



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. 2171-24
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.

A three-member panel of the Board, sitting in executive session, considered your application on 15 August 2024. The names and votes of the members of the panel will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record and applicable statutes, regulations, and policies. The Board also considered the 5 April 2024 advisory opinion (AO) from Commander, Navy Personnel Command (PERS-95), a copy of which was provided to you. Although you were provided an opportunity to respond to the AO, you chose not to do so.

A review of your record shows that you enlisted in the Navy Reserve on 31 January 1996. Over the course of your Navy Reserve service, you served periods of active duty from time to time. On 21 June 2018, you submitted a Line of Duty (LOD) request in regard to an injury that you assert you incurred while performing a physical readiness test during your last period of active duty, at Guantanamo Bay, Cuba. On 26 November 2018, Commander, Navy Personnel Command (PERS-9) denied your LOD request, explaining as follows:

2. This is a chronic degenerative problem that was present prior to mobilization. You had a neurologic issue that was present and undisclosed prior to the mobilization. You were aware of the issue and were working with the VA to get an evaluation. This issue was due to chronic degenerative disease of the neck. The symptoms appear to have increased during the mobilization, but that is consistent with the normal progression of the disease. You have had surgical treatment and it appears to have made significant improvement in your symptoms.

Thereafter, you submitted an appeal to the denial of his LOD request, which was transmitted via your commanding officer. On 9 May 2019, Navy Personnel Command, in its capacity as the Benefits Issuing Authority, forwarded your appeal to the Department of the Navy Office of the Judge Advocate General (Code 13), with the following endorsement:

1. Upon reconsideration of [Petitioner's] appeal, it has been determined that the member is not entitled to Line of Duty Healthcare benefits. The period in which the member could have submitted his appeal ended on 14 February 2019. The member submitted the appeal to NOSC █ on 19 March 2019, 33 days after the appeal period concluded. There is no amplifying information in this appeal that would support overturning the denial.

On 19 July 2019, Code 13 denied your request for LOD benefits. Separately, on 18 May 2023, you were notified by Navy Personnel Command that you were authorized to receive retired pay effective 3 May 2023.

In your petition, you request LOD incapacitation pay for the period 15 December 2017 to 23 July 2018. In support of your request, you assert that you were unable to go back to your civilian job due to an injury you incurred while mobilized to █. You further explained that you incurred a neck injury while performing the physical readiness test at █, and you subsequently received medical evaluation and treatment for the condition.

In order to assist it in reviewing your petition, the Board obtained the 5 April 2024 AO, which was considered unfavorable to your request. According to the AO, in part:

a. Although it is likely that he had an increase in pain secondary to his cervical degenerative disc disease as the result of activities occurring while performing physical training during the claimed period of service, the cervical spondylosis with radiculopathy is clearly related to degenerative disease of the cervical spine as evidenced by the MRI of 6 July 2017 and the x-ray of 3 November 2017.

b. The findings of degenerative disc disease may have been more fully defined as a result of the diagnostic findings in July 2017. Specifically, the multilevel multifactorial degeneration of the cervical spine, broad-based disc protrusion, and uncovertebral joint spurring causes moderate left neural foraminal narrowing. However, degenerative disc disease would not have developed in the four-month period from the start of orders and the date of the diagnostic testing.

c. Cervical spondylosis with radiculopathy was not incurred or aggravated as a result of qualified Naval service beyond the natural progression of the condition.

14. PERS-95's recommendation is to deny LOD benefits, to include the request for incapacitation pay. The documentation provided in reference (a) and enclosures (1) and (3) do not support [Petitioner's] claimed condition was incurred or aggravated while in a qualified duty status and therefore he does not qualify for LOD benefits

including incapacitation pay. Additionally, the separate request for incapacitation pay was never made, including verification of loss of civilian earned income.

In its review of your petition, including all of the materials that you provided, the Board disagreed with your rationale for relief. In reaching its decision, the Board observed that your request for LOD incapacitation pay had been appropriately reviewed at every level and that your arguments for such had been fully evaluated and appropriately considered. Further, the Board substantially concurred with the findings of the AO, which the Board determined contained a rational analysis that was based on substantial evidence. The Board also noted that you did not provide any rebuttal to the AO. Therefore, in its careful review of your request, and its evaluation at each stage in the review process, the Board determined you were provided substantial due process and the record reflects that your claim was fully and fairly evaluated. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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

Sincerely,

8/27/2024

