



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. 6956-24
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.

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 23 January 2025. 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, to include the Kurta Memo to include the 25 August 2017 guidance 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"). In addition, the Board considered the 4 December 2024 Advisory Opinion (AO) from a Licensed Psychiatrist. Although you were afforded an opportunity to submit a rebuttal, you chose not to do so.

A review of your record shows that you enlisted in the United States Navy and began active duty on 20 October 2004. In December 2004, you were involved in a motor vehicle accident. Upon medical evaluation, you denied neurological symptoms. On 16 April 2005, you reported aboard the USS Austin. On 6 November 2005, you underwent nonjudicial punishment (NJP) for failure to obey a lawful order and wrongful use of a controlled substance. You were awarded reduction in rank to the next inferior pay grade as well as restriction and extra duty. Your commanding officer (CO) recommended administrative separation for drug abuse; noting you tested positive for cocaine during a routine urinalysis on 26 October 2005. On 8 December 2005, you underwent a separation physical examination in which you denied a history of dizziness,

headache, head injury, and memory loss. You also denied being evaluated or treated for a mental health condition or any other symptoms indicative of residuals of traumatic brain injury (TBI). On 23 February 2006, you acknowledged you had been informed of your right to request medical treatment for Alcohol/Drug Abuse. You were subsequently discharged, on 27 February 2006, with an Other Than Honorable (OTH) characterization of service. Your Certificate of Release or Discharge from Active Duty (DD Form 214) states “Misconduct (Drug Abuse)” as the narrative reason for separation.

In 2015, you petitioned the Naval Discharge Review Board (NDRB) requesting an upgrade to your characterization of service to General (under Honorable conditions) contending the discharge was inequitable as it was “based on one isolated incident during 16 months of service” and because mental health problems led to bad judgment and drug use. You further contended that your post-service conduct warranted consideration for an upgrade to your discharge. On 12 November 2015, the NDRB denied your request; noting your command had pursued a more lenient administrative discharge for violation of using cocaine while in the service, vice court-martial and a punitive discharge. The NDRB found your violation of Article 112a was a serious offense requiring mandatory processing for administrative separation which usually results in an unfavorable characterization of discharge. Thus, the NDRB found your characterization of service was equitable and consistent with that given others in similar circumstances.

For this petition, you request a discharge upgrade and medical discharge. You argue that the Department of Veterans Affairs (VA) service connected your TBI at 70%. You further argue that your misconduct, drug use, was due to symptoms from the TBI incurred while on active duty.

Based on your assertions that you incurred a mental health concern (MHC) during your military service, which might have mitigated your discharge character of service, a qualified mental health professional reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

There is no clinical evidence Petitioner sought evaluation or treatment for any mental health conditions or residuals of TBI during the almost two years in service following his reported motor vehicle accident in December 2004.

The AO concluded, “the preponderance of objective clinical evidence provides insufficient support for Petitioner’s contention that at the time of his discharge he suffered from a mental health condition that mitigated his in-service misconduct behavior or rendered him unfit for continued military service.”

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 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 disability evaluation system 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. As an initial matter, in its application of the Clarifying Guidance, the Board acknowledged that you have asserted that you had a condition or experience that may excuse or mitigate your discharge, which, at least for the sake of analysis, occurred, or was worsened, during your naval service. Next, the Board analyzed whether your condition actually excused or mitigated your discharge. On this point, the Board observed that, even assuming that you had a condition, the Board determined that such condition would not excuse or mitigate your discharge. In making this finding, the Board concurred with the AO, which found that there was insufficient evidence to attribute your misconduct to a medical condition. Thus, the Board determined your assigned characterization of service remains appropriate and is supported by your record of misconduct.

Next, the Board analyzed whether your condition mitigated your discharge with respect to the award of a service disability retirement. The Board determined that the record evidence demonstrates that, even if you had a condition, there is no evidence that any medical provider determined that you had any conditions that warranted referral to a medical board for a determination of fitness for duty within the disability evaluation system. In addition, there is no indication that any leader in your chain of command prepared any non-medical assessment describing your inability to perform the duties of your rate. Further, even assuming, *arguendo*, that you had TBI or a mental health diagnoses while you were on active duty, it would not necessarily result in the award of a service disability retirement. Service members routinely remain on active duty with diagnoses of TBI or mental health conditions without those conditions considered to be unfitting. A diagnosis alone is not the standard for the award of a service disability retirement. Rather, as mentioned, 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. In your case, the proximate reason for your discharge was your illegal use of cocaine. Thus, even assuming that you were found to have TBI or a mental health condition during your service, discharges based on misconduct take precedence over disability evaluation processing. 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,

2/27/2025

