



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. 7994-23
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 1 August 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, applicable statutes, regulations, and policies, to include the Kurta Memo. Additionally, the Board also considered the 3 July 2024 Advisory Opinion (AO) provided by a licensed psychiatrist and your rebuttal response.

A review of your record shows that you enlisted in the Marine Corps Reserve and began active duty service on 29 June 1999. After completing initial training, you were released on 22 January 2000 with an Honorable characterization of service. You were mobilized and deployed to Iraq in support of Operation Iraqi Freedom from 16 February to 29 September 2004. As a result of your civilian profession as a funeral director, during this deployment, you were assigned to the Marine Mortuary Affairs unit. Your duties included developing and conducting a mortuary affairs program and the recovery, assembly, and repair of dead and mutilated bodies, commonly recovered under extremely dangerous combat conditions. During your deployment, while on a mission to retrieve remains of Marines, your vehicle was struck by an improvised explosive device (IED). You later received a Purple Heart for injuries as a result of this incident.

Upon return to your unit, you were recommended for accelerated promotion and received fitness reports assessing you as an “Eminently Qualified Marine.” Based on your performance, you were selected as the 2005 “Marine of the Year” by the Marine Corps Times.

You started receiving treatment through the Boston Veterans Affairs (VA) Healthcare system in September 2005. You reported horrific memories and a psychiatrist diagnosed you with Post Traumatic Stress Disorder (PTSD), and attested to the severity of your symptoms that continued to cause clinically significant distress and impairment in your social and occupational functioning.

On 17 April 2006, the Informal Physical Evaluation Board (PEB), found you unfit for continued service due to PTSD at a 30% rating and recommended placement on the Temporary Disability Retirement List (TDRL), combat related, combat zone. Consequently, you were transferred to the TDRL on 30 May 2006.

You underwent your first Periodic Physical Examination (PPE) on 3 December 2007, the examiner noted you were able to maintain full-time employment but no longer processed remains due to triggering distressing memories. On 17 December 2007, the PEB notified you of retention on TDRL at 30%. In June 2008 you underwent a VA examination which concluded you had a diagnosis of Traumatic Brain Injury and referred you to neuropsychology for an assessment. On 9 October 2009, you underwent your second PPE. The examiner noted you were working over 80 hours a week as Vice President of a funeral home, stopped attending treatment, and no longer taking psychotropic medications. In addition, the examination documented you enjoyed a relatively normal social life. Based on the PPE, the Informal PEB determined you were unfit for service at a 10% rating and recommended separation with severance pay from the TDRL. You requested a formal board hearing which was held on 11 March 2010. You presented testimony and new information at the hearing. The FPEB also determined you were unfit for continued service due to PTSD at a 10% disability rating stating:

“Since placement on the TDRL, the member ceased taking medication and has not sought any treatment for his PTSD in the last year. He lives above his family-owned funeral business where he works as a funeral director. In that capacity, he counsels bereaved families, applies makeup to and transports bodies of the deceased. He currently works 80-100 hours per week. He reports he drinks regularly and gets nightmares periodically. He now associates with veterans as opposed to his old friends, is married, and is actively vested in raising his children. He has not lost time from work as a result of PTSD.”

On 24 January 2011, the PEB informed you of your discharge from TDRL was effective 28 February 2011. On 22 February 2012, the Commandant of the Marine Corps informed you of a change in your disability rating as a result of a class action lawsuit. You were placed back on the TDRL with a rating of 50%. On 7 February 2014, you underwent your 3rd PPE. The examiner opined you were incapable of full duty and recommended placement on the Permanent Disability Retirement List (PDRL). The PPE report stated:

“SM exhibits little to no impairment in occupational functioning at this time. As he makes his own work schedule, he is able to accommodate his needs with respect to breaks and sleeping. Additionally, when it is necessary, SM is able to work long hours at full functionality in order to get a job done. SM exhibits moderate impairment in social functioning. His wife reported difficulty dealing with his issues, namely his sleep habits and his unaccommodative approach to accomplishing a task. However, SM reported ongoing socialization with friends and continued communication with members from his USMC unit. Despite difficulties reported by his wife, they displayed a communicative and cooperative relationship and reported ongoing interaction with children and grandchildren. SM exhibits moderate to severe impairment in his ability to function in a military environment. Due to the symptoms he is currently experiencing as well as a marked lack of treatment, a military setting would likely exacerbate these symptoms rendering him unable to fulfill responsibilities.”

As a result of no mental health treatment since 2009, no reported change to your condition since your last PPE, and no detriment to your employment or social functioning due to your PTSD diagnosis, the IPEB again found you unfit at a 10% disability rating and recommended you be separated with severance pay from the TDRL. On 19 March 2014, you requested reconsideration contending your condition warranted a 70% disability rating; however, the finding did not change and you were ultimately discharged from TDRL on 28 February 2014.

For this petition, you request to be placed on the Permanent Disability Retirement List (PDRL) at a 70% rating, retroactive payment of all pay and allowances, or to direct the Marine Corps to refer all conditions to the IDES to determine your overall rating. You argue it was in injustice for you to be removed from the TDRL at less than a 30% rating and that you should have been referred to the Disability Evaluation System (DES) for TBI.

You contend the PEB made several errors to include failure to assign you a disability percentage for both PTSD and TBI and failure to place you on the PDRL after six years on the TDRL. You argue these errors resulted in injustice and your removal from the TDRL at less than a 30% rating.

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.

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:

Review of the available objective clinical and non-clinical evidence documented Petitioner continued to demonstrate career successes post-Iraq deployment with consistent performance assessments of “highly qualified” and “eminently

qualified,” promotion to SSgt, and selection as 2005 Marine of the Year by Marine Corps Times. Despite the presence of increasing PTSD symptoms, and contention of TBI residual symptoms, he successfully executed the responsibilities of his rate and rank up through 2005, when his PTSD symptoms worsened to the point of seeking mental health care through the Boston VAMC, resulting in eventual referral to the PEB and medical retirement with placement on the TDRL in May 2006. In my review of the decisions rendered by the IPEB, FPEB, Director CORB, these determinations appear appropriately based on the objective evidence of Petitioner’s condition and occupational/social functioning available at the time of his initial discharge to the TDRL, and through subsequent TDRL Periodic Examinations and PEB determinations regarding unfitness for return to active duty

The AO concluded, “in my medical opinion, the preponderance of objective clinical evidence provides insufficient support for Petitioner’s contentions that at the time of his discharge from the TDRL with severance pay for the unfitting condition of PTSD, his PTSD condition rated a higher disability determination and placement on the PDRL, and that in addition, he should have been found unfit for TBI with consideration for additional disability evaluation.”

In your response to the AO, you contend that your symptoms met the 30% criteria as there was evidence of work inefficiency (you needed to work longer hours to complete work tasks), weekly panic attacks, and insomnia due to intrusive memories.

After reviewing your rebuttal evidence, the AO remained unchanged.

The Board concurred with the AO that there was insufficient evidence that you were unfit, unable to perform the duties of your office, grade, rank or rating as a result of a qualifying disability condition. The Board noted your objective cognitive tests could not be interpreted as cognitive weakness and your inability to control anger and impaired sleep due to flashbacks were your immediate concerns during the medical board process. Moreover, the Board found that you had the ability, and availed yourself of the opportunity several times to petition the PEB for a higher rating and you were denied based on insufficient evidence. However, most importantly, the Board agreed with the conclusions of the PEB and AO that the objective evidence of your disability condition and occupational/social function, as described in the final PPE, supports the 10% disability PEB rating assigned to you prior to your 2014 discharge from the TDRL. The Board found the decisions of the PEB and the AO to be rational and based on substantial evidence within your record. Therefore, 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,

8/26/2024

