



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. 6740-23
Ref: Signature Date

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

Subj: REVIEW OF NAVAL RECORD OF █
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Ref: (a) Title 10 U.S.C. § 1552
(b) SECNAVINST 5420.193
(c) MARCORPROMMAN VOL. 2, CH. 4
(d) MARADMIN 521/20

Encl: (1) DD Form 149 w/attachments
(2) Physician Advisor, Board for Correction of Naval Records ltr NR2023000740 of 14 June 2024
(3) █ ltr of 3 July 2024

1. Pursuant to the provisions of the reference, Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), requesting (1) that his service disability rating be changed from 20% to 30% by correcting records to account for his left knee instability as unfitting in addition to his bilateral limitations of motion; and (2) that his paygrade be changed to reflect that during his last year of service he was selected for promotion to staff sergeant.

2. The Board, consisting of █, reviewed Petitioner's allegations of error and injustice on 18 July 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 Petitioner's application, together with all material submitted in support thereof, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies. Additionally, the Board also considered the enclosure (2), an advisory opinion (AO) furnished by qualified medical professional, as well as enclosure (3), Petitioner's response to the AO.

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.

b. A review of Petitioner's official military personnel file and materials provided by Petitioner, with his enclosure (1) petition, reveals that he enlisted in the Marine Corps and commenced active duty on 28 January 2013. During his service, he was referred into the

Integrated Disability Evaluation System (IDES). As part of the evaluation of his disability conditions in the IDES, and in its role within the IDES, the Department of Veterans' Affairs (VA) evaluated Petitioner and provided proposed disability ratings, and, as appropriate, it deferred findings of unfitness to the service Physical Evaluation Board PEB. On 6 February 2020, the VA issued its DES Proposed Ratings. On 2 September 2020, Petitioner was reviewed by the Formal Physical Evaluation Board (FPEB), which found him to be unfit for left and right knee limitation of motion at 10% each totaling 20%. The FPEB specifically addressed the left knee instability condition raised by Petitioner and found it to be a Category III not-unfitting condition. The FPEB decision was supported by a written Formal Rationale, which specifically addressed the left knee instability as follows:

There is no objective medical evidence to support the described lateral instability; indeed the medical evidence documents repeatedly that there is no evidence of lateral instability. As to the anterior instability proposed by the VA, this is described as 0 to 5 millimeters and "minimal" by the VA. Further, anterior stability is documented on multiple occasions elsewhere in the medical record. Finally, there is insufficient evidence that the frequency, duration, and/or intensity of symptoms of LEFT KNEE INSTABILITY significantly interfere with the performance of duties

c. On 13 October 2020, Petitioner filed a Petition for Review (PFR) of the findings of the FPEB. In his PFR, Petitioner requested to be found unfit due to Left Knee Instability in addition to his other unfitting conditions. Petitioner's PFR was denied on 14 October 2020, as follows:

I find the decision of the PPEB was valid and supported by a preponderance of the evidence. Your records contain insufficient evidence that LEFT KNEE INSTABILITY is an unfitting condition. It was not listed as a potentially unfitting condition in a 24 January 2020 Narrative Summary and was not referred by a Medical Evaluation Board Report. Additionally, it was not included on your 20 November 2019 claim to the VA. Further, and as noted in the formal board's rationale, although you testified you experience lateral instability in you LEFT KNEE, your VA Compensation & Pension Examination noted the absence of any lateral instability in that joint. Although that examination did note the presence of a minimal amount of anterior instability, there is no evidence that condition has limited your ability to engage in appropriate military duties.

d. On 23 October 2020, the FPEB issued its final findings, which reiterated its prior decision, and which findings Petitioner accepted by signing an Election of Options form. On 1 December 2020, President, PEB, issued a Notification of Decision to Navy Personnel Command explaining that Petitioner was found unfit at 20% and that he should be discharged. Petitioner was discharged, on 15 February 2021, due to disability, with severance pay.

e. In his petition, Petitioner requests: (1) that his disability rating be changed from 20% to 30% to account for his left knee instability as unfitting, and (2) that his rank be changed to reflect

that during his last year of service he was selected for promotion to rank of staff sergeant. In support of his petition, Petitioner asserted that while he was in the IDES, the VA rated his knee condition at condition at 30% due to: (1) left knee instability (10%), (2) status post meniscus repair and transplant, left knee (10%), and (3) status post arthroscopy right knee meniscus (10%). Further, according to Petitioner, the PEB improperly reduced the VA's finding to 20%. The PEB found that Petitioner's knee pain was unfitting, but there was insufficient evidence to support the VA's findings of left knee instability. According to Petitioner, the PEB improperly failed to follow the VA's naming convention and diagnostic codes when rating Petitioner's unfitting conditions, which resulted in the PEB incorrectly classifying the left knee instability as a category III injury; indicating that the instability was not separately unfitting and did not contribute to the unfitting conditions. Further, according to Petitioner, the PEB did not properly consider the combined effect that a buckling, unstable, painful knee would have on his ability to walk, run, and perform the other essential requirements of his job. Petitioner also provided a MARADMIN reflecting that he was selected for promotion to staff sergeant in fiscal year 2020.

f. In order to assist the Board in reaching a decision, it obtained the enclosure (2) AO, which was considered unfavorable to Petitioner, in part:

Review of the available objective clinical and non-clinical evidence documented the PEB did review the VA Compensation and Pension Exams and proposed disability ratings as part of their deliberations. The PEB concurred with the VA service-connected conditions of bilateral knee limitations of motion and post-surgical procedures and determined they were unfitting for continued service and assigned a disability evaluation commensurate with the VA ratings. The PEB separately considered the scar and left knee instability conditions. The PEB determined the bilateral knee scars from the surgeries were well healed and did not impair Petitioner's ability to perform his duties and were therefore not unfitting.

In considering the left knee instability condition, the PEB did consider both the limitation to range of motion and instability components as reflected in the VA proposed DES ratings and rendered separate findings for the limitation to motion (unfitting at 10% disability evaluation, reflecting the VA ratings) and instability (not separately unfitting or contributing to the unfitting condition). The finding of fitness for duty/continued service resides with the service regardless of VA findings, which are occurrence based and separate of consideration of fitness for duty. In this case, the PEB found the preponderance of evidence did not support the contention of left knee instability as preventing (or contributing to) Petitioner from carrying out his duties and was not therefore a Category I unfitting condition.

Review of documentation from the IPEB, FPEB, and Director, CORB reviews and determinations appear appropriately based on available objective evidence of Petitioner's condition at the time of his DES processing and medical discharge. Additionally, at each review, the findings of the IPEB, FPEB, and PFR Denial indicated due consideration was given to the combined effect of all conditions in making fitness determinations and that this consideration was applied to the final adjudication at each level of the DES process.

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g. The AO concluded, “in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner’s contention his Category III condition of Left Knee Instability should have been found unfitting and therefore classified as a Category I condition and assigned a disability evaluation.”

h. The Board provided a copy of the AO to Petitioner for his response, which he provided in his enclosure (3). In his response to the AO, Petitioner argued that the VA findings of 10% for his left knee instability was persuasive and should have been adopted by the PEB. As a second argument, he asserted that the AO was arbitrary and capricious because it did not conduct an independent medical analysis, “the Opinion simply recites the procedural history of [Petitioner’s] evaluation and states “it has been determined the available evidence provides insufficient support for the request” without providing any substantive, independent medical assessment regarding whether his left knee instability contributed to his unfitness.” After a review of Petitioner’s response, the AO remained unchanged.

CONCLUSION

In its review of the entirety of Petitioner’s materials as described above, the Board concluded that partial relief was warranted. Specifically, he should be promoted to staff sergeant with a DOR of 1 February 2021 and effective 15 February 2021. The Board observed that reference (c) provides:

4400. SNCOS. Those Marines in the grades of Sgt and above who have been selected for promotion, and who are to be separated or retired from active duty because of physical disability prior to their seniority number being reached, may be promoted with a DOR [date of rank] of the 1st day of the month of discharge/retirement and effective the last day of active duty, provided they are otherwise qualified.

1. Upon completion of the final physical disability evaluation proceedings by the Secretary of the Navy, the command will forward, via naval message, the exact date of separation/retirement to the CMC (MMPR-2) requesting appointment in the selected grade prior to the Marine’s scheduled separation/retirement date.

In Petitioner’s case, per reference (d), it appeared to the Board that he was selection for promotion by the Fiscal Year 2020 Staff Sergeant Board, and that he was separated from active duty because of physical disability prior to his seniority number being reached. Therefore, he was entitled to be promoted to staff sergeant.

With respect to Petitioner’s request to increase his disability rating percentage as found by the FPEB, the Board determined insufficient evidence of error or injustice exists to grant relief. At the outset, the Board reasoned Petitioner’s disability conditions were appropriately reviewed by the PEB, as reflected in the Formal Rationale, which expressly set forth its reasoning for not finding Petitioner’s Left Knee Instability condition as unfitting. Petitioner filed a PFR of the FPEB finding, and the PFR was denied based on a reasonable rationale for the denial. Further, the Board substantially concurred with the findings of the AO, which, after review of the PEB

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record, explained that the determination in Petitioner's case appeared "appropriately based on available objective evidence of Petitioner's condition at the time of his DES processing and medical discharge." Further, the AO explained that, at each review, the "findings of the IPEB, FPEB, and PFR Denial indicated due consideration was given to the combined effect of all conditions in making fitness determinations and that this consideration was applied to the final adjudication at each level of the DES process."

The Board carefully considered, but was not persuaded by, Petitioner's response to the AO. Specifically, the Board agreed with Petitioner's partial contention that VA findings are not "dispositive as to the question of fitness" The Board observed that the PEB, acting for the service, is the entity that makes decisions as to a member's fitness within the IDES and it is not bound by VA findings of service connection. Petitioner's response also faults the AO for not conducting an independent analysis of Petitioner's medical conditions and instead merely reviewed all available documentation from Petitioner's processing in the IDES. On the point, the Board observed that this assertion manifests a misunderstanding of the role of the Board, which is not an investigative body. See reference (b). Rather, it is an applicant's responsibility to procure evidence not contained within the official records of the Department of the Navy. In sum, the Board found that the AO supplied a comprehensive review and analysis of Petitioner's IDES processing and it provided a careful analysis and rational conclusion. Thus, in light of the foregoing, the Board recommended denying Petitioner's request to increase his disability rating assigned by the PEB.

RECOMMENDATION

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

Providing he was otherwise qualified for promotion, Petitioner shall be promoted to the Grade and Pay Grade of Staff Sergeant/E-6, with a DOR of 1 February 2021 and an effective date of 15 February 2021.

Petitioner shall be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214) reflecting the change to his paygrade.

That a copy of these proceedings be placed in Petitioner's naval record.

The Defense Finance and Accounting Service will complete an audit of Petitioner's pay records to determine Petitioner's pay entitlements.

That no further changes be made to Petitioner's naval record.

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

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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 behalf of the Secretary of the Navy.

8/5/2024

