your 1 March 2007 non-judicial punishment but denied you request to be placed into the DES, reasoning as follows:

Regarding Petitioner's request to be placed on the disability retirement list, the Board concluded the preponderance of the evidence does not support his request. In this regard, the Board substantially concurred with the Advisory Opinion at enclosure (2). Specifically, the Board found insufficient evidence to support a finding that Petitioner's kidney disease prevented him from performing the duties of his office, grade, rank or rating. Even though Petitioner was diagnosed with Stage 3 Chronic Kidney Disease, the Board agreed with the advisory opinion that his condition was treatable and stable at the time of his discharge. They felt this was evidenced by the stable nature of his condition for approximately 10 years after his release from active duty until it progressed to the 4th stage. The Board found that Petitioner's poor performance was not related to his kidney disease since there was no medical evidence to support such a finding.

In 2020, you filed another petition seeking to be placed on the disability retired list due to kidney disease. On 24 September 2020, the Board denied your request as follows:

The Board carefully considered your arguments that you deserve to be placed on the disability retirement list based on your kidney disease. You assert that you were unfit for continued naval service at the time of your discharge. Unfortunately, the Board disagreed with your rationale for relief. The board again concurred with the advisory opinion finding that your kidney disease was not service disqualifying at the time of your discharge and did not meet the criteria for unfitness. Specifically, the Board relied on several factors in concluding the evidence did not support a finding of unfitness in your case. First, your kidney condition remained stable for approximately 10 years after your discharge. It wasn't until 2017 that your condition worsened sufficiently to require a transplant. Second, there was no evidence that your military performance was sufficiently impaired to prevent you from performing your duties. While the Board noted your performance suffered in 2007, your record shows that you were reinstated to recruiting duties on 21 February 2007 indicating you were able to perform your duties. Additionally, you were able to complete a Physical Fitness Test during the reporting period ending in March 2007. Finally, you were medically cleared for separation despite your kidney condition. The Manual of the Medical Department Chapter 15-20 requires separation examinations and evaluations for active duty members and states "comprehensive evaluations are conducted for the purposes of ensuring that Service members have not developed any medical conditions while in receipt of base pay that might constitute a disability that should be processed by the Physical Evaluation Board (PEB) and to ensure Servicemembers are physically qualified for recall to additional periods of active duty. Thus, the standards for being physically qualified to separate are the same as those being qualified to continue active duty Service . . . ." In the Board's opinion, your separation physical results were consistent with your documented ability to

perform your duties and your reenlistment code assigned upon your discharge that did not restrict you from reenlisting.

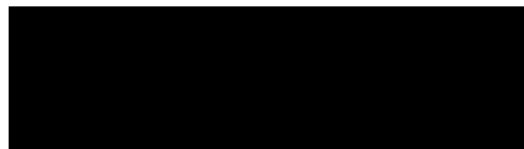
In your current petition, you seek reconsideration of your petition and seek to have the Board appoint a “special retiring board” to consider the prior Board’s failure to grant you relief in the form of a medical disability. You also seek to be placed on the Permanent Disability Retirement List (PDRL), to have a period of legal hold removed from your military record, to have an adverse evaluation removed from your record, and to be advanced to paygrade E-6. In support of your request, you provided a written brief in support of your request, which you asserted constituted new and material evidence. In your written brief, you contend that the Board’s prior decisions were arbitrary and capricious.

The Board carefully considered your arguments, including the entirety of your petition and its enclosures, and disagreed with your rationale for relief. After a careful review of the available service record documents, as well the entirety of your petition, the Board determined that you provided insufficient new material for it to change its prior decisions. With respect to your request to be placed into the PDRL, the Board determined that its prior two decision letters robustly and soundly described the reasons for its denial to award you a service disability retirement. Neither your brief nor any of your attachments raised sufficient new matters to overcome the Board’s prior decisions. With respect to your request for the removal of materials from your service record, to include evidence that you were placed on legal hold, and the removal of an adverse evaluation, the Board also determined that you provided insufficient support to overcome the presumption of regularity that attached to these documents when they were placed into your service record. Finally, with respect to your request for advancement to E-6, the Board observed that there appeared to be no basis or authority for this request. 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,

5/15/2023

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Deputy Director

Signed by: 