



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. 4785-23
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 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 28 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.

A review of your record shows that you enlisted in the Navy and commenced active duty on 10 July 2002 and served without incident until November 2017. On 16 November 2017, you struck a █ police vehicle while driving a government rental vehicle. It was determined that at the time of the crash, you were intoxicated and resisted apprehension. On 27 November 2017, you were admitted to Naval Medical Center █ and diagnosed with Diffuse Traumatic Brain Injury (TBI) with Loss of Consciousness of Unspecified Duration, Sequela, Neurocognitive Disorder due to TBI, with Behavioral Disturbance, and Generalized Anxiety Disorder. On 13 February 2018, you were notified of the initiation of administrative separation processing and your rights in connection therewith. You elected your right to have an administrative board. On 26 April 2018, the administrative board found you committed misconduct, that you should be discharged, and that your characterization of service should be Other Than Honorable (OTH).

In January 2019, a Nurse Corps Officer opined that your diagnosed condition contributed to your misconduct. This opinion and your command's recommendation for your administrative separation was forwarded to Commander, Navy Personnel Command for decision. As part of

your administrative separation package, a medical opinion was provided by a Navy medical provider that your TBI did not contribute to your misconduct. As a result, your discharge was approved by Navy Personnel Command on 30 July 2019 resulting in your discharge from the Navy on 4 December 2019 with an OTH characterization of service. You provided information demonstrating that, after your discharge, the Department of Veterans Affairs (VA) rated you for delusional disorder, unspecified anxiety disorder with depressive features, unspecified neurocognitive disorder, and TBI. The Naval Discharge Review Board denied your application for an upgrade of your characterization of service on 31 July 2020.

In 2020, you filed a petition with this Board (Docket No. 5926-20) seeking a disability retirement as well as to have your discharge characterization upgraded. In your petition, you argued that you deserved a disability retirement based on your diagnosed TBI and the Navy's failure to forward your case to Chief of Navy Personnel (CNP) for separation. You also argued the administrative separation board did not consider your TBI. In order to assist it in making its decision, the Board obtained an advisory opinion (AO) from a qualified medical professional. In denying your requested relief, the Board explained that it substantially concurred with the AO in your case. The Board also explained that:

Regarding your request for a disability retirement or discharge, the Board concluded the preponderance of the evidence does not support relief. Despite evidence that you suffered from a disability condition at the time of your discharge, the Board found no evidence that you were not mentally responsible for the conduct that formed the basis for your discharge. As pointed out in the advisory opinions, your disability conditions were likely developed in the context of your misconduct. Further, the Board relied on a performance evaluation issued the day prior to your misconduct in which you were assigned a 4.14 trait average and documented as the 4th quarter senior sailor of the quarter. Based on these findings, the Board determined you were mentally responsible for your misconduct and, therefore, ineligible for disability processing due to your misconduct based administrative separation that resulted in an Other Than Honorable characterization of service. Disability regulations direct misconduct based administrative separation processing to supersede any disability processing. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your record.

With respect to your argument that your discharge was procedurally defective because the Navy failed to process your administrative separation in accordance with MILPERSMAN 1910-704, the Board determined this error was harmless in light of the medical determination from a medical professional that your TBI did not contribute to your misconduct. Thus, in the Board's opinion, a referral to the Chief of Naval Personnel would not have changed the result of your administrative separation because it was determined that your TBI did not contribute to your misconduct.

In your petition for reconsideration, you argue that your prior petition was "denied mainly due to misinterpretation" of your medical notes, which mistake the date of your TBI diagnosis. Thus, according to your current petition, you submitted medical documentation using the corrected diagnosis dates. You assert that the TBI at issue was caused by a motor vehicle accident with

loss of consciousness in 2010, which was seven years prior to your motor vehicle accident in 2017.

The Board carefully reviewed all of your contentions and the new matter that you provided in support of your request for reconsideration and it disagreed with your rationale for relief. In reaching its decision, the Board observed that, even assuming, as you argue, that the Board evaluated the TBI that you contend occurred in 2010 vice 2017, its decision would not change. The Board found it significant that approximately seven years elapsed between your first diagnosis of TBI in 2010 and the car accident that occurred in 2017. During those years, you had a favorable performance record, and you provided insufficient evidence that you were operating at a deficiency during that period of time. In other words, the Board found insufficient evidence that the misconduct that resulted in your discharge should be mitigated by a medical condition that occurred seven years prior to the misconduct, particularly since you were an effective and fit Sailor during the intervening seven years. 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,

10/16/2023

