



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

██████████
Docket No. 4679-23
Ref: Signature Date

████████████████████
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Dear ██████████,

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 21 September 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 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 commenced a period of active duty as a Marine Corps officer on 1 May 2005. On 1 December 2017, you were reviewed by a medical board, which prepared a comprehensive narrative summary (NARSUM). According to the NARSUM, you presented a variety of ailments, which included a description of ailments that were considered not duty limiting. You were reviewed by a physical evaluation board (PEB), and, on 2 April 2018, an informal PEB (IPEB) found you to be unfit at 40% due to the condition of fibromyalgia and finding that you should be placed on the Temporary Disability Retired List. In the notes of the IPEB report, dated 8 February 2018, the IPEB explained:

The member has a confirmed diagnosis of Fibromyalgia with supporting surgical/laboratory/imaging studies documentation. Treatment consisting of

rehabilitation, therapy, and/or medication did not resolve the symptoms sufficiently so that the member can perform the duties of their (rank/rate/MOS) at sea, on shore or in a deployed status, the facts of which are supported by the NMA. Of special note, the member cannot perform the following duties: physical training, watch standing, deployment. Therefore, the diagnosis identified above is unfitting as it interferes significantly with the member's ability to carry out the duties of their office, grade, rank or rating. The PEB incorporates the enclosed DVA Rating Decision Letter and its supporting rationale regarding the above unfitting condition(s).

The IPEB further explained that the “Department of the Navy considered the combined effect of all conditions when making its fitness determination and applied this to the final adjudication.” After you received the report of the IPEB, on 9 April 2018, you initially did not accept its findings. Ultimately you accepted the findings of the IPEB and you were placed on the Temporary Disability Retired List effective 30 January 2019. Thereafter, on 1 January 2021, you were transferred to the Permanent Disability Retired List (PDRL) at 40% disabling condition.

In your petition, you have requested that your service disability retirement rating be increased from 40% due to fibromyalgia to the highest rating for both fibromyalgia (40%) and secondary conditions of “depressive disorder due to another known medical condition with sleep disturbance and insomnia & generalized anxiety disorder” which you contend total 50% as found by the Department of Veterans Affairs (VA). In support of your request, you contend that correcting your military record and discharge ratings will address the injustice you experienced and result in a proper characterization of your disability ratings. You provided a written statement in support of your petition, in which you asserted that your condition of fibromyalgia was considered a presumptive condition by the VA, and that, as such, the IPEB should have considered all of your secondary conditions in assessing your unfitting conditions.

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 reaching its decision, contrary to your contention relating to your VA ratings, the Board observed that the VA is not involved in making determinations as to a service member’s unfitness. Rather, 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. By contrast, 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 described that you separately have requested combat related special compensation (CRSC). You did not describe the final disposition of that request, and the Board discerned that you were not specifically seeking review of your entitlement to CRSC through

your petition to this Board. To the extent you did seek a review of your entitlement to CRSC, the Board determined it did not appear that you had exhausted your remedies by way of the CRSC Board and that adjudication of such a request by this Board would be premature.

In reviewing your petition, including all of the material that you provided in support, the Board was unable to discern sufficient support for your contention that the IPEB in your case was in error when it found that you were unfit due to fibromyalgia at the level of a 40% disability. You indicated in your materials that the IPEB failed to consider all of your secondary conditions. However, a review of the IPEB findings reveals that it specifically stated that the “Department of the Navy considered the combined effect of all conditions when making its fitness determination and applied this to the final adjudication.” The Board otherwise considered the entirety of your statement, which details the background of your claims with the VA as well as your application for combat related special compensation, which explained is separately pending with a different organization, and it was unable to discern sufficient support for your request that the IPEB erred in its finding. Similarly, the Board was unable to discern any finding that there was an injustice in your naval record with respect to the findings of the IPEB. 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,

9/28/2023

