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

[redacted]
Docket No. 8090-23
Ref: Signature Date

[redacted]

Dear [redacted]:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, submitted pursuant to the Order of the U.S. Court of Federal Claims (CFC) (No. 20-cv-579), dated 22 September 2023, remanding your case to the Board for Correction of Naval Records [hereinafter referred to as the Board] for reconsideration of its previous denial of your request in Docket No. 11217-16.[1] Specifically, the COFC directed the Board to: (1) Explain, in the first instance, its determination in this case in view of the change in your discharge characterization and narrative reason for separation directed by the Naval Discharge Review Board (NDRB); (2) Determine your fitness under all relevant considerations set out in SECNAVINST 1850.4E;[2] (3) Address your eligibility for military disability benefits under 10 U.S.C. §§ 1201 and 1203; and (4) Consider any additional argument or evidence regarding your claim for military disability benefits that you may submit to the Board. Upon careful review and consideration of all the evidence of record, the Board continued to find insufficient evidence of any probable material error or injustice in your naval record. Accordingly, your application has been denied.

A three-member panel of the Board, sitting in executive session, reconsidered your application *de novo* on 26 April 2024. None of the Board members who reconsidered your application on 26 April 2024 participated in the previous review of your case in Docket No. 11217-16. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with the administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board included the Order of the COFC, filed 22 September 2023; the additional matters that you submitted for the Board's consideration in accordance with the COFC's Order, which included a 17-page legal brief from your attorney and a 52-page "document appendix" containing multiple regulatory and policy documents, your 15 April 2020 Decision Review Officer Decision from the Department of Veterans Affairs (VA), a Navy media release dated 8 June 2016 discussing the

[1] You requested in Docket No. 11217-16 that the Board correct your naval record to reflect your placement on the Permanent Disability Retired List (PDRL) effective upon your discharge date. The present remand was ordered in accordance with the decision of the U.S. Court of Appeals for the Federal Circuit (CAFC) issued on 30 May 2023.
[2] *Department of the Navy (DON) Disability Evaluation Manual*, 30 April 2002.

Navy's new "dual-processing" policy, your personal declaration, and the 30 May 2023 decision of the CAFC in your case; an advisory opinion (AO) provided by the Senior Medical Advisor (SMA) to the Secretary of the Navy Council of Review Boards (CORB), dated 8 March 2024, and your response thereto also dated 8 April 2024; the case file for Docket No. 11217-16, which included your original application for relief; relevant portions of your naval record; and applicable statutes, regulations and policies, to include the 3 September 2014 guidance from the Secretary of Defense titled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder"[3] and the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (USD (P&R)) titled "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment."[4]

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved in your case. You provided a written statement purporting to describe what you would testify to, and the Board did not find your credibility to be at issue in this case. For this reason, the Board determined that such an appearance was unnecessary and considered your case based upon the evidence of record. In this regard, the Board noted the CAFC's finding that you have a recognized property interest in military disability pay benefits since such benefits are nondiscretionary and statutorily mandated in accordance with 10 U.S.C. § 1201, and the related argument pertaining to whether this interest entitled you to a personal appearance hearing pursuant to the Due Process Clause of the Fifth Amendment to the U.S. Constitution. This Board is neither qualified nor empowered to opine on such matters. However, this Board did not convene on 26 April 2024 to determine your eligibility for military disability benefits in accordance with 10 U.S.C. § 1201; it convened to determine whether there exists an error or injustice in your naval records in accordance with 10 U.S.C. § 1552. There exists no right to a personal appearance hearing for the correction of a military or naval record based upon an error or injustice pursuant to 10 U.S.C. § 1552. This Board is neither qualified nor empowered to make the original finding of unfitness necessary to qualify for medical disability benefits pursuant 10 U.S.C. §§ 1201. The Secretary of the Navy (SECNAV) assigned that responsibility exclusively to the Department of the Navy (DON) Physical Evaluation Board (PEB) in SECNAVINST 1850.4E.[5] By contrast, this Board's statutory and regulatory function is to "consider applications properly before it for the purpose of determining the existence of error or injustice in the naval records of current and former members of the Navy and Marine Corps, to make recommendations to the Secretary or to take corrective action on the Secretary's behalf when authorized."[6] While this Board is empowered to correct a naval record in any way it deems necessary consistent with the law to correct an error or injustice, to include making the corrections necessary to establish a former member's eligibility for medical disability benefits if necessary to correct an error or remove an injustice, it

[3] Hereinafter referred to as the "Hagel Memo."
[4] Hereinafter referred to as the "Kurta Memo."
[5] See paragraph 4a.
[6] SECNAVINST 5420.193, *Board for Correction of Naval Records*, 19 November 1997. See Section 2b of Enclosure (1).

does not make fitness determinations.[7] There is a distinct difference between making a finding of error or injustice in a naval record pursuant to 10 U.S.C. § 1552 and making a finding of fitness pursuant to 10 U.S.C. § 1216a. Accordingly, if, in fact, there exists the right to a personal appearance hearing for a post-separation claim for military disability retirement benefits which never vested, such a hearing does not come from this Board. Rather, it must come from a forum empowered by the SECNAV to make original fitness determinations.

You requested the recusal of the Staff Judge Advocate for the U.S. Naval Academy (USNA) at the time of your discharge from any involvement in this case.[8] This individual no longer serves in the capacity of a case examiner for the Board and had no involvement in the *de novo* review of your case.

In a footnote to your legal brief on remand, you requested that the Board "seek a medical opinion from Navy Medicine doctors experienced with applying the [Manual of the Navy Medical Department (MANMED)]" if it had any doubt that the MANMED disqualified you from diving, and suggested that the CORB's SMA was "not qualified to render an opinion as evidenced by the fact he did not even know to review the MANMED for his prior opinion." You then claimed in your response to his AO that you had "specifically objected to [the CORB's SMA] being assigned to review this matter on remand" because he is a psychiatrist and not experienced on the day-to-day application of the Navy's medical diving standards. Accordingly, you requested that the Board seek an AO from a Navy Diving Medical Officer (DMO) experienced in applying diving medical standards. Your request in this regard was denied. First, your attack on the CORB SMA's qualifications because "he did not even know to review the MANMED for his prior opinion" was disingenuous because you had not raised those standards in your prior request. Second, if your case had been reviewed by the PEB in due course, the PEB would not necessarily have consulted a DMO to reach its fitness determination. Rather, the PEB would have reviewed your existing medical records, as the CORB's SMA did, along with the results of the MEB which would have referred your case to the PEB, and any medical advice required would have come from the Medical Corps Officer assigned as a voting member of the PEB or another medical professional assigned to the CORB. As the PEB is a subordinate agency to the CORB, it is very possible that the PEB may have relied upon the opinion of the CORB's SMA himself; there literally is no medical expert in the DON more qualified to advise the Board regarding the standards of medical fitness than him. Your request that the Board seek an opinion from a qualified DMO essentially asks for a benefit provided to no other Sailor. It also seeks to reverse the burden of proof in this case. It is your burden to prove the existence of an error or injustice to the Board. As such, it was your burden to produce the opinion of a qualified DMO if

[7] To be clear, the Board is empowered to correct a naval record to accomplish the same outcome as would have been reached if the PEB had made a determination of unfitness in order to remedy an error or injustice in the deprivation of medical disability benefits. It simply does not reach this result by making a fitness determination, as the civilian employees of the DON who comprise this Board are inherently unqualified to make such determinations and have not been empowered by the SECNAV to do so. Rather, this Board may achieve this result by finding an error or injustice in the fact that an individual is not entitle to military disability benefits for whatever reason, through a separate and distinct statutory and regulatory scheme which neither contemplates nor authorizes fitness determinations.

[8] The individual in question was coincidentally the case examiner for Docket No. 11217-16, as he was then employed as the Board's primary case examiner for physical disability cases.

you desired such opinion to be considered by the Board.[9] Third, as discussed further below, the diving standards of the MANMED were not relevant to the Board's analysis and the relevant duties in question in your case because they are regulatory restrictions and not physical disabilities. Finally, in accordance with 10 U.S.C. § 1552(g)(2), any medical AO issued to the Board with respect to a former member who was diagnosed while serving in the armed forces as experiencing a mental health disorder shall include the opinion of a clinical psychologist or psychiatrist if the request for correction of records concerned relates to a mental health disorder. Additionally, 10 U.S.C. § 1552(g)(2) requires the Board to seek the advice and counsel of a psychiatrist, psychologist, or social worker with training on mental health issues associated with PTSD or TBI in the review of claim for review of a discharge based in whole or in part upon combat-related PTSD or TBI. Your claim satisfied both of these criteria. Accordingly, your objection to the CORB SMA's credentials to review this case as a psychiatrist was without merit, as the Board was obligated by law to seek an AO from a mental health professional.

Factual Background. Following is the factual background of your case based upon relevant portions of your naval record and the matters you submitted for the Board's consideration:

You originally enlisted in the Navy and began a period of active duty service on 12 November 2008. You enlisted pursuant to a Navy Diver program guarantee and received a $35,000 Navy Diver enlisted bonus.

On or about 9 January 2009, you were assigned to Mobile Diving Salvage [redacted] at Joint Expeditionary Base (JEB) [redacted] in [redacted].[10]

In 2010, you received a head injury during a dive. Specifically, you struck your head and reportedly lost consciousness for "a couple of seconds" while surfacing from a dive. You were evaluated by a doctor and advised to rest for a period of time but returned to duty later that day with no restrictions. You reported problems with headaches and difficulty sleeping following this incident, but that these problems resolved over the following two days.

In 2012, you received a head injury playing football. Specifically, you reported taking "a knee to the face" and then hitting the ground with your head. You reported losing consciousness for a couple of seconds and being "sent to medical" to be checked out. You also reported feeling "hazy" afterwards and a severe headache, but that these symptoms resolved later that day. You were again returned to duty with no restrictions.

In 2012, you suffered an episode of type 2 Decompression Sickness (DCS) during a dive.[11] You were treated in a hyperbaric chamber.

---

[9] In accordance with 10 U.S.C. § 1552(a)(3)(D), you are entitled to reconsideration of this decision upon the presentation of new materials not previously presented to or considered by the Board. Accordingly, you may request reconsideration if you subsequently seek and obtain an opinion from a DMO.

[10] [redacted] was described in your performance evaluation reports as an "[e]xpeditionary unit deploy[able] in support of diving, combat salvage operations and fleet exercises in AFRICOM, CENTCOM, EUCOM, NORTHCOM, and SOUTHCOM AOR's to conduct salvage, emergent and force protection diving, battle damage repair and harbor clearance."

[11] Three other divers also suffered DCS during this dive.

Between 10 September 2012 and 26 October 2012, you received mental health treatment from a licensed clinical psychologist at JEB [redacted]. This licensed clinical psychologist reported in a letter to your attorney dated 30 October 2014 that you had presented with intense emotional distress due to the impending end of your marriage, and that this treatment focused on dealing with those emotions and your impending move t[redacted] The licensed clinical psychologist also revealed that you reported some concentration issues during one session, but that it was determined best for you to seek treatment for those issues once i[redacted] so that she could focus on resolving the intense emotions related to your marital crisis to determine if your marital concerns were a contributing factor to your concentration issues.

On 26 October 2012, you received a performance evaluation upon your detachment from [redacted] for the reporting period 16 March 2012 to 29 October 2012. This evaluation described your diving skills as "key to the overall success of exercise[redacted] and reported that you "[l]ogged ten hours of bottom time during JPAC mission to [redacted] and that your efforts in this regard were "vital to the successful excavation, recovery and repatriation of three[redacted] lost since 1942 in 120 feet of water." Your performance trait average for this evaluation was 4.14, meaning that your average trait rating exceeded "Above Standards."[12]

On or about 30 October 2012, you were reassigned to the USNA.

On 16 January 2013, you failed to appear at a mandatory command physical fitness training session without notifying your leadership. Instead, you arrived by the end of the session order to attend the mandatory [redacted] Course. However, upon arrival you displayed substandard appearance. You were unshaven, your uniform components were misplaced and not in accordance with regulations, you wore an unauthorized color of socks, and displayed an unkept uniform. You later revealed that you slept through your alarm that morning because "unfortunate marital issues" subjected you to undue stress and a lack of sleep.

On 12 February 2013, you sought mental health treatment from the Naval Health Clinic (NHC) [redacted] or Attention Deficit/Hyperactivity Disorder (ADHD) and marital issues after discovering that your wife was talking with someone online.[13] The medical record of this encounter reported that you demonstrated behavioral problems before your enlistment.[14] It also recorded minimal neurological symptoms and no head symptoms.[15] You reported feeling

[12] A letter provided to the Board by your Leading Chief Petty Officer described your performance while assigned to [redacted] as "indicative of a capable sailor who performed his job extremely well as a Navy Diver. He was capable of performing diving operations in extreme environments with certainty and professionalism."

[13] You reported and self-diagnosed yourself with ADHD, but have never been formally diagnosed with this condition.

[14] These specific pre-enlistment behavioral issues included shoplifting and acting out/discipline problems. You also reported having lost your driver's license for five years prior to joining the Navy because you had 19 moving violations and prior encounters. Although not included in this report, other evidence in the record reflected that you were also charged with "transportation of alcohol by a minor" in 2008.

[15] The "neurological symptoms" were recorded as follows: No dizziness, no vertigo, no lightheadedness, no fainting, and no decrease in consciousness. Decreased concentrating ability fluctuates. No confusion and no disorientations. Misplacing items. No convulsions, no focus disturbances, sense of smell is normal, no taste

restless and nervous, along with anxiety with the fear of losing self-control and anger management issues. All of your symptoms were tied to your marital difficulties, and unrelated to work. In fact, the medical record for this encounter recorded that you had "[n]o difficulty functioning at work" and that you felt "the best when [you're] in the water diving." Your functional status was reported as follows: "No mental disability, no physical disability, activities of daily living were normal, and self-reliant in usual daily activities." On 19 February 2013, you were diagnosed with an adjustment disorder with anxiety and depressed mood.

On 15 March 2013, you received a performance evaluation for the reporting period 30 October 2012 to 15 March 2013. This evaluation described you as a "motivated diver," reporting that you "[p]layed an essential role in salvage and recovery of eight Yard Patrol craft rub rails from Naval Support Activity, [redacted], saving the Navy $8,000 in replacement costs." Your performance trait average was 3.57, reflecting that your performance met or exceeded the standard for all performance traits.[16]

On 18 March 2013, you were issued a reckless driving citation by civilian law enforcement authorities while driving a government vehicle on temporary additional duty.[17]

On 14 April 2013, you were arrested by civilian law enforcement authorities in Annapolis for driving while impaired by alcohol, negligent driving in a careless and imprudent manner, and reckless driving in wanton and willful disregard for safety of persons and property.[18]

On 25 April 2013, you received nonjudicial punishment (NJP) for drunken operation of a vehicle in violation of Article 111, Uniform Code of Military Justice (UCMJ).[19] You were restricted and required to perform extra duties for 45 days, reduced in grade to the next inferior pay grade, and required to forfeit half of your pay for two months.[20]

Following the NJP of 25 April 2013, your diving privileges were suspended.[21] As a result of this suspension, you were reassigned to perform duties as a maintenance technician.

On 29 May 2013, you received a special performance evaluation for the reporting period 16 March 2013 to 13 May 2013 to document your NJP of 25 April 2013. You were assessed to "meet standards" for every performance trait except for "Military Bearing/Character," for which you were assessed as "Below Standards" due to the misconduct for which you received NJP. You were described as "an above average Sailor who made a serious mistake," and your

---

disturbances, no speech difficulties, no difficulty writing, no change in handwriting and no motor disturbances. Walking. No difficulty with balance, good coordination, and no sensory disturbances.

[16] A 3.0 rating indicates meeting the standard. You received ratings of 3.0 or 4.0 (Above Standards) for every performance trait.

[17] You were cited by civilian law enforcement authorities for driving 84 miles per hour (MPH) in a 60 MPH zone while returning from [redacted] after being instructed to slow down.

[18] You reportedly failed to stop at a stop sign and to remain on the right-hand side of the road.

[19] This NJP was in response to the events of 14 April 2013.

[20] The reduction in grade and forfeitures were suspended for six months.

[21] The Board presumes that this suspension was based upon the guidance of MANMED Article 15-102, paragraph 7(k)(2), which provides that an "alcohol incident will result in disqualification from diving duty until all recommended treatment or courses mandated by the member's current commanding officer and/or SARP have been fully completed."

Reporting Senior opined that "[w]ith proper mentoring and a strong personal desire, he can recover from this incident."

On 21 July 2013, you were arrested by civilian law enforcement in [redacted] for theft, disorderly conduct, and resisting/interfering with arrest.[22] You failed to report this incident to your command; they learned of it only by proactively checking with local law enforcement based upon suspicions of your misconduct. As a consequence of this incident, the suspension of the reduction in grade and forfeitures imposed by your NJP of 25 April 2013 was vacated and ordered executed on 12 August 2013.

On 30 July 2013, you were notified that you were being processed for administrative separation for misconduct due to commission of a serious offense.[23] You acknowledged receipt of this notification on the same day.

On 24 September 2013, your Second Class Diver NEC (5343) was removed.[24]

On or about 24 September 2013, you were assigned to temporary additional duty at the [redacted] Community Hospital [redacted] for in-patient alcohol rehabilitation treatment.

On 18 October 2013, you were seen individually and in group psychotherapy. The possibility of traumatic brain injury (TBI) was discussed during this session, and the provider noted significant evidence of impaired brain function. The provider recommended that you remain in treatment for six to seven additional weeks to complete psychiatric and addiction medicine services in addition to competing a TBI evaluation.

On 3 December 2013, you completed a battery of neuropsychological assessments at the Neurorehabilitation and [redacted]. This testing revealed subtle deficits "including difficulties with visuospatial processing, processing speed, slowed fine motor speed and dexterity, and reduced executive function (flexibility of thinking) with cognitive load." The summary of these testing results, which were recorded in a memorandum dated 9 December 2013, suggested multiple possible etiologies including childhood maltreatment, fetal alcohol exposure, hypoxia episodes from multiple long-term dives and reduced oxygen saturation," and that your MRI results indicated the presence of a "small retrocerebellar cyst." It also described your profile as "consistent with major depression and potentially posttraumatic stress disorder." You were diagnosed with Major Depressive Disorder (MDD) (Recurrent, Severe, without Psychosis) and Cognitive Disorder (Not Otherwise

[22] You were arrested for disorderly conduct and resisting arrest after walking out of a restaurant without paying your $75.62 bill. When you were confronted by restaurant employees regarding this bill, you presented an expired credit card. The responding law enforcement officers noted signs of alcohol impairment. When they sought your identification in order to ensure payment for the restaurant, you became uncooperative and ultimately physically resisted arrest. You had to be physically carried out of the restaurant while screaming profanities at the arresting officers, and you tried to run away from the officers once you were outside of the restaurant. As you were transported to the police station in the back of a police car, you reportedly began to kick the right rear door and window.

[23] Because you did not have more than six years of service and your command did not contemplate separating you under other than honorable conditions, you were not entitled to an administrative separation board and the notification procedures were utilized in accordance with MILPERSMAN 1910-702.

[24] This action had the effect of removing your diving credentials.

Specified). The [redacted] further opined that the otherwise benign cyst discovered by the MRI may be source of your difficulties given the changes in pressure that a Navy Diver endures and the number of dives that you performed. The [redacted] provided several recommendations regarding further treatment, but notably made no recommendations or comments regarding your fitness for further service.

On 6 December 2013, the [redacted] directed that you be discharged from the Navy for misconduct due to commission of a serious offense with a general (under honorable conditions) characterization of service.

On 10 December 2013, you entered an alternative plea in the District Court for [redacted] to the charges resulting from the incident on 21 July 2013. Those charges were suspended for 12 months.

On 11 December 2013, your attending physician at the [redacted] wrote a letter to the [redacted] t to advocate for your retention on active duty. Specifically, he informed the [redacted] t of your successful completion of the residential treatment and the [redacted], and that you were currently committed to your sobriety and demonstrated excellent potential in supporting your recovery. He also expressed his confidence that you would continue to be successful in your recovery from alcohol addiction, and highly recommended you for continued service in the Navy.

By memorandum dated 16 December 2013, you requested that the [redacted] reconsider his decision to administratively separate you from the Navy. In this request, you explained that you had inadvertently left the restaurant without paying your bill on 21 July 2013, and admitted that you handled the situation inappropriately and out of character when law enforcement became involved. You reported having successfully graduated from the in-patient rehabilitation program and an outpatient dual diagnoses therapy program at [redacted], and that you "actively engaged in all aspects of [your] treatment plan and began to get [your] life back on track in a healthy, constructive manner." You also reported that your attending physician during this treatment program concluded that you had been self-medicating for an anxiety disorder and major depression, and that it had been discovered that you had a potential TBI due to a retrocerebellar cyst coupled with repeated overexposure to the changes in pressure and lack of oxygen to the brain as a direct result of diving. You admitted that "[f]amily, financial, and emotional problems became overwhelming, and [you] did not have the tools to properly cope," but you were grateful for the Navy's support in your recovery and believed that you could again be an asset to the Navy.

On 19 December 2013, you received a Separation History and Physical Examination (SHPE) and were medically cleared for separation. This assessment noted that "TBI, depression and anxiety disorder affect[ed your] capacity to continue diving."

On 19 December 2013, you received your final performance evaluation for your performance as a Maintenance Technician for the reporting period 14 May 2013 to 20 December 2013.[25] Your

[25] This performance evaluation noted that you were assigned to temporary additional duty at the [redacted] from 24 September 2013 to 13 December 2013.

performance was assessed as "Meets Standards" for every performance trait except for "Military Bearing/Character," for which your performance was assessed as "Progressing."

On 20 December 2013, you were discharged from the Navy for misconduct due to commission of a serious offense with a general (under honorable conditions) characterization of service.

By memorandum dated 27 January 2014, the [redacted] notified Navy Personnel Command of his action in your case. This notification included your TBI evaluation of 9 December 2013. The [redacted] commented that you had "no potential for further Naval Service. He has shown through his actions that he has a complete lack of respect and disregard for the armed forces and law enforcement by consuming alcohol and making reckless decisions. His actions were highly prejudicial to good order and discipline and brought discredit upon the armed forces. [You] received and completed alcohol dependency treatment prior to separation."

Following your discharge from the Navy, you entered the [redacted] Your career specialist in this program believed that you were suffering from undiagnosed post-traumatic stress disorder (PTSD) in addition to the previously identified TBI.

On 31 January 2014, you underwent a neurological examination which revealed no neurological abnormalities.

On 23 July 2014, you underwent a Compensation and Pension (C&P) Examination pursuant to your claim for disability benefits for PTSD from the VA.[27] The examining psychologist found that your symptoms did not meet the diagnostic criteria for PTSD, but noted your existing diagnoses for MDD and cognitive disorder.[28] The level of occupational and social impairment identified during this examination was described as follows: "Occupational and social impairment due to mild or transient symptoms which decrease work efficiency and ability to perform occupational tasks only during periods of significant stress," and your current level of depression was described as "mild." You did not report significant occupational impairment during this evaluation, and the examining provider opined that your social impairment was "more likely due to depression than Cognitive Disorder." The examiner also observed that you "appeared to exaggerate exposure to traumas until further details were obtained,"[29] and noted that your psychological testing suggested "symptom exaggeration."

[26] This program is not to be confused with a DON-affiliated [redacted] This was a non-Federal entity providing career support to discharged Veterans.
[27] The examiner was a VA psychologist.
[28] The examiner noted that the 9 December 2013 report from the [redacted] had commented that your profile is "potentially" consistent with PTSD, but also noted that a complete PTSD evaluation was not conducted, a specific stressor was not noted, and the primary symptoms noted were hyperarousal and withdrawal, rather than re-experiencing of a specific event. The examining psychologist also speculated that the [redacted] evaluators "may have been considering PTSD related to childhood experiences, not military experiences."
[29] You reported "being under fire" in Iraq as though this was a frequent occurrence, while further inquiry revealed that it occurred once with no injuries. You also described your tour in Haiti in terms of exposure to bodies, when your duties there related to the removal of debris to stabilize a pier.

On 5 August 2014, you underwent a C&P Examination pursuant to your claim for disability benefits for TBI from the VA.[30] The examiner found that you did have a TBI diagnosis and performed neuropsychological testing. The testing results indicated "a man of average to above average intellectual abilities with subtle deficits in mental processing speed, visual memory, motor speed, word-finding, and executive functions (planning and organization)."[31] The examiner found "mild impairment of memory, attention, concentration, or executive functions resulting in mild functional impairment"; your motor activity "normal most of the time, but mildly slowed at times due to apraxia (inability to perform previously learned motor activities, despite normal motor function)"; and your "[c]omprehension or expression, or both, of either spoken language or written language … only occasionally impaired."[32] The examiner concluded that you did sustain two mild TBI/concussions during your naval service, but that "it is very unlikely that [your] current cognitive deficits and motor slowing are related to those concussions." Rather, they found that your cognitive deficits and motor slowing are "at least as likely as not related to decompression sickness and hypoxic episodes from multiple long-term dives and reduced oxygen saturation incurred during [your] service as a Navy diver."

By letter dated 9 September 2014, the VA informed you that it had granted you service-connection for MDD, which you had claimed as PTSD, with a 30 percent disability rating; and for cognitive deficits and motor slowing due to DCS and hypoxic episodes, which you had claimed as TBI, with a 40 percent disability rating.[33]

On 3 February 2015, you requested a discharge upgrade from the NDRB on equity and propriety grounds. Specifically, you raised the following issues in support of your request for relief:

- A discharge upgrade is warranted pursuant to the Hagel Memo because PTSD was likely a mitigating cause of your misconduct outweighing its severity;
- You were entitled to the protections of 10 U.S.C. § 1177 and should have had a determination as to whether your TBI contributed to your misconduct prior to separation;[34]
- Even if you did not technically qualify for protection under 10 U.S.C. § 1177, you were within the protected class intended by Congress and equitable considerations warrant consideration of the TBI relative to discharge status;
- The USNA violated MILPERSMAN 1910-702 in failing to consider your TBI as contributing to your misconduct prior to your separation;

[30] The examiners were a neurologist and a neuropsychologist.
[31] These results were described as being consistent with the test results from 3 December 2013.
[32] The examiner found no impairments with regard to any of the other seven facets of TBI-related cognitive impairment and subjective symptoms (i.e., judgment, social interaction, orientation, visual spatial orientation, subjective symptoms, neurobehavioral effects, and consciousness).
[33] This assessment was based upon "objective testing of mild impairment of memory, attention, concentration, or executive functions resulting in mild functional impairment."
[34] 10 U.S.C. § 1177 required the SECNAV to ensure that a Sailor who has been deployed overseas in support of a contingency during the previous 24 months, and who is diagnosed with PTSD or TBI or who otherwise reasonably alleges the influence of such a condition based on the deployed service, receives a medical examination to evaluate such a diagnosis before being administratively discharged under other than honorable (OTH) conditions. The purpose of the medical examination was to assess whether the effects of PTSD or TBI constitute matters in extenuation that relate to the basis for administrative separation under conditions OTH.

- The USNA violated MILPERSMAN 1910-702 since the [redacted] lacked separation authority and a mental health professional review was required prior to separation since you were diagnosed with TBI;
- You were unfairly and inappropriately denied a personal hearing relative to the vacation of your NJP and separation in violation of JAGMAN and Navy General Regulations;
- The USNA erroneously determined that you committed "serious misconduct" given that the police report shows no intent to commit theft and that you had a right to resist an illegal arrest under the UCMJ;
- The overall quality of your service warranted an honorable characterization of service, and the restaurant incident was not sufficiently negative to warrant a general (under honorable conditions) characterization of service; and
- Equitable considerations warrant an upgrade even if no legal error is found.

In July 2015, you were offered and accepted a job with the National Park Service (NPS) as a diver running the underwater recovery unit at the [redacted]. You were subsequently removed from this position after you reportedly yelled at and physically threatened your supervisor out of frustration.

On 15 September 2015, the NDRB granted your requested relief on purely equitable grounds after a personal appearance hearing. Specifically, the NDRB rejected each of your claims of legal error/impropriety and granted relief based primarily upon "matters of equity related to [your] post-service diagnoses of medical conditions related to [your] hazardous duty diving operations."[35][36][37][38] Accordingly, the NDRB directed that your characterization of service be

[35] In reaching its conclusion with regard to the first five allegations of error cited above, the NDRB noted that you provided no evidence of any PTSD or TBI diagnosis. You provided evidence that you had received treatment for PTSD and TBI symptomology, but no documentation of any actual PTSD or TBI diagnosis even after numerous and extensive medical screenings focused on the possibility of TBI. Rather, you were diagnosed with MDD, alcohol dependence, and cognitive defects in motor slowing due to decompression sickness and hypoxic episodes; the VA granted you service connection for these conditions, but not for the PTSD and TBI conditions that you claimed. Your TBI screening revealed a brain cyst, but also determined that your TBI events were mild in nature and likely did not contribute to your cognitive defects. As such, the NDRB did not find sufficient evidence to conclude that PTSD or TBI were sufficient mitigating factors to excuse your conduct or accountability concerning your actions. The NDRB also found that the evidence showed that your command acted properly and equitably with respect to your medical issues.

[36] With regard to your claim that you were wrongfully denied a personal hearing relative to the vacation of your suspended NJP in violation of the JAGMAN and Navy General Regulations, the NDRB found sufficient evidence to conclude that you were actually afforded your rights in this regard and that you failed to overcome the presumption of regularity in this regard.

[37] The NDRB rejected your claim that you did not actually commit "serious misconduct," finding that the equivalent offense to resisting arrest under the UCMJ for which you were arrested (i.e., Article 95, UCMJ) carried a maximum punishment of a year in confinement and a punitive discharge, and therefore would satisfy the definition of "serious offense."

[38] The NDRB rejected your claim that your service record warranted an honorable characterization of service and that the circumstances of your arrest did not warrant a downgrade of that determination, noting that your record included a previous arrest for driving under the influence of alcohol before you resisted arrest for theft. The NDRB also noted evidence that your performance had deteriorated to a substandard level by early 2013, as documented by counseling statements detailed your dissheveled and unshaven appearance on duty and failure to report to formation, and your reckless operation of a government vehicle. Ultimately, the NDRB found that significant negative aspects of your conduct or performance of duty outweighed the positive aspects of your service record, and that the characterization of service assigned was therefore warranted.

upgraded to honorable and your narrative reason for separation changed to "Secretarial Authority."

On 12 November 2015, you were issued a new DD Form 214 reflecting the discharge upgrades directed by the NDRB.

On 1 June 2016, the SECNAV changed DON policy to permit the referral of Sailors and Marines being processed for administrative separation for misconduct into the Disability Evaluation System (DES). Prior to this policy change, such individuals were precluded from disability processing pursuant to SECNAVINST 1850.4E.

On 15 February 2017, the VA informed you that your service-connected MDD and mental and cognitive deficit, which had previously been evaluated separately at 30 percent and 40 percent respectively, were being combined and rated together because the VA examiner was unable to delineate the symptoms of each condition.[39][40] Accordingly, you were assigned a 50 percent disability rating for these conditions, effective 12 August 2015.

On 27 February 2017, you underwent a neuropsychological assessment at the [redacted] Neuropsychology Clinic. This assessment found current diagnostic impressions of PTSD, mild neurocognitive disorder, and MDD, and the report concluded that it is more likely than not that these diagnoses existed at the time of your separation from the Navy in 2013.

In June 2017, you submitted a request for reconsideration of the 50 percent disability rating assigned by the VA for your MDD, and on 21 November 2017 the VA granted an increased evaluation to 70 percent effective 17 July 2017.

In November 2018, you filed a Notice of Disagreement with the VA regarding the 70 percent disability rating assigned to your service-connected MDD condition. Specifically, you requested a 70 percent disability rating for MDD, a 70 percent disability rating for TBI, and 70 percent disability rating for PTSD, or a combined rating of 100 percent. On 15 April 2020, the VA increased your disability rating for MDD to 100 percent. In doing so, however, the VA specifically rejected your claim of service-connected PTSD and made no change to your service-connected disability.

Procedural Background.

You first petitioned this Board seeking the correction of your naval record to reflect your placement on the PDRL, rather than your involuntary discharge from the Navy, with a 60 percent

[39] The new, combined service-connected condition was labeled as "major depressive disorder, recurrent, moderate, with anxious distress, severe and traumatic brain injury (claimed as post traumatic stress disorder, post concussion syndrome, mild neurocognitive disorder)." It is not clear from the record how or why TBI was included as a service-connected disability given the initial C&P examination conclusion that your two minor head injuries did not contribute to your cognitive deficit or motor slowing.

[40] The VA also informed you that this decision was based upon the evidence of record because you failed to attend the examination scheduled for your cognitive deficit condition.

disability rating, on 20 December 2016.[41] Specifically, you asserted that this relief was warranted because your service-connected brain injury contributed to the changes in your behavior and caused you to self-medicate with alcohol. You also asserted that this relief was warranted due to the NDRB's upgrade of characterization of service to honorable and the disability rating assigned by the VA. This application was designated as Docket No. 11217-16.

During the pre-boarding process for Docket No. 11217-16, the Board sought an AO from the CORB. By memorandum dated 23 October 2017, the CORB's SMA provided an AO for the Board's consideration recommending that your request be denied. Specifically, he found that the evidence did not support your request for a disability retirement due to the presence of objective evidence in your record that your duty performance was judged to have been adequate at the time of separation but for your largely alcohol-related misconduct. He further opined that the record did not demonstrate that any of the involved health care evaluators and providers of record contemporary with your active service felt that you were unfit or that referral to the PEB was warranted, and that your post-discharge record suggested a lack of willingness to participate in trial medication and continued alcohol abuse. Finally, he opined that if you had been referred to the PEB, a finding of fit to continue naval service would have been the likely outcome.

By letter dated 12 December 2017, your attorney provided a rebuttal to the AO referenced above. Specifically, your attorney asserted that the 9 December 2013 diagnostic report from the [redacted] discussed above, which was issued three days after the [redacted] had directed your administrative discharge for misconduct, supported the conclusion that you suffered from significant cognitive and emotional impairment as well as untreated PTSD at the time of separation, and that the preponderance of the evidence suggests that these impairments related directly to your in-service injuries. Your attorney also provided the Hampton Roads neuropsychology assessment report which found current diagnoses for PTSD, mild neurocognitive disorder, and MDD. In response to the AO provided by the CORB's SMA, your attorney disagreed with his assessment that the alcohol-related misconduct that precipitated your separation "appears … not to have resulted from a legally exculpating level of psychological impairment incident to a potentially compensable psychiatric condition" based upon the neuropsychological assessment provided by the Hampton Roads Neuropsychological Clinic. Your attorney also disagreed with the CORB SMA's conclusion that referral to the PEB was not warranted and would not have resulted in a finding of unfitness. Specifically, your attorney asserted that your medical records at the time of your service and separation show symptomology that should have led to a referral to the DON PEB contemporaneously with your decline in performance starting in 2012. This argument was essentially based upon your "abrupt change in behavior and performance starting in 2012 and culminating in the alcohol-related arrest in July 2013, which your attorney asserted should have "reasonably prompted doubt" as to your fitness for continued duty. Finally, your attorney argued that the PEB would have found you unfit with at least a 30 percent disability rating based upon your performance evaluations which demonstrated a marked decline in your ability to perform your duties as a Navy diver.

[41] In your response to the AO provided by the CORB's SMA, which is discussed further below, you requested the alternative relief of reinstatement to active duty for the purpose of undergoing the Medical Evaluation Board (MEB)/PEB process (i.e., the DES) which you claim that you should have undergone prior to your release from active duty.

On 4 January 2018, the Board denied your request for relief in Docket No. 11217-16, finding insufficient evidence of any error or injustice warranting relief. Specifically, the Board substantially concurred with the AO provided by the CORB's SMA and found that the objective evidence in the record showed that you were able to perform the duties of your office, grade, rank or rating despite the existence of your diagnosed disabilities.[42] The Board also agreed with the NDRB's analysis that you were properly processed and discharged for your misconduct. The Board's decision in Docket No. 11217-16 was communicated to you by letter dated 5 February 2018.

You filed suit in the COFC on 8 May 2020, alleging that the Board's decision in Docket No. 11217-16 was arbitrary and capricious. Specifically, you asserted that that decision must be reviewed for the following reasons:

- The SECNAV changed the policy of prioritizing administrative separation processing for misconduct over disability processing in June 2016 to allow for dual processing. When that policy was changed, the Department of Defense issued a press release informing former members that they could petition the Board for relief.
- The Board did not consider the criteria DODI 1332.38[43] and SECNAVINST 1850.4E.
- The Board failed to consider the duties of a Navy Diver in its decision, instead focusing upon your 2013 evaluation reports which you claimed not to be tied to those duties.
- The Board failed to consider that Navy Divers must meet heightened medical standards, and that your medical condition made you unqualified to continue in that specialty.
- The Board failed to identify or consider your common military tasks.
- The Board failed to consider your deployability.
- The Board failed to consider whether your condition imposed an unreasonable burden on the Navy to maintain or protect you.

On 19 November 2021, the COFC granted judgment in favor of the government in your case. Specifically, the COFC found that while the Board's decision in Docket No. 11217-16 was arbitrary and capricious for failing to consider important factors, including some which you had not raised in your application, the Board's determination that your administrative separation for misconduct took precedence over disability processing was not arbitrary and capricious or contrary to law. The COFC also rejected your argument that you had a recognized property interest in disability retirement benefits which would entitle you to a personal hearing in accordance with the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

On 9 March 2022, you appealed the COFC's decision to the CAFC. Specifically, you asserted on appeal that the Board erred in its decision to correct your naval record to reflect your eligibility for medical disability retirement benefits and that the Board denied your right to due process by refusing to grant you a personal appearance hearing. On 30 May 2023, the CAFC agreed with both of these contentions. With regard to the former issue, the CAFC agreed with

[42] The Board relied upon your last two performance evaluations from 2013 which reflected that your met acceptable performance standards from 13 May 2013 through your discharge on 20 December 2013 for every performance trait except for that related to your misconduct.

[43] *Physical Disability Evaluation*, 14 November 1996. This Department of Defense regulation was cancelled on 5 August 2014 and superceded by DODI 1332.18 (*Disability Evaluation System (DES)*).

the COFC's conclusion that the Board's decision in Docket No. 11217-16 was arbitrary and capricious for failing to consider important factors, but overruled the COFC's conclusion that that deficiency was moot given the determination that you were not eligible for disability processing because you were being processed for administrative separation for misconduct. Specifically, the CAFC found that the Board failed to explain its rationale that the NDRB's decision to upgrade your discharge to remove reference to misconduct had no legal effect upon your eligibility for disability processing. With regard to the latter issue, the CAFC rejected the COFC determination that you lacked a recognized property interest in military disability retirement benefits. The CAFC was silent, however, with regard to whether this property interest entitled you to a personal appearance hearing and/or the process due in this regard; rather, it remanded your case to the Board to "explain, in the first instance, its determination in this case in view of [your] change in discharge characterization and narrative reason for separation, to determine [your] fitness under all relevant considerations set out in SECNAV 1850.4E § 3304, and to address [your] eligibility under the relevant military disability retirement pay statute, 10 U.S.C. § 1201, 1203," at which you were "free to reassert [your] request for a post-separation hearing."

On 22 September 2023, the COFC remanded your case to the Board in accordance with the CAFC's 30 May 2023 decision. In addition to ordering the Board to address those matters specified by the CAFC, the COFC also directed the Board to consider any additional argument or evidence regarding your claim for military disability benefits that you may submit to the Board within 45 days.

The Board received your additional arguments and evidence submitted in accordance with the COFC's remand order on 30 October 2023. Your attorney made the following arguments in support of your claim for relief:

- You may not be denied a disability retirement due to misconduct. Additionally, the Navy changed its policy in 2016 to permit dual processing for misconduct and disability, and the associated press release suggests that you were within the intended beneficiaries permitted to petition the Board for relief.
- You are entitled to liberal consideration pursuant to 10 U.S.C. § 1552(h) and the Kurta and Hagel Memos. In this regard, you argued that your arrest by the [redacted] police was almost certainly illegal, and that this should weigh in your favor for the Kurta Memo analysis.
- You were clearly unfit under the criteria of SECNAVINST 1850.4, paragraph 3304. In this regard, you asserted that both the CAFC and COFC agreed that you were discharged as a Navy Diver and that the common military tasks of a Navy Diver are therefore the relevant ones.
- Even if the Board is not convinced that you were unfit at the time of your separation, it must refer you to the PEB in accordance with Enclosure (8) to SECNAVINST 1850.4.

Upon receipt of your matters described above, the Board sought an AO from a qualified mental health professional.[44] By memorandum dated 8 March 2024, the CORB's SMA provided an AO for the Board's consideration, finding that his conclusion from his 23 October 2017 AO remained unchanged.[45] Specifically, he opined that you were fit according to all of the relevant considerations in SECNAVINST 1850.4E. With regard to your common military tasks, he noted that there was no evidence that any military medical treatment providers ever assigned any duty restrictions or limitations, and that you were medically cleared for separation. He also noted that your performance evaluations suggested that you were meeting the performance standards up until your discharge. With regard to the criteria regarding your physical fitness test, the CORB's SMA noted that you did not participate in the PFA cycle prior to your discharge, but each presumably passed the PFAs for each of the previous cycles. Finally, the AO noted that there was no evidence in your medical treatment records suggesting that you were disqualified from deploying alone or with a unit, or that a military medical treatment provider ever disqualified you from any special qualification duty. With regard to your eligibility for military disability benefits under 10 U.S.C. §§ 1201, 1203, the CORB's SMA opined that the record does not support that you were unfit for any medical condition while on active duty. Finally, with regard to your claim that the DON's MANMED requirement for diving medical eligibility necessitated your referral to the DES, the CORB's SMA opined that SECNAVINST 1850.4E was issued by a superior authority than was the MANMED and provides the authoritative standards for DES referral.

On 18 March 2024, the Government filed an unopposed motion with the COFC for an enlargement of the remand period for the reason stated in footnote 44. That request was granted by the COFC.

By letter dated 8 April 2024, your attorney provided a response to the AO referenced above. After providing a general response attacking the content of the AO and the qualifications of its author, your attorney provided the following specific responses to the AO:

- The AO excluded the common military tasks of a Navy Diver from that portion of its analysis;
- You claimed that your assignment to Maintenance Technician duties was limited duty;[46]
- The 12 February 2023 mental health treatment note cited in the AO was irrelevant, as it predated your diagnosis with a brain injury, cognitive difficulties, and a serious psychiatric illness;
- The AO misrepresented the facts by omission by stating that your SHPE found you "qualified for service and separation," when in fact it included comments supporting your unfitness as a diver;

[44] The Board originally sought this AO from its own Physician Advisor, who happens to be a psychiatrist. However, his personal medical issues prevented him from completing this review and necessitated that the Board seek an AO from elsewhere in the DON and an enlargement of the remand period.
[45] The CORB SMA who provided the AO for Docket No. 11217-16 was the same who provided the present AO.
[46] Your attorney claimed that the suspension of your diving privileges was required by MANMED Article 15-102, and you could have been restored once your alcohol treatment was completed but by that time your brain injury and cognitive impairments were known. This assertion was erroneous, as your Navy Diver NEC was officially removed on 24 September 2013, several months before your brain injury and cognitive impairments were identified by the [redacted]

- The performance evaluations were not the most relevant evaluation of your ability to perform duties;
- The AO improperly relied upon your final performance evaluation which evaluated your performance as a maintenance technician;
- It was improper to rely upon your performance evaluation for the reporting period 16 March 2013 to 13 May 2023 because it predated your removal from diving duties and diagnoses with a brain injury, cognitive difficulties, and a serious psychiatric illness;
- The AO fails to comply with the court instructions by not engaging in a substantive fashion on the issue of non-deployability;
- The AO is misleading in that it states that a military treatment provider did not disqualify you from any special duty, failing to mention that your diagnosis disqualified you from diving and associated special qualifications;
- In opining that you were fit, the AO did not reference the duties of a Navy diver or discuss the effects of your diagnosed brain injury, cognitive limitations, and serious psychiatric condition on your fitness;
- The MANMED was dispositive on whether you were medically eligible to dive. Additionally, the AO's comment that your active duty medical treatment providers did not find your fitness for continued naval service to be questionable is misleading because "the issue is not fitness for Naval Service generally but fitness to perform the duties of [your] 'office, grade, rank or rating";
- The AO did not address your argument that Enclosure (8) to SECNAVINST 1850.4E compelled your referral to the PEB;[47]
- The AO failed to consider that the NDRB previously characterized you as having "service connected disabilities including cognitive defects in motor slowing due to decompression sickness and hypoxic episodes," and that such impairments are inconsistent with continued service as a Navy diver.

Conclusion.

Upon careful review and consideration of all the evidence of record, the Board found insufficient evidence of any error or injustice warranting relief.

Discharge for Misconduct.

The Board found no evidence of any material error or injustice in your discharge for misconduct due to commission of a serious offense with a general (under honorable conditions) characterization of service.[48] You were arrested in a public setting after failing to pay your bill at a restaurant in [redacted] on 21 July 2013. Your explanation for leaving the restaurant without paying your bill has evolved over time, as you have alternatively explained at different times that you simply forgot to pay and that you had stepped outside to call your wife. Regardless of the reason, you lacked the means to pay this bill when the circumstances compelled you to do so, and then reacted in a wholly inappropriate and unlawful manner. You became belligerent with

[47] You asserted that this failed to comply with the Court's order. However, the Court's order applies to the Board and not to the content of the AO.
[48] In reaching this conclusion, the Board concurred with the NDRB's finding of no impropriety in your discharge.

law enforcement officials when they reasonably requested that you provided identifying information to ensure payment of the bill for which you had demonstrated either an unwillingness or inability to pay, and then became violent when your belligerent behavior escalated the situation. Your conduct required physical restraint; you had to be physically removed from the restaurant while screaming profanities at the arresting officers, and you tried to run away once you were outside of the restaurant. Once secured in the police car, you began kicking at the door window. By your own admission, you exercised poor judgment, but such conduct by a Sailor is far more than simply poor judgment. There is no evidence to support your contention that the law enforcement officers unnecessarily escalated this situation. Rather, the evidence suggests that it was you who unnecessarily escalated it, as it was entirely reasonable for them to request your identification to ensure payment of your bill after you had demonstrated an inability or unwillingness to do so. You also provided no evidence to support your claim that this arrest was illegal. The charges survived the civilian court proceedings, and you could have been punishment you could have been punished for them if you failed to comply with the conditions of the diversion program.

By your own admission, your status as a Sailor at [redacted] was known to the arresting officers, which aggravates such conduct since it was clearly service discrediting. Additionally, this incident occurred approximately three months after you received NJP for, amongst other offenses, driving while intoxicated. That misconduct alone could have justified your administrative separation for misconduct, but your command graciously provided you the opportunity to recover from that mistake. As such, you were on notice that your conduct was under close scrutiny and that further misconduct could result in serious consequences. A general discharge was the least severe consequence that you reasonably could have expected under the circumstances.

The 21 July 2013 incident resulted in charges of theft of services under $100, disorderly conduct, and resisting arrest. The theft of services charge was closely related to a violation of either Article 121 (Larceny) or 134 (False pretenses, obtaining services under), Uniform Code of Military Justice (UCMJ), both of which carried a maximum punishment of up to six months of confinement and a bad-conduct discharge (BCD) when involving property or services of a value less than $100, while the resisting arrest charge was analogous to a violation of Article 95, UCMJ,[49] which carried a maximum punishment of up to one year of confinement and a BCD. As such, both offenses constituted "serious offenses" for which you could be administrative separated for misconduct pursuant to MILPERSMAN 1910-142.[50] The fact that these charges were ultimately dismissed by the civilian authorities after you satisfied the conditions of an alternative plea agreement is irrelevant to the fact that you committed the underlying offenses.

Finally, there were no apparent errors in the administrative discharge process. You were notified of the initiation of your administrative separation proceedings for misconduct due to commission of a serious offense on 30 July 2013, and you acknowledged this notification on the same day.

[49] This offense has since been redesignated as Article 87a, UCMJ.

[50] MILPERSMAN 1910-142 provides that "Service members may be separated based on commission of a serious military or civilian offense when the offense would warrant a punitive discharge, per [the Manual for Courts-Martial], for the same or closely related offense." Your previous driving while intoxicated charge was a violation of Article 111, UCMJ, for which a punitive discharge was also authorized. Accordingly, that offense could also have served as a basis for an administrative separation for misconduct due to commission of a serious offense.

Because you had less than six years of service at the time and your command did not consider separating you under other than honorable (OTH) conditions, the notification procedures of MILPERSMAN 1910-402 were authorized. As such, your due process with regard to this administrative separation consisted of your right to submit a statement for consideration by the separation authority. The record reflects that you submitted such a statement on 2 August 2013.

As the Board found no error of fact regarding the serious misconduct in question, or of process in the proceedings by which you were administratively separated, the Board found no error in your discharge for misconduct due to commission of a serious offense at the time. The Board also found not injustice in this result at the time because, as stated above, an administrative discharge with a general (under honorable conditions) characterization of service was the least severe consequence for your misconduct that you reasonably could have expected under the circumstances.

Existence and Effect of Mental Health Conditions.

Because you based your request for relief in whole or in part upon the existence of mental health conditions, the Board reviewed your case in accordance with the guidance of the Hagel and Kurta Memos. Accordingly, the Board applied liberal consideration to your claimed mental health conditions and the effect that they may have had upon your conduct. As discussed in more detail below, the Board found sufficient evidence that you suffered two TBI events, developed several cognitive deficits, and suffered from MDD during your naval service. It found insufficient evidence, however, that you suffered from PTSD during your naval service. The Board also found that the latter two of these conditions mitigated, but did not excuse, at least some of your misconduct. If the NDRB had not already upgraded your characterization of service and changed your narrative reason for separation based upon equitable considerations, the Board would have considered this mitigating effect amongst other factors for the same purpose. However, the mere existence of these conditions did not entitle you to referral to the DES or render you unfit for further service.

PTSD.

Even applying liberal consideration, the Board found insufficient evidence to conclude that you suffered from PTSD during your naval service. First, you were never diagnosed with PTSD while you were in the Navy despite multiple evaluations and treatment by mental health professionals. You received mental health treatment from a licensed clinical psychologist at [redacted] prior to your reassignment to the USNA, and then again from the Naval Health Clinic [redacted] in February 2013, and neither of these providers diagnosed you with PTSD. You then underwent a comprehensive battery of neuropsychological assessments at the [redacted], which had identified potential PTSD symptoms and was therefore looking for that condition in particular, but this assessment also did not result in a PTSD diagnosis. The Board acknowledges a formal diagnosis is not required to find that you had PTSD. However, you did not serve during a period when PTSD was unknown and/or unrecognized, which was the original purpose for liberal consideration under the Hagel Memo. Your military mental health providers were fully aware of and trained to be alert to signs of PTSD in Service members, and the evidence reflects that the [redacted] had reason to focus its assessment upon the possibility of

PTSD, but none of them ultimately found that your condition satisfied the diagnostic criteria for that condition. The Board found this to be compelling evidence that you did not actually suffer from PTSD during your military service.

The Board also found persuasive the results of your VA C&P examination in July 2014, seven months after your discharge from the Navy. The VA psychologist who conducted this examination evaluated you specifically for PTSD since that was the one of the bases for your VA disability benefits claim, and found that you did not satisfy the diagnostic criteria for PTSD. She did find that you met the diagnostic criteria for another compensable condition, so this finding was not motivated by any latent motivation to deprive you of any benefits. The Board also notes that the VA has continued to deny service connection for PTSD since its initial determination. The Hagel Memo directs the Board to give special consideration to VA determinations pertaining to PTSD claims. Accordingly, the Board found this determination to be virtually dispositive on the issue of whether you had PTSD during your military service.

The Board acknowledges that you provided the opinion of your career counselor at the [redacted] that you were suffering from the effects of a "dual diagnosis of untreated PTSD and TBI" soon after your discharge from the Navy, but found this opinion to be far less persuasive than the evidence relied upon by the Board above. The career counselor who reached this conclusion specifically referenced the fact that you were treated and evaluated at the [redacted], which she described as a "premier clinical team" which "initiates treatment and develops individualized treatment plans for cohorts or service members with the complex interaction of TBI and [PTSD] for the Department of Defense" in support of her opinion, but then proceeded to ignore the fact that the [redacted] did not diagnose you with PTSD after its comprehensive assessment. She also did not base her opinion in this regard upon any neuropsychological assessments like the [redacted] and VA psychologist did in rendering their contrary diagnoses; rather, she based her opinion upon vague reference to PTSD-like symptoms without discussion of any of the diagnostic criteria for PTSD. Finally, the Board presumes that you relied upon this opinion to support your claim for VA disability benefits for PTSD since you did not have any other medical documentation supporting such a claim. As such, the VA's finding after submitting you to the battery of neuropsychological assessments necessary to render an accurate diagnosis for PTSD tended to negate the validity of this opinion.

The Board also acknowledges that you provided a neuropsychological assessment from the [redacted] which diagnosed you with PTSD. The Board found minimal relevance to this evidence because it assessed your mental health as of 27 February 2017, more than three years after your discharge. As such, this diagnosis is irrelevant to the question of whether you suffered from PTSD during your military service. The fact that a condition may have arisen from events occurring during military service or progressed after military service may be relevant in establishing service connection to determine your eligibility for VA benefits, but it is irrelevant to the question of whether the condition actually existed during your military service. The Board also noted that the [redacted] PTSD diagnosis relied upon the same claimed traumatic events that you reported in connection with your claim for VA disability benefits, which the VA psychologist had explicitly discounted based upon her further inquiry which revealed that you exaggerated the nature of these events. The Board believed that a VA psychologist, who presumably treats and evaluates Veterans on a routine

basis, was likely more qualified than the [redacted] to assess the credibility of military service-related trauma claims. The Board acknowledges that the [redacted] opined that "it is more likely than not that *these diagnoses* did exist at the time of [your] separation from service in 2013, (*emphasis added*)" but noted that the assessment did not clarify which of "these" diagnoses more likely than not existed at that time. The explanation provided for this finding made no reference to PTSD, but rather focused on your cognitive deficits, so the Board found it likely that the [redacted] clinic was referring to the Mild Neurocognitive Disorder and MDD conditions which it also diagnosed. As discussed further below, the Board concurred that there was sufficient evidence that you suffered from these conditions during your naval service.

TBI.

The Board found sufficient evidence to conclude that you experienced two TBI events during your naval service. The medical evidence reflects that you hit your head upon surfacing from a dive in 2010, which resulted in a momentary loss of consciousness. It also reflects that you were momentarily knocked unconscious from a "knee to the face" during a football game in 2012. Further, the in-service occurrence of your TBIs is supported by your current service-connected disability from the VA. The Board found no evidence that either of these TBI incidents were combat related.[51]

Although the Board found sufficient evidence that you incurred TBIs during your naval service, it found insufficient evidence to conclude that these TBIs either excused or mitigated the misconduct for which you were discharged. First, these TBIs were extremely mild in nature. You were evaluated at the time of each incident and returned to duty without restrictions on the same day. Additionally, you reported no residual effects from either of these incidents during the TBI evaluation conducted in support of your claim for VA benefits on 5 August 2014. Further, the neurological examination conducted during that evaluation revealed no evidence of abnormality related to TBI and found it "very unlikely that [your] current cognitive deficits and motor slowing are related to those concussions." Finally, the Board found no logical nexus between mild TBIs occurring in 2010 and 2012, and the conduct that you exhibited at a restaurant in July 2013. The Board acknowledges that TBI may produce symptoms such as aggressiveness and/or impulsivity, but found insufficient evidence that your mild TBI experiences had such an effect so remotely from their occurrence. Accordingly, even applying liberal consideration, the Board found insufficient evidence that your TBI events excused or mitigated any of your misconduct.

Cognitive Deficits (Neurocognitive Disorder).

The Board found sufficient evidence to conclude that you developed cognitive deficits during your naval service.[52] Although the Board applied liberal consideration in this regard, it need not

[51] As neither of these TBI incidents were combat related, the Board found that the liberal consideration requirement of 10 U.S.C. § 1552(h) did not apply to your case. The Board did, however, apply the liberal consideration guidance of the Hagel and Kurta Memos, and notes that the analysis called for by the latter essentially encompasses that directed by 10 U.S.C. § 1552(h).

[52] You have been alternatively diagnosed with cognitive deficits and various specific types of "Cognitive Disorders." The Board found irrelevant the specific diagnosis, as the symptoms were clearly established.

have done so to reach that conclusion since these deficits were identified prior to your discharge. Specifically, the [redacted] diagnosed you with a Cognitive Disorder on 9 December 2013, based upon a battery of neuropsychological assessments which identified cognitive difficulties on tasks requiring "mental processing speed, slowed fine motor and dexterity and visuospatial processing, complex problem solving and memory." The [redacted] attributed these deficiencies to multiple etiologies, including but not limited to "childhood maltreatment, developmental exposure to alcohol (e.g., fetal alcohol exposure), hypoxia episodes from multiple long-term dives and reduced oxygen saturation, and [your] MRI results indicating a 'small retrocerebellar cyst.'" The severity of these cognitive deficits soon after your discharge were further developed during your initial evaluation of residuals of TBI conducted by the VA on 5 August 2014 pursuant to your claim for disability benefits for TBI. Specifically, with regard to your memory, attention, concentration, and executive functions, the VA evaluation found "[o]bjective evidence on testing of mild impairment of memory, attention, concentration, or executive functions resulting in mild functional impairment."[53] The Board also noted that there was evidence in the record that your concentration issues were identified prior to your reassignment to the [redacted] in October 2012,[54] and that you reported some memory issues soon after your DCS episode in 2012. With regard to your motor activity, the VA evaluation found that your "[m]otor activity is normal most of the time, but mildly slowed at times due to apraxia (inability to perform previously learned motor activities, despite normal motor function)." Finally, with regard to your communication functions, the VA found that your "[c]omprehension or expression, or both, of either spoken language or written language is only occasionally impaired," but that you "[c]an communicate complex ideas."

Applying liberal consideration, the Board found that your cognitive deficits may have mitigated some, but not all, of the misconduct for which you were discharged. Specifically, the Board found it plausible that your memory and attention deficits may have contributed to your failure to pay your restaurant bill on 21 July 2013. This would mitigate that offense, but would not excuse it because you lacked the ability to pay the bill regardless and these deficits did not reasonably call your mental competency into question. If the NDRB had not already upgraded your characterization of service and changed your narrative reason for separation, the Board would have considered this mitigating factor amongst other considerations for this purpose. However, the Board found that your cognitive deficits neither excused nor mitigated your resistance of arrest by civilian law enforcement officials. There was simply no logical nexus between decreased memory and/or attention functions, and/or diminished motor and communication skills, and violently resisting arrest, which was the more serious offense arising from your conduct on 21 July 2013. None of your identified cognitive deficits can explain that conduct, so even with the application of liberal consideration the Board did not find those deficits to excuse or mitigate it.

Major Depressive Disorder.

[53] Your self-report during this evaluation suggestd that these mild impairments were primarily related to your memory and attention functions.

[54] In a letter dated 30 October 2014, a Licensed Clinical Psychologist at [redacted] informed your attorney that you had mentioned some concentration issues during one of your treatment sessions which focused on the emotional distress resulting from the status of your marriage at the time.

The Board found sufficient evidence to conclude that you suffered from MDD during your naval service. Again, although the Board applied liberal consideration in this regard, it need not have done so to reach this conclusion since this condition was identified prior to your discharge. The Board found that the symptoms of this condition were identified at least as early was 2012, as you sought mental health treatment for such symptoms before your reassignment to the [redacted] Although you were not formally diagnosed with MDD until the very end of your naval career, it was apparent that these symptoms had previously existed.

Applying liberal consideration, the Board found that this condition may have mitigated the misconduct for which you were discharged. Specifically, the Board found it plausible, if not likely, that your depression caused you to self-medicate with alcohol, and your excessive alcohol consumption obviously contributed to your misconduct. The condition did not, however, excuse your misconduct, because your alcohol use was voluntary and MDD does reasonably implicate your mental competency. Again, if the NDRB had not already upgraded your characterization of service and changed your narrative reason for separation, the Board would have considered this mitigating factor amongst other considerations for the same purpose.

Enclosure 8 of SECNAVINST 1850.4E.

The Board found no merit to your novel contention that enclosure (8) of SECNAVINST 1850.4E compels this Board to refer your case to the PEB. Your novel interpretation of this enclosure as to require such referral upon the occurrence of any injury or the development of any condition listed would produce the absurd result of requiring the referral of virtually every Sailor and Marine to the PEB at some point during their respective careers. That is simply not how the DES works.

First, paragraph 3201(a) of SECNAVINST 1850.4E provides that, as a general rule, Service members will be referred to the PEB for a fitness determination "only by a medical board that has found the member's fitness for continued naval service questionable by reason of physical or mental impairment." This Board is not a MEB, so you contention that Enclosure (8) obligates this Board to do anything is without merit. This Board may utilize SECNAVINST 1850.4E as a guide to evaluate naval records for error or injustice, but its conduct is not governed by SECNAVINST 1850.4E. While this Board may refer individuals to the PEB in order to remedy an error or injustice, it does not do so as a substitute for a MEB – that is not this Board's function.

Second, paragraph 3202(c) of SECNAVINST 1850.4E provides that the mere presence of a disease or injury alone does not justify referral to the PEB, but rather that such referral should occur only when, in the opinion of the MEB, the defect "may materially interfere with the member's ability to perform reasonably the duties of his or office, grade, rank, or rating/MOS on active duty." This provision negates your contention that the mere existence of a condition which happens to be listed in Enclosure (8) should presumably result in referral to the PEB.

Third, as discussed further below, you failed to prove that your conditions met the criteria for referral to the DES. As enclosure (8) of SECNAVINST 1850.4E provides guidance regarding referral of individuals to the PEB, such guidance only comes into effect after the individual has

been properly referred to the DES for review by a MEB. Accordingly, the guidance of enclosure (8) did not apply to your conditions.

Finally, paragraph 8001(g) of SECNAVINST 1850.4E cautions that "the physician should be aware that the presence of the condition alone is often not a criteria for submission of a MEB report – the member must have been tried on appropriate courses of medication (and proper use of [limited duty] status), been unresponsive to them, and required untoward number of visits for medical care or hospitalizations. Just as importantly, the condition must have resulted in an impairment of the ability to perform the duties as a member of the DON." This provision, which is specifically referencing the conditions listed in Enclosure (8), also negates your contention that the existence of a condition which happens to be discussed in Enclosure (8) presumably warrants referral to the PEB.

Eligibility for DES Processing.

At the time of your discharge, you were ineligible for disability processing through the DES even if your medical conditions would have warranted such processing. In accordance with SECNAVINST 1850.4E, "processing for … administrative discharge for misconduct takes precedence over processing for disability," and cases could not be submitted to the PEB "for a member who is pending an administrative discharge due to misconduct."[55] You were being processed for administrative discharge for misconduct as of 30 July 2013, long before you received any diagnosis or displayed any symptoms which even arguably could have warranted referral for disability processing, and that process resulted in your discharge for misconduct. Accordingly, you were not eligible for disability processing under the regulations in effect at the time.

The Board found the action taken by the NDRB to change the narrative reason for your separation from misconduct to "Secretarial Authority" to have no bearing on your eligibility for disability processing because the NDRB's action was based upon equity rather than impropriety.[56] The NDRB rejected each of your eight claims of impropriety, but granted relief

[55] See paragraph 1002(b).

[56] Per DODI 1332.28 (*Discharge Review Board (DRB) Procedures and Standards*, 4 April 2004), the NDRB reviews discharges for propriety and equity. The NDRB shall deem a discharge to be proper unless, in the course of discharge review, it is determined that:

- An error of fact, law, procedure, or discretion exists associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby; or
- A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

See paragraph E4.2.1. of DODI 1332.28.

The NDRB shall deem a discharge to be equitable unless:

- It is determined that the policies and procedures under which the applicant was discharged differ in material respects from those currently applicable on a Service-wide basis to discharges of the type under consideration provided that the current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings and there is substantial doubt that the applicant would

on solely equitable grounds based primarily upon its finding that your service-connected cognitive defects contributed to your performance decline and misconduct. The NDRB also considered the fact that you performed a relatively dangerous duties, and that the entirety of your service was otherwise meritorious. In rejecting your claims of impropriety, the NDRB found, as this Board also did, that you were properly discharged for misconduct. In fact, the NDRB found that your discharge was both "proper and equitable at the time of discharge." A discharge upgrade granted by the NDRB on purely equitable grounds does not negate the fact that you were, in fact, processed for administrative separation for misconduct and therefore ineligible for disability processing. The narrative reason for separation reflected on your DD Form 214 today bears no relevance or resemblance to the actual reason for your discharge in 2013, and that actual reason disqualified you for disability processing. This finding is consistent with the 25 July 2018 guidance provided by the USD (P&R) to both the Board and the NDRB titled "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determinations."[57] Specifically, paragraph 6l of the attachment to the Wilkie Memo provides that changes to the changes to the narrative reason for a discharge and/or an upgraded character of discharge *granted solely on equity grounds* should not normally result in eligibility for financial benefits.

The Board's determination in this regard might have been different if the NDRB's action had been based upon a finding of impropriety. For example, if the NDRB had found an error of fact in the underlying misconduct which prompted the administrative separation proceedings, or an error in the administrative separation process itself, such a finding would call into question basis for your disability processing ineligibility. In the absence of such a finding, however, the NDRB's decision had no bearing whatsoever upon your eligibility for disability processing in 2013. The Board noted the CAFC's commentary that the Board's treatment of a change to the characterization of service is different than the VA's treatment of such changes, and that it could "see no principled reason for such disparate treatment in how the Navy treats changes in discharge characterization." The Board respectfully disagreed with the CAFC in this regard. Neither your discharge characterization nor your narrative reason for separation had any bearing upon your eligibility for disability processing in 2013, as neither was assigned until you were actually discharged. Unlike VA disability benefits, eligibility for military disability retirement benefits is not tied to the individual's characterization of service. Rather, it was the fact that you were being administratively processed for separation due to misconduct which disqualified you for disability processing in 2013. This policy existed, at least in part, to promote good order and discipline in the Navy and Marine Corps. Additionally, the CAFC's comment in this regard reflected its misunderstanding of the function of this Board. This Board did not find that you were ineligible for military disability retirement benefits because of your misconduct; this Board

---

have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration;

- At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member; or
- In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the NDRB viewed in conjunction with other stated factors and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance.

See paragraph E4.3. of DODI 1332.28.

[57] Hereinafter referred to as the "Wilkie Memo."

does not make such determinations. Rather, this Board found no error or injustice in the fact you were not eligible for such benefits since you were not eligible for disability processing in 2013. To be clear, the fact that you were not eligible for disability processing in 2013 due to your processing for administrative separation for misconduct does not preclude the Board from correcting your record to reflect your eligibility for disability retirement benefits on the basis of an injustice; it simply precludes the finding of an error in the Navy's failure to process you for disability in 2013 upon which such relief may be based.

The Board found the change of DON policy in June 2016 to permit the dual processing of individuals through both the administrative separation process for misconduct and through the disability process to have no bearing upon your eligibility for disability processing in 2013. The 2016 policy change was prospective in effect and did not have any retroactive application. The Board also found no relevance to the 8 June 2016 press release which announced the change of policy. The press release in question simply made a factual statement that Service members previously separated under similar circumstances may petition to have their discharge reviewed through either the NDRB or the Board. Nothing about this statement implied that such petitions would or should receive favorable results. The SECNAV has never informed this Board that it should apply the 1 June 2016 policy change retroactively or give favorable consideration to individuals administratively separated for misconduct prior to 1 June 2016, and the Board is not inclined to presume his intent in this regard based upon a press release written by Second Class Petty Officer.

The Board also found no injustice in the fact that Sailors being processed for administrative separation due to misconduct under similar circumstances today may receive a more favorable outcome than you experienced due to the change of policy, because it is unlikely that you would have experienced a more favorable outcome today under the circumstances. As discussed further below, the Board found insufficient evidence to conclude that you even met the criteria for referral to the DES even in the absence of any misconduct, and that you likely would have been found fit for continued service even if you did. Accordingly, the Board found it unlikely that a different outcome would have resulted if the present policy had been in effect during your naval service.

Apart from the fact that you were ineligible for disability processing in 2013 due to your processing for administrative separation for misconduct, the Board found that the evidence reflects that you likely never would have qualified for referral to the DES even in the absence of any misconduct. Per SECNAVINST 1850.4E, "[a] case usually enters the [DON] DES when a [MEB] is dictated for the purpose of evaluating the diagnosis and treatment of a member who is unable to return to military duty because the member's conditions most likely is permanent, and/or any further period of temporary limited duty (TLD) is unlikely to return the member to full duty."[58] SECNAVINST 1850.4E further directs commanders of medical treatment facilities and individual medical and dental officers to "identify promptly for referral to the DES those members presenting for medical care whose Fitness for active duty is questionable." The preponderance of the evidence reflects that you did not meet this criteria.

[58] See paragraph 3102(a).

The most compelling evidence that you did not meet the criteria for referral to the DES is that not a single one of the several mental health and medical providers that treated and/or evaluated you during your naval service ever even assigned you to a single period of TLD,[59] much less suggested that you would not be able to return to full duty. You received mental health treatment from a licensed clinical psychologist prior to your reassignment to the [redacted] for the emotional distress related to the status of your marriage, and this provider did not believe that your condition warranted any duty limitations. Upon the end of this treatment, she determined that you were coping better with your emotional distress. At no time did she suggest limiting your duties or raise questions regarding your fitness for continued service, as she would be required to do if your mental health presentation raised any questions regarding your performance of duty or continued service.

You again sought mental health treatment at [redacted] February 2013. The focus of this treatment was also related to the emotional distress pertaining to the status of your marriage. All of the symptoms described during this session related to emotions surrounding your marriage, while none pertained to your duties. In fact, the provider's note commented that you had "[n]o difficulty functioning at work," and that you felt "the best when [you were] in the water diving." Again, there was nothing about your presentation during this treatment to suggest that your duties should be limited or that your fitness for continued service was in doubt. To the contrary, the comment above suggests that your diving duties had a mitigating effect upon your mental health issues at the time. You were diagnosed with an adjustment disorder with anxiety and depressed mood by [redacted] but there was no suggestion to limit your duties or questions regarding your fitness. Indeed, you were returned to full duty and continued performing your diving duties without pause. This provider also had a professional and regulatory duty to either limit your duties if they presented any concerns and/or to refer you to the DES if your fitness was in question. The fact that he did not do so suggests that your mental health condition did not satisfy the criteria for referral to the DES.

Your next encounter with a medical provider came when you were referred to the [redacted] for alcohol rehabilitation and mental health treatment in September 2013. You remained in this treatment program for nearly three months, and your attending physician reported that you graduated from both the residential treatment program and the Co-Occurring Partial Hospitalization Program "with distinction" and with no evidence of any relapse. Upon the end of these treatment programs, he "highly recommended [you] for continued service in the United States Navy." The Board found this recommendation, made just nine days before your discharge and after nearly three months of daily treatment, to be dispositive of the fact that you were medically able to return to duty and did not meet the criteria for referral to the DES.

While you were at [redacted] you were also referred for a TBI evaluation at the [redacted] which included clinical interviews with a physical examination, laboratories, MRI imaging and neuropsychological assessments. This evaluation identified your cognitive deficits and the need

[59] In this regard, the Board notes that SECNAVINST 1850.4E, paragraph 8001, provides that members should, whenever possible, be placed on TLD for an appropriate period of time before determining that a MEB is appropriate, and that the presence of a condition alone is often not a criteria for submission of a MEB report, but rather the "member must have been tried on appropriate courses of medication (and proper use of [LTD] status), been unresponsive to them, and required untoward number of visits for medical care or hospitalizations."

for further assessment and treatment, and resulted in your MDD diagnosis, but made no suggestion that you continued service was in doubt or that your duties should be limited. While the Board did not consider this evaluation to be as compelling as was the recommendation rendered by your attending physician, the fact that the detailed recommendations provided included no suggestion of limiting your duties or referring you to a MEB suggested that you did not meet the criteria for referral to the DES.

Finally, the Board found the results of your SHPE to be persuasive evidence that you did not meet the criteria for referral to the DES. On 19 December 2013, you received a SHPE which found you to be medically qualified for separation. According to Article 15-20 of the MANMED, the purpose of the SHPE is to determine whether the Service member has developed any medical conditions that might constitute a disability that should be processed by the PEB and to ensure that the Service member is physically qualified for recall to additionally periods of active duty. As such, the standard for being physically qualified to separate are the same as those to continue active duty. That the provider who conducted this examination found that you were medically qualified for service/separation was compelling evidence that you did not meet the criteria for referral to the DES.

Besides the fact that the objective medical evidence did not suggest that you should have been referred to the DES, you also failed to provide the Board with any evidence to suggest otherwise. In this regard, the Board found your reliance upon the diving standards in Article 15-102 of the MANMED to be misplaced. There was no merit to your contention that your suspension from diving duties pursuant to Article 15-102 was for medical reasons, and therefore a de facto "limited duty" for purposes of DES referral. Your diving privileges were suspended pursuant to Article 15-102 because you had an alcohol-related incident and not due to any medical reasons. According to SECNAVINST 1850.4E, referral to the DES requires action by a medical provider. As such, the Board did not find the temporary disqualification from diving duties which follows the occurrence of an alcohol incident equivalent to TLD for purposes of referral to the DES. Even if there were such an equivalency, however, referral to the DES is required when the member is "unable to return to military duty because the member's condition is permanent, and/or any further period of temporary limited duty (TLD) is unlikely to return the member to full duty." By its own terms, the relevant diving disqualification of Article 15-102 is temporary in nature; it cannot serve as the basis for a DES referral absent a medical determination that a MEB is warranted. No medical provider ever opined or suggested that your return to full duty because of your medical conditions was ever in doubt. To the contrary, your attending physician at FBHC strongly recommended your continued service in the Navy. Further, after 24 September 2013, you lost your diving credentials with the removal of your NEC for non-medical reasons, so the likelihood of your return to diving duties became irrelevant to this analysis. The burden to prove the existence of an error or injustice in your naval record is yours, and you failed to provide the Board with any evidence to overcome the weight of the evidence suggesting that you never met the criteria for referral to the DES.

Fitness Analysis.

Having found no error or injustice in your discharge from the Navy or in the Navy's failure to refer you to the DES, the Board's analysis would be complete but for the COFC's remand order.

That order, however, further directed the Board to "[d]etermine [your] fitness under all relevant considerations set out in [SECNAVINST 1850.4E]" and to "[a]ddress [your] eligibility for military disability benefits under 10 U.S.C. §§ 1201, 1203." This directive instructs the Board to perform a function outside of its purview. As stated previously, the Board is neither qualified nor empowered to make fitness determinations, as the SECNAV assigned that responsibility exclusively to the PEB. Rather, the statutory and regulatory function of this Board, per 10 U.S.C. § 1552 and SECNAVINST 5420.193, is to correct errors in and/or remove injustices from naval records. While the Board is indeed empowered to correct your naval record to reflect your eligibility for medical retirement benefits pursuant to 10 U.S.C. § 1552 if it finds the existence of an error or injustice in the fact that you are not currently so eligible, it does not do so by making a fitness determination pursuant to 10 U.S.C. § 1201. Rather, the Board is governed by DODD 1332.41[60] and SECNAVINST 5420.193, along with other various policy guidelines such as the Hagel Memo, the Kurta Memo, and the Wilkie Memo, in performing this function. It is not governed by DODI 1332.38 or SECNAVINST 1850.4E; the Board is not part of the DES process. These authorities provide the standards against which the Board may analyze naval records for error or injustice, but they do not dictate the function of the Board. As the DON PEB never made a fitness determination in your case and there was no error or injustice in the fact that it never did so, there was nothing in your naval record against which the Board could compare the guidance of SECNAVINST 1850.4E. As such, the Board respectfully disagreed with the COFC's determination that it was arbitrary and capricious in previously failing to apply all of the relevant considerations applicable to a finding that it was not qualified or empowered to make.

In deference to the COFC's Order, however, the Board continued to assess your application as if there was there was some error or injustice in the fact that you were not referred to the PEB. This fiction is necessary for the Board to comply with the Court's order. To be clear, the Board did not find an error or injustice in that fact, so it would have denied relief even if it found that you provided sufficient evidence to prove your unfitness. Based upon this analysis, the Board found that you fell far short of your burden to prove that you were unfit for continued service at the time of your discharge.

Common Military Tasks.

The preponderance of the evidence of record clearly suggests that you were fully capable of performing your common military tasks throughout your naval service. The most compelling evidence of this fact is that you were fully performing those duties right up until the time that your diving duties were suspended in April 2013, and that your physical abilities did not change after that suspension. The evidence reflects that your cognitive deficits began to manifest soon after your episode of DCS in 2012, and that you exhibited symptoms of depression at least as early as 2012. Despite these symptoms, you continued to dive and dive well. This fact is reflected in your performance evaluations for the reporting periods 30 October 2012 to 15 March 2013 and from 16 March 2013 to 13 May 2013, both of which found that you met or exceeded standards as a Second Class Diver for every performance trait except for "military bearing/character," which was rated as below standards in the latter performance evaluation due to your misconduct. While these performance evaluations reflect that you were performing

[60] *Boards for Correction of Military Records (BCMRs) and Discharge Review Boards (DRBs)*, 8 March 2004, with Change 1, 2 February 2022.

collateral duties outside of your rating (as all Sailors do), they also reflect that you were actively performing diving duties at or above standards. The only thing that changed after April 2013 was your eligibility to dive. Your diving privileges were suspended after your alcohol-related misconduct in April 2013 pursuant to Article 15-102 of the MANMED, and your diving credentials were subsequently revoked with the removal of your NEC in September 2013. These were regulatory restrictions, however, and not medical restrictions. While you were not authorized to perform diving duties after April 2013, there was no evidence in the record that you were physically unable to do so. Accordingly, the evidence suggests that nothing about your physical disability prevented you from reasonably performing the duties of your office, grade, rank, or rating.

The analysis above regarding your ineligibility for DES processing even apart from your disqualification due to misconduct also suggests that you were capable of performing your common military tasks. As referral to the DES is premised upon a determination by medical provider that there is some question regarding your ability to perform the duties of your office, grade, rank or rating, the fact that no medical or mental health provider ever so referred you, or even suggested some period of limited duty, is compelling evidence that you were capable of performing those duties. A PEB making a fitness determination would have reviewed the same medical evidence reviewed by the Board and likely reached the same conclusion.

In addition to the fact that the evidence reflects that your mental health conditions did not render you unable to perform the duties of your office, grade, rank or rating while in the Navy, your post-service activities also demonstrate that your disabilities did not render you incapable of performing those duties. In July 2015, you were offered and accepted a job as a diver with the NPS. As such, you were performing duties for the Federal government very similar to your common military tasks long after your disabilities were diagnosed. The Board found this fact to be dispositive regarding your continuing ability to perform such tasks despite your disabilities.

The Board found nothing about your diagnosed conditions which would necessarily have rendered you incapable of performing your common military tasks. As noted previously, your two TBI incidents were very minor and rendered no residual effects – they did not limit your ability to perform the duties of a Navy Diver in any way. The evidence reflects that your cognitive deficiencies resulted in only minor functional impairments. This was apparent from the results of the neuropsychological assessment performed on 5 August 2013 by the VA pursuant to your claim for disability benefits. Additionally, the [redacted] Neuropsychological Assessment that you provided in support of your claim diagnosed you with only a "*Mild* Neurocognitive Disorder" more than three years after your discharge. You were performing your diving duties at or above standards with these cognitive deficiencies before they were diagnosed, and the existence of a diagnosis did not change anything with regard to your physical ability to perform these duties. The Board did not question that you diving duties contributed to your cognitive deficits, but you provided the Board with no evidence to suggest that continued diving would worsen those deficits or that the mild impairments would have rendered you unable to reasonably perform diving duties had you been permitted to continue performing them. Finally, there was nothing about your MDD condition which would have rendered you incapable of performing diving duties. It was obvious that your depression symptoms long predated your formal MDD diagnosis and that they did not impair your ability to

perform your diving duties prior to their suspension, so it was apparent to the Board that this condition did not render you incapable of performing those duties.

The only factor that the Board found which might have weighed in favor of a finding of unfitness due to your disability was the possibility that continued diving may have represented a risk to your health. This possibility was raised in the [redacted] report of 9 December 2013, with the comment that "it is possible that the cyst is one source of the difficulties given the changes in pressure that a diver endures, especially given the number of dives he performed." However, the Board would have to engage in blind speculation to conclude that continued diving with the cyst represented "a decided medical risk" to your health if you continued on active duty given the speculative nature of this comment. Certainly, your attending physician at [redacted] did not believe that it would. You provided this Board with no evidence upon which it could reach this conclusion beyond this mere speculation that the cyst might have been a contributing factor to your difficulties. Unfortunately, it was your burden to prove the existence of any error or injustice in this regard, and you failed to do so.

In addition to the fact that there was nothing about your diagnosed conditions which would necessarily have rendered you incapable of reasonably performing your common military tasks, the evidence also reflects that you emerged from your treatment regimen at [redacted] well on the road to recovery. The [redacted] recommended further treatments and assessments but did not recommend any duty restrictions. The Board did not find these recommendations to impose any unreasonable requirements upon the Navy, as they were fairly routine and not uncommon for Sailors experiencing mental health issues. As stated previously, your attending physician at [redacted] raved about your performance in treatment and your commitment to recovery, and highly recommended you for continued service in the Navy. The Board found this recommendation to be compelling evidence that your diagnosed medical conditions did not impair your ability to perform your duties – he could not have ethically provided this recommendation if he reasonably believed that your continued performance of those duties would cause you any harm. Even you emerged from this treatment fully convinced that you were capable of performing your common military tasks. On 16 December 2013, you asked the [redacted] to reconsider his decision to administratively separate you from the Navy for misconduct. In doing so, you emphasized your successful completion of treatment and the positive effect that it had, and stated that you wanted more than anything to complete your service. The effective treatment that you received at [redacted] tended to negate any suggestion that you were unable to perform the duties of your office, grade, rank, or rating as of your discharge date.

As it did in its analysis of whether you satisfied the criteria for referral to the DES, the Board found your reliance upon the diving standards of Article 15-102 of the MANMED to establish your unfitness to be misplaced. The sole standard to be used in making determinations of physical disability as a basis for retirement is unfitness to perform the duties of office, grade, rank or rating because of disease or injury incurred or aggravated while entitled to basic pay.[61] SECNAVINST 1850.4E further provides that "[a] service member shall be considered Unfit when the evidence establishes that the member, *due to physical disability*, is unable to reasonably perform the duties of his/her office, grade, rank, or rating (*emphasis added*)."[62] The diving

[61] See paragraph 3301 of SECNAVINST 1850.4E.
[62] See paragraph 3302(a).

standards of Article 15-102 do not constitute physical disabilities; they are regulatory restrictions. While these restrictions may have temporarily rendered you unable to perform your common military tasks, this inability was not due to any physical disability. Additionally, SECNAVINST 1850.4E provides that "[t]he inability to perform specialized duties or loss of specialized qualification, i.e., … diving qualifications, … will not be the sole basis for a finding of Unfitness." Accordingly, the Board found no relevance to the diving standards of MANMED Article 15-102 in the fitness analysis.[63]

Just as the suspension of your diving privileges in April 2013 pursuant to Article 15-102 was not valid basis for a finding of unfitness since it was unrelated to any physical disability, so too was the loss of your diving credentials also not a valid basis for such a finding. Your Second Class Diver NEC was removed effective 24 September 2013. Contrary to your claim, the removal of your NEC was not due to the discovery of your brain injury and cognitive deficiencies; your NEC was removed long before those conditions were identified. Rather, it was removed upon the request of your command pursuant to MILPERSMAN 1221-021, presumably due to your misconduct since there was no other diagnosis or regulatory basis for this action at that time. Accordingly, your inability to perform your common military tasks after 24 September 2014 was not due to any physical disability; it was due to your loss of the credentials to do so.

The Board notes that you provided no evidence to reflect that you were unable to perform your common military tasks due to your disabilities, and that you based your argument for unfitness primarily upon the diving standards of MANMED Article 15-102. As stated above, the Board found those standards to be irrelevant to this analysis since regulatory restrictions do not constitute physical disabilities. If this Board were the PEB making an initial fitness determination, it would have the benefit of a non-medical assessment provided by your commander upon which you assess the functional impact of your disabilities upon your ability to perform your duties. However, this Board is not the PEB and did not have the benefit of such evidence. The burden to prove the existence of an error or injustice in this forum in on the applicant, and you provided no relevant evidence to support your claim in this regard.

Physical Readiness/Fitness Tests.

The Board found no evidence that your disabilities impaired your ability to perform any portion of your required Physical Fitness Assessment (PFA). The Board also found nothing about your medical conditions which would prevent you from doing so.

Your performance evaluations reflect that you routinely participated in and passed the annual PFA, to include the Physical Readiness Test, during every cycle except for the last one preceding your discharge. Your final performance evaluation reflects that you did not participate in the final PFA cycle preceding your discharge only because you were assigned to temporary duty for treatment at [redacted].

There is nothing about this consideration which would weigh in favor of a finding of unfitness.

[63] Please note that SECNAVINST 1850.4E provides that physical disqualification from special duties does not necessarily imply physical unfitness. See paragraph 3202(e).

Deployability.

The Board found no evidence that your medical conditions rendered you undeployable.

Per DODI 6490.07,[64] "[a] trained DoD health-care provider must make a provisional determination on DD Form 2795 as to the deployability of DoD personnel."[65] There was no evidence that any trained DoD health-care provider ever made such a determination in your case. The Board also found no evidence that your disabilities satisfied the criteria for potentially non-deployable conditions listed in Enclosure (3) of DODI 6490.07.[66] While it is possible that your mental health conditions may have met these criteria to be potentially non-deployable, you did not provide the Board with any evidence to establish that they did.[67]

As stated above, there was no evidence that you were unable to perform the duties of your office, grade, rank, or rating due to your physical disabilities. Rather, your inability to perform those duties was due to your alcohol-related misconduct which resulted first in the suspension of your diving privileges pursuant to Article 15-102 of the MANMED and the later loss of your diving credentials. Accordingly, your inability to perform those duties in any geographical location was not due to your disabilities. As such, this factor did not weigh in favor of a finding of unfitness.

Special Qualifications.

As mentioned previously, it was not your medical condition which caused you to lose your diving credentials. While the temporary suspension of your diving privileges was required following your alcohol-related misconduct in accordance with Article 15-102 of the MANMED, the removal of your NEC was not so mandated. Those qualification were removed at the request of your command due to your misconduct. As such, this consideration did not weigh in favor of a finding of unfitness.

Eligibility for Military Disability Benefits under 10 U.S.C. §§ 1201, 1203.

Per 10 U.S.C. § 1201(a), "[u]pon a determination by the [SECNAV] that [an eligible member] is unfit to perform the duties of the member's office, grade, rank, or rating because of physical disability incurred while entitled to basic pay …, the [SECNAV] may retire the member, with retired pay computed under [10 U.S.C. § 1401], if the Secretary also makes [certain

[64] *Deployment-Limiting Medical Conditions for Service Members and DoD Civilian Employees*, 5 February 2010.
[65] See paragraph 2 of Enclosure (2).
[66] Paragraph (h) of Enclosure (3) provided a non-exhaustive list of mental health disorders that are potentially non-deployable. Those conditions are as follows:

- Psychotic and/or bipolar disorders;
- Psychiatric disorders under treatment with fewer than three months of demonstrated stability;
- Clininal psychiatric disorders with residual symptoms that impair duty performance;
- Mental health conditions that post a substantial risk for deterioration and/or recurrence of impairing symptoms in the deployment environment; and
- Chronic medical conditions that require ongoing treatment with antipsychotics, lithium, or anticonvulsants.

[67] Your attorney was mistaken in assigning this responsibility to the CORB's SMA in his response to the AO. The burden of proving the existence of any error or injustice to this Board is yours.

determinations with respect to the member listed in 10 U.S.C. § 1201(b)]." As stated previously, this Board is neither qualified nor empowered to make the determination of unfitness on behalf of the SECNAV, as the SECNAV assigned that responsibility exclusively to the PEB. Rather, the SECNAV empowered this Board to correct errors in and/or remove injustices from naval records on his behalf in accordance with 10 U.S.C. § 1552.

For the reasons stated above, the Board found insufficient evidence of any error or injustice in the fact that you are currently ineligible for medical retirement benefits. There was no error in your administrative discharge for misconduct that the time that it was administered. At the time, you were ineligible for disability processing due to DON policies which prohibited such processing while administrative separation proceedings for misconduct were pending, and the subsequent change to this policy had no retroactive effect upon this disqualification. Further, even if you were not pending administrative separation proceedings for misconduct at the time, the Board found insufficient evidence that your medical conditions would have warranted referral to the DES. Finally, the Board found insufficient evidence to conclude that you would have been found unfit due to your disabilities even if the PEB had considered you case prior to your discharge. In addition to the fact that none of the considerations listed in paragraph 3304 of SECNAVINST 1850.4E weighed in favor of a finding of unfitness, the Board also noted that paragraph 3306 provides that the benefit of any unresolved doubt "shall be resolved in favor of the fitness of the service member under the rebuttable presumption that the member desires to be found Fit." As you informed the USNA Superintendent in your letter dated 16 December 2013 that you wanted nothing more than to complete your service, you could not have rebutted that presumption. The burden to prove any error or injustice in your naval record was yours, and you fell far short of this burden. Accordingly, the Board found no basis upon which to correct your naval record to reflect your eligibility for disability benefits pursuant to 10 U.S.C. § 1552.

You are entitled to have the Board reconsider its decision upon submission of new matters. This 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,

[redacted] 5/28/2024

Executive Director

Signed by: [redacted]