



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

JCB
Docket No. 4021-23
Ref: Signature Date

MR AARON M HASSAY
C/O JOSH D SCHNELL
CORDATIS LLP
1011 ARLINGTON BLVD SUITE 375
ARLINGTON VA 22209

Dear Mr. Hassay:

This is in reference to your application for correction of your naval record pursuant to Section 1552 of Title 10, United States Code, and the Order of the U.S. Court of Federal Claims (COFC) (No. 19-594C), filed 15 May 2023, remanding your case to the Board for Correction of Naval Records [hereinafter referred to as the Board] for reconsideration of its previous denial of your request for relief in Docket No. 7479-20 in light of the decision of the U.S. Court of Appeals for the Federal Circuit (CAFC) in the case of *Doyon v. United States*, 58 F.4th 1235 (Fed. Cir. 2023). Specifically, the COFC directed the Board to apply the principles discussed in its previous Order, filed 16 October 2020 and reissued 23 October 2020, which remanded the Board's decisions in Docket Nos. 1097-16 and 10601-16) for reconsideration, to include application of the "liberal consideration" standard articulated in the 3 September 2014 guidance from the Secretary of Defense titled "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder"¹ and the 25 August 2017 guidance from the Under Secretary of Defense for Personnel and Readiness (USD (P&R)) titled "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment"² and codified in 10 U.S.C. § 1552(h). Upon careful review and consideration of all of the evidence of record, conducted in compliance with the Order of the COFC, the Board continues to find insufficient evidence to establish the existence of probable material error or injustice. Consequently, your application has been denied.

A three-member panel of the Board, sitting in executive session, reconsidered your application on 5 July 2023. None of the Board members who reconsidered your application on 5 July 2023 participated in the previous reviews of your case in Docket Nos. 7479-20, 10601-16, or 1097-16. The names and votes of the panel members will be furnished upon request. Your allegations of error or injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board and the Order of the COFC. Documentary material

¹ Hereinafter referred to as the Hagel Memo.

² Hereinafter referred to as the Kurta Memo.

considered by the Board included the Order of the COFC, filed 15 May 2023, remanding the Board's decision in Docket No. 7479-20 for reconsideration; the case files for Docket Nos. 7479-20, 10601-16, and 1097-16, which included the previous Order of the COFC, filed 16 October 2020 and reissued on 23 October 2020, your Amended Complaint to the COFC filed on 27 January 2020, all of the materials you submitted in support of each of these applications, and the advisory opinion (AO) referenced in the decision letter for Docket No. 7479-20 and your response thereto; relevant portions of your naval record; and applicable statutes, regulations and policies, to include specifically 10 U.S.C. § 1552(h), the Hagel Memo, the Kurta Memo, and the 25 July 2018 guidance from the USD (P&R) titled "Guidance to Military Discharge Review Boards and Boards for Correction of Military / Naval Records Regarding Equity, Injustice, or Clemency Determination."³

The Board determined that your personal appearance, with or without counsel, would not materially add to their understanding of the issues involved. Accordingly, the Board determined that a personal appearance was not necessary and considered your case based upon the evidence of record.

Factual Background. Following is the factual background of your case based upon relevant portions of your naval record and the matters you submitted for the Board's consideration:

On 26 May 1994, you signed an eight-year enlistment contract in the U.S. Navy Reserve (USNR), beginning in the paygrade of E-1 and serving in the Sea and Air Mariner Program. Your Report of Medical History, dated 26 May 1994, reflects that you were in good health at the time of your enlistment.

Following your initial training period, you were assigned to the U.S.S. COPELAND (FFG-25) from November 1994 through the summer of 1995. In July 1995, you were reassigned to the U.S.S. SIDES (FFG-14). According to information contained in your performance evaluations, the U.S.S. SIDES was employed for the training and administration of selected reserves. You assert that, beginning in 1996, you were subjected to physical assaults, threats, harassment, abuse and unwanted sexual advances/sexual assault from various members of the U.S.S. SIDES active duty crew, to include a physical assault perpetrated by the Command Master Chief (CMC). In the transcript for your hearing before the Board of Veterans Appeals (BVA), dated 27 January 2016, you provided a detailed accounting of the events that transpired onboard the U.S.S. SIDES. Specifically, you asserted that a Seaman "tried to get sexual with (you) in berthing on the USS SIDES, 1996," that you defended yourself and ran into the galley and openly complained, and that the Seaman was then no longer part of the ship's company but that you were not told why he was gone. Additionally, you stated that another enlisted Sailor threatened you with a firearm in 1997, and that a different Sailor "stuck a knife at (your) throat." You further reported ongoing physical and verbal conflict onboard the ship, and state that you "went into a dog fight every month ... on this ship to get threatened [by your fellow Sailors]."

On 21 September 1997, while assigned to the U.S.S. SIDES, you executed an Annual Certificate of Physical Condition. On this document, you answered "no" to the following questions: (1) Have you had any injury, illness, or disease within the prior 12 months which required

³ Hereinafter referred to as the Wilkie Memo.

hospitalization?; (2) Have you been under a physician's care within the prior 12 months?; (3) Have you taken any prescription medications in the prior 12 months?; and (4) Do you have any physical defects, family, or mental problems which might restrict your performance on active duty?. You wrote on this form that, "sometimes, if I worry, or something I feel stress in my heart and down to my left hand and I don't like it," but did not provide any further explanation.

In late 1997, you were awarded the Naval Reserve Meritorious Service Medal, recognizing your meritorious service from 1 November 1994 to 30 October 1997.

In August 1998, you unsuccessfully attempted to enlist in the Army. The San Diego Military Entrance Processing Station (MEPS) conducted a physical evaluation in conjunction with this application, which found you to be medically disqualified for accession into the Army due to "Spine, Other Musculoskeletal/Psych."⁴

Your performance evaluations from your service onboard the U.S.S. SIDES were favorable, describing you as a "hard working" and a "valuable asset" to the ship. There is no indication in any of your records from your service onboard either the U.S.S. COPELAND or the U.S.S. SIDES that you had any unfitting condition, or that you demonstrated any inability or difficulty in performing your duties as a Boatswain's Mate.

In 1999, you were reassigned to Navy Reserve Military Sealift Command (NR-MS), San Diego. During your first year at NR-MS, you performed your monthly weekend drills, and also performed a period of AT from 9 August 1999 to 20 August 1999. During this AT, you engaged in moving vehicles and also assisted in delivering mail to ships. You were described as someone who "thrives on challenge," and that your "outstanding professionalism and positive attitude gained respect and support from this command."

On 13 August 1999, during the above referenced AT, you made an appointment to see Dr. Killian at Naval Station San Diego. During this appointment, you revealed a history of depression and bipolar disorder, and that you were taking lithium. You also reported symptoms of depression such as disturbed sleep and reduced interests, and that you had guilt over your recent breakup with your girlfriend of four years. Dr. Killian recommended that you follow up with mental health the following Thursday, but your record does not include any evidence of such a follow-up.⁵ The record of this encounter with Dr. Killian includes no mention of any negative or traumatizing events reported.

⁴ On 19 July 2016, approximately 14 years after your discharge from the Navy, the U.S. MEPS Command Office of the Inspector General (OIG) provided you a letter stating that it conducted a thorough review and determined that the Navy should have completed a DD Form 368 (Request for Conditional Release) to transfer you to the Army, and the Army should have completed section IV of the DD Form 368 notifying the Navy of your medical disqualification for accession. The OIG letter further stated that it could not determine if the Army completed the form and provided it to the Navy. Additionally, the Department of the Army, Headquarters Recruiting Command, provided you a letter dated 1 August 2016, which cited record retention practices and noted that there was no way to validate any portion of your 1998 processing.

⁵ In your complaint to the COFC, you described it as "shocking" that there was "no evidence of any Navy follow-up" in your service records. However, it would have been your responsibility to schedule and appear at this follow-up appointment. The absence of such record suggests that you failed to do so. The Board notes that this was a recurring pattern in your mental health treatment records subsequent to your discharge from the USNR.

During your next year of service in the USNR, you continued your monthly participation in weekend drills at NR-MST. For your AT in 2000, you were selected to go to Naples, Italy, to provide support to Navy Support Activity, Naples (NAVSUPACT Naples) from 24 January 2000 through 4 February 2000. During this AT, you provided support in the mail room and assisted in routing and delivering mail to Sixth Fleet units. Your evaluation during this period described you as making “significant contributions to the overall mission of NAVSUPACT Naples’ Postal Division and the overseas postal community,” and that you “[produced] high quality results with minimal supervision.” There were no indications from any source that you demonstrated any difficulty in performing the duties of your office, grade, rank, or rating during this AT. Upon completion of this AT, you returned to your regular monthly weekend drill participation at NR-MSC San Diego.

Your annual evaluation report from NR-MSC for the period 16 June 1999 to 15 June 2000 rated you “Above Standards” in every performance trait except the “Leadership” trait, for which you were rated as “Meets Standards.” You received the second highest promotion recommendation available (“Must Promote”), and were recommended for retention in the USNR.

In June 2000, you participated in a medical readiness check with a Navy medical provider. According to the Report of Medical Examination, the provider who examined you noted with respect to block 42 (Psychiatric) that you were “dealing with a stressful [illegible] relationship – does not appear to be depressed, however.” The report also noted your previous encounter with Dr. Killian during AT in 1999, and noted that you had stopped the lithium use you had reported to him because of side effects. It also noted that you felt the need to meet with a counselor again for your benefit.⁶ This record does not describe any stressors reported regarding your naval service.

Your final evaluation report received in the USNR, for the period 16 June 2000 through 15 June 2001, rated you as “Meets Standards” for every performance trait except for the “Equal Opportunity” trait, for which you were rated as “Above Standards.” The report notes that you helped maintain unit readiness, had become an expert in the assembling and operation of the Military Sealift Operation Center van, maintained excellent physical condition and consistently received excellent marks on Physical Readiness Tests. It also stated that you conducted a monthly lecture series, during which you relayed your expansive knowledge of the Navy to your fellow unit members. You received a “Promotable” promotion rating, which was right in the middle of your cohort, and were recommended for retention.

There is no evaluation in your record covering the period from 16 June 2001 through the end of your enlistment on 25 May 2002.⁷ This period included 11 weekend drill periods (22 days), with no AT.

⁶ In your complaint to the COFC, you reported that the Navy denied this request. There is no evidence in the record supporting this conclusion. It would have been your responsibility to follow-up on this request, and the absence of records suggests that you failed to do so.

⁷ You would not have been due to receive another evaluation report until 15 June 2002, so the absence of such a report is not noteworthy.

On 25 May 2002, you were honorably discharged from the USNR upon the completion of your reserve enlistment. You received a reentry code of “RE-1,” meaning that you were fully eligible for reenlistment if you desired without any waivers. You did not receive a separation physical examination upon the expiration of your enlistment.⁸

Throughout your USNR service, you maintained performance trait averages of 3.00 or higher, meaning that you met or exceeded the standard for every performance trait during every evaluation of your performance. You also advanced to the grade of E-4 (BM3), and participated as a member of the Navy baseball team.

On 27 August 2002, three months after your discharge from the USNR, you presented to the San Diego County Psychiatric Hospital to request a medication refill.⁹ During this encounter, you submitted to a psychiatric assessment. The report of this assessment reflects that you had failed to appear for two appointments following your previous treatment in June 2002. You specifically denied any suicidal and/or homicidal thoughts, perceptual disturbances, or the use of street drugs and/or alcohol (although you admitted to using marijuana a few weeks prior). It also reflects that you were “believed to be adequately domiciled” at that time, that your thought processes were “logical and goal directed,” that your thought content was “void of suicidal and homicidal thoughts,” and that “there is no evidence of paranoid, grandiose or obsessional ideation.” The psychiatrist who conducted the assessment described your then-current potential for harm as “Low now and for the foreseeable future.”

Based on the records provided in support of your application, you earned an annual income of \$20,429 in 2003, which appears to be your second-highest earning year during the years that you were employed.¹⁰

⁸ In your complaint to the COFC, you asserted that the Navy “[i]nexplicably” did not provide you with “a required separation physical examination.” However, there was no such examination required, because you were not being separated from active duty. Per Department of Defense and Navy Regulations, Separation History and Physical Examinations (SHPE) are required only for members separating from active duty or for reservists separating after an extended period of active duty. You were not discharged from active duty, and therefore did not require a separation physical examination. Per paragraph 15-20 of NAVMED P-117 (Manual of the Medical Department), members of the reserve component who do not meet the requirements for a SHPE may request such an examination by utilizing a DD Form 2697, but there is no evidence that you ever made such a request. You cited MILPERSMAN 1900-808 as authority for the requirement for a separation physical examination, but that provision referenced NAVMED P-117 (Manual of the Medical Department) as the source of this requirement, and, as stated above, NAVMED P-117 did not require a separation physical examination for reservists not on active duty.

⁹ You reported in your complaint to the COFC that you were hospitalized for depressive disorder at this time. However, that is not reflected in your medical records. Your medical records reflect your admission and discharge from the San Diego County Psychiatric Hospital on the same day, and that you presented yourself there not for treatment but rather to request a refill of your medications (Paxil), which you had been prescribed in June 2002 (after your discharge). The psychiatric assessment which was conducted at that time was recorded as lasting for 15 minutes. The record reflects that you were not actually hospitalized for any mental health condition until late September 2005.

¹⁰ You reported in your complaint to the COFC that it was during your years of assignment to NR-MSD from 1999-2002 that you “deteriorated into mental illness, poverty, and chronic homelessness.” The record does not support this claim. Your deterioration into poverty and homelessness occurred after your discharge from the USNR, as reflected by the fact that your highest earning year on record occurred during this period (2001) and your second highest earning year on record occurred after your discharge (2003). Further the provider who conducted your psychiatric assessment in August 2002 believed you to be adequately domiciled. Your medical records reflect that

On 15 January 2004, you again appeared at the San Diego County Psychiatric Hospital, this time to request resumption of your antidepressant medications.¹¹ This was necessary because you had recently lost your job and your medical coverage as a result, and had therefore been without this medication for the previous two weeks. You again underwent a psychiatric assessment. The report of this assessment suggested that there was no indication of any psychiatric emergency at that point, and you specifically denied any suicidal and/or homicidal thoughts, perceptual disturbances, manic excitement and the use of illicit drugs or alcohol to excess. Unlike your previous psychiatric assessment in August 2002, this time you were reported as homeless. However, you reported being in generally good health and had no acute complaints. There was no evidence reported of perceptual disturbances, your thought processes were described as “logical and goal directed,” your thought content was “void of suicidal and homicidal thoughts” and there was “no evidence of paranoid, grandiose or obsessional ideation.” The psychiatrist who conducted this assessment again described your current potential for harm as “Low now and for the foreseeable future.”¹²

At some point following this January 2004 encounter, you relocated to the San Francisco Bay area and your mental health clearly began to deteriorate.¹³ On or about 28 September 2005, you appeared at the Sausal Creek Outpatient Stabilization Clinic in Oakland, California, seeking a refill of your medications. While you were waiting to be seen, you began to make superficial cuts on your wrist with a pen. You were subsequently admitted to the Alameda County Medical Center, and then referred for inpatient treatment at the Villa Fairmont Mental Health Rehabilitation Center (VFMHRC) the following day. You remained at the VFMHRC from 29 September 2005 to 4 October 2005. The records from these encounters reflect a distinct change in your mental health since your previous encounter in January 2004. Whereas previously you demonstrated no suicidal thoughts and were not considered to be at risk of self-harm, now you were preoccupied with death.¹⁴ Whereas previously there had been “no evidence of paranoid, grandiose or obsessional ideation,” in 2005 you were clearly paranoid and delusional and for the first, but not last, time were noted as psychotic. You described hallucinations “from the devil” and felt that people were out to get you. Your treatment records during this stay at VFMHRC reflect that you felt overwhelmed by your recent move from San Diego, as you had a poor support system, a poor housing system, and low to no income.

your mental illness only began deteriorating sometime after a psychiatric assessment which was conducted on 15 January 2004, after you lost your job and became homeless.

¹¹ You reported in your complaint to the COFC that this was another hospitalization. However, that is not reflected in the medical records of this encounter. You appeared only to restart medications, and received another 15-minute psychiatric assessment in conjunction with this request.

¹² The staff psychiatrist who conducted this assessment was the same who conducted the previous assessment in August 2002.

¹³ Your treatment records reflect that this relocation occurred relatively recently prior to your admission to the Villa Fairmont Mental Health Rehabilitation Center on 29 September 2005, and that you had a difficult time adjusting to this relocation.

¹⁴ In your letter to the Board, dated 2 May 2021, you stated that you purposefully jumped into traffic during your final years in the USNR. This method is very similar to the report that you made at Sausal Creek in describing your suicidal plans in September 2005, during which you made no reference to your previous service in the USNR or your traumatic experiences onboard the U.S.S. SIDES.

All of your medical records subsequent to your hospitalization in late-September 2005 reflect this noted downturn in your mental health. Paranoia and suicidal ideations were a consistent feature of these records.

On 2 August 2011, you received a complete psychological evaluation at the request of the Social Security Administration Department of Social Services in support of your claim for Social Security Disability Insurance (SSDI) benefits.¹⁵ In support of this claim, you reported 8 July 2005 as the date that you became unable to work because of your mental health conditions. The report of this evaluation described you as “an unreliable historian” with regard to your medical history, and as “insincere in [your] presentation.” On 25 August 2011, it was determined that you qualified for SSDI for affective (mood) and anxiety disorder, effective 8 July 2005.¹⁶

You also provided information reflecting that you were referred to the County Veterans Service office in 2013 for assessment of post-traumatic stress disorder (PTSD) by a San Francisco County Veterans Service Officer. You began to receive treatment from a clinical psychologist, Dr. C. Louie, who diagnosed you with PTSD based upon your traumatic experiences onboard the U.S.S. SIDES in August 2013. On 4 September 2013, Dr. Louie provided a statement in support of your efforts to obtain veterans benefits, reporting that you felt harassed and ostracized onboard the U.S.S. SIDES due to being a reservist, and that you reported having been assaulted by your CMC. She noted that over your four-year period of service onboard the U.S.S. SIDES, you became depressed, isolated, and fearful of being trapped on a ship with people who would attack you physically and verbally, and found that you met the diagnostic criteria for PTSD and would likely benefit from individual therapy to reduce the distressing symptoms.¹⁷

You subsequently began to receive care from Dr. W. Foote, MD, for PTSD and Attention Deficit Hyperactivity Disorder.

In September 2014, the Department of Veterans Affairs (VA) denied your claim for benefits related to your mental illness and lower back disorder. Following this denial, Dr. Foote provided a letter, dated 26 May 2015, which stated that you had been under his care for “two years with symptoms of anxiety, hyper-vigilance, sleep disorder, and depressed mood,” and that you suffered from chronic PTSD which was directly related to your military experience.

You subsequently appealed the VA’s denial of your claim for benefits to the BVA. On 6 July 2016, the BVA, “resolving all doubt in [your] favor,” found that you had “current diagnoses of major depressive disorder, anxiety disorder, schizoaffective disorder, bipolar disorder, and PTSD which have been related to a mental health injury which occurred during your [ADT] and [IDT] service.” Accordingly the BVA concluded that service connection for an acquired psychiatric disorder was warranted, and remanded the case to the VA for further examinations and reconsideration.

¹⁵ Prior to this encounter, you had not received any medical treatment since 2009.

¹⁶ Your complaint to the COFC erroneously reported that you were awarded SSDI in 2005. However, July 8, 2005 was the effective date of these benefits, but they were not actually awarded until August 2011.

¹⁷ This was the first appearance in the record of any mention of your traumatic experiences onboard the U.S.S. SIDES.

On 11 April 2017, following the favorable decision by the BVA on your appeal of the VA's denial of your claim for benefits, the VA awarded you a 100 percent service-connected disability rating for anxiety disorder and schizoaffective disorder, effective 9 September 2012. This effective date was the date that your service-connected disability met the percentage requirements for consideration of total benefits because of unemployability.

Procedural History:

You first petitioned this Board seeking correction of your naval record to reflect your placement on the permanent disability retired list in 2016. On 13 October 2016, the Board denied your request in Docket No. 1097-16. In reaching this decision, the Board concluded that there was sufficient evidence to establish that you were suffering from a mental disorder as early as 1998, but that you did not establish that your condition was incurred or aggravated in connection with your military service.¹⁸ The Board also noted that your performance evaluations while in the USNR reflected that your performance was slightly above average, with your second to last performance evaluation reflecting the highest performance trait average of your career. Accordingly, the Board was unable to conclude that you were unfit to perform the duties of your office, grade, rank, or rating.¹⁹

You subsequently requested reconsideration of the Board's decision based in part on the BVA findings above. This request for reconsideration was supported by another letter from Dr. Foote, dated 9 January 2017, which stated that "it was clear that [you] could not handle the pressures of active duty status when [you] were on active duty." Dr. Foote further stated that "[b]y not addressing the many issues that seem to have been present and keeping [you] on the reserve status with active duty weekends continuing to be in the military compromised [you] even more and created more severe problems of [you] not only while [you were] in the service but moreso when [you were] released from [your] military duty," and that you had not been able to maintain employment and were compromised with psychosocial functioning since your discharge. Dr. Foote concluded that you "should not have been retained even in the reserve status given [your] symptoms and inability to adapt to the military life," and opined that your PTSD symptoms worsened by maintaining your status as a reservist. The Board reconsidered your request on 25 January 2018, but continued to find insufficient evidence of any error or injustice warranting relief in Docket No. 10601-16. While the Board acknowledged that the additional evidence that you provided established a service-connection to your conditions, it continued to find insufficient evidence that those conditions created a sufficient occupational impairment to warrant referral to a medical board or the Physical Evaluation Board (PEB). In reaching this conclusion, the Board relied upon an AO provided by the Senior Medical Advisor (SMA), Secretary of the Navy Council of Review Boards (CORB), dated 15 October 2017, which found that the preponderance of available evidence did not support your request for either a finding of unfitness or a disability retirement at discharge from the USNR in 2002. The Board again found your documented performance from your evaluations during the relevant time frame to be persuasive evidence that

¹⁸ Your application predated the BVA's findings, and you did not subsequently provide those results to the Board until 5 December 2016, after it had already considered your application and you had received its decision in Docket No. 1097-16.

¹⁹ The Board did not find the 26 May 2015 letter from Dr. Foote to be persuasive because it was tailored to the VA determination of service connection and did not address your fitness for duty.

you were able to perform the duties of your office, grade, rank, or rating despite any mental health conditions you may have had. The Board also found the BVA decision to be unpersuasive with regard to the question of your medical fitness because that decision was unrelated to any fitness determination.

You filed suit in the COFC on 22 April 2019, alleging that the Board's previous decision to deny your entitlement to military disability retirement pay and other benefits was arbitrary, capricious, contrary to law, and unsupported by substantial evidence.²⁰ On 25 April 2020, you filed a motion to supplement and correct the administrative record, requesting to add a declaration describing the circumstances of the Army's denial of your transfer request in 1998, a transcript of your testimony before the BVA in January 2016, and a 23 January 2017 letter signed by a psychiatrist and a therapist at the San Francisco VA Medical Center which opined, among other things, that you had been "clearly and severely impacted by [your] time in the military." On 16 October 2020, the COFC issued its opinion, finding that the Board's decision was arbitrary and capricious. Specifically, the Court found that the Board failed to address important evidence in the record bearing on whether your continued service represented "a decided medical risk" to your health, and did not apply the guidance of the Kurta Memo. Accordingly, the COFC remanded your case to the Board for reconsideration, specifically directing the Board to (1) decide whether and when your continuation on active reserve status presented "a decided medical risk" to your health or the welfare of other members; (2) evaluate and consider all medical and other evidence you may present, giving appropriate weight to the letters from the mental health professionals who have treated you in the years following your discharge; and (3) apply the guidance of the Hagel and Kurta Memos.

On 27 May 2021, the Board reconsidered your application in accordance with the Order of the COFC, again finding insufficient evidence of any error or injustice warranting relief.²¹ Specifically, the Board found no evidence to suggest that you were unable to perform the duties of your office, grade, rank, or rating at any time during your service, and significant evidence that you were. With regard to the determination of whether and when your continuation on active reserve status presented "a decided medical risk" to your health or welfare, the Board found insufficient evidence that your continued service in the USNR represented a decided medical risk to your health or welfare at any time. The Board also purported to apply the guidance of the Hagel and Kurta Memos, but noted that such guidance did not properly apply to the consideration of requests for medical retirements. This comment was based upon the common understanding of this guidance by the various Services at the time, which had been endorsed by the proponent of the guidance. Nonetheless, the Board purported to apply the Hagel and Kurta Memo guidance "to the extent possible." In this regard, the Board did not question the validity of your reported military sexual trauma (MST) and other traumatic experiences onboard the U.S.S. SIDES, or the legitimacy of your PTSD or other claimed mental health conditions. It also did not question whether these conditions developed as a result of your experience onboard the U.S.S. SIDES. However, the Board found the occurrence of these traumatic experiences and existence of these mental health conditions to be irrelevant to the question of whether you were unfit during your USNR service, as the objective evidence clearly showed that your ability to

²⁰ This complaint was amended on 27 January 2020 to cite the appropriate statutory authority for your claim for monetary relief.

²¹ This decision was provided to you by letter dated 1 June 2021.

satisfactorily perform the duties of your grade, rank, and rate was not impaired by any of these conditions.

On 25 January 2023, the CAFC overturned an unrelated COFC decision which had upheld the Board's previous interpretation regarding the inapplicability of the Hagel and Kurta Memo guidance to cases such as yours in the case of *Doyon v. United States*, 58 F.4th 1235 (Fed. Cir. 2023).²² Specifically, the CAFC found that the liberal consideration guidance of both the Kurta Memo and 10 U.S.C. § 1552(h) is applicable to applications requesting records corrections to reflect eligibility for medical retirement. Based upon this finding, you and the Government jointly requested that the COFC remand your case to the Board again for reconsideration. The COFC granted this request by Order dated 15 May 2023. Based upon the Board's comment regarding the applicability of the Hagel and Kurta Memos to your case in Docket No. 7479-20, the Court concluded that it had declined to apply liberal consideration to your case or to apply the principles called for in that guidance, as it had previously directed. As such, the Court again directed the Board to apply the principles discussed in its 2020 Order, including the "liberal consideration" standard articulated in the Hagel and Kurta Memos and codified in 10 U.S.C. § 1552(h).

The Court's Order provided you 30 days to submit any additional information that you wished for the Board to consider. No such information was received. After your 30 days had expired, your case was processed for consideration by the Board at the earliest available date.

Analysis.

Liberal Consideration pursuant to the Hagel and Kurta Memos.

Because you based your application for relief in whole or in part on matters relating to an MST experience, the Board applied liberal consideration in accordance with the Kurta Memo. Despite the fact that you provided no evidence and only a cursory description of this incident; the absence of any evidence whatsoever that this experience adversely affected your performance in the USNR in any way; the fact that you achieved your highest ever performance trait average in an evaluation which followed this reported experience; that you did not report this experience when you sought mental health treatment during and after your service in the USNR; that neither Dr. Louie in her September 2013 letter nor Dr. Foote in his 26 May 2015 letter even mentioned this particular experience in support of your claim for VA benefits; and that you never mentioned this experience during your numerous interactions with civilian mental health providers after your discharge despite reporting sexual abuse during your childhood, the Board accepted this claim as true based upon the guidance of the Kurta Memo which provides that your testimony alone may establish the existence of such an experience. The Board acknowledges that there are legitimate reasons that you may have been reluctant to discuss this incident. However, the occurrence of such a condition itself is irrelevant to the question of whether you should have been referred in to the DES or were qualified for a medical retirement. Sexual assault is not a disqualifying medical condition; its only relevance in this regard is the effect that such an

²² The COFC decision in the *Doyon* case was cited by the Board in its commentary regarding the applicability of the liberal consideration guidance of Hagel and Kurta to your case in Docket No. 7479-20.

experience may have contributed to your mental health. As such, this experience was considered in the context of your reported mental health conditions, as discussed below.

Because you based your application for relief in whole or in part on matters relating to mental health conditions, including PTSD, the Board applied liberal consideration in accordance with the Kurta Memo. Despite the absence of any physical or contemporaneous testimonial evidence of the assaults and abuse that you reported onboard the U.S.S. SIDES, sexual or otherwise; the absence of any evidence that the any mental health symptoms ever adversely affected your performance in the USNR; and that you never reported such abuse to any of the medical and/or mental health providers from whom you sought treatment both during and after your USNR service, the Board accepted as true your claimed traumatic experiences and that these experiences either triggered or exacerbated your mental health conditions, including PTSD. In this regard, the Board gave special consideration to the VA's determination that these conditions were service-connected in accordance with the Hagel Memo, and also gave appropriate weight to the various diagnoses that you received both during and after your service in the USNR. The Board also noted your claim that you attempted to reenlist in the Army to escape the stressors of the U.S.S. SIDES.

As the Kurta Memo provides that requests for discharge relief typically involve four questions, each of those questions are addressed as follows:

1. *Did you have a condition or experience that may excuse or mitigate the discharge?* As discussed above, the Board, applying liberal consideration, accepted as true your claim that you had MST experiences and/or mental health conditions during your naval service. Specifically, the Board accepted as true your claim that you endured sexual assault onboard the U.S.S. SIDES, as well as other physical trauma and abuse, which either triggered or exacerbated mental health conditions, to include PTSD, depression, bipolar disorder, and/or anxiety disorder.
2. *Did that condition exist/experience occur during military service?* As stated above, the Board accepted as true that these experiences occurred during your military service, and that your mental health conditions were either triggered or were exacerbated by these experiences during your military service.
3. *Does that condition or experience actually excuse or mitigate the discharge?* Because there was no misconduct in your record and you were not involuntarily discharged from the USNR, there is nothing for these conditions and/or experiences to excuse or mitigate. You were honorably discharged upon the expiration of your enlistment with an RE-1 reentry code, meaning that you would have been welcomed back into the Navy if you had chosen to reenlist. Accordingly, this question was inapplicable to your application.
4. *Does that condition or experience outweigh the discharge?* Again, this question is inapplicable to your application because there was nothing for the Board to weigh your conditions/experiences against.²³

²³ Paragraphs 18 and 19 of the Attachment to the Kurta Memo make specific references to the severity or nature of misconduct in conducting this balancing test. As you had no record of misconduct and misconduct did not play a

Although the Board accepted as true your claimed MST experience and mental health conditions, and that these experiences and conditions were either triggered or exacerbated during your military service through the application of liberal consideration, that application did not establish that you should have been referred to the DES or that you were actually unfit for continued service. As discussed further below, the objective contemporary evidence overwhelmingly established that you did not meet the criteria for referral to the DES and that you were fully capable of performing the duties of your office, grade, rank, or rating, and **you provided almost no credible evidence to counter it.**

Liberal Consideration pursuant to 10 U.S.C. § 1552(h)(2)(B).

Section 1552(h)(2)(B) provides that, in the case of a former member of the armed forces whose claim for review of a discharge is based in whole or in part on matters related to combat- or MST-related PTSD, the Board shall “review the claim with liberal consideration to the claimant *that [PTSD] ... potentially contributed to the circumstances resulting in the discharge ... or to the original characterization of the claimant’s discharge... (emphasis added).*” As stated above, the Board, applying liberal consideration, accepted as true your claimed MST experience and that this experience contributed to your service-connected PTSD. **However, even the most extreme application of liberal consideration could not establish that this MST-related PTSD condition potentially contributed to the circumstances resulting in your discharge or to the original characterization of your discharge.** The only circumstances which contributed to your honorable discharge was the expiration of your enlistment contract and your decision not to reenlist. The evidence clearly reflects that you were recommended for retention, that you were well-regarded by your superiors, and that the Navy would have welcomed your continued service if you desired to continue serving. Nothing about your mental health conditions adversely affected your performance. The only possible contribution that your MST experience and/or PTSD could have had upon the circumstances resulting in your actual discharge was to make you less likely to reenlist. However, this would not enhance your claim for a disability retirement in any way. This provision does not direct the application of liberal consideration to a discharge which did not actually occur (i.e., the disability retirement which is the basis for your petition).

Referral to the Disability Evaluation System (DES).

While the Board accepted as true that you developed PTSD as result of your experiences onboard the U.S.S. SIDES, and that these experiences either triggered or exacerbated the other mental health conditions which so debilitated you in the years after your discharge from the USNR, it continued to find insufficient evidence that you should have been referred to the DES at any time during your USNR service. The mere existence of a medical or mental health condition does not warrant referral to the DES, **unless it is among the category of conditions which are disqualifying for continued service. You provided insufficient evidence to conclude that any of your conditions were disqualifying.**

role in your discharge, there was nothing for the Board to weigh the mitigating effects of your mental health conditions against.

SECNAVINST 1850.4E²⁴ provides that “line commanders, commanding officers of [military treatment facilities], and individual medical and dental officers shall promptly identify for evaluation by Medical Boards and appropriate referral to the PEB [i.e., referral to the DES] ... those members presenting for medical care whose physical or mental fitness to continue naval service is questionable.”²⁵ It further provides that “[a] case usually enters the [DON] DES when a Medical Evaluation Board (MEB) is dictated *for the purpose of evaluating the diagnosis and treatment of a member who is unable to return to military duty* because the member’s condition most likely is permanent, and/or any further period of temporary limited duty (TLD) is unlikely to return the member to full duty (*emphasis added*).”^{26,27} The Board found insufficient evidence to conclude that your continued service in the USNR was ever questionable due to any mental health conditions, that your ability to fully perform your military duties was ever in doubt, or that your continued service may have compromised your health or well-being. You provided no evidence to supporting this contention other than a statement from Dr. Foote, which, as discussed further below, the Board did not find to be credible or supported by the record. Further, the objective contemporaneous evidence in the record overwhelmingly reflects that the criteria for referral to the DES was never met. This Board has the benefit of reviewing your performance with hindsight, which unequivocally established that your mental health conditions did not impair your ability to perform your duties in any way.

Obviously your PTSD condition was never identified by any medical provider during your USNR service, so the Board cannot assess how it was or should have been evaluated during any such encounters. However, there was nothing about this condition which would have triggered referral to a MEB. The objective evidence reflects that you were fully capable of performing your duties despite this condition without any restrictions. There is also insufficient evidence that it may have seriously compromised your health or well-being by remaining in the USNR. The only evidence that you offered for this contention was the statement provided by Dr. Foote, but as discussed further below the Board did not find that statement to be credible or supported by the record. Considering that your mental health only began to deteriorate long after your discharge from the USNR and that your PTSD symptoms did not manifest in any way harmful to your health during your service, it was not your continued service which compromised your health and well-being.

There was nothing about your interaction with Dr. Killian in 1999 which should have triggered your referral to a MEB. First and foremost, the fact that Dr. Killian did not refer you to a MEB is persuasive evidence in itself that there was nothing about your medical or mental condition at the time which raised any doubts about your mental fitness to continue naval service. He was

²⁴ SECNAVINST 1850.4E, Department of the Navy (DON) Disability Evaluation Manual, dtd 30 April 2002, was promulgated immediately prior to your discharge from the USNR in May 2002. SECNAVINST 1850.4D provided consistent referral guidance to that contained in SECNAVINST 1850.4E prior to 30 April 2002.

²⁵ See paragraph 1005.

²⁶ See paragraph 3102.

²⁷ Paragraph 18-4(2) of NAVMED P-117 provides the circumstances indicating the need for an MEB. They include when a member has a condition that appears to significantly interfere with performance of duties appropriate to the member’s office, grade, rank, or rating; when a member has a condition which will prohibit returning the patient to his parent command in a medically unrestricted duty status (following appropriate light duty); and when a member has a condition that may seriously compromise the member’s health or well-being if the member were to remain in the military service (e.g., continued service would likely result in extended hospitalization(s), requirements for close medical supervision, or potential aggravations of the existing condition).

obligated by regulation to refer you to a MEB if that were the case, he was presumably fully qualified to make such an assessment and he had direct interaction with and observation of you at the time. He was also far more qualified than any of the Board members to make that assessment. Accordingly, his failure to do so strongly suggests that nothing about your presentation to him on 13 August 1999 raised any doubts regarding your fitness for continued naval service. An objective review of the evidence related to this encounter further suggests that Dr. Killian's judgment in this regard was sound. You presented to Dr. Killian with a history of depression and bipolar disorder, and informed him that you were taking lithium at the time. These conditions would not necessarily warrant automatic referral for a MEB, but rather would be assessed on a case-by-case basis to determine whether persistent duty modifications were necessary or that your functioning was impaired so as to preclude satisfactory perform of the duties of your office, grade, rank, or rating. In your case, you returned to your duties without any limitations, and there was no degradation in your capacity to perform those functions for the duration of your time in the USNR. The symptoms that you reported were disturbed sleep, lack of interest, guilt over a recent relationship (you had recently broken up with a girlfriend), reduced concentration, and reduced appetite, and the only stress you reported was your recent break-up. These symptoms would not warrant such a referral. Finally, Dr. Killian reported that you had no suicidal ideations, and no such plans. The Board did not agree with your assessment that the fact that he asked you to enter into a "contract for safety" while pending follow-up with mental health, to be an indication that he believed you to be suicidal. If he actually had such a belief, he would not have specifically indicated that you had no suicidal ideations and would have insisted upon much more than a "contract for safety" in the interim. At that time, you were on AT, which means that he could (and presumably would) have contacted your commanding officer at NR-MSC to insist upon a suicide watch, as is the norm for suicide risks in the military, if there was any such concern. The fact that he did not do this was persuasive evidence that you were not actually a suicide risk at that time and that Dr. Killian had no significant concerns for your safety apart from that which he would have for any patient complaining of depression. There simply was nothing about your encounter with Dr. Killian which would have made any reasonable medical officer believe that your mental fitness for continued service was questionable. Perhaps your recommended follow-up at mental health would have revealed more about your condition which is not discernable from your records, but there is no evidence of that because you apparently did not follow up. This Board cannot speculate regarding what such a follow-up would have revealed, but it does note that you continued to perform the duties of your office, grade, rank, and rating at or above the standard for the remainder of your USNR service.

Your 10 June 2000 encounter with a USNR Medical Corps officer provided even less cause for referral to the MEB than did your 13 August 1999 encounter with Dr. Killian. By this time, you had stopped taking lithium, and reported no conditions or symptoms which could possibly raise doubts regarding your continued naval service. The provider noted that you were dealing with stress related to a relationship, but observed that you did "not appear depressed." This provider was a USNR Captain, so he would have been an experienced doctor. The Board has no reason to question his judgment in this regard. During this encounter, you simply stated that you would like to resume counseling. This does not even approach the threshold for referral to the MEB. The Board did not find the evidence to support your contention that you were denied such counseling. It would have been your responsibility to follow-up on that desire, and the absence

of any record of such follow-up in your record suggests that you failed to do so, at least within the Navy.

The Board did not find your disqualification for enlistment in the Army in 1998 to be particularly probative of your claim that the Navy should have referred to you to the DES.²⁸ The evidence regarding this disqualification is insufficient for the Board to reach any definitive conclusions, but it did not agree that a medical disqualification for enlistment would have triggered the need for a MEB referral. First, the medical standards for enlistment into the military are very different and far more restrictive than are the medical standards for retention in the military. For example, your history of bipolar disorder and/or any symptoms of or treatment for depressive disorder within the previous 36 months would have disqualified you for enlistment in any of the armed services per paragraph 6.28 of DODI 6130.03 (Volume 1). However, the same conditions would only disqualify you for retention in the military if they either required persistent duty modifications to reduce psychological stressors or enhance safety or impaired your functions so as to preclude the satisfactory performance of required military duties of your office, grade, rank, or rating, per paragraph 5.28 of DODI 6130.03 (Volume 2). Your conditions clearly did not meet either of the disqualifying criteria at the time. Accordingly, even if the Navy knew of the MEPS determination that you were medically disqualified for enlistment in the Army, that determination would not trigger referral to a MEB.

Second, the Board did not agree with your contention that the Navy knew or should have known of your medical disqualification for enlistment in the Army, and subsequently should have referred you for disability processing. If there was any error in processing your DD Form 368, it was the Army's failure to return the form to the Navy after denying your enlistment. This Board is not empowered to correct the errors of the Army. There simply was no way for the Navy to know of this determination if the Army did not return the form, so there was no error in the Navy's failure to act upon it.

The Board acknowledged your statement, dated 2 May 2021, claiming that you were suicidal during your service in the USNR, but did not find it to be credible. This is not to say that the Board believes that you are lying. Rather, the Board believes it to be highly likely that you are conflating events that occurred after your discharge from the USNR with those that occurred during your service. The clinical psychologist who conducted your psychological evaluation on 1 April 2017 in support of your claim for VA benefits following the BVA's action on your appeal described you as a poor historian of your background. Another clinical psychologist made the same observation on 2 August 2011 in support of your claim for SSDI, and further assessed your memory as "impaired." Further, you stated yourself that you have do not remember the last four years of your USNR service, which reinforced the observation that your memory of your USNR service is impaired. Specifically, you claim now that during your first four years on the ship, from 1994 to 1998, your stressors had you "suicidal to the point, [you] would edge into traffic off base, and consider jumping into it." However, you said nothing about any such thoughts in your annual certificate of physical condition in 1997, despite commenting on the occasional effects of stress. You specifically denied any suicidal ideations when you sought treatment from Dr. Killian in 1999 and described your main stressor as the recent break-

²⁸ The Board concurred with and adopted the analysis provided by its predecessor in Docket No. 7479-20 with regard to the spinal injury noted in your disqualification for enlistment in the Army.

up with your long-time girlfriend, and provided no information that would prompt him to recommend any proactive precautions to ensure your safety. In fact, you never communicated such thoughts to any provider during your USNR service, and continued to specifically deny any suicidal ideations after your discharge from the USNR during multiple encounters with various mental health providers. It was only when you started making superficial cuts on your wrist while waiting for medications on 28 September 2005, and were subsequently hospitalized at VFMHRC that your record reflects any suicidal ideations. It was during the psychiatric assessment which followed this incident, after previously having denied any suicidal ideations, that you reported numerous suicidal plans, to include a reference to a plan related to jumping into traffic. The Board does not doubt that your mental illnesses have driven you to suicidal ideations in the past, and that those ideations may have included taking or planning to take dangerous actions in and around traffic as you reported in your letter to the Board. It does, however, believe that you have inadvertently conflated these experiences which occurred after your discharge with your military service, because your mental health records clearly reflect that your mental health began deteriorated long after this discharge.

The Board also considered the Dr. Foote's claim that he would not have allowed you to return to full duty if he had evaluated you at the time knowing what was in your records, but found this claim to lack any credibility or support. Dr. Foote did not explain what he found in your contemporaneous medical record which would have lead him to this conclusion, and there was literally nothing in your in-service medical record which would lead any reasonable and objective provider to such a conclusion. You sought assistance from Dr. Killian based upon what was reported as relatively minor symptoms of depression. According to the record of this encounter, the main stressor that you described was your recent break-up with a girlfriend. Dr. Killian recommended that you follow-up with mental health the next week, but the absence of any records suggests that you failed to do so. Further, your contemporaneous records make no reference to the workplace stressors you now claim, and do not suggest that you sought transfer to the Army to escape such stressors. Your in-service medical records simply do not reflect the distress that you report today. There is nothing in these records which would lead any reasonable and objective military provider to limit a patient's duties under these circumstances. It was very obvious to the Board that Dr. Foote's comments in this regard were based upon his understanding of how your condition progressed after your discharge, and were offered solely in support of your request for relief rather than to offer an objective assessment of the evidence. Accordingly, the Board did not find Dr. Foote's comments to be persuasive with regard to the issue of whether you should have been referred for disability processing.

As stated above, the Board accepted as true that you suffered from several mental health conditions while serving in the USNR, including but not necessarily limited to PTSD, depressive disorder, anxiety disorder, and bipolar disorder, and that your experiences in the USNR either triggered or exacerbated these conditions. However, there is no evidence whatsoever that these conditions manifested themselves in any way during your USNR service that negatively impacted your health and safety or your ability to perform the duties of your office, grade, rank, or rating. Your ability to perform your duties was never degraded while you were in the USNR, and no limitations were ever needed or imposed for your safety. Further, your mental health records reflect that these conditions began to negatively impact your safety and functions sometime between the psychological evaluation conducted on 15 January 2004 and your

hospitalization in late September 2005, following the loss of your job and perhaps your relocation to the San Francisco Bay Area, which undermines Dr. Foote's contention that it was your continued service which adversely affected your health and safety. If anything, the evidence suggests that it was the termination of your service adversely affected your health and safety, since your mental health deteriorated only you were removed from the USNR for approximately two to three years and the lack of income and stability which that service provided apparently contributed to that deterioration. Unfortunately, the progression of your mental health after your discharge on 25 May 2002 is irrelevant to the question of whether you should have been referred to the DES. Only the manifestations of these conditions prior to your discharge are relevant in this regard, and the contemporary, objective evidence unequivocally suggests that there was nothing about your mental health up until that date which would have called your continued service into question. Accordingly, there was insufficient evidence that these conditions ever met the criteria for referral to the DES during your USNR service.

Fitness for Continued Service.

Having found insufficient evidence that your mental health during your USNR would have or should have raised questions regarding your continued service such as to warrant referral to the DES, it follows that there was also insufficient evidence to conclude that your mental health conditions rendered you unable to perform the duties of your office, grade, rank, or rating. However, even if such referral was warranted, and a MEB for some reason found that your mental health conditions materially interfered with your ability to reasonably perform the duties of your office, grade, rank, or rating to warrant referral to the PEB for a fitness determination, the Board is confident that the PEB would have found you fit for continued service. Per SECNAVINST 1850.4E, "[t]he sole standard to be used in making determinations of physical disability as a basis for retirement or separation is unfitness to perform the duties of office, grade, rank, or rating."²⁹ You have not provided any evidence that you were unfit to perform the duties of your office, grade, rank, or rating," and the record overwhelming reflects that you were fully capable of doing so.³⁰

Per paragraph 3304 of SECNAVINST 1850.4E, the determination of whether a member can reasonably perform his duties includes consideration of common military tasks, physical readiness/fitness tests, deployability, and special qualifications. Of these considerations, only

²⁹ Per paragraph 3302(a) of SECNAVINST 1850.4E, "[a] service member shall be considered Unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his/her office, grade, rank, or rating ... to include duties during a remaining period of Reserve obligation."

³⁰ This conclusion does not represent a finding of fitness. Rather, it reflects the Board's determination that you failed to prove that you were not fit. This Board is not the PEB and therefore does not make medical fitness determinations. The statutory and regulatory function of this Board, per 10 U.S.C. § 1552 and SECNAVINST 5420.193, is to correct errors in, and remove injustices from, naval records. While this Board empowered to correct your record to reflect that you were medically retired if it finds the existence of an error or injustice in the fact that you were not, it does not make fitness determinations. The civilian employees of the DON who constitute this Board, none of whom have the medical expertise and only some of whom incidentally have the line officer experience in their past which is mandated for the PEB, are neither qualified nor mandated to make this determination. Per SECNAVINST 5420.193, the burden is on you to prove the existence of an error or injustice in the fact that you were not medically retired. It is not on the Board to prove that you were fit.

your deployability might have weighed in favor of a finding of unfitness.³¹ However, paragraph 3304(a)(3) specifically provides that the inability to perform the duties of your office, grade, rank, or rating in every geographic location and under every conceivable circumstance (i.e., your deployability) “will not be the sole basis for a finding of Unfit.”

The most convincing evidence that you were reasonably able to perform the duties of your office, grade, rank or rating is that you did so throughout your USNR service without any apparent degradation in your performance. Every evaluation report of your USNR service rated your performance as average to above-average relative to your peers. Your performance evaluations from your time onboard the U.S.S. SIDES were favorable, describing you as a “hard worker” and a “valuable asset” to the ship and providing no indication that you were unable to perform the duties of a Boatswain’s Mate. You even received an award for merit in 1997, which reflects that the quality of your performance onboard the U.S.S. SIDES was worthy of recognition. Your annual evaluation from the period 16 June 1999 to 15 June 2000, after the reported traumatic events onboard the U.S.S. SIDES and during the time period that you stated that you were unable to remember, rated your performance as “Above Standards” relative to your peers in every performance trait but one. Your reporting senior also checked the box for “Must Promote” and recommended your retention. This suggests that you were fully capable of performing the duties of your office, grade, rank, or rating at this time, and that your mental health conditions did not impair your performance. Your next evaluation report for the period 16 June 2000 to 15 June 2001 reflects that you met the standard for every performance trait except one, for which you were rated above the standard. Again, this reflects that not only were you capable of performing the duties of your office, grade, rank or rating during this period, but that you were doing so. The reduced ratings relative to the previous report are easily explained by the fact that you did not perform AT during this period, which denied your command of an extended opportunity to observe and assess your performance. If anything, the fact that your performance was rated so highly during the year that you did perform AT while assigned to NR-MSA suggests that you were not only fully capable of performing the duties of your office, grade, rank, or rating, but that you excelled when doing so for an extended period outside of drill weekends. You did not receive an evaluation report for your final 11 drill periods, which is not surprising given that your enlistment expired before you would have been due to receive another, but there is nothing in your record which suggests that your performance diminished during this period. Your record is devoid of any misconduct or indications of substandard performance, and you were issued an RE-1 reentry code. This suggests that your command was fully satisfied with your performance and capabilities up until your discharge, and would have welcomed your continued service in the Navy if you had chosen to reenlist.

As stated previously, the evidence suggests that your mental health conditions only began to impair your functionality after your discharge. Your second most productive year of civilian employment was the year after your discharge from the USNR, and you reported that it was not until July 2005 that you became unable to work due to your mental health conditions in your 2011 claim for SSDI benefits. If you were capable of maintaining civilian employment prior to that date, you were certainly capable of performing the very generic duties of a Boatswain’s Mate. Finally, even Dr. Foote stated that it was from the “time of discharge forward [that your]

³¹ You had no special qualifications to take into consideration, and your physical readiness/fitness tests would have weighed heavily in favor of a finding of fitness.

ability to function was seriously compromised,” and that the negative outcomes of your mental health conditions “occurred upon [your] being discharged.” Fitness determinations are not based upon projections or predictions of how a condition may progress; they are based upon the effect upon the member’s ability to perform the duties of their office, grade, rank, or rating at the time. In your case, nothing about your mental health conditions impaired your ability to perform those duties while you were in the USNR.

Paragraph 3302 of SECNAVINST 1850.4E provides that, “[i]n making a determination of a member’s ability to perform his/her duties, the following criteria *may* be included in the assessment: (1) Medical condition represents a decided medical risk to the health of the member or to the welfare of other members were the member to continue on active duty or in an Active Reserve status; (2) Medical condition imposes unreasonable requirements on the military to maintain or protect the member; [and] (3) Nature of service member’s established duties during any remaining period of reserve obligation (*emphasis added*).” Each of these considerations would have weighed against a finding of unfitness in your case.³²

It is clear from the medical evidence in the record that your continuation in an Active Reserve status did not represent a decided medical risk to your health or to the welfare of other members. There is no evidence whatsoever that your continued Active Reserve service ever represented a decided medical risk to anyone else, and, as stated previously, the evidence reflects that your mental health conditions did not represent a decided medical risk to you until sometime after your 15 January 2004 psychiatric assessment, which was conducted shortly after you had lost your job and nearly 20 months after your discharge from the USNR. The provider who conducted this assessment noted no psychiatric emergency and assessed your potential for self-harm as low. You reported yourself to be in good health at that point with no acute complaints, and you specifically denied any suicidal ideations, perceptual disturbances, or manic excitement. This assessment was consistent with every previous medical encounter in your record, particularly the assessment conducted just three months after your discharge from the USNR on 27 August 2002 which is the most reliable evidence of your mental health as of your discharge charge. It is clear from the record that your mental health took a notable downturn sometime after the 15 January 2004 assessment. The next encounter in your medical records was related to your hospitalization more than 20 months later in late September 2005. The records related to that hospitalization represent the first, but not last, appearance of suicidal ideations, delusional thought processes, and psychotic features, which suggests that your mental health conditions became a risk to you sometime between 2004 and 2005. This period was characterized by your homelessness and unemployment, which likely contributed to the deterioration of your mental health.

The only evidence that you have offered to suggest that your continued service represented a decided risk to your health was the statement provided by Dr. Foote. As stated previously, the Board did not afford significant weight or credibility to Dr. Foote’s assessment. However, even

³² Only the first of these criteria are discussed in detail here, in compliance with the Order of the COFC. It is clear from the evidence, with the benefit of hindsight, that your medical condition imposed no requirements on the military to maintain or protect you, and there was nothing about your established duties in the USNR, which consisted primarily of weekend drills during which you excelled, which would weigh in favor of a finding of unfitness.

taking his statement as true, Dr. Foote did not state how your continued service presented a decided medical risk to you. Rather, he speculated that there “could have been some negative outcomes for [you] or others while on duty.” Those negative outcomes never occurred, and fitness determinations are not based upon unsupported speculation. He also asserted that your experiences in the USNR triggered your mental health conditions and that your continued service made them worse. While the Board has accepted these contentions as true, these facts alone would not support a finding of unfitness for continued service; they are the reason that you are entitled to service-connected disability compensation from the VA. Considering Dr. Foote’s comment that the negative outcomes resulting from your mental health conditions occurred upon your discharge with no psychiatric help and you own poor ability to manage daily life, that your mental health conditions never manifested negative consequences while you were in the USNR, and that your post-service homelessness and unemployment likely contributed to the notable downturn in your mental health, the Board found it more likely that you would have actually benefitted from the income and structure that continued service in the USNR provided.

Application of the Wilkie Memo.

In accordance with the Order of the COFC, the Board applied the guidance of the Wilkie Memo to your application for relief. Even applying this guidance, however, the Board found no injustice upon which to base further relief beyond that which you are already receiving from the VA. Certainly, your experience onboard the U.S.S. SIDES was an injustice and your resulting mental health conditions are a tragedy. However, the record reflects that you have been granted 100 percent service-connected disability rating from the VA for these conditions, for which you receive monthly disability compensation. That is the appropriate form of compensation and relief for this injustice. There simply is no injustice in the fact that you did not receive a medical retirement as a result of your conditions, because your conditions never warranted referral to the DES much less rendered you unfit for continued service. The Board also found no equitable basis for relief in your case. In determining what constitutes equity, the Board is obligated to consider not only what you should receive, but also what other similarly situated service members are entitled to receive. The Board determined that no other similarly situated service member would have been referred to the DES at the time even with the facts as they are now known, nor would anyone be retroactively medically retired based upon similar facts. Accordingly, the Board determined that there is no basis for relief based on equity. The Board continues to regret the experience that you endured during your service onboard the U.S.S. SIDES and the long-term effect that it has had upon your mental health. The Board members are also gratified to know that you have been granted disability compensation and medical benefits from the VA, to which you are fully entitled and deserving. Finally, the Board members recognized that you continued to serve the Navy honorably despite the trauma that you endured onboard the U.S.S. SIDES. That, however, is the point. Medical retirements are intended only for those service member unable to continue providing such honorable and effective service due to a disqualifying medical condition. The Board regrettably found no basis to grant you the medical retirement that you were never qualified to receive.

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,

7/21/2023

X 

ELIZABETH A. HILL

Executive Director

Signed by: HILL.ELIZABETH.ANNE.1106915438