



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

█  
Docket No. 8888-22  
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 19 December 2022. 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.

A review of your record shows that you enlisted in the Navy and commenced a period of active duty on 2 July 2003. You were on periods of unauthorized absence from 16 January 2004 to 20 January 2004, 16 February 2004 to 15 March 2004, and 17 April 2004 to 25 April 2004. Consequently, you were charged with offenses, which were referred to a special court-martial. In connection with your court-martial, you were evaluated by medical professionals to determine your competency to stand trial. According to this medical evaluation, you were determined to be competent to stand trial and you were not criminally insane at the time of your misconduct. You were diagnosed with Attention-Deficit Hyperactivity Disorder, Major Depressive Disorder, borderline Personality Disorder, and antisocial personality traits. On 28 October 2004, you were convicted by a special court-martial. On 3 November 2004, you were referred to a medical evaluation board. On 29 December 2004, you were released from confinement and placed on appellate leave. On 23 December 2004, your medical board was cancelled due to your pending discharge as a result of misconduct, as your misconduct discharge took precedence over your disability evaluation processing. On 18 December 2007, after finalization of your appellate review, you were discharged with a bad conduct discharge.

In 2014, you submitted an application to the Naval Discharge Review Board (NDRB) seeking to upgrade your discharge. In your application you contended you were improperly diagnosed when you were in the Navy, you were incompetent to stand trial, and the Navy failed to refer you to a medical board. On 24 April 2014, the NDRB denied your application. In 2015, you filed a petition with this Board, seeking similar relief as your current petition, which was denied.

In 2016, you filed a petition with this Board, seeking relief similar to the relief you seek in your current petition. In order to assist the Board in reaching a decision, it sought an advisory opinion (AO) from a medical professional. The AO, dated 20 November 2017, was considered unfavorable to your request, finding that your medical conditions were not compensable by the Department of the Navy Physical Evaluation Board, as follows:

Unfitness potentially attributable to a compensable psychiatric condition was not apparent while the applicant was in receipt of basic pay, which, a preponderance of evidence suggests, terminated at confinement and while in an unauthorized absence status. By regulation, the applicant would not have been eligible to receive basic pay while either in a confinement or Appellate Leave status. The applicant was diagnosed with Schizophrenia just prior to placement on Appellate Leave on 29 April 2005.

As stated above, the preponderance of evidence suggests these charges are more consistent with the diagnoses of Conduct Disorder, Borderline Personality Disorder, or Antisocial Personality Disorder Traits rather than the more psychotic spectrum disorders which were later considered. While not compensable by the DON PEB these conditions are considered potentially mitigating but not exculpating with respect to the accrued UCMJ violations.

The Board denied your 2016 petition (Docket No. 9979-16), and in 2019, you petitioned this Board for reconsideration (Docket No. 9485-19). On 7 January 2020, this Board denied your petition in light of the seriousness of your misconduct for which you were discharged, and that your discharge based on misconduct appropriately superseded medical evaluation board processing. Further, despite applying liberal consideration to your request, the Board determined that your discharge characterization was appropriate. In 2016, you filed another application with NDRB, which was denied on 24 August 2018.

In 2022, you filed another petition with this Board seeking a medical discharge (Docket No. 4708-22). In review of the materials that you presented and the 2017 AO, as a matter of clemency, the Board found support for mitigation of your misconduct and granted you partial relief in the form of upgrading your discharge to general (under honorable conditions). The Board found no basis for your request for a medical retirement.

In your current petition, you again seek reconsideration of your previous requests for military retirement. You included with your petition medical records and a statement from a psychologist, as well as additional documents such as banking information. According to the statement of the psychologist, you “developed an extremely complex acquired psychiatric disorder which at least as likely as not began in the military and includes 295.70 (F25.0)

Schizoaffective Disorder, Bipolar Type (with intermingling and undifferentiated major depressive disorder, recurrent, severe type and manic/hypomanic episodes inclusive of presentation) and secondary polysubstance disorder, severe type as a form of self-medication based on the full former DSM IV and current DSM V criteria.” The psychologist concluded that, “in my opinion, these diagnoses perhaps were in prodromal phase and did not fully manifest beyond normal progression until after the veteran entered the service.”

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 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 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. The Board concurred with the 20 November 2017 AO in finding that the conditions at issue while you were on active duty were “not compensable by the DON PEB” and that the conditions “are considered potentially mitigating but not exculpating with respect to the accrued UCMJ violations.” With respect to the finding that the conditions are potentially mitigating, the Board observed that it already provided you the benefit of mitigation in granting you partial relief in the form of upgrading your characterization of service to general (under honorable conditions).

The Board also considered the finding of your psychologist that you provided. The Board observed that the finding of your psychologist was akin to a manifestation-based finding. On this issue, the Board concurred with the AO provided in your earlier petition and the Board did not agree that your psychologist’s finding provided sufficient support to the contrary. At best, the finding of your psychologist described manifestation-based disability conditions, which would be more applicable to findings made by the VA, 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. By contrast, as explained above, in order to be eligible for a military disability retirement, there must be evidence of an unfitting disability condition that is contemporaneous to your service. Here, as described in its prior letters to you, the Board did not find such a disability condition. And, even if the Board had found such a condition, your misconduct discharge took precedence over any such disability evaluation processing. Accordingly, in light of all of the foregoing, the Board denied your petition.

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.

In the absence of sufficient new evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

Sincerely,

1/6/2023

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Deputy Director

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