



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

██████████
Docket No. 5037-24
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER ██████████
██████████ USMC

Ref: (a) Title 10 U.S.C. § 1552
(b) Petitioner's Official Military Personnel Folder

Encl: (1) DD Form 149 w/attachments

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with the Board for Correction of Naval Records (Board), seeking to have his naval records reflect that he was retired with a service disability retirement with a discharge characterization of Honorable.

2. The Board, consisting of ██████████, ██████████, and ██████████, reviewed Petitioner's allegations of error and injustice on 7 November 2024 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of Petitioner's application, enclosure (1), together with all material submitted in support thereof, relevant portions of Petitioner's naval record, and applicable statutes, regulations, and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy. Although Petitioner's application was not filed in a timely manner, the Board waived the statute of limitations and considered the case on its merits in the interest of justice.

b. A review of Petitioner's reference (b) reveals that on 5 February 1998, prior to enlisting in the Marine Corps, Petitioner underwent a pre-enlistment physical. During the physical, it was determined he had pes planus, which is flat feet, identified as mild and asymptomatic. On 21 April 1998, he enlisted in the Marine Corps and commenced active duty. On 18 July 2005, the medical officer of Petitioner's Battalion recommended that he be separated due to a condition, not a disability. The medical officer explained his finding, including the background of Petitioner's condition, as follows:

1. This letter is to recommend administrative separation in the case of [Petitioner] for reasons of physical condition not a disability. [Petitioner] has been diagnosed

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with recurrent left shin pain that started in June 1998 during boot camp in [REDACTED], [REDACTED].

2. [Petitioner] has a significant history of having had left knee arthroscopic repair of his menisci cartilage in July 1999. He also has a history of flat feet.

3. [Petitioner] first complained of left shin pain that lasted for 3 weeks in June 1998. His pain resolved with conservative therapy. In December 1999, he developed a similar episode on his right shin, which lasted for about 2 weeks. X-ray was done and did not show any fractures. In March 2000, he again experienced left shin pain, and a subsequent bone scan revealed bilateral tibial stress fractures. He was referred to see orthopedics in April 2000. Per Orthopedics recommendations, he was placed on a six-month limited duty board and began Physical Therapy.

4. The patient was RTFD [returned to full duty] in October 2000 with medical clearance from Orthopedics. In May 2004, he returned again with left shin pain. X-ray results were equivocal, and he was sent for another bone scan, which confirmed a recurrent left tibial stress fracture. In August 2004, he was referred to Sports Medicine who recommended: (1) No impact activities, (2) administrative separation due to documented second stress fracture, and (3) released with work/duty limitation (see enclosure 1). The patient has continued to work with PT both for his left shoulder and his left leg.

c. On 25 July 2005, Petitioner was notified of the initiation of administrative separation processing and his rights in connection therewith, "by reason of convenience of the government due to a condition not a disability." On 26 July 2005, Petitioner executed his acknowledgment of rights, in which he waived his right to consult with counsel and his right to an administrative separation board. The same day, Petitioner's Battalion Commanding Officer transmitted his recommendation that Petitioner be discharged to his Commanding General, recommending that Petitioner receive an Honorable characterization of service. On 29 July 2005, Petitioner's Headquarters Commanding Officer transmitted his favorable endorsement on Petitioner's discharge recommendation to the general officer with separation authority. On 9 August 2005, the separation authority reported Petitioner's discharge to the Commandant of the Marine Corps, stating that Petitioner's discharge will be "under honorable conditions."

d. On 24 August 2005, Petitioner was issued his final fitness report from the period 1 June 2005 through 24 August 2005. According to the fitness report, he was "submitted for a Navy and Marine Corps Achievement Medal from 4 April 2004 to 6 July 2005." It further explained that his "solid performance was critical to the battalion's successful redeployment from its OIF mission. He stepped up and filled several key roles that required the professionalism, dogged work ethic, and tact not normally expected from a Marine of his rank. Furthermore, his contributions occurred during periods of significant discomfort related to his medical condition. His can-do attitude will be missed." The officer sighter explained that Petitioner was "an excellent performer who has remained motivated despite his medical ailments. His service to this command and to the Corps have been exemplary." Ultimately, Petitioner was discharged on

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24 August 2005 with a General (Under Honorable Conditions) (GEN) characterization of service.

e. In his petition, Petitioner requests that his naval record be changed to reflect that he was retired from service with a disability retirement with an Honorable characterization of service. In support of his request, he argues that, in anticipation of his separation, he filed a pre-discharge claim for service connected disability benefits with the Department of Veterans Affairs (VA) on 15 June 2005. He stated that the VA conducted a clinical examination of him on 21 June 2005, noting that he experienced “constant pain in both shins” and that his bilateral pes planus caused limited function of standing and walking and required custom corrective orthotic footwear. The VA examiner diagnosed him with bilateral tibial stress fractures and bilateral pes planus. Petitioner argues that it is of note that the examiner stated that Petitioner “developed collapsed arches in 1999,” and that the VA Rating Decision from October 2005 (which relied on that examination) noted that his pes planus had been “mild and asymptomatic” at entry, but “[his] military service permanently worsened [his] bilateral pes planus” and it was now “moderate” (versus mild).

CONCLUSION

Upon careful review and consideration of all of the evidence of record, the Board concluded Petitioner is entitled to partial relief. Specifically, the Board determined that Petitioner’s OMPF contained no basis for assigning Petitioner a GEN characterization of service. In fact, his record reflects that his service was well regarded and that his final fitness report reflects some level of consideration for him to receive a Navy and Marine Corps Achievement medal. Thus, the Board found that there was an error in Petitioner’s record, and it recommended that this portion of his requested relief be granted.

Notwithstanding the recommended corrective action below, the Board determined Petitioner’s basis for separation remains appropriate. 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 the Petitioner’s record, the Board concluded the preponderance of the evidence does not support a finding that he met any of the criteria for unfitness at the time of his discharge. The Board found that Petitioner failed to provide sufficient evidence to demonstrate that he had an unfitting condition within the meaning of the DES during his time in service. The Board employed, as it is required, a presumption of regularity, and in so doing, it considered the Battalion medical officer’s medical report to be rational and based on substantial evidence contemporaneous to Petitioner’s service. Further with respect to Petitioner’s reliance on VA findings to support his request, the Board observed that, while the VA may have rated him for

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disability conditions that it determined were service connected to his time in the service, this fact did not persuade it that these conditions were unfitting at the time of his discharge from the Marine Corps because 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 Petitioner's case, the relevant service medical provider deemed his conditions not to constitute a disabling condition within the meaning of the DES¹. Accordingly, based on the foregoing, the Board denied Petitioner's request for a military disability retirement.

RECOMMENDATION

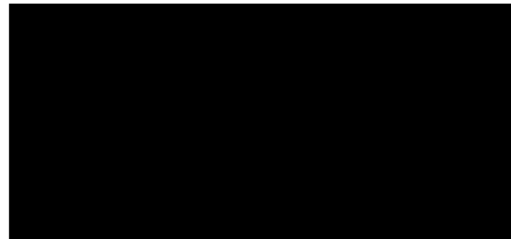
In view of the above, the Board recommends the following corrective action.

Petitioner shall be issued a new Certificate of Release or Discharge from Active Duty (DD Form 214) or Amended Form (DD Form 215), whichever is appropriate, with changes as follows: characterization of service: honorable.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above-entitled matter.

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulation, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

12/3/2024



¹ The Board noted that Petitioner's superior performance prior to his discharge was also a factor in their decision. For the same reasons it determined Petitioner's performance warranted an Honorable characterization of service, they concluded it showed he was capable of performing the duties of his office, grade, rank or rating.