



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

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Docket No. 8240-23
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although you did not file your application in a timely manner, the statute of limitation was waived in accordance with the 25 August 2017 guidance from the Office of the Under Secretary of Defense for Personnel and Readiness (Kurta Memo). A three-member panel of the Board, sitting in executive session, considered your application on 2 May 2024. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your naval record, applicable statutes, regulations, and policies, to include the Kurta Memo, the 3 September 2014 guidance from the Secretary of Defense regarding discharge upgrade requests by Veterans claiming post-traumatic stress disorder (PTSD)/mental health condition (MHC) (Hagel Memo), and the 25 July 2018 guidance from the Under Secretary of Defense for Personnel and Readiness regarding equity, injustice, or clemency determinations (Wilkie Memo).

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

A review of your record shows that you enlisted in the Marine Corps and commenced active duty on 19 April 2005. You deployed in support of Operation Iraqi Freedom (OIF) from 21 January 2006 to 16 August 2006. While deployed, you underwent a non-judicial punishment (NJP), on

4 May 2006, for violating Article 113, of the Uniform Code of Military Justice (UCMJ) due to falling asleep while assigned to a security post for your platoon's patrol base.

In September 2006, you completed a post-deployment health assessment (PDHA) in which you denied symptoms of Post-traumatic stress disorder (PTSD) and endorsed some depression symptoms, but rated your health as "excellent," and declined any intention "to seek, counseling or care for...mental health." On 12 December 2006, you completed a post-deployment health reassessment (PDHRA) in which you endorsed PTSD symptoms of being watchful and feeling detached. Upon follow-up by the physician, these were noted to be "minor PTSD symptoms that were mostly resolved since returning."

On 3 January 2007, you were formally counseled after your urinalysis sample tested positive for cocaine. On 2 February 2007, you received your second NJP for wrongful use of cocaine; you were reduced to E2, and awarded forfeiture of pay, restriction, and extra duty. Consequently, you were notified of your Commanding Officer's recommendation for administrative separation due to misconduct, drug abuse, with an Other Than Honorable (OTH) characterization of service. You waived your right to consult with counsel and to request a hearing but submitted a statement for consideration. In that statement you cited personal stressors to include the health condition of your great-grandmother. You subsequently were discharged from the Marine Corps, on 18 April 2007, with an OTH characterization of service; your Certificate of Release or Discharge from Active Duty (DD Form 214) states "misconduct" as the narrative reason for separation. In 2010, you petitioned the Naval Discharge Review Board (NDRB) requesting to upgrade your characterization of service. The NDRB denied your request, on 2 September 2010, after determining your discharge was proper as issued. In July 2021, the Department of Veterans Affairs (VA) granted you service-connection for post-traumatic stress disorder (PTSD).

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case in accordance with the Kurta, Hagel, and Wilkie Memos. These included, but were not limited to, your desire to upgrade your characterization of service from OTH to Honorable, to change your narrative reason for separation from misconduct to "medical separation" or "Secretarial Authority," and to be placed on the Permanent Disability Retirement List (PDRL) due to post-traumatic stress disorder (PTSD). You contend you incurred PTSD from military combat and you used cocaine to self-medicate. For purposes of clemency and equity consideration, the Board noted you provided statements from family, friends, and fellow Marines as well as evidence of your post-discharge work experience and associate degree.

Based on your assertions that you incurred a mental health concern (MHC) during your military service, which might have mitigated your discharge character of service, a qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

The Petitioner was evaluated for mental health concerns during military service and received no diagnosis. This absence of formal diagnosis was based on observed behaviors of the Petitioner during military service, the information he chose to disclose during evaluation, and the evaluation performed.

Temporally remote to his military service, he has received service connection for PTSD from the VA, although his symptoms have not been rated to be sufficiently interfering as to meet a disability determination.

There is insufficient evidence to attribute his misconduct to PTSD symptoms. Petitioner denied experiencing interfering symptoms in service, and claimed that family stressors contributed to his mental health state.

The AO concluded, “it is my clinical opinion there is post-service evidence from the VA of a diagnosis of PTSD that may be attributed to military service. There is insufficient evidence to attribute his misconduct to PTSD.”

You submitted a response to the rebuttal arguing that, although you did not have a PTSD diagnosis in-service, you had a noted change of behavior after your deployment and exhibited symptoms while in service indicating PTSD. You further contend that there is a known link between PTSD and drug usage – evidence that your mental health contributed to your misconduct. After a review of your rebuttal evidence, the AO remained unchanged.

After thorough review, the Board concluded the potentially mitigating factors were insufficient to warrant relief. Specifically, the Board determined that your misconduct, as evidenced by your NJPs, outweighed these mitigating factors. In making this finding, the Board considered the seriousness of your misconduct and the fact it included a drug offense. The Board determined that illegal drug use by a service member is contrary to military core values and policy, renders such members unfit for duty, and poses an unnecessary risk to the safety of their fellow service members. Further, the Board concurred with the AO that there is insufficient evidence to attribute your misconduct to PTSD. As explained in the AO, you denied experiencing interfering symptoms in service and claimed that family stressors contributed to your mental health state. Further, the Board relied on your February 2007 separation physical, in which the physician noted you had denied experiencing PTSD symptoms. As a result, the Board concluded your conduct constituted a significant departure from that expected of a service member and continues to warrant an OTH characterization.

Based on the Board’s finding that you were properly discharged and assigned an OTH for your drug abuse, the Board determined a change to your narrative reason for separation is not supported by the preponderance of the evidence. The Board determined you were ineligible for disability processing or benefits based on your OTH discharge for misconduct. Additionally, based on the medical evidence, the Board also determined insufficient evidence exists to support a finding that you were unfit as a result of a qualifying disability condition. The Board again relied upon your separation physical which noted you were not suffering from any PTSD symptoms and were fit for separation.

Therefore, while the Board carefully considered the evidence you submitted in mitigation, even in light of the Kurta, Hagel, and Wilkie Memos and reviewing the record liberally and holistically, the Board did not find evidence of an error or injustice that warrants granting you the relief you requested or granting relief as a matter of clemency or equity. Ultimately, the Board concluded the mitigation evidence you provided was insufficient to outweigh the

seriousness of your misconduct. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

You are entitled to have the Board reconsider its decision upon submission of new matters, which will require you to complete and submit a new DD Form 149. New matters are those not previously presented to or considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

5/20/2024

