



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

█
Docket No. 2634-23
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 you did not file your application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 25 April 2024. 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, to include the Kurta Memo. The Board also considered an advisory opinion (AO) from a qualified medical professional along with your response to the AO.

A review of your record shows that you enlisted in the Marine Corps and commenced active duty on 19 April 2004. You deployed to █ in support of █ (█) from 1 October 2004 until 30 June 2005. On 1 March 2006, you underwent a second deployment to █. On 18 January 2007, you sustained fragmentation wounds from an improvised explosive device (IED) blast while conducting combat operations. You were medically evacuated to █ Medical Center, █ and then to █ Army Medical Center, █ to receive treatment. You were awarded a Purple Heart as a result of this injury.

On 18 March 2008, you underwent a Medical Board, which referred you to the Physical Evaluation Board (PEB), due to right leg pain and decreased ankle range of motion. Despite multiple courses of physical therapy you were still unable to run at full capacity, nor walk or stand for prolonged periods of time. On 11 February 2009, the PEB found you unfit for continued service and recommended placement on the Temporary Disability Retirement List

(TDRL) at 30% for Right Peroneal and Tibial Incomplete Nerve Injury, combat related, combat zone. Four additional right leg disability conditions were deemed to be related category 2 conditions. Consequently, you were released from active duty on 20 March 2009 and transferred to the TDRL.

On 23 September 2009, the Department of Veterans Affairs (VA) rated you 10% for right common peroneal nerve injury, and 10% for ankle strain. And 20% for scars, right lower extremity. The record shows you were sent orders, on 13 September 2010, to return to a government medical facility in order to complete the Periodic Physical Examination (PPE). Due to not complying with the PPE orders and not undergoing an evaluation, you were administratively removed from the TDRL after exceeding the TDRL statutory five-year time limit on 29 May 2014.

For this petition, you request to be reinstated to the TDRL or placed on the Permanent Disability Retirement List (PDRL). You contend that, when you left active duty, you suffered from intense post-traumatic stress disorder (PTSD) symptoms causing extreme social anxiety and depression, which in turn caused you to miss doctor appointments and led to your removal from TDRL. In addition, you contend that your leg and foot injuries should have warranted your placement on the PDRL, as these injuries were significant and permanent. You included a 2024 rating decision from the VA, showing a rating of 30% for right common peroneal nerve and tibial nerve injury, a 10% for right knee strain, a 10% rating for ankle strain, and 30% for painful scars, right lower extremity.

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 keeping with the letter and spirit of the Kurta Memo, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced, and their possible adverse impact on your service, to include whether they qualified you for the military disability benefits you seek.

Based on your assertion on your DD Form 149 that you incurred PTSD during your military service, a qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

Petitioner provided evidence of a PTSD diagnosis and VA award of service-connection at 50% disability post-discharge to the TDRL, this condition was neither diagnosed at the time of his discharge to the TDRL, nor were the symptoms documented in his in-service medical record indicative of a mental health condition that rose to the level of being unfitting for service at the time of placement on the TDRL. This would have precluded the PTSD diagnosis being considered as a new unfitting condition had Petitioner undergone his scheduled TDRL Periodic Physical Examination.

The AO concluded, “in my medical opinion, the preponderance of objective clinical evidence provides sufficient support for Petitioner’s contention that at the time of his orders to report for his TDRL Periodic Physical Examination, his ability to attend or change his appointment, or

otherwise meet the requirements of his orders, was negatively affected by his post-discharge diagnosed condition of PTSD. However, the preponderance of objective clinical evidence does not provide sufficient evidence to support Petitioner's request for placement on the PDRL."

You provided a rebuttal to the AO, stating the AO failed to consider related secondary conditions, which were a result of the IED blast and nerve injury. You claim the low back injury, ankle strain, and right knee strain should be considered unfitting conditions as they stem from the leg injury. In addition, you reiterate that you suffered from PTSD when you left service which was improperly not referred to the medical evaluation board.

After reviewing your rebuttal evidence, the AO remained unchanged.

The Board observed that in order to qualify for military disability retirement, a medical provider refers a service member to the PEB if they believe the member has a condition that prevents them from continued service. In this process, the service member has to be found unfit; meaning there must be evidence the service member is unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. The Board noted you were referred only for your right leg nerve injury and concurred with the AO that there was insufficient evidence of a mental health condition in-service. The Board relied on a 5 November 2007 Neuropsychological Report, which stated you were "cognitively and psychiatrically fit for full duty" and that you did "not currently require nor is he seeking mental health services," along with the absence of a medical board referral for any mental health conditions.

In addition, the Board noted when you received your Informal PEB findings on 11 February 2009 you were notified of your right to a formal board hearing, where you could present evidence to request additional conditions to be found unfit. The Board determined you voluntarily waived the right to submit information showing that you were unfit for military service due to mental health symptoms. With respect to the secondary conditions you argue should also be unfitting conditions, the Board noted a diagnosis and VA service connection does not equate to unfitness from service. Again, absent evidence that a medical board determination that these related conditions prevented you from staying in your billet and completing your Marine duties, the Board determined insufficient evidence exists the PEB findings were erroneous.

Finally, the Board noted the VA increased the rating for your nerve injuries 14 years post-discharge; the Board found your conditions more likely than not worsened over time and that the increased rating does not provide sufficient proof that your nerve injuries would have warranted the same rating at your PPE exam, 13 years prior. The Board was not persuaded by your post-discharge VA ratings since 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. Ultimately, the Board concurred with the AO's conclusion that the preponderance of objective clinical evidence does not provide sufficient evidence to support your request for placement on the disability retirement list. In sum, in its review and liberal consideration of all the evidence, the Board did not observe any error or injustice in your naval records. 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,

5/20/2024

