



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

█
Docket No. 8797-23
Ref: Signature Date



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 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 and applicable statutes, regulations, and policies.

A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 19 January 2016. During your service, you were placed into the Integrated Disability Evaluation System (IDES). In the IDES, the Department of Veterans' Affairs (VA) issues proposed disability ratings and, for its part, the Navy Physical Evaluation Board (PEB) evaluates the member for continued fitness to serve. On 21 February 2020, the VA issued proposed findings, which were revised from proposed findings it made in December 2019, as follows:

On the rating decision dated December 20, 2019, a clear and unmistakable error was found in the evaluation of 40 percent for lumbosacral spine ankylosing spondylitis with sacroiliitis. Based on the current symptoms associated with lumbosacral spine ankylosing spondylitis with sacroiliitis your condition warrants a proposed evaluation of 20 percent.

It is proposed to reduce service connection for lumbosacral spine ankylosing spondylitis with sacroiliitis due to a clear and unmistakable error. Clear and unmistakable errors are errors that are undebatable, so that it can be said that

reasonable minds could only conclude that the previous decision was fatally flawed at the time it was made. A determination that there was clear and unmistakable error must be based on the record and the law that existed at the time of the prior decision. Once a determination is made that there was a clear and unmistakable error in a prior decision that would change the outcome, then that decision must be revised to conform to what the decision should have been.

Service connection for lumbosacral spine ankylosing spondylitis with sacroiliitis is proposed because this condition, which existed prior to military service, permanently worsened as a result of service. The pre-service percentage is normally deducted before assigning any service connected evaluation less than 100 percent. Since the pre-service percentage is zero, no deduction is necessary. (38 CFR 3.303, 38 CFR 3.304, 38 CFR 3.306, 38 CFR 3.322). We have assigned a 20 percent evaluation for your lumbosacral spine ankylosing spondylitis with sacroiliitis based on: Forward flexion of the thoracolumbar spine greater than 30 degrees but not greater than 60 degrees (38 CFR 4.71a)

Thereafter, on 20 April 2020, the Navy Informal PEB found you to be unfit at 20% due to Low Back Pain Due to Ankylosing Spondylitis. On 6 May 2020, you completed an election of options form in which you stated you did not accept the findings of the IPEB. However, on 28 August 2020, you completed a new election of options form in which you accepted the findings of the IPEB. On 2 September 2020, the President, PEB, issued its notification of decision that you were rated at 20% and directed you be discharged with severance pay. On 15 November 2020, you were released from active duty with severance pay.

In your petition, you request that your rating decision issued on December 20, 2019 be reconsidered by the board. In support of your petition, you contend that you were never informed that you had arthritis, nor were you ever treated for it to alleviate the pain that you experienced on a daily basis. You further assert that you were initially issued a rating of 40% for Ankylosing Spondylitis with Sacroiliitis but a miscalculation resulted in decision to reduce your rating to 20% and allot a 20% for upper right extremity, cervical radiculopathy.

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 the VA noted their error with respect to the Ankylosing Spondylitis with Sacroiliitis before the IPEB assigned its final rating. Thus, absent contrary medical evidence that the VA's proposed 20% rating for this condition was made in error, the IPEB was required to adopt the rating. With respect to your assertion concerning your VA rating of 20% for your right upper extremity rating, the Board noted it had no bearing on the IPEB rating because the IPEB did not find you unfit for any upper extremity disability condition. The Board also observed that you accepted the findings of the IPEB at the time. 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,

12/5/2023



Executive Director

Signed by: █