



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

[REDACTED]  
Docket No. 411-17

MAR 12 2018

[REDACTED]  
Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of 10 USC 1552. Your case was reconsidered in accordance with procedures that conform to *Lipsman v. Secretary of the Army*, 335 F. Supp. 2d 48 (D.D.C. 2004). You were previously denied relief by the Board on 16 May 2013.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 22 February 2018. 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. Additionally, the Board considered the advisory opinion contained in Director CORB ltr 1910 CORB: 002 of 29 Nov 2017; a copy of which was previously provided to you for comment.

The Board carefully considered your arguments that you should be placed on the Permanent Disability Retirement List due to your low back condition that was found by the Physical Evaluation Board (PEB) to be unfitting on 23 January 2009. You assert the PEB made an error when they found you fit for return to active duty upon reconsideration. Unfortunately, the Board disagreed with your rationale for relief. In making their findings, the Board substantially concurred with the advisory opinion contained in Director CORB ltr 1910 CORB: 002 of 29 Nov 2017. Specifically, the Board concluded that there was sufficient evidence to support the PEB's decision to find you fit for active duty based on the two Temporary Disability Retirement List periodic evaluations dated 2 December 2008 and 9 December 2008. Both reports show that you were asymptomatic for back pain and exhibited good range of motion. They both opined that your condition would not prevent you from performing duties necessary for active duty. In the Board's opinion, these reports combined with your unrestricted Border Patrol work performance were conclusive evidence that the PEB had sufficient medical evidence to find you fit. The Board also did not feel the PEB's decision was invalidated by its previous decision to find you unfit since it was reasonable for the PEB to conclude you may be limited in heavy lifting activities. However, the Board also felt it was reasonable for the PEB to change their conclusion

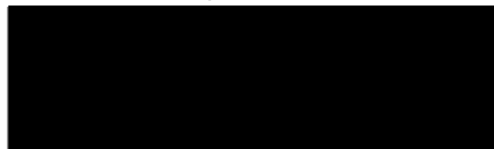
based on a reconsideration of the evidence, which was slanted toward a finding of fit to return to active duty, and your adamant belief that you were physically fit despite their concerns. Ultimately, the Board concluded that there was no error or injustice since you got exactly what you asked for in 2009 and the medical evidence supported the decision. As to your arguments that your failure to meet Army enlistment standards supports a finding that you were unfit to return to active duty in 2009, the Board again disagreed. The Board concluded that the Army's enlistment standards are different from the standards used by the PEB to determine whether a Servicemember is fit to return to active duty. As a result, the Army's determination that you were not physically qualified to enlist does not equate to a finding of unfitness for continued naval service by the PEB. This finding is further evidenced by the Marine Corps' decision to change your reentry code to RE-1A in 2011 which would have qualified you to reenlist in the Marine Corps at that time. Accordingly, the Board determined no error or injustice exists in your case.

Regarding your request for a personal appearance, the Board determined that a personal appearance with or without counsel will not materially add to their understanding of the issue(s) involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

It is regretted that the circumstances of your reconsideration petition are such that favorable action cannot be taken again. You are entitled to have the Board reconsider its decision upon the submission of new and material evidence. New evidence is evidence not previously considered by the Board. In the absence of sufficient new and material evidence for reconsideration, the decision of the Board is final, and your only recourse would be to seek relief, at no cost to the Board, from a court of appropriate jurisdiction.

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,



Executive Director