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

Docket No. 3730-23
Ref: Signature Date

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 30 November 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 Office of the Secretary of Defense concerning discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), the 24 February 2016 guidance from the Principal Deputy Under Secretary of Defense concerning discharge upgrade requests by PTSD or TBI (Carson Memo), and the 25 July 2018 guidance from the Under Secretary of Defense regarding application of equity, injustice, and clemency to discharge upgrade requests (Wilkie Memo) (collectively "the Clarifying Guidance").

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 enlisted in the Navy and commenced a period of active duty on 8 February 1978. On 18 October 1978, you received nonjudicial punishment and you were issued a formal written warning for a period of unauthorized absence. On 23 March 1979, you were issued a formal written warning concerning your involvement in discreditable actions.

On 4 April 1979, you were convicted by a summary court-martial for two different periods of unauthorized absence. On 2 August 1979, you were issued another formal written warning concerning your involvement in discreditable actions. On 9 August 1979, you were seen by a psychiatrist for adult situational maladjustment with depression with suicidal ideation. According to your service medical record, your mental health status examination revealed no evidence of psychosis, disabling neurosis or organic brain syndrome, and that your potential for honorable service was negligible. Thereafter, you were recommended for administrative separation.

On 17 August 1979, you were convicted by a special court-martial for seven different periods of unauthorized absence. On 28 August 1979, you were notified of the initiation of administrative separation processing due to frequent involvement of a discreditable nature with military authorities and your rights in connection therewith. On 16 October 1979, you submitted a statement requesting that you be discharged in advance of your final discharge date and that you would receive final notification of your discharge after your actual discharge date, which was granted. On 17 October 1979, you received nonjudicial punishment for a period of unauthorized absence. Subsequently, you were discharged on 19 October 1979 without a characterization of service pending a determination by the separation authority. On 21 November 1979, the separation authority directed that you be discharged under Other Than Honorable conditions and you were mailed your final discharge paperwork. In 1994, you filed an application with the Naval Discharge Review Board (NDRB). On 29 March 1995, NDRB issued its decision granting you relief in the form of upgrading your discharge to honorable.

In your petition, you request that your narrative reason for separation be changed to medical and that your separation program designator and reentry code be conformed to be consistent with a medical discharge. In support of your petition, you contend that you had post-traumatic stress disorder (PTSD) and traumatic brain injury prior to enlisting in the Navy, and that your time in the Navy worsened your conditions. You assert that that you attempted many times to seek medical help while you were in the Navy but the diagnosis of PTSD did not exist at the time and your mental health issues were misdiagnosed. You further assert that if you had been diagnosed by current standards for PTSD when you were discharged, you would have received a medical discharge.

The Board carefully reviewed your petition and the 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, including 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, 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. Despite its application of special and liberal consideration, the Board observed no evidence that you had any unfitting condition while on active duty. As an initial matter, in its application of the Clarifying Guidance, the Board acknowledged that you had a condition or experience that may excuse or mitigate your discharge, which, at least for the sake of argument, occurred, or was worsened, during your naval service. Next, the Board analyzed whether your condition actually excused or mitigated your discharge. On this point, the Board observed that the NDRB already upgraded your discharge characterization from Other Than Honorable to Honorable. Next, the Board analyzed whether your condition mitigated your discharge with respect to the award of a service disability retirement. On this point, the Board determined that the record evidence demonstrates that, notwithstanding your condition, there is no evidence that any medical provider determined that you had any conditions that warranted referral to a medical board for a determination of fitness for duty within the disability evaluation system. In addition, there is no indication that any leader in your chain of command prepared any non-medical assessment describing your inability to perform the duties of your rate. Further, the Board noted that, applying a presumption of regularity, you would have been assigned a qualified lawyer in the defense of at least your special court-martial. There is no evidence in your record, and you have provided none, that you were found to incompetent to stand trial or that you raised your mental health condition with respect to the adjudication of any of your misconduct.

In addition, even assuming, arguendo, that you had diagnoses for PTSD or TBI, or both, while you were on active duty, it would not necessarily result in the award of a service disability retirement. Service members routinely remain on active duty with diagnoses of PTSD or TBI without those conditions considered to be unfitting. A diagnosis alone is not the standard for the award of a service disability retirement. Rather, as mentioned, to be eligible for a service disability retirement, a service member must have conditions that have been medically-determined to be unfitting at the time of service. In your case, the proximate reason for your discharge was your repeated instances of misconduct. Thus, even assuming that you were found to have a mental health condition during your service, discharges based on misconduct take precedence over disability evaluation processing. In addition, the Board observed that mitigating your discharge as a matter of clemency as a result of your conditions (as had been accomplished by the NDRB) is distinct from mitigating your narrative reason of discharge to a finding that those conditions were actually unfitting at your time of service.

Finally, to the extent you, post-service, have been treated by the Department of Veteran's Affairs (VA) or awarded a VA disability rating, the Board does not find such award to be persuasive, because 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 sum, in its review and liberal consideration of all of the evidence and its careful application of the Clarifying Guidance, the Board did not observe any error or injustice in your naval records. 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,

12/8/2023