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

[redacted]
Docket No. 8454-23
Ref: Signature Date

[redacted]

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 30 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, the 3 September 2014 guidance from the Office of the Secretary of Defense concerning 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 regarding application of equity, injustice, and clemency to discharge upgrade requests (Wilkie Memo) (collectively "the Clarifying Guidance").

A review of your record shows that you enlisted in the Marine Corps and commenced active duty on 1 August 2005. In April 2013, you received a charge of driving under the influence, which required that you request permission to extend you enlistment. You were allowed to extend for one year and, despite your request, you were denied the ability to extend a second year, which resulted in your separation due to high-year tenure. The basis for the denial of your request to reenlist in the Marine Corps was set forth in a letter dated 29 August 2014, as follows:

> SNM has failed to demonstrate the high standards of leadership, professional competence, and personal behavior required to maintain the prestige and quality standards of the Marine Corps. SNM has been authorized payment of half separation pay per MCO 1900.16. This headquarters (MMEA-1) has assigned SNM a reenlistment eligibility code of RE-3C. SNM's command is directed to make the appropriate SRB page 11 entries SNM is required to serve a period of 36 months in the Marine Corps Inactive Ready Reserve (IRR) to receive the separation pay, authorized in this message per the instructions contained in MCO 1900.16. SNM has been found unqualified for service in the Marine Corps Reserve by the Reserve Affairs Branch of this headquarters. The requirement, as outlined in MCO 1900.16 to reenlist for a period of 36 months in the Marine Corps Reserve prior to payment of separation pay, is waived. No Marine Corps Reserve contract is required. Although, SNM has been disapproved/waived for 3 additional years in the IRR . . . .

Thereafter, you were discharged on 1 January 2015. After your discharge, you sought benefits from the Department of Veterans' Affairs (VA). The VA awarded you a combined rating of 100% for several conditions that it determined were connected to your service.

In 2016, you filed a petition with this Board seeking a disability retirement. In order to assist the Board in reaching a decision, the Board obtained an advisory opinion (AO) from a qualified medical professional. According to the AO, in part:

> a. The member was engaged in combat operations in support of Operation [redacted] and awarded the Purple Heart on 27 April 2007. The medical record documents the applicant recovered from this injury and a note in his medical record from 12 Jun 2013 indicated the 'member states he has no current issues and is doing well' and found the member healthy and without duty limitations.
>
> b. There is a paucity of medical treatment after this encounter and none for mental health or traumatic brain injury in the records submitted. It should be noted the medical providers did not feel it necessary to place the applicant in the Disability Evaluation System based on his medical status at the time of his discharge. Additionally, the member's last fitness report dated 01 Jan 2015, documents the member was an exceptional Marine with mostly average marks, recommended for retention and promotion, and one of the many highly qualified. Other reviewed fitness reports also document him as tactically tough and technically smart, and one of the many highly qualified Marine capable of performing his duties. However, his May 2013 report was adverse due to being arrested for Driving Under the Influence (DUI) of alcohol (see reports contained in enclosure (1)). Except for the DUI, this clearly demonstrates the member was not limited in his performance at that time and was working in his specialty.
>
> 5. In summary, the evidence does not support the applicant's request for a disability retirement. This is due to the presence of objective evidence the applicant's duty performance was judged to have been adequate at the time of separation. Had

> referral to the PEB occurred a finding of fit to continue naval service would have been the likely result. Should any further ce surface supporting unfitness or a disability retirement, resubmission would be appropriate."

The Board considered your case on 11 May 2017, at which it denied your requested relief. It reported its denial of your request by letter dated 5 June 2017, in which it explained its rationale as follows, with formatting edits:

> The Board carefully considered your arguments that you deserve to be placed on the disability retirement list based on injuries suffered in [redacted] Unfortunately, the Board disagreed with your rationale for relief. In making its findings, it substantially concurred with the advisory opinion contained in Director, Secretary of the Navy Council of Review Boards letter 5220 CORB: 002 of 10 March 2017.
>
> The Board examined your 12 June 2013 medical examination and concluded, based on the medical findings of that report, you were in good health and cleared for full duty at that time. The Board also noted that you scored a 28l on your Physical Fitness Test and 292 on your Combat Fitness Test as part of your 1 January 2015 Fitness Report; issued the day of your discharge. These two facts convinced the Board there was insufficient evidence to support a finding of unfitness for continued naval service at the time of your discharge despite your VA disability rating.
>
> The Board concluded that the mere presence of a medical condition or specific correspondence of any manifestations thereof to an entry indicating a disability rating contained in the VA Schedule for Rating Disabilities is insufficient to warrant either a finding of unfitness for continued naval service or a specific disability rating by the Physical Evaluation Board in the absence of demonstrated duty performance impairment of sufficient magnitude as to render a Service member unfit for unfit for continued naval service. 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 case, the Board was unable to establish an occupational impairment based on the evidence discussed above. Accordingly, the Board was unable to find an error or injustice warranting a correction to your record and denied your application.

In your current petition, you request reconsideration of your prior petition that had been denied. In support of your request for reconsideration, you provided new and material evidence in the form of reports from medical professionals, as well as medical records documenting your care and treatment. You also provided a declaration, a declaration from your wife, and also from fellow service members, tabbed. You asserted that the record demonstrates that, consistent with the conclusions of the Department of Veterans' Affairs (VA), the Marine Corps should have

given you a disability retirement, and that, by concluding otherwise, the Marine Corps did not properly assess you by way of the Disability Evaluation System process.

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 keeping with the letter and spirit of the Clarifying Guidance, including 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, as it explained to you in its initial decision denying your relief, the Board applied the rule that 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.

In reviewing the new material that you provided on reconsideration, the Board concluded, once again, that the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the Disability Evaluation System at the time of your discharge. Despite its application of special and liberal consideration, the Board observed no evidence that you had any unfitting condition while on active duty.

The Board analyzed whether your condition mitigated your discharge with respect to the award of a service disability retirement. On this point, the Board determined that the record evidence demonstrates that, notwithstanding your condition, there is no evidence that any medical provider determined that you had any conditions that warranted referral to a medical board for a determination of fitness for duty within the disability evaluation system. Even applying special and liberal consideration, and in light of the new and material evidence you provided, the Board observed that the proximate reason for your discharge was your failure to secure reenlistment in the Marine Corps. The Board did not observe any credible evidence that you were not permitted to reenlist due to any medical condition, including any mental health condition. To the contrary, the record evidence demonstrates that you were not authorized to reenlist due to a civilian arrest for driving under the influence. Other than this mark on your record, it appeared to the Board that you had received positive fitness reports. In addition, the Board observed that none of the new and material evidence that you provided demonstrated that anyone in your leadership submitted any non-medical assessments describing a perception that you were unable to perform the duties of your rank and military occupational specialty during your time in service.
In addition, even assuming, *arguendo*, that you had been diagnosed with PTSD or other mental health condition while you were on active duty, it would not necessarily result in the award of a service disability retirement. Service members routinely remain on active duty with diagnoses of PTSD, TBI, depression, and a variety of other conditions without those conditions considered to be unfitting. A diagnosis alone is not the standard for the award of a service disability retirement. Rather, as mentioned, to be eligible for a service disability retirement, a service member must have conditions that have been medically-determined to be unfitting at the time of

service. In short, the service disability program is designed to address Sailors and Marines who cannot perform their jobs due to qualifying disabilities. The fact that the VA diagnosed you post-service, and connected your current condition to your naval service, is not the applicable standard for being granted a service disability retirement. In your case, the proximate reason for your discharge was your inability to reenlist in the Marine Corps based on an alcohol related incident. There is no evidence in your service record, and you provided none, that any person ever noted that you were unable to perform any of your duties due to disability conditions. Accordingly, in its review with special and liberal consideration, given the totality of the circumstances, the Board concurred with its prior decision on your request and it determined that your request for reconsideration 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,

12/19/2023