



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. 6960-23
Ref: Signature Date

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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 11 April 2024. The names and votes of the panel members 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 3 September 2014 guidance from the Office of the Secretary of Defense concerning discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD) (Hagel Memo), the 24 February 2016 guidance from the Principal Deputy Under Secretary of Defense concerning discharge upgrade requests by PTSD or TBI (Carson Memo), and the 25 July 2018 guidance from the Under Secretary of Defense regarding application of equity, injustice, and clemency to discharge upgrade requests (Wilkie Memo) (collectively "the Clarifying Guidance"). The Board also reviewed the 24 January 2024 advisory opinion (AO) from a Licensed Clinical Psychologist.

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Therefore, the Board determined that a personal appearance was not necessary and considered your case based on the evidence of record.

A review of your record shows that you enlisted in the Marine Corps and commenced active duty on 29 July 1996. You served on active duty through 14 February 2004 and then affiliated with the Marine Corps Reserve. Thereafter, you served several periods of active duty to include from

23 October 2006 to 29 February 2008, 5 October 2008 to 30 September 2010, 17 November 2010 to 17 May 2011, and 15 August 2011 to 29 June 2014.

During your final period of active duty, on 28 August 2013, you were reviewed by a medical evaluation board (MEB), which found that you had a knee injury that you incurred while playing basketball in June 2012. The MEB did not mention that you had any potentially unfitting mental health conditions. The MEB referred you to the Physical Evaluation Board (PEB). On 6 February 2014, an Informal PEB (IPEB) found you to be unfit for knee-related conditions totaling a 30% rating. The IPEB found your conditions were not combat related. On 6 March 2014, the PEB informed THE Commandant of the Marine Corps that you were found unfit at 30% and that you should be placed on Permanent Disability Retired List (PDRL). On 29 June 2014, you were transferred to the PDRL.

In your petition, you request a correction to the combat related coding that applies to your rating by the Department of Veterans Affairs (VA). In support of your request, you contend that you served in combat two separate times, initially in 2004. You further assert that there is evidence within your psychological appointments that you were under-diagnosed in the details regarding your PTSD in relation to combat, and that you experienced numerous mortar/rocket attacks while you were on active duty.

The Board carefully reviewed your petition and the material you provided in support of your petition, and disagreed with your rationale for relief. In keeping with the letter and spirit of the Clarifying Guidance, including 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. In reaching its decision, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System (DES) 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.

As an initial matter, in reviewing your record, the Board observed that in your request, you seek a change to your VA rating. The Board noted that the VA is a separate organization and makes its own decisions relating to its ratings. This Board has no authority with respect to changing VA ratings or the method by which such ratings are coded. To the extent your petition constituted a request to this Board for a finding that the PEB erred in its failure to find that you had an unfitting and combat-related mental health condition(s) while you were on active duty, the Board determined that you provided insufficient evidence to warrant such a finding.

Despite its application of special and liberal consideration, the Board observed that the record evidence demonstrates that, notwithstanding your current condition, there is no evidence that any medical provider determined that you had a mental health condition that was potentially unfitting and that it should be reviewed by the PEB. To the contrary, during your service you were

actually reviewed by the PEB, which found only that you had an unfitting condition related to your knee injury caused by playing basketball.

In fact, the Board observed that there is no indication that any leader in your chain of command prepared any non-medical assessment describing your inability to perform your duties as a result of a mental health condition. On this point, even assuming, *arguendo*, that you had a mental health diagnoses while you were on active duty, it would not necessarily result in the award of a service disability retirement. Service members routinely remain on active duty with mental health diagnoses. A diagnosis alone is not the standard for the award of a service disability retirement. Rather, as mentioned, to be eligible for a service disability retirement, a service member must have conditions that have been medically-determined to be unfitting at the time of service. This finding is consistent with the finding of the 24 January 2024 AO, which found that, while you were still on active duty and you were being reviewed within the DES, in September 2013, you were diagnosed with PTSD, Major Depressive Disorder, and Generalized Anxiety Disorder, and that, in October and November 2013, you received mental health treatment for Anxiety Disorder Not Otherwise Specified. Despite these diagnoses while you were being reviewed within the DES, no provider recommended that you be reviewed by the PEB to determine whether these conditions were potentially unfitting. Rather, the only condition that medical authorities determined may be potentially unfitting was your knee condition. In other words, there is no indication that your mental health conditions were overlooked. Rather, they were specifically diagnosed while you were in the midst of the DES and they were not referred for review by the PEB. In sum, in its review and liberal consideration of all of the evidence and its careful application of the Clarifying Guidance, the Board did not observe any error or injustice in your naval records. Given the fact that you were placed on the PDRL only for your knee injury, and your knee injury is not combat-related, 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,

4/23/2024

