



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



Docket No. 5432-24

Ref: Signature Date



Dear Petitioner:

This is in reference to your reconsideration request 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.

Because your application was submitted with new evidence not previously considered, the Board found it in the interest of justice to review your application. A three-member panel of the Board, sitting in executive session on 16 January 2025, has carefully examined your current request. 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. In addition, the Board considered the Advisory Opinion (AO) provided to the Board by a licensed physician. Although you were provided an opportunity to respond to the AO, you chose not to do so.

A review of your record shows that in May 2001, when you were a high school student, you were involved in an all-terrain vehicle (ATV) accident and incurred a right shoulder acromioclavicular (AC) joint separation. You recovered without surgery and a 3 July 2002 enlistment physical examination noted your injury but denied any limitations. You were deemed physically qualified for enlistment and enlisted in the United States Navy and began active duty service on 2 July 2003. On 1 April 2008, you discharged with an Honorable characterization of service and transferred to the United States Naval Reserve (USNR) to attend school. While in the USNR, in early July 2009, you underwent a right AC joint reconstructive procedure. In November 2009, you underwent a revision of the clavicle resection to treat your continued joint pain. On 4 May 2010, you discharged from the USNR in the rank of E-7 with an Honorable characterization of service in order to accept commission.

You commenced your third period of active duty on 5 May 2010. In December 2010, you were placed on Limited Duty due to your shoulder pain. You were found Fit for full duty in June 2011; however, you were placed on a second period of Limited Duty in October 2011 due to continuation of symptoms. In December 2011, you underwent revision of the right shoulder; however, post-surgery, you continued to report neurogenic pain. On your 30 January 2012 follow up appointment, you were found to have significant muscular atrophy with overall decreased range of motion (ROM) and significant decrease in strength compared to your left upper extremity. The orthopedic surgeon recommended medical separation. On 5 March 2010, Medical Evaluation Board (MEB), [REDACTED] referred you to the Physical Evaluation Board (PEB) for the diagnoses of 1) Pain in Joint Involving Shoulder Region and 2) Other Chronic Pain. The MEB stated your physical limitations included inability to raise your right arm above your head and inability to reliably carry items in your right arm or perform pushups. On 15 March 2012, the informal PEB (IPEB) found you Unfit for continued service and recommended Separation from Active Duty with Severance Pay for one unfitting condition of Right Shoulder Pain with a category 2 (not separately unfitting but contributing to unfitting condition) conditions of Weakness s/p Multiple Surgical Procedures to Right Shoulder and Chronic Pain Requiring Use of Narcotics. These conditions were referred to the Department of Veterans' Affairs (VA) in order for the VA to assign rating percentages.

On 3 April 2012, the VA released their proposed ratings which included 1) Status Post Distal Clavicular Resection with Residual Right shoulder Neuralgia from a Neuroma (referred as right shoulder pain) (claimed as neuralgia, chronic pain, right shoulder) at a 10% disability evaluation under VA Code 5203 and 2) Neuropathy, Right Subclavian Nerve at a 20% disability evaluation under VA Code 8510.

On 30 May 2012, the IPEB found you Unfit for continued service and recommended Separation from Active Duty with Severance Pay at a 10% disability rating for unfitting condition of Right Shoulder Pain (VA Diagnostic Category 5203). On 31 May 2012, you accepted the IPEB's findings and did not request a formal PEB hearing. In addition, you did not request a VA reconsideration of your disability rating for your unfitting condition. On 30 July 2012, you were separated from the service with severance pay with an Honorable characterization of service.

In August 2012, you asked this Board to increase your PEB rating to 30% based on the fact the VA rated you under VA Code 5203 Status Post Distal Clavicular Resection at 10% and under VA Code 8510 for neuropathy, right subclavicular nerve. The Board granted partial relief after finding an error that your unfitting condition was under the 5203 code. The Board determined that your unfitting condition was best described under the 8510 VA Code for neuropathy and, as there was only mild shoulder range of motion reduction, there was insufficient evidence that the Status Post Distal Clavicular resection under VA Code 5203 constituted a separately unfitting condition. Consequently the Board increased your PEB rating to 20% under the VA code 8510 which still did not warrant placement on the Permanent Disability Retired List (PDRL).

In October 2019, the VA found that your 20% disability rating for right shoulder Subclavicular nerve neuropathy (VA code 8510) and 30% rating for status post cubital tunnel with ulnar nerve transposition surgery of the right elbow (VA code 8516) constituted pyramiding and removed the

rating for right shoulder nerve neuropathy. On 23 February 2021, the Board of Veterans' Appeals, deemed the October 2019 decision improper and restored the service-connection and 20% disability rating. In doing so, the Board of Veterans' Appeals Judge found the two conditions were separate and distinct and warranted separate findings of service-connection and unique disability evaluations. On 23 April 2024, a Veterans Law Judge determined you were entitled to a 20% disability rating for right clavicle resection (VA Code 5203) effective 7/31/2012 (day after discharge) due to residuals of right clavicle resection (identified as painful motion, reduced range of motion) as a finding of painful motion warranted at a minimum; a disability evaluation of 20%.

For this petition, you request placement on PDRL at 40%. You contend at the time of discharge you were unfit for your right shoulder and the VA rated your right shoulder under two distinct VA codes 5203 and 8510. You argue the PEB should have included both of these codes in the finding as they are separately unfitting. You included Board of Veterans' Appeals documents to support your contention.

The Board carefully considered all potentially mitigating factors to determine whether the interests of justice warrant relief in your case. Based on your assertions, a licensed physician reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

After review of all available objective clinical and non-clinical evidence, in my medical opinion, the new evidence presented by Petitioner does not overcome the preponderance of evidence supporting the original findings by the PEB or the subsequent findings by the BCNR.

The VA assigned disability ratings to each condition indicates it has been determined to have been incurred in the line of duty. The VA assigned those ratings based on those conditions and without regard to the issue of fitness to perform military duty. Even if supported by the Veterans Administration, VA service connection does not dictate unfitness for naval service. The Veterans Administration does not determine fitness for military duty, which is the responsibility of the Secretary and military authorities. (*Hinkle v. United States*, 229 Ct.Cl. 801, 804-05 (1982))

Neither of the referenced BVA decisions directly applies to the Petitioner's unfitting condition and the assignment of disability evaluation.

The 2021 BVA decision restoring service-connection and 20% disability evaluation for his right clavicle resection and subsequent residuals was based on a finding that this condition was separate and distinct from his right elbow cubital tunnel with ulnar nerve transposition surgery and warranted a separate disability determination and therefore should not have been considered pyramiding and discontinued. In Petitioner's right shoulder condition, the unfitting condition of right shoulder pain status post multiple surgeries and residual conditions of Subclavian Nerve

Neuropathy, pain from associated Neuroma, and decreased range of motion/painful motion were all related and arose as a result of his injury to his AC joint and subsequent surgical procedures attempting to restore function and reduce pain. Additionally, the PEB found that “despite the visible shoulder muscle atrophy, only minimal muscle weakness was documented, and this was not felt to be separately unfitting by the IPEB. A relatively mild shoulder range of motion reduction was recorded; however, this also did not appear to have been separately unfitting.”

Regarding the 2024 BVA decision, the Judge found Petitioner was entitled to a 20% disability evaluation for his right clavicle resection as the finding of “painful motion” on his disability evaluations warranted a minimum disability evaluation of 20%. The 12/9/2014 BCNR decision had found the existence of an injustice and increased his disability evaluation to 20% for his unfitting condition of Right Shoulder Pain due to Right Subclavicular Neuropathy. The BCNR left unchanged the PEB findings of Weakness s/p Multiple Surgical Procedures to Right Shoulder and Chronic Pain Requiring Use of Narcotics as category 2 conditions (not separately unfitting but contributing to unfitting condition) as these and essentially any other residual pain or motion symptoms were considered a part of the underlying right shoulder condition and subsequent surgical procedures attempting to restore function and reduce pain.

The AO concluded, “the preponderance of objective clinical evidence provides insufficient support for Petitioner’s contention that recent decisions by the Board of Veterans’ Appeal warranted findings of increased disability for unfitting medical conditions existent at the time of his discharge from the service.”

Upon review, the Board disagreed with your rationale for relief. First, the Board noted the IPEB found you Unfit under VA Code 5203 at 10%. The record shows you were properly counseled on the meaning of that Unfit finding, and you had the opportunity to request a formal board hearing to present evidence to ask for other conditions to be found Unfit or to request a VA Rating reconsideration for your unfitting condition. You elected to waive the formal board hearing and the VA rating reconsideration. Based on your election of options, the PEB informed the Chief of Naval Personnel of your finding and to direct your separation with severance pay.

In addition, the Board noted your argument for transfer to the PDRL is partially based on the fact that you received two VA ratings for your right shoulder. The Board concurred with the AO that the VA does not make determinations as to fitness for service. 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. Therefore, the Board agreed that the objective clinical evidence provides insufficient support for your contention that recent decisions by the Board of Veterans’ Appeal warranted findings of increased disability for unfitting medical conditions existent at the time of your discharge from the service. The Board determined it was reasonable for the PEB to find that your muscle atrophy was not separately unfitting as only minimal muscle weakness was documented and a mild should range of motion reduction was recorded. 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,

2/27/2025

