



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. 2382-24
Ref: Signature Date

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Dear █

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 27 September 2024. The names and votes of the panel members will be furnished upon request. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations, and policies, to include the Kurta Memo as well as the 4 April 2024 guidance from the Under Secretary of Defense for Personnel and Readiness relating to the consideration of cases involving both liberal consideration discharge relief and fitness determinations (Vazirani Memo) (collectively the "Clarifying Guidance"). The Board also considered the 26 July 2024 advisory opinion (AO) from a Licensed Clinical Psychologist. 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 Marine Corps and commenced active duty on 23 June 2003. On 24 November 2008, you received nonjudicial punishment due to wrongfully uttering a non-sufficient funds check. On 10 April 2009, you pleaded guilty at a special court-martial for a period of unauthorized absence commencing on 5 December 2008 and terminated by your apprehension on 2 March 2009, as well as for an instance of unauthorized absence by failing to go to restricted man's muster. After you were incarcerated in the naval brig, on 24 April 2009, you sought mental health treatment, in which you complained of

“anger/irritability/sleep problems since [your] incarceration.” You were diagnosed with an “occupational problem.” On 8 May 2009, while in the brig, you had a follow-up medical appointment, in which you reported your “meds not working” and that you “never [them] needed prior to incarceration.” You were again diagnosed with “occupational problem,” as well as rule out obstructive sleep apnea.

On 4 June 2009, you were notified of the initiation of administrative separation processing and your rights in connection therewith. After consulting with legal counsel, you waived your right to an administrative board. On 10 June 2009, your Battalion Commanding Officer transmitted your administrative discharge package to the Base Commanding Officer. On 18 June 2009, you had another mental health follow up appointment where you were diagnosed with episodic mood disorder. You were scheduled to have another follow up appointment on 24 June 2009, which you missed, and it was rescheduled. You had several follow up medical appointments in July 2009, during which a provider found that you did not have post-traumatic stress disorder (PTSD). A meeting with a mental health provider, on 12 August 2009, resulted in a finding of “mental health status within normal limits.” On 21 July 2009, your Base Commanding Officer transmitted your administrative discharge recommendation to the separation authority. On 15 September 2009, the separation authority directed that you be discharged under Other Than Honorable conditions. On 22 September 2009, you were so discharged.

In 2013, you filed an application with the Navy Discharge Review Board (NDRB) seeking to have your discharge characterization upgraded to General (Under Honorable Conditions) (GEN). By its decision dated 20 March 2014, the NDRB denied your request. As evidenced by your Certificate of Release or Discharge from Active Duty (DD Form 214) as well as your statement in your petition, at some point thereafter, your discharge characterization was upgraded to GEN.

In your petition, you request to be referred to a Medical Evaluation Board (MEB) and that you be granted retroactive pay and benefits. In support of your request, you contend that you had service connected injuries and should have been reviewed by a MEB while you were in service. You argue that your discharge “was unfair at the time and remains so now.” In further support of your request, you have provided a decision letter from the Department of Veterans Affairs (VA), reflecting that you have been granted a 100% disability with individual unemployability, effective 23 December 2014, due to PTSD with major depressive disorder with psychotic features. You also provided a Notice of Award from the Social Security Administration, dated 18 April 2017, which entitles you to monthly disability benefits due to your disabilities effective May 2015.

The Board carefully reviewed your petition and the material that you provided in support of your petition and disagreed with your rationale for relief. In keeping with the letter and spirit of the Clarifying Guidance, the Board gave liberal and special consideration to your record of service, and your contentions about any traumatic or stressful events you experienced, and their possible adverse impact on your service. In reaching its decision, the Board observed that, in order to qualify for military disability benefits through the Disability Evaluation System (DES) with a finding of unfitness, a service member must be unable to perform the duties of their office, grade, rank or rating as a result of a qualifying disability condition. Alternatively, a member may be found unfit if their disability represents a decided medical risk to the health or the

member or to the welfare or safety of other members, the member's disability imposes unreasonable requirements on the military to maintain or protect the member, or the member possesses two or more disability conditions which have an overall effect of causing unfitness even though, standing alone, are not separately unfitting.

In reviewing your record, the Board concluded the preponderance of the evidence does not support a finding that you met the criteria for unfitness as defined within the DES at the time of your discharge. Despite its application of special and liberal consideration, the Board observed no evidence that you had any unfitting condition while on active duty. In its application of the Clarifying Guidance, the Board acknowledged that you had a condition or experience that may excuse or mitigate your discharge, which, at least for the sake of argument, occurred, or was worsened, during your naval service. In accordance with the Vazirani Memo, the Board first applied liberal consideration to your assertion that your PTSD potentially contributed to the circumstances resulting in your discharge to determine whether any discharge relief is appropriate. After making that determination, the Board then separately assessed your claim of medical unfitness for continued service due to PTSD as a discreet issue, without applying liberal consideration to the unfitness claim or carryover of any of the findings made when applying liberal consideration. Thus, the Board analyzed whether your PTSD condition actually excused or mitigated your discharge. On this point, the Board considered the 26 July 2024 AO.

According to the AO, a review of your medical records demonstrates that there is evidence that you had a mental health condition that may be attributed to military service, as discussed above. The AO further observed that you have provided documentation that, post-service, the VA has diagnosed you with PTSD. The AO concluded, however, that there is "insufficient evidence to attribute all of [your] misconduct to PTSD or another mental health condition." In light of the facts that the NDRB apparently provided you mitigation in the form of upgrading your discharge characterization, as well as the AOs finding that there was insufficient evidence for mitigation of all of your misconduct, the Board observed that you provided insufficient evidence supporting additional relief by way of mitigation. Further, the Board observed that even assuming, arguendo, that you were referred into the DES while you were in service, your administrative processing due to misconduct would have taken precedence over disability processing.

With respect to its analysis of your request for referral to a MEB, the Board observed there is insufficient evidence that you had an unfitting condition while you were on active duty. On this point the Board found insufficient evidence in your service records, and you did not provide any, demonstrating that while you were in service you had an unfitting condition within the meaning of the DES. The Board noted that there is no indication that anyone in your chain of command observed that you were unfit to perform your duties due to any medical conditions. In fact, medical documentation in your record demonstrates that you had no mental health concerns until you were confined to the brig; thereafter, you were found by a medical provider not to have PTSD. Another medical provider found that your mental health status was within normal limits. As noted, to be eligible for a service disability retirement, a service member must have conditions that have been medically determined to be unfitting at the time of service. It is clear that you were discharged due to your conviction by a special court-martial for a lengthy period of unauthorized absence that was terminated by your apprehension, which misconduct would in any event have taken precedence over any disability processing.

With respect to your reliance on post-service findings by the VA granting you service connection for mental health conditions, the Board did not find this to be persuasive because the VA does not make determinations as to fitness for service as contemplated within the service DES. Rather, eligibility for compensation and pension disability ratings by the VA is tied to the establishment of service connection and is manifestation-based without a requirement that unfitness for military duty be demonstrated. In your case, contrary to your assertion that you should have been reviewed by a MEB, there is no indication in your service record, and you provided none, that any of your treating providers or any non-medical personnel in your command recommended that you actually be referred to a MEB or to the DES for evaluation of your fitness to perform the duties of your rate. The Board found the post-service findings by the Social Security Administration that you provided to be similarly unpersuasive as such findings have no bearing on whether you were entitled to a service disability retirement during your time in the Marine Corps. In sum, in its review and liberal consideration of all of the evidence and its careful application of the Clarifying Guidance, the Board did not observe any error or injustice in your naval records. Accordingly, given the totality of the circumstances, the Board determined that your request does not merit relief.

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

Sincerely,

10/3/2024

