



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. 2057-23
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 19 October 2023. 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, 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) (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) (collectively "Clarifying Guidance"]. Additionally, the Board considered a 23 August 2023 advisory opinion (AO) furnished by qualified medical professionals. 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.

As set forth in its letter to you of 2 October 2021, and based on a review of your service record, you enlisted in the Navy and commenced a period of active duty on 25 May 1983. On 9 January 1984, you received nonjudicial punishment for attempting to steal keys, a wallet, and a makeup

kit, for failing to obey a lawful order, and for unlawful entry. On 9 May 1984, you received nonjudicial punishment for uttering a worthless check to the Navy Exchange. On 8 June 1984, you received nonjudicial punishment for periods of unauthorized absence totaling four days. On that day, you also received a written warning concerning your misconduct. On 5 September 1985, you received nonjudicial punishment for failing to obey a lawful order. During the period from 6 to 31 January 1986 you were hospitalized and diagnosed with a cerebral contusion, with scalp lacerations, superficial left temporal scalp infection, and negative exploratory burr holes. The medical report noted that due to the burr holes it was impossible to predict your suitability for further service and your case was subsequently referred to a physical evaluation board for adjudication. On 9 April 1986, you received nonjudicial punishment for use of cocaine and for disobeying an order to march in ranks.

On 8 May 1986, you were notified of the initiation of administrative separation processing and your rights in connection therewith. You waived your right to an administrative discharge board, and submitted a written request for a general discharge. On 19 June 1986, your commanding officer recommended that you be discharged with an other than honorable characterization of service. On 2 August 1986, the discharge authority directed that you be discharged with an other than honorable characterization of service, and on 20 August 1986, you were so discharged.

In 1987, you filed an application with the Naval Discharge Review Board (NDRB). In your application, you provided a written statement describing the context of your misconduct as well as the accident that resulted in your head injury. On 2 June 1987, the NDRB conducted its review, and denied your request. In 2008, you filed a petition with this Board contending as mitigating factors your youth and desire to upgrade your discharge. On 3 November 2009, this Board denied your petition. In 2017, you filed a petition for reconsideration with this Board. On 23 June 2017, this Board informed you that it was administratively closing your petition because it did not provide new matter.

In 2019, you filed another petition with this Board, presenting as new evidence a letter from the Department of Veterans Affairs (VA) granting service connection for treatment purposes only for Traumatic Brain Injury (TBI) and unspecified bipolar disorder and related disorder with alcohol use disorder, claimed as PTSD. You also provided an excerpt from an October 2011 psychological evaluation noting diagnoses of “cognitive disorder and bipolar disorder that was self-medicated with alcohol and drugs.” You asserted that you were given an undesirable discharge after a motor vehicle accident and you were self-medicating with controlled substances while awaiting medical discharge. On 15 May 2020, this Board denied your petition, relying in part on an AO, which found:

[t]he Petitioner has a diagnosis of TBI and other mental health disorders that can be attributed to military service. However, his accident that resulted in the TBI occurred after four NJPs. As such, that misconduct cannot be attributed a mental health condition incurred during military service. The VA has stated that it is not possible to separate his mental health symptoms from his TBI, so his mental health symptoms are also considered to have onset following the accident. It is possible that the misconduct resulting in his final NJP could be attributed in part to mental health symptoms that developed after his head injury, but he did report a history of

drug use prior service so it is also possible that his in-service drug use represented a continuation of pre-service behavior.

Based on the preponderance of the evidence, it is my considered medical opinion that there is insufficient evidence to attribute the majority of his misconduct to a mental health condition incurred during military service.

Thereafter, you filed another petition with this Board in 2021. In that petition, you contended that your character of service should be upgraded to Honorable because of a mental health condition that you contend was caused by the accident that occurred while you were on active duty. In particular, you asserted that you were diagnosed with Traumatic Brain Injury (TBI) and PTSD post service. You contend that your diagnoses might have mitigated the substandard performance or inability to adapt to military service that led to your under other than honorable characterization of service. You also explained that you were young and immature at the time and provide background and context to your time in the Navy. You provided records from the Department of Veterans' Affairs (VA) in support of your petition.

In reviewing your 2021 petition, the Board obtained another AO from a medical professional dated 25 July 2021. That AO was considered unfavorable to your request, and explained:

Petitioner's in-service records did not contain evidence of a diagnosis of a mental health condition or psychological/behavioral changes, which may have indicated a mental health condition. Petitioner's TBI from his 1/4/86 car accident was well documented with diagnoses of Cerebral Contusion and Post-Concussional Syndrome, with reported short-term memory deficits and headaches. However, Petitioner's four NJP's prior to the car accident are not mitigated by his diagnosis of TBI. Although he claimed PTSD and post-discharge Bipolar Disorder, he did not provide any description of experiencing symptoms in-service that would meet the criteria for either mental health condition.

Following his car accident, Petitioner contended he experienced residual symptoms consistent with a TBI of ongoing headaches and episodic temporary visual changes. It is not unusual for service members who experience a TBI, especially with continued chronic pain conditions (e.g., migraine headaches) or concerning medical conditions (e.g., episodic temporary loss of vision) to revert to past maladaptive coping skills (such as substance abuse). However, Petitioner's history of a single episode of cocaine use in an off-duty liberty situation while socializing with other Sailors is not a typical example of self-medication behavior. Additionally, the 2018 VA Rating Decision found he was 'sane' at the time of his misconduct, which argued against any mitigation due to a medical or mental health condition.

That AO concluded, "based on the available evidence, it is my considered medical opinion the preponderance of objective evidence established Petitioner was diagnosed with TBI incurred during his military service. However, the available evidence is insufficient to support his contention that his in-service drug abuse misconduct could be attributed to his experience of TBI."

You were provided a copy of that AO, and you provided a response dated 24 August 2021, which the Board carefully reviewed. The preparer of the AO also reviewed your response, and stated, “I have reviewed Petitioner's letter of rebuttal to the 7/25/2021 Advisory Opinion and previously reviewed clinical documents to include the 1986 Physical Evaluation Board, 2018 VA Rating Decision, and other medical evaluations and treatment records. There was no new or material clinical evidence presented. Therefore, the original AO stands as written.”

Upon its review of your 2021 petition, the Board explained to you in its letter of 2 October 2021, that it concluded the potentially mitigating factors that you raised were insufficient to warrant relief. In its letter denying your petition, the Board explained that it concurred with the findings of the AO and that it determined that the misconduct that you engaged in while on active duty supported your characterization of service.

Thereafter, you filed another petition with this Board in 2022. In response to your new petition, the Board wrote to you and explained that, “A preliminary review of your application revealed that you previously petitioned the Board in 2021 and were denied relief. Please be advised that current policy instructs the Board to reconsider its decision upon submission of new and material evidence. New evidence is evidence not previously considered by the Board; no such evidence was found in review of your recent application package.”

You then filed your current petition, in which you requested that your discharge characterization be upgraded from Other Than Honorable (OTH) to General (Under Honorable Conditions). You also argue that you should have been medically separated. In support of your request, you contend that you provided new and material evidence, and you argued that, in its prior decisions, this Board relied on an AO that misapplied facts relating to your prior misconduct and did not fully consider your military service, the Navy did not accurately follow Department of Defense and Navy regulations, the Navy failed to provide you medical treatment and evaluate you for a medical separation, and the VA and other medical facilities have determined that your TBI is service connected.

In order to assist it in its review of your current request for reconsideration, the Board obtained the 23 August 2023 AO, which was considered unfavorable to your request. According to this new AO:

There is in-service evidence of TBI. Post-service, the VA has granted service connection for TBI and a mental health condition. The VA has stated that it is not possible to separate his mental health symptoms from his TBI, so it is considered that his mental health symptoms began following the MVA [motor vehicle accident]. It is possible that the Petitioner's misconduct resulting in his April 1986 NJP could be attributed to symptoms associated with his TBI and mental health concerns. However, the Petitioner reported a history of drug use prior to entry into service, and described his cocaine use as a one-time event on liberty (not as an ongoing maladaptive coping mechanism developed to mitigate psychological distress). The Petitioner's multiple NJPs prior to his MVA can not be attributed to symptoms from TBI or a mental health condition. Additional records (e.g., post-

service mental health records describing the Petitioner's diagnosis, symptoms, and their specific link to his misconduct) may aid in rendering an alternate opinion.

The AO concluded, "it is my clinical opinion there is in-service evidence of TBI. There is post-service evidence from the VA of another mental health condition that may be attributed to military service. There is insufficient evidence to attribute most of his misconduct to TBI or another mental health condition."

The Board carefully reviewed your request for reconsideration and the new material that you provided in support of your petition, and disagreed with your rationale for relief. In keeping with the letter and spirit of the Clarifying Guidance, and in particular the Kurta Memo, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced, and their possible adverse impact on your service. In reaching its decision, the Board observed that your assertion that you should have received a medical retirement would have required that you be processed through the Disability Evaluation System (DES) while you were on active duty. In order to qualify for military disability benefits through the DES 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.

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. At the outset, the Board determined that the new matter that you provided in your current petition was insufficient to change its prior findings. In its comprehensive review of the entirety of your request, the Board determined that, even assuming that your mental health conditions arose during your service, they did not amount to unfitting conditions within the meaning of the DES. In reaching its findings, the Board concurred with the findings of the AO, observing that it sufficiently considered the relevant factors and reached a reasonable conclusion. Notably, the Board observed that, while you were diagnosed with mental health conditions, there is no evidence that any medical provider considered your conditions to warrant referral to a medical board for a determination of fitness for duty within the disability evaluation system. Rather, the cause of your discharge was a result of the several disciplinary actions that you had faced during your service. On this point, the Board reiterated its prior determination that you were discharged based on your record of misconduct and, during your time in service, Department of Navy disability regulations directed misconduct processing to supersede disability processing.

The Board noted that, with respect to your reliance on findings by the VA, the Board observed that the VA does not make determinations as to fitness for service as contemplated within the service disability evaluation system. Rather, 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.

In your petition, you also requested an upgrade of your OTH characterization of service, asserting that your mental health conditions should mitigate the misconduct that you engaged in while on active duty. The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Clarifying Guidance. These included, but were not limited to, your desire for a discharge upgrade and previously discussed contentions.

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 complete disregard for military authority and regulations. In addition, The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. Further, the Board concurred with the most recent AO that determined there is insufficient evidence to attribute most of your misconduct to TBI or another mental health condition. As explained in the AO, while it is possible that your misconduct resulting in your April 1986 NJP could be attributed to symptoms associated with his TBI and mental health concerns, you reported a history of drug use prior to entry into service, and described your cocaine use as a one-time event on liberty rather than on ongoing maladaptive coping mechanism developed to mitigate psychological distress. In addition, your multiple NJPs prior to your motor vehicle accident cannot be attributed to symptoms from TBI or a mental health condition. 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. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Clarifying Guidance 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. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. 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,

11/16/2023

