



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. 7789-23
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 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 9 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 and 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo).

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 entered active duty with the Marine Corps on 24 October 2000. You deployed to █ from February 2003 to May 2003. On 13 November 2003, you tested positive for use of marijuana. On 29 January 2004, you were notified of the initiation of administrative separation processing and your rights in connection therewith. On 18 February 2004, you were convicted by a summary court-martial for use of an illegal drug. Your sentence included reduction in rank. On 26 March 2004, you were discharged with an Other Than Honorable characterization of service. In 2022, you filed a petition with this Board

seeking an upgrade to your characterization of service and associated relief. The Board informed you by letter, on 31 January 2023, that it had granted you relief in the form of issuing you a new Certificate of Release or Discharge from Active Duty (DD Form 214) that reflected an Honorable characterization of service, Secretarial Authority narrative reason for separation, JFF1 separation program designator, and MARCORPSEPMAN, Par 6012 separation authority. The Board explained that it reached its decision based in part on an advisory opinion which found that you submitted evidence that you were diagnosed post-service with post-traumatic stress disorder (PTSD) related to your military service in Iraq, and that it was possible that you used marijuana to cope with symptoms of PTSD.

In your current petition, you request to be awarded a service disability retirement and to have your rank reinstated. In support of your petition, you contend that the previous decision of this Board determined that you had a “ratable” condition of PTSD, which justifies that you should have received a disability retirement. You also argue that, with respect to your request for a restoration of your rank, you had a momentary lapse in judgment and that you otherwise had an excellent record.

The Board reviewed your petition and the material that you provided in support, and disagreed with your rationale for relief. In keeping with the letter and spirit of 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 with respect to your request for a service disability retirement would have required that you be processed through the Disability Evaluation System (DES) while you were on active duty. In order to qualify for military disability benefits through the DES, a service member must be unable to perform the duties of his or her office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if his or her 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.

The Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the DES at the time of your separation. In its comprehensive review of the entirety of your request, the Board determined that, even assuming, *arguendo*, you should have properly been diagnosed with mental health condition such as PTSD while you were on active duty, there is no evidence that any medical provider considered such conditions to warrant referral to a medical board for a determination of fitness for duty within the DES. Service members routinely serve in the naval services with PTSD and other mental health diagnoses, and such a diagnosis does not necessarily result in a finding of an unfitting condition. The Board noted that in your brief in support of your petition, you argued that your use of marijuana was an aberration and that you had an excellent record and were a motivated Marine. The Board agreed that there is no indication that you were unfit to serve based on any mental health condition. In fact, your record reflects that your proficiency and conduct marks over your enlistment were 4.5/4.5, which reflected your ability to adequately perform your duties. You received a Navy and Marine Corps Achievement Medal a few months prior to your misconduct.

Similarly, there is no indication in your record, and you provided none, that your unit found you mentally unfit to perform your duties.

Further, the Board was not persuaded by your reliance on findings by the Department of Veterans Affairs (VA) 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. Therefore, the Board concluded insufficient evidence exists to place you on the disability retirement list.

The Board also found insufficient support for your request to reinstate your rank. While this Board previously granted you relief based on mitigating your misconduct, it did not find a basis for restoring your rank. You provided no new and material evidence that would support extending this Board's grant of relief based on mitigation beyond its previous decision. Your record reflects that you engaged in serious misconduct and the fact that this Board determined your misconduct should be mitigated, to an extent, due to your mental health condition, it did not rise to the level of extending that relief. While the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta 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. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the seriousness of your misconduct. 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,

11/24/2023

