



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. 8912-23
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. The Board initially reviewed your petition on 31 August 2023 and denied your requested relief. After you received the denial letter, you informed the Board that it did not consider your rebuttal to the advisory opinion (AO) that the Board obtained to assist it in reviewing your initial petition. You explained that you submitted a rebuttal on 25 August 2023. Thus, on 26 October 2023, a three-member panel of the Board, consisting of different members from those who considered your petition on 31 August 2023, considered the entirety of your application in an executive session, including your rebuttal to the AO. 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. As noted, the Board also considered the 25 July 2023 advisory opinion (AO) from a qualified medical professional as well as your 25 August 2023 rebuttal to the AO.

The facts of your case remain unchanged from your initial petition. A review of your record shows that you enlisted in the Marine Corps and commenced a period of active duty on 10 December 2007. During your enlistment, your proficiency and conduct mark average were 4.4/4.4 respectively. Your fitness reports from 2013 to 2019 revealed consistently positive narrative comments, assessments as a "Highly Qualified" Marine, and recommendations for retention, promotion, and assignment to billets of increasing responsibility and career challenges. All indications were that you were performing your duties and responsibilities commensurate

with your rank throughout your career through your separation from service. On 5 June 2019, you were released from active duty due to completion of your required service. Post-service, you filed for disability benefits with the U.S. Department of Veterans' Affairs (VA), and you were granted a combined 100% disability rating effective 6 June 2019 consisting of a variety of conditions, including 100% for chronic kidney disease.

You request that your record reflect that the cause of your separation was due to "medical disability retirement," effective as of the date of your separation, for disability incurred while on active duty, and that you be issued orders for referral to a Medical Evaluation Board and Physical Evaluation Board for processing of your medical disability retirement from the Marine Corps. In support of your request, you contend that had the Marine Corps properly evaluated you prior to your discharge you would have been referred to the disability evaluation system for processing. You further assert that you have been as 100% disabled by the VA, which came about less than one year after you were separated from the Marine Corps. You explained that in 2019, you initiated an inter-service transfer but learned that there was not enough time left in your Marine Corps enlistment to complete the transfer. You were advised to simply reenlist in the United States Army, under their Warrant Officer program, as a prior service candidate. After you began processing through the military entrance processing station (MEPS) in ██████████ for the Army, you learned that you had an advanced stage of chronic kidney disease or kidney failure and your Army processing was halted.

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 reaching its decision, the Board observed 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.

To assist it in reviewing your petition, the Board obtained the AO. According to the AO, in part:

The available clinical evidence pertaining to Petitioner's post-discharge evaluation and treatment for his Acute/Chronic Kidney Failure is insufficient to determine the existence or extent of an unfitting renal condition during his military service and its effects on his ability to serve. In the early stages, chronic kidney disease may not present with any, or just a few, signs or symptoms to indicate its presence. The renal disease may not manifest itself at all until it is in its advanced stages. Additionally, signs and symptoms of kidney disease are nonspecific and can be caused by other illnesses. To say that the renal condition existed during Petitioner's military service, though seemingly intuitive due to the proximity of his diagnosis to his discharge from service, is difficult without greater clinical evidence. Information such as his diagnostic work up during his hospitalization and process of determination whether it was a chronic condition dating to his military service vice an Acute Kidney Injury

during his transition out of the Marines and attempted enlistment with the Army would be helpful. Additional clinical evidence, such as records from his hospitalization at █ and his clinician's evaluation and determination of origin and timing of his acute/chronic renal failure would greatly assist in clarifying the clinical timeline of Petitioner's condition.

The AO concluded, "in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner's contention that at the time of his discharge he was experiencing an acute or chronic renal condition that rendered him unfit for duty or warranted medical referral for evaluation for medical discharge."

You responded to the AO by letter dated 25 August 2023. In your response, you argued that your diagnosis at █ Medical Center reflected that, at the time in 2019, you were suffering from a pre-existing chronic kidney condition that had worsened severely. In addition, you reiterated that, post-service, the VA rated you at 100% disabled for your kidney condition, that you reduced or mitigated your symptoms while on active duty despite feeling some symptoms such as weakness, and that your health should have been better monitored while you were on active duty.

In reviewing your record, the Board concluded that the material provided in your rebuttal to the AO did not change its original decision. As noted in its prior decision, the Board determined 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. In particular, the Board observed the lack of any evidence that you had any unfitting condition while on active duty. To the contrary, the record evidence demonstrates that 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. In addition, there is no indication that any leader in your chain of command prepared any non-medical assessment describing your inability to perform the duties of your office and rank. In fact, your fitness reports were uniformly positive and they do not include any indication that you were unable to perform the duties of your rank or military operational specialty while in service.

Finally, the Board observed that its findings here are in harmony with the finding of the medical professional in the AO, and the Board substantially concurred with the findings of the AO in reaching its decision. In its review of the materials that you provided in rebuttal to the AO, the Board observed you did not provide new or material clinical records in support of your contentions. The Board determined that the fact that you were diagnosed post-service with Chronic or Acute Renal Failure that may have manifested itself in a subclinical manner at the end of your military service is not a core contention. Rather, the crux of the AO is that there was no objective evidence that your condition prevented you from successfully performing your duties in a way that indicated you may be unfit for duty, which would have led to further evaluation and possible referral to a medical evaluation board or the physical evaluation board.

With respect to your reliance on post-service findings by the VA, the Board noted that 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. Accordingly, given the totality of the circumstances, the Board again 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,

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