



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

█  
Docket No. 9279-22  
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER █  
█ USMC

Ref: (a) Title 10 U.S.C. § 1552  
(b) Official Military Personnel File  
(c) SECNAVINST 1850.4E  
(d) USD Memo of 25 Aug 17 (Kurta Memo)

Encl: (1) DD Form 149 w/attachments

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting that his naval record be corrected by retroactively placing him on the temporary disability retired list (TDRL) at a 50% rating for a period of five years.

2. The Board, consisting of █, █, and █, reviewed Petitioner's allegations of error and injustice on 13 March 2024, and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. Although Petitioner did not file his application in a timely manner, the statute of limitation was waived in accordance with the Kurta Memo.

b. According to the reference (b), Petitioner served a brief enlistment in the Marine Corps, from 9 August 2004 to 30 September 2004, during which he was administratively separated due to entry level performance and conduct. Petitioner again enlisted in the Marine Corps and commenced another period of active duty on 31 October 2005. While in service, Petitioner deployed twice to Iraq from January 2007 until August 2007 and from April 2008 to October 2008.

c. In 2009, Petitioner presented with symptoms of a mental health condition to a medical provider, and was eventually reviewed by a Medical Evaluation Board. The report of an abbreviated MEB was issued on 13 February 2009, which recommended that Petitioner be placed on limited duty status from 13 February 2009 to 13 August 2009. A second report of an

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abbreviated MEB, issued 23 July 2009, recommended that Petitioner be placed on limited duty from 13 August 2009 to 23 February 2010, which end date fell after Petitioner's end of active obligated service date (EAOS).

d. Petitioner's service medical records reflect that on 1 September 2009, a psychologist wrote with respect to Petitioner:

He would be more comfortable in [REDACTED]. His girlfriend's family is in [REDACTED] including her parents who are in this area. He knows he does not want to stay in eastern [REDACTED]. He is anxious about getting out, but he does not want to wait for TBI work-up and be placed on Med Hold. He wants to get out on his EAS in Oct and take Terminal Leave beginning 07 Oct.

e. On 9 September 2009, Petitioner underwent a separation physical, which noted that Petitioner was on limited duty and had a diagnosis of PTSD. Despite these limitations, the medical provider failed to note on the form whether Petitioner was fit for separation. Next, on 10 September 2009, Petitioner was seen by a psychologist, who wrote:

He said he is excited to start a new life. He continues to have depression and anxiety.

Released w/ Work/Duty Limitations: Profile: DEPRESSION WITH ANXIETY 300.4 from 17 Aug 2009 to 17 Feb 2010; Comment: No deployment, deployment training, weapons handling/exposure

f. Petitioner's medical record reflects that on 17 September 2009, a psychiatrist wrote:

Patient requested RTFD [return to full duty] since his EAS is upcoming. Form completed and available for him to take to PEB office.

g. Thereafter, despite his limited duty status, Petitioner was returned to full duty, apparently at his request, without a medical finding as to his status as to fitness for separation. On 30 October 2009, Petitioner was discharged with an Honorable service and assigned an RE-3P reentry code, which meant that he was not able to reenlist due to a physical disability or condition. Petitioner's OMPF does not provide an explanation for the assignment of an RE-3P reentry code at the end of Petitioner's EAOS without any findings of a physical disability.

h. Petitioner provided documentation that on 15 January 2010, the Department of Veterans' Affairs (VA) awarded him a 30% disability rating for PTSD.

i. In his enclosure (1) petition, Petitioner requested that his naval record be corrected by retroactively placing him on the TDRL at a 50% rating for a period of five years. In support of his petition, he contended that it was error for him to not be placed into the Disability Evaluation System and that the evidence in his record established that he was unable to perform the duties of his military operational specialty while in service due to PTSD, and he was separated despite these limitations.

## CONCLUSION

Upon review and consideration of all the evidence of record, the Board concluded that Petitioner's request warrants favorable action in the form of relief.

In its review of the entirety of Petitioner's materials as described above, as well as his OMPF, the Board concluded that it was error for Petitioner not to be placed into the DES during service. 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.

In reviewing the Petitioner's record, the Board concluded the preponderance of the evidence demonstrated that Petitioner had unfitting conditions while he was on active duty. Specifically, he was in a limited duty status, which was medically recommended for a date that was past his EAOS. The Board observed that his medical providers notes implied that Petitioner was seeking to return to full duty so that he could be released from active duty, but it was improper to omit an evaluation of Petitioner's disability based on his preference. Allowing Petitioner to waive DES processing based on his desire to leave the service is governed by reference (c) at paragraph 3209(d). It states, where a service member seeks to avoid extension past the date his EAOS, the member must sign a waiver declining retention on active duty with a written DES waiver that requires final approval by the President of the Physical Evaluation Board. In addition, reference (c) at paragraph 3106 explains that "[t]here exists no authority to omit or postpone disability evaluation of physical impairment, which renders questionable the ability of service members to perform reasonably the duties of office, grade, rank, or rating [...] Individual medical [...] officers are to identify promptly for referral to the DES those members presenting for medical care whose Fitness for active duty is questionable."

In Petitioner's case, the Board observed there was no doubt that his fitness for active duty was questionable. He was, in fact, on limited duty, for a date that went past the date of his EAOS. The abbreviated MEB that placed Petitioner on limited duty expressly described the circumstances of Petitioner's injuries as "[s]evere posttraumatic and postconcussive symptoms that render him unfit for duty." Further, the Board found it insightful that Petitioner's separation physical did not have a fit/unfit finding, leaving that section blank. The purpose of such physicals is to determine whether service members have potentially unfitting conditions. Finally, the Board found no basis for Petitioner to be assigned an RE-3P (physical disability) reentry code under the circumstances where Petitioner was ostensibly released from active duty due to his EAOS, which would usually be assigned an RE-1, or other applicable non-disability related reentry code. This raised the issue to the Board that, at the time of his EAOS, Petitioner was considered to have had a physical disability.

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Thus, the Board concluded that, had there been no error during his service, Petitioner would have been placed into the DES and found to be unfit at a 50% rating and placed into the TDRL. After five years on the TDRL, Petitioner would have been transferred to the permanent disability retired list (PDRL). Interval VA documentation reflects Petitioner's PTSD disability improved to the level of 30% rating after his separation. Thus, after five years on the TDRL, Petitioner would be retired to the PDRL at the level of 30% rating.

The Board also determined that the circumstances of the onset of Petitioner's PTSD was combat related and from a combat zone. The Board observed that Petitioner's service and medical records reflect he engaged in close quarters combat, witnessed the death and grievous injuries of U.S. Marines, and that he was issued the Combat Action Ribbon for service in Iraq.

### RECOMMENDATION

In view of the above, the Board recommends the following corrective action:

Petitioner's naval record be corrected to reflect that upon his discharge on 30 October 2009, he was placed on the TDRL as follows:

Unfit for the following conditions with placement on the Temporary Disability Retired List (TDRL):

1. Post Traumatic Stress Disorder, VA Code 9411, rated at 50%, combat related (CR), combat zone (CZ).

The Petitioner shall be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214) with changes as follows: narrative reason for separation: Disability, Temporary; separation program designator: as appropriate.

Petitioner's record shall reflect that, after having served five years from the date he was placed on the TDRL, he was transferred to the PDRL at the level of 30% rating for the same disability condition.

The DFAS shall audit the Petitioner's pay account for payment of back pay to the date of Petitioner's placement on the TDRL, and account for Petitioner's transfer to the PDRL five years after his placement on the TDRL through the present, and any lawful monies owed.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on

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behalf of the Secretary of the Navy.

3/28/2024

