



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. 6032-23
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 12 October 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.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered the case based on the evidence of record.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 18 April 2011. In February 2014, you were evaluated by orthopedic medical specialists concerning the condition of your knee, who placed you on a limited duty status. Your command requested that its Regimental Surgeon review the medical records and provide advice. According to a 19 February 2014 letter from your command's Regimental Surgeon to your Commanding Officer, you were provided an opportunity to be reviewed by a Physical Evaluation Board, but you declined the opportunity because you indicated that it would impact your future civilian options, as follows:

After a review of the pertinent medical documents, SNM was evaluated by the Orthopedic Surgeon, Dr. [] at Naval Hospital []. SNM might otherwise be entitled to a medical retirement through the Physical Evaluation Board

process, but states that a medical retirement would limit his opportunity to pursue his desired profession after active duty discharge. SNM has been returned to a full duty status to facilitate the separation. However, his chronic left knee injury renders him unable to fully complete his duties to include ability to stand for prolonged periods of time, run or hike long distances.

On 6 March 2014, you were notified of the initiation of administrative separation processing and your rights in connection therewith based on Convenience of the Government for a Condition, Not a Disability. You acknowledged your rights the same day. On 14 May 2014, you were reviewed by a medical profession to consider whether you were physically qualified for discharge. The medical professional evaluating you determined that you were qualified for discharge, and provided to you a document explaining that “[y]ou have been found physically qualified to separate or retire, which means that no medical condition has been noted that disqualifies you from the performance of your duties or warrants disability evaluation system processing.” The document further explained that, “[s]ome conditions, while not considered disqualifying for separation or retirement, may entitle you to benefits from the Department of Veteran's affairs.”

On 14 July 2014, your commanding officer transmitted your separation package to the Commanding General recommending that you be discharged per your request. According to your commanding officer's transmittal letter, ██████████ has been counselled about his opportunity for a PEB [Physical Evaluation Board] and has repeatedly requested to be ADSEP'ed [administratively separated] for CND [Condition, Not a Disability].”

Next, to ensure that you did not process through the Disability Evaluation System, on 4 August 2014, you took the additional, and extraordinary, step, of personally writing a memorandum to the President of the Physical Evaluation Board, in which you stated:

I consciously waive my rights to a Physical Evaluation Board [PEB]. I understand the effect that this will have upon my discharge from the Marine Corps. At this point in my life, I need to accept the fact that I am no longer physically capable of meeting the physical rigors that come with military service. In my current condition I am not doing the unit or my section justice by being non-deployable. I respectfully request that my case be granted a waiver so that I may start the next chapter of my life and enable my family to start theirs as well.

Thereafter, in light of your specific and repeated request that you not be processed through the Disability Evaluation Process, your command had your administrative separation package reviewed by an attorney for the organization. On 10 August 2014, your separation package was reviewed by the attorney for the Commanding General with authority over your discharge and your separation was found to be legally sufficient. In his notes to the Commanding General, the attorney explained that “[t]he ██████████ Surgeon states that he rates a Performance Evaluation Board for possible retirement but ██████████ waived his board in order to not marginalize his opportunities in the civilian sector.” Thereafter, on 11 August 2014, your Commanding General notified the Commandant of the Marine Corps that your discharge had been approved. On 26 August 2014, you were so discharged.

In your petition, you request that you be processed through a medical evaluation board. In support of your request, you contend that when you were leaving the Marine Corps, you did not receive enough information to explain why you should have gone through the Disability Evaluation System process and you therefore waived your rights to a medical board. You further aver that you and your wife were given the impression that a medical board process would be lengthy and difficult. In support of your request, you provided a written statement from your mother-in-law, as well as one from your wife, and medical records.

The Board carefully reviewed all of your contentions and the material that you submitted in support of your petition, and the Board disagreed with your rationale for relief. In reaching its decision, the Board observed that, contrary to your assertion that you were not provided sufficient information upon which to make a decision concerning the Disability Evaluation Process, your record makes clear that you were provided significant information from a variety of sources upon which to make your decision. In fact, it appears that you were personally counseled by at least the Regimental Surgeon and your commanding officer. In addition, you took the extraordinary step of personally writing to the President of the Physical Evaluation Board to ensure that you were not reviewed by the Physical Evaluation Board. Thus, the Board determined that you knowingly waived the ability to be reviewed by the Physical Evaluation Board, over nine years ago, during your transition from the Marine Corps.

In addition, the Board did not find your assertion that the medical evaluation process would be lengthy and difficult and therefore your judgment was impacted by an undue burden, to be persuasive. At the outset, according to your Official Military Personnel File (OMPF) your service obligation was for four years, and, had you not sought to be discharged, you would otherwise have been required to honor your four-year active duty commitment, followed by four years of reserve commitment. Thus, there does not appear to have been any acute pressure from the perspective of a time line. In fact, you would have been paid the same salary and receive the same benefits whether you were in the Disability Evaluation System on active duty or working with your unit on active duty. In addition, your records reflect that you were placed in a limited duty status on 13 February 2014, thus your day-to-day work activities would have been designed so as not to exacerbate your injuries. Thus, there is no physical reason that required you to hasten your departure from the Marine Corps.

Further, the Board did not find your assertion that you were told that processing through the Disability Evaluation System would have been burdensome as persuasive, inasmuch as it consists of, for the most part, being evaluated by medical professionals from time to time in a hospital or clinic environment. Evaluating a potential knee condition is something that is regularly performed by Navy orthopedic specialists and would likely not have required lengthy testing or evaluation. Significantly, the Board noted your petition provides no information that you were advised to the contrary. Accordingly, in light of all of the foregoing, the Board your petition in its entirety.

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,

10/28/2023

