



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. 8986-22
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 27 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, applicable statutes, regulations, and policies, to include the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD)/mental health condition (MHC) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo). In addition, the Board considered the 17 March 2023 Advisory Opinion (AO) from a Licensed Clinical Psychologist and Psychiatrist. Although you were provided an opportunity to respond to the AO, you chose not to do so.

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 entered active duty in the Marine Corps on 8 September 2008. On 10 June 2009, you accepted non-judicial punishment (NJP) imposed by your Commanding Officer (CO) for insubordinate conduct, aggravated assault, and disorderly conduct, drunkenness. On 5 August 2009, you completed 10 days of Outpatient Treatment for alcohol abuse.

On 26 February 2010, you underwent your second NJP for two specifications of disrespectful language, and drunk and disorderly conduct. In March 2010, you were counseled regarding disobedience. In April 2010, you were evaluated and determined to still meet criteria or alcohol use disorder (AUD). You completed AUD relapse prevention class in May 2010. However, on 10 August 2010, you received your third NJP for two specifications of verbally disrespecting a noncommissioned officer, and being severely intoxicated.

On 1 May 2012, you received a fourth NJP for assaulting another Marine in the face with your hand. As a result of your misconduct, you were notified of administrative separation processing due to pattern of misconduct. Ultimately, on 12 July 2012, you were discharged under Other Than Honorable (OTH) conditions by reason of misconduct due to a pattern of misconduct.

On 12 October 2022, the Board of Veterans' Appeals (BVA) found that you are entitled Department of Veterans (VA) benefits on the basis your pre-existing brain injury was aggravated by military service and that your in-service misconduct was due to your TBI.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire for a discharge upgrade to Honorable and contentions that your pre-existing brain injury was aggravated in service, you suffered from Post-Traumatic Stress Disorder (PTSD) and other mental health condition (MHC), and that you should have received a disability discharge. For purposes of clemency and equity consideration, the Board considered the evidence you provided in support of your application.

Based on your assertions that you incurred PTSD and other MHC during your military service, which might have mitigated your discharge character of service, qualified mental health professionals reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

There is no evidence of a Traumatic Brain Injury (TBI) incurred in service, nor aggravated as a result of his military service. There is evidence of a pre-service TBI that was known upon enlistment, evaluated in service, and deemed non-contributory to misconduct. Although a post-service clinician has reviewed documentation determined the Petitioner's pre-enlistment TBI may have accounted for in-service misconduct, this determination is temporally remote to military service and cited through third person documentation. Available documentation from the Petitioner's military service indicates that his pre-service AUD continued in service and contributed to the majority of his misconduct. Problematic alcohol use is incompatible with military readiness and discipline and does not remove responsibility for behavior.

The AO concluded, "it is my considered clinical opinion there is insufficient evidence of TBI incurred or aggravated during military service. There is insufficient evidence his misconduct could be attributed to TBI."

After thorough review, the Board concluded these potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your

NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and found that your conduct showed a disregard for military authority and regulations. The Board concurred with the AO that is insufficient evidence your misconduct could be attributed to TBI. The Board noted that you received a waiver for your pre-service TBI since neuropsychological testing showed “a very mild cognitive disorder” and a neurology consult found “no permanent neurological sequelae.” The medical evaluation also noted that you had completed 65 hours of college credits pre-enlistment, with a cumulative grade point average of 2.89. Furthermore, regarding your claim of PTSD and a MHC, the Board considered your medical evaluation in May 2012; in which a medical provider stated that you do not have post-traumatic stress disorder (PTSD) and that your TBI “did not materially have an impact on [your] behavior.” Thus, the Board determined there is insufficient evidence your misconduct could be attributed to a mental health condition or TBI. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization.

Regarding your request for a disability discharge, the Board found no evidence that you suffered from an unfitting condition while on active duty. Contrary to your assertion, the Board noted that you were repeatedly referred for AUD and discharged for misconduct. The Board also noted that you were never referred to a medical board or the Physical Evaluation Board for any disability conditions. Regardless, even if evidence of unfitness existed, the Board determined you were ineligible for disability processing since service regulations directed misconduct processing to supersede disability processing.

Therefore, while the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos and reviewing the record liberally and holistically, the Board did not find evidence of an error or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. 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

