



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

█  
Docket No. 5872-24  
Ref: Signature Date

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Dear Petitioner:

This is in reference to your application for correction of your naval record pursuant to Title 10, United States Code, Section 1552. 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 was insufficient to establish the existence of probable material error or injustice. Consequently, your application has been denied.

Although your application was not filed in a timely manner, the Board found it in the interest of justice to waive the statute of limitations and consider your case on its merits. A three-member panel of the Board, sitting in executive session, considered your application on 7 November 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 determined that a 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 Navy and commenced active duty on 25 September 1989. On or about 11 February 1999, you were commissioned as an officer in the █. On 21 July 2000, you were reviewed by a Medical Evaluation Board (MEB) relating to your history of right shoulder injury. The MEB found that you had a 95 degree abduction on the right upper extremity and recommended that you be reviewed by the Physical Evaluation Board (PEB). On 25 August 2000, you were reviewed by an Informal Physical Evaluation Board (IPEB), which found you to be unfit at 20% due to Chronic Right Shoulder Pain and Subjective Instability (VASRD 5201) along with related conditions. On 7 September 2000, you signed an Election of Options (EOO) form, in which you noted your acceptance of the findings of the IPEB. On 11 September 2000, President, PEB, informed Chief of Naval Personnel of its findings, and you were separated with severance due to disability on

25 October 2000. You have provided documentation reflecting that on 6 June 2001, the Department of Veterans' Affairs (VA) awarded you service connected disability compensation for a variety of conditions, including for a shoulder condition, which it rated at 30 percent effective October 26, 2000.

On 21 April 2003, you filed an application with this Board, in which you argued that your service disability rating for the unfitting condition based on right shoulder instability and pain, rated at 20%, was in error, and should have been consistent with the finding of the VA at 30%, which would entitle you to a medical retirement." The Board informed you by letter dated 15 December 2003 that it denied your request, as follows:

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this regard, the Board noted that the 20% rating assigned by the Department of the Navy was correct, based on the degree of limitation of motion in your right shoulder reflected in your disability evaluation proceedings, which was 5 degrees above shoulder level. The fact that a VA physician later found a greater degree of limitation of motion was not considered probative of the existence of error or injustice in your Navy record. Accordingly, your application has been denied.

Thereafter, you sought reconsideration, which was denied as follows, which the Board denied by its letter to you dated 16 March 2004, as follows:

On 24 August 2000, the Physical Evaluation Board (PEB) made preliminary findings that you were unfit for duty because of chronic right shoulder pain and subjective instability, which it rated at 20% under VA code 5201. You accepted the preliminary findings on 7 September 2000 and were subsequently discharged with entitlement to disability severance pay. The Board noted that the rating assigned by the PEB was based in large part on information contained in a medical board report dated 21 July 2000, which shows that you were able to abduct your right arm to 95 degrees, as stated in our letter of 15 December 2003. In view of the foregoing, there is no basis for further consideration of your case at this time. I regret that my reply cannot be more favorable.

In 2005, you submitted another request for reconsideration. In order to assist the Board in its review of your reconsideration request, the Board obtained an advisory opinion (AO) from the Department of the Navy Council of Review Boards (CORB), which is the entity in the Department of the Navy responsible for the administration of Physical Evaluation Boards. According to the AO, you based your request on your contention that half of the 95 degrees mechanical range of motion in abduction recorded in your 21 July 2000 MEB occurred in the presence of pain, and, therefore, should not be included in your range of motion measurement for rating purposes. According to the AO, however, there is no indication of significant pain accompanying the range of motion examination in the 21 July 2000 MEB. Further, according to the AO, even if the pain you contended may have occurred:

proper interpretation of the referenced VASRD Section requires attention to Section 4.59 of the VASRD which makes it clearer that the intent of the VASRD was that the presence of significant pain on range of motion be recognized by awarding at least the 'minimum compensable rating' under the applicable code. Regarding the VASRD code under scrutiny, viz., 5201, that figure is 20%, which is, numerically, identical to the PEB award in contention.

The AO continued:

While not dispositive, it is noted that the (95 degrees) right shoulder abduction recorded in PTNR's [Petitioner's] July 2000 MEB represented an improvement over the measurement (90 degrees) recorded in his 9 July 1998 MEB which had, apparently, resulted in a PEB finding of Fit.

Alternatively, subject BCNR application contends that the PEB erred in not 'having chosen to combine my permanent right sternoclavicular dislocation... [at 20% under VASRD Code 5203 with] . . . code 5201.' If accurate, then the subsequent 6 June 2001 VA Rating Decision submitted as evidence, also, would have been in error in having made the same grouping of diagnoses for rating purposes. In point of fact, both the Navy PEB and VA acted correctly in order not to violate Section 4.14, VASRD, which cautions against 'pyramiding' or rating overlapping functional losses under different diagnostic VASRD Code entities. Even the wording of PTNR's BCNR application showcases the overlapping relationship between sternoclavicular dysfunction and shoulder function impairment, as follows: 'positive pain at the sternoclavicular joint with cross body abduction of his right arm.'

Hence, the evidence appears insufficient to warrant recommending the requested PEB finding change.

You were provided a copy of the foregoing AO, and you provided a rebuttal in response on 12 September 2005, in which you argued that the MEB report at issue in fact reflected that you had pain in your shoulder in measuring your range of motion. You also argued that the AO incorrectly applied section 4.59 of the VASRD when it should have used section 4.4. Finally, you argued that the Navy's rating did not take into consideration your entire injury.

The Board considered this second request for reconsideration in light of the AO as well as your response to the AO and informed you by letter 3 March 2006 that it denied your requested relief as follows:

The Board was not persuaded that your condition met the criteria for the award of a 30% rating under Department of Veterans Affairs code 5201, or that your condition should have been rated at 30% because of the pain and functional limitations associated with the condition. The Board did not accept your contention that you had 'chronic pain' with the abduction of your right arm beyond 45 degrees when a Navy physician 'forcibly' manipulated the arm. In this regard, the Board

found that although the 21 July 2000 medical board reported that pain occurred with cross body adduction of your right arm, it did not report pain with forward flexion, abduction, external rotation, or internal rotation of the arm.

In view of the foregoing, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

In your latest, third, request for reconsideration, you argue that an untrained Navy physician forced your shoulder movement to attain a 20% disability rating, yet while you were still on active duty a VA physician rated you at 30%, and that your injury has been evaluated on at least three separate occasions, and every time you have rated at 30%.

The Board reviewed your petition and all associated material and disagreed with your rationale for relief. In reaching its decision, the Board observed that, in its diligent review of your latest request, the Board was unable to discern any new material that it had not previously considered in its several prior reviews of your request. In its review of its prior decisions regarding your requests, and in view of the AO that it received, the Board observed that its prior decisions were rational and based in substantial fact. It further found that you provided insufficient evidence that there was an error or injustice in your naval record with respect to your service disability rating that resulted in your discharge with severance due to an unfitting disabling condition rated at 20%. Accordingly, the Board denied your request for reconsideration.

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,

12/3/2024

