



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

██████████
Docket No. 7394-24
Ref: Signature Date

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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.

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 30 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 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 8 January 2025 Advisory Opinion (AO) provided to the Board by a Licensed Psychiatrist and your response to the AO.

A review of your record shows that you served in the Marine Corps Reserves and active component starting 23 November 1979. Your occupational specialties were listed as Field Radio Operator and Recruiter, and you rose to the rank of master sergeant (E-8). On 6 May 1999, you were found guilty at Special Court-Martial (SPCM) of violating the Uniform Code of Military Justice (UCMJ) for unauthorized absence, three specifications of wrongful use of cocaine, writing a check with insufficient funds, and dishonorably failing to pay a debt for hotel service. You were sentenced to a reduction in rate to E-1, 90 days confinement (all but 30 days served suspended per pre-trial agreement), and a Bad Conduct Discharge. On 5 September 2001, the Naval Clemency and Parole Board (NCPB) remitted this sentence and ordered you to be separated with a General (Under Honorable Conditions) characterization of service. Your

Certificate of Release or Discharge from Active Duty (DD Form 214) states a General (Under Honorable Conditions) characterization of service with a narrative reason for separation of court-martial.

In 2005, you requested the Board to upgrade your characterization of service to Honorable, restore your rank to E-8, and grant medical retirement. The Board denied this request on 12 January 2006. In 2013, you then submitted a petition to the Naval Discharge Review Board (NDRB) requesting the same. You argued your post-service conduct warranted the upgrade in characterization of service and that your Post Traumatic Stress Disorder (PTSD) was a mitigating factor in your misconduct. The NDRB denied relief, finding that you committed numerous serious offenses and that your clemency was already granted regarding your characterization of service by the NCPB.

For this reconsideration request, you ask the Board to upgrade your characterization of service to Honorable, to restore your rank to E-8, to provide back pay based on the increase in rank, to enter administrative notes in your record showing that you became disabled during military service, not afterwards, and medical retirement. You contend that you were experiencing PTSD due to experiencing family members and close-friend's sudden deaths, divorce, and debilitating pain caused by what you consider a failed surgery. For purposes of clemency and equity consideration, the Board considered the totality of your application.

Based on your assertions that you incurred a mental health condition during your military service, a licensed psychiatrist reviewed your request for correction to your record and provided the Board with an AO. The AO stated in pertinent part:

There are no military health records available for review regarding Petitioner's contention of in-service PTSD, TBI, or other mental health conditions. However, review of the available objective non-clinical evidence contained in his military service records included his performance evaluations documenting Petitioner exhibited superior sustained performance in successfully executing the full range of responsibilities of his rate and rank up through his evaluations ending 7/31/1998, a period encompassing the reported series of personal and medical stressors described from 1993-1998.

There were no entries in his available personnel files that he was placed on any periods of light or limited duty due to a medical or mental health condition or that Petitioner sought assistance from command, medical, or mental health resources in the face of his reportedly overwhelming stressors and increasing psychological distress. There was no evidence in the administrative records that his medical providers referred Petitioner to the local medical treatment facility for the initiation of a Medical Evaluation Board or entry into the Disability Evaluation System (DES).

Throughout Petitioner's administrative and disciplinary processes involving close contact with numerous members of his chain of command, defense and prosecutorial counsels, and judges, there were no concerns raised about his

psychological state indicating he may need mental health evaluation or referral for treatment. Outside of his substance abuse related misconduct, there were no records indicating Petitioner manifested any signs or symptoms suggestive of other mental health conditions. Additionally, there were no issues raised by defense counsel or the command calling into question his cognitive capabilities or that he was not responsible for his actions.

Though Petitioner contended he suffered from PTSD/TBI and was unfit for duty at the time of his disciplinary proceedings and discharge from service, there was no objective evidence that he manifested his reported psychological symptoms or behaviors. Even had there been evidence of psychological symptoms, the mere presence of disease or injury alone does not justify PEB referral. Referral should take place only when, in the opinion of a medical board, the defect may materially interfere with the member's ability to perform reasonably the duties of his or her office, grade, rank, or rating/MOS on active duty. (SECNAVINST 1850.4E, para 3202)

Further, the mere presence of a diagnosis is not synonymous with a disability. In order to find that a member is Unfit for continued naval service, it must be established that the medical disease or condition underlying the diagnosis actually interferes significantly with the member's ability to carry out the duties of his or her office, grade, rank, or rating. (SECNAVINST 1850.4E para 1004 c(2)(a))

The AO concluded, "after review of all available objective clinical and non-clinical evidence, in my medical opinion, at the time of discharge from military service, the available evidence does not support an in-service diagnosis of a medical or mental health condition that prevented him from reasonably performing the duties of his office, grade, rank, MOS, or rating or mitigated his behavior. Other than Petitioner's substance abuse-related behavior, there was no evidence establishing a nexus between a medical or mental health condition and his in-service misconduct."

In response to the AO, you provided additional arguments in support of your application. After reviewing your rebuttal evidence, the AO remained unchanged.

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 misconduct¹.

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 the punitive discharge due to your court-martial conviction. 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. Finally, the Board noted your argument for a medical discharge is partially based on the Department of Veterans Affairs (VA) decision to issue you service connected disability ratings. The Board was not persuaded by your VA evidence since 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 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.

¹ Based on this finding, the Board also found that your paygrade remains appropriate and no basis for granting of back pay or other pay entitlements exists.

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,

3/6/2025

