



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

[REDACTED]
Docket No. 4899-17

NOV 28 2017

[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 remanded to this Board by the U.S. Court of Federal Claims Order No. 15-1583C filed 23 June 2016 and 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 this Board on a number of previous occasions for requests to upgrade your characterization of service. The court order directed this Board to consider whether you are entitled to military disability retirement pay or benefits on the basis of your claim of Post-Traumatic Stress Disorder (PTSD) and Schizoaffective Disorder (SAD). The Board reviewed and denied your petition on 15 December 2016. Your case was again remanded to this Board by the U.S. Court of Federal Claims Order No. 15-1583C filed 1 June 2017 to allow the Board to consider an advisory opinion from a clinical psychologist or psychiatrist, as required by 10 U.S.C. § 1552(g), when reviewing your disability claim.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 2 November 2017. 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 medical record, applicable statutes, regulations and policies. All matters previously submitted by you were forwarded to the Director and the Senior Medical Advisor, Secretary of the Navy Council of Review Board, and considered in formulating their advisory opinions and recommendations. The advisory opinions provided in Director, Secretary of the Navy Council of Review Boards letter 1910 CORB: 001 of 13 October 2017 and Senior Medical Advisor, Secretary of the Navy Council of Review Boards letter 1910 CORB: 002 of 13 October 2017 were sent to you on 18 October 2017 for an opportunity to comment prior to being considered by the Board. Copies of these advisory opinions are again enclosed. Your responses were received on 19 October 2017 and 24 October 2017, and were included in your complete case file for review by the Board in making their determination on your request.

A review of your record shows that you enlisted in the United States Marine Corps and began a period of active duty on 29 May 1981. You served for two years without disciplinary incident, but

on 5 May 1983, you received nonjudicial punishment (NJP) for violating Uniform Code of Military Justice (UCMJ), Article 86 (Unauthorized Absence) and received a reduction in rank (suspended), restriction, extra duties, and forfeitures. On 16 May 1983, the reduction in rank suspension was vacated due to your additional misconduct. On 17 May 1983, you received NJP for violating UCMJ, Article 112(a) (Wrongful Use of a Controlled Substance) and received a reduction in rank, restriction, extra duties, and forfeitures. On 18 November 1983, you were arrested by civilian authorities for driving while intoxicated and later found guilty in civilian court. On 27 April 1984, you received NJP for violating UCMJ, Article 92 (Failure to Obey a Lawful Order) for having alcohol in the barracks and received extra duties and forfeitures. On 17 May 1984, you were notified of the initiation of administrative separation processing, acknowledged your rights, and waived your right to an administrative separation board. Legal review determined that the separation process was sufficient in law and fact and the General Court Martial Convening Authority approved an Other than Honorable (OTH) discharge. On 29 June 1984, you were discharged with an OTH characterization of service for "Misconduct" and assigned a reentry code of RE-4. During this period of service, the only medical issues identified in your medical record are somnambulism and enuresis.

On 29 May 1985, you began a second period of enlistment in the United States Marine Corps by fraudulently concealing your record of prior OTH discharge. On 19 December 1985, less than a year after your fraudulent enlistment, you received NJP for violating UCMJ, Article 86 (Unauthorized Absence) for absenting yourself from your appointed place of duty. In June 1986, you were diagnosed with a personality disorder. On 30 June 1987, you were found guilty at Special Court Martial for violating UCMJ, Article 86 (Unauthorized Absence) (totaling 327 days), and were awarded a Bad Conduct Discharge (BCD), 45 days confinement, and forfeitures.

In accordance with the previously cited U.S. Court of Federal Claims orders, the Board carefully considered your arguments that you deserve disability benefits or a retirement from the military. You assert that you were unfit for continued naval service due to PTSD and SAD. However, the Board did not agree with your rationale for relief. After careful and conscientious consideration of all relevant portions of your medical record and service record, the Board found that the evidence was insufficient to establish the existence of a material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion provided by [REDACTED] Senior Medical Advisor, Secretary of the Navy Council of Review Boards. The Board confirmed that [REDACTED] is a licensed psychiatrist and meets the requirements established in 10 U.S.C. § 1552(g). Further, the Board noted that [REDACTED] is a Distinguished Life Fellow of the American Psychiatric Association (DLFAPA), the highest membership status possible in the American Psychiatric Association.

First, the Board determined that there was insufficient evidence in your medical record to show that you suffered from either PTSD or SAD during your time in service. The Board noted that you were diagnosed with somnambulism and enuresis during your first period of service and with a personality disorder during your second period of service. However, the Board concluded that the mere existence of these conditions does not prove that you suffered from PTSD or SAD during your service. You were diagnosed with PTSD and SAD nine years after your service, during which time any number of circumstances could have caused and aggravated your psychiatric diagnoses.

Second, in order to be eligible for a disability discharge or retirement, a service member must be unfit for continued naval service due to a disability incurred on or aggravated by active duty service. Each case is considered by relating the nature and degree of the disability to the requirements and duties that a member may reasonably be expected to perform in his or her office, grade, rank or rating. Your medical record shows that you suffered from somnambulism and enuresis during your first period of service and personality disorder during your second period of service; however, the Board found no evidence that you were determined unfit for duty any time during your service. The Board was not persuaded that you were unfit for continued naval service based on evidence of your post-service psychiatric diagnoses since those did not occur until well after your discharge from the Marine Corps.

Third, even if your record did contain evidence of a disability incurred or aggravated by service, the Board was unable to draw a nexus between your medical conditions and the misconduct that led to either of your discharges. The Board concluded you were mentally responsible for your misconduct. As pointed out in the advisory opinion, the Board concluded it was too speculative to find that side effects associated with Elavil caused your misconduct. Therefore, even if there were evidence of a qualifying disability, the Board concluded that you were properly discharged for misconduct during both periods of service, since the disability processing would have been superseded by misconduct processing. The Board noted that the advisory opinion addressed the fact that your urine did not contain drug metabolites during subsequent testing; however, the Board concluded that this information did not impact the accuracy of the initial positive urinalysis. Further, the Board stated that even without your marijuana use, the remaining misconduct was sufficient to form the basis of your OTH discharge. The Board concluded that the lack of metabolites contained in your urine during subsequent testing was irrelevant to their overall assessment that the initial drug test was accurate and that you were cognitively responsible for your actions.

Finally, the Board highlighted that you fraudulently reentered the Marine Corps on 29 May 1985 by concealing your prior OTH discharge. The reentry code of RE-4 from the prior enlistment indicates that the individual is "ineligible for reenlistment." The Board concluded that as a matter of equity, you should not be allowed to benefit from your fraudulent actions by gaining disability entitlements from your second enlistment period. Accordingly, the Board determined no error or injustice exists in your case and you are not entitled to a military disability retirement or benefits.

It is regrettable that the circumstances of your case are such that the Board will not process any additional reviews and this matter is considered a final action. However, if you wish to continue to seek relief you will need to present your concerns to a federal court of appropriate jurisdiction.

Sincerely,



Executive Director

