



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. 7034-23
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 20 June 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), and the 24 February 2016 guidance from the Principal Deputy Under Secretary of Defense concerning discharge upgrade requests by PTSD or TBI (Carson Memo), (collectively “the Clarifying Guidance”).

A review of your record shows that you enlisted in the Marine Corps and commenced active duty on 22 May 2001. You completed initial active duty training in the Marine Corps Reserve and you were released from active duty. Thereafter, you served other periods of active and reserve service. On 26 July 2005, you were commissioned in the Marine Corps, and you ultimately served in the capacity as a judge advocate. Your initial enlistment documents reveal that, on 7 August 2000, the █ Military Entrance Processing Station (MEPS) found that you were not medically qualified for entrance in the armed forces due to a history of severe acne. On 10 December 2001, a letter from the Department of the Navy Bureau of Medicine and Surgery (BUMED) informed the Commander of Marine Corps Recruiting Command that, while you did not meet established physical standards due to acne, a waiver of the standards was recommended. On 19 November 2004, BUMED issued another letter recommending a waiver

of medical qualification standards. You continued service in the Marine Corps and your record reflects that you were successful and considered a top performing judge advocate. For example, your penultimate fitness report, covering the period from 1 June 2017 to 31 May 2018 ranked you as “One of the Few Exceptionally Qualified Marines,” described you as a “Superb Marine officer, talented attorney, and litigator,” and noted that, among other things, you were lead counsel for the Department of Defense in a complicated class-action case. According to the fitness report, there were no deficiencies reported.

In the meantime, on 2 May 2018, you voluntarily requested to resign from the Marine Corps. In your request for resignation, you stated that you did not desire a reserve commission. Your resignation was forwarded through your chain of command, and an interim endorsement reflected that your request was favorably endorsed. On 21 June 2018, you underwent a separation medical examination and medically cleared for separation. The evaluating provider recommended that you follow up with a provider to address left sided chest pressure and a skin condition that reoccurred; however, you were released without any limitations. The Board observed that its records reflect that it addressed a prior matter that you had brought, which came before it on a court remand in 2022. In a letter dated 19 October 2022, the Board recommended that no corrective be taken on your naval record. The Board’s 19 October 2022 letter discussed your medical history in detail and this Board incorporates by reference the recitation of your medical history set forth in that letter.¹ Ultimately, on 31 August 2018, pursuant to your voluntary request, you were discharged from the Marine Corps with an honorable characterization of service and a separation program designator reflecting FBK1 (expiration of term of service). You receive a final fitness report covering the period 1 June 2018 through 31 August 2018 and it ranked you, again, as “One of the Few Exceptionally Qualified Marines,” and noted that you were a “Superb Marine officer, talented attorney, and litigator” who was “Assigned complex, high-vis cases due to demonstrated expertise.” The fitness report explained that you “Maintained high level of physical fitness; once again earned high first class PFT.” Your reviewing officer explained that you were “An absolute must for promotion and selection for billets of increased responsibility.”

In your petition, you request that the Board review your records to determine whether you should be entitled to a disability retirement. In support of your request, you contend that the U.S. Department of Veterans’ Affairs (VA) has determined that your mental health conditions are service connected and that your post-traumatic stress disorder (PTSD), depression, and anxiety were caused by your deployment to [REDACTED] in 2013 as well as due to whistleblower retaliation that resulted from having filed an Inspector General complaint against your supervisor during your deployment. You assert that the retaliation caused you to resign your commission, suffer from the impacts of the condition, and results in your continued use of medications. You also assert that, while your skin condition has not been considered by the VA to be service connected, your claim is on appeal, and that this condition caused significant pain throughout your service.

¹ In addition, as discussed more fully below, in reviewing your court remand matter in 2022, the Board obtained an advisory opinion (AO) dated 29 July 2022. The Board found this AO to be informative with respect to its analysis of your medical condition during your service.

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 Clarifying Guidance, 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 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 your record, the Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the disability evaluation system at the time of your discharge. Despite its application of special and liberal consideration, the Board observed no evidence that you had any unfitting condition while on active duty. As an initial matter, in its application of the Clarifying Guidance, the Board acknowledged that you had a condition or experience that may excuse or mitigate your discharge, which, at least for the sake of argument, occurred, or was worsened, during your naval service. Next, the Board analyzed whether your condition actually excused or mitigated your discharge. On this point, the Board observed that even assuming, *arguendo*, that the mental health conditions that you contend that you have manifested are related to your service, there is no indication that any provider contemporaneous to your service found that you had any condition that warranted referral to a medical board for a determination of fitness for duty within the disability evaluation system. On this point, the Board considered that your medical records indicate that you were regularly evaluated medical professionals during your service. In fact, you also received a pre-separation medical examination and you were found to be fit to separate. The Board's observations here are consistent with the findings of the AO in your prior remand case, which found that there were no clinical records indicating that you were deemed unfit for duty or separation from service and that after medical evaluation, you were returned to duty without limitations by both your primary care physician and the general surgeon.

In addition, the Board observed that your record does not contain any evidence, nor did you provide any, that any individual in your chain of command provided any non-medical assessments describing that you were unable to perform your duties as a judge advocate and should be referred to a medical evaluation board for evaluation. To the contrary, the Board observed that, as reflected in your fitness reports, you were considered a highly skilled and effective judge advocate who enjoyed the respect of your chain of command. These documents also reflect that you were also considered very physically fit, scoring a first class PFT. Further, the Board observed that the proximate cause of your separation from service was your voluntary resignation from the Marine Corps, and not for any inability to perform the duties of your position as a Marine judge advocate.

Finally, the Board did not find your reliance upon a VA disability findings to be persuasive. The Board noted that your argument concerning your skin condition, which you state has not been considered to be service connected by the VA but is on appeal, reflects a misunderstanding of the nature of a service disability retirement. As described above, a service disability retirement is based on findings of unfitness to perform the duties of your office, grade, rank or rating as a result of a qualifying disability condition. In your case, the available evidence demonstrates that you were extremely successful in executing your duties as a judge advocate. For your work, you received praise in your fitness reports. You also received high scores in your PFT, which is also inconsistent with being unfit to perform your duties as a Marine judge advocate. Further, your argument that your PTSD was caused by your deployment in 2013 and the retaliation you experienced is similarly inconsistent with being unfit due to the fact that you were able to work at a high level for approximately five additional years up until your final discharge. Even assuming, *arguendo*, that you had symptoms consistent with PTSD or other mental health condition, or even a diagnosis of such, while you were in service, you were clearly able to perform your duties until your voluntary resignation. A diagnosis of a mental health condition does not result in a service disability retirement. Many Marines serve with a variety of mental health and physical conditions and are able to perform their duties while receiving appropriate treatment. In your case, the fact that, post-service, you may have received service connected ratings, reflects the difference between the disability evaluation system and the VA. The VA does not make determinations as to fitness for service as contemplated within the disability evaluation system. Rather, 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. 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. 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,

7/1/2024

