



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. 7293-23
Ref: Signature Date

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Dear █

This is in reference to your reconsideration request 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 16 November 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, 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). The Board also considered an advisory opinion (AO) a qualified mental health professional. The AO was prepared as part of your last application to the Board. 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.

You previously applied to this Board for a discharge upgrade and were denied on 24 July 2023. The facts of your case remain substantially unchanged.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to your desire to upgrade your discharge and contentions that you suffered from cognitive issues and mental health concerns during military service, which might have mitigated the circumstances of your separation. You assert that you suffered a traumatic brain injury (TBI) in service and that your misconduct was due to your TBI. You further argue that you warrant a medical discharge as your TBI incurred in-service. For purposes of clemency and equity consideration, the Board noted you provided medical documentation but no supporting documentation describing post-service accomplishments or advocacy letters.

As part of the Board's review, it considered the previously prepared AO from your recent application to the Board. The AO stated in pertinent part:

Petitioner has submitted evidence that he was appropriately referred for psychological evaluation and properly evaluated during his enlistment. The absence of a mental health diagnosis in service was based on his observed behaviors and performance during his period of service, the information he chose to disclose, and the evaluation performed by the neuropsychologist. Although he did demonstrate symptoms during military service that could be evidence of TBI, there is no evidence these symptoms were incurred as a result of his military service, contributed to his misconduct, or interfered with his performance of his military duties, as he was deemed fit for full duty. Although the Petitioner has submitted evidence of impairment requiring surgery less than two years following his discharge, there is no medical evidence this impairment contributed to his misconduct. 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 evidence the Petitioner exhibited some symptoms consistent with TBI during his military service. There is insufficient evidence to attribute these symptoms to an incident incurred during military service. There is insufficient evidence of a diagnosis of a mental health condition that may be attributed to military service. There is insufficient evidence to attribute his misconduct to TBI or another mental health condition."

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 SPCM, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact that it involved a drug offense and domestic violence. 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. The Board noted that illegal drug use in any form is still against Department of Defense regulations and not permitted for recreational use while serving in the military. Further, the Board again concurred with the AO that there is insufficient evidence that your misconduct could be attributed to a cognitive issue or a mental health condition. As explained in the AO, although you demonstrated symptoms during military

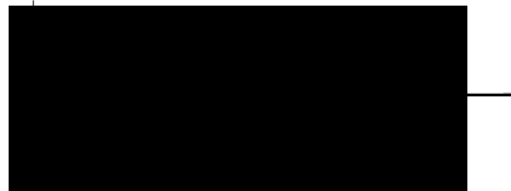
service that could be evidence of TBI, there is no evidence these symptoms were incurred as a result of your military service, contributed to your misconduct, or interfered with the performance of your military duties, as you were deemed fit for full duty. Although you submitted evidence of impairment requiring surgery less than two years following your discharge, there is no medical evidence this impairment contributed to your misconduct. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant a BCD.

Regarding your request for a disability retirement, the Board noted the medical documentation provided showed a diagnosis in-service of Hydrocephalus uncertain etiology with chronic headaches. However, the Board concurred with the AO and found that you did not have a mental health or TBI diagnosis while in service, and you were found to be fit for duty. Moreover, the Board determined you were ineligible for disability processing since service regulations directed misconduct processing to supersede disability processing. Therefore, in its review and liberal consideration of all the evidence, the Board concluded you do not warrant a disability retirement. Even in light of the Kurta, Hagel, and Wilkie Memos 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. 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,

12/10/2023

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