

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-089

XXXXXXXXXXXXXXXXXX.

XXXXXXXXXXXXXXXXXX BMCS (Ret.)

FINAL DECISION

Author: Ulmer, D.

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on April 8, 2005, upon receipt of the applicant's completed application and military records.¹

This final decision, dated February 8, 2006, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his Coast Guard military record by awarding him Combat-Related Special Compensation (CRSC)² at 100% of his Department of Veterans Affairs (DVA) ratings. The applicant stated on his CRSC application that the DVA rated his bilateral hearing loss and tinnitus as 60% disabling and his "loss of rectum, neurogenic bladder, and loss of use of a creative organ" as 100% disabling.

¹ The Board first received the applicant's submissions on April 20, 2004. The application was docketed after the Board had received a completed application and exhaustion of administrative remedies had occurred.

² CRSC is a recently enacted law (2002) that allows certain retirees to receive both retired pay and disability compensation. To be eligible for combat related special compensation a retired member must have 20 years of active service and either a combat-related disability or a Purple Heart related disability that the DVA has rated to be at least 10% disabling.

According to a December 19, 2003, letter from the Commander, Coast Guard Personnel Command (CGPC), the applicant has DVA ratings as follows: 100% for malignant growths of the digestive system, 30% for arteriosclerosis heart disease, 20% for urinary condition (general), and 10% for scars of the head, face or neck

The applicant alleged that his hearing loss was combat-related because it originated from his "performance of duty under conditions simulating war," while "serving as a gun captain on a 3/50 gun mount for 40 months engaged on a quarterly period with night and day firing along with other CG vessels and the US Navy."

He alleged that his rectal cancer was combat-related because it resulted from an instrumentality of war. He stated that in 1960 he incurred the injury when he was

[m]aking repair[s] to a boundary buoy that had been hit by a stray aircraft rocket. The buoy exploded due to trapped hydrogen gas [and he was] hurdled over twenty feet over board. [He] received burns over 40% of his body with bleeding of the rectum. [The] bleeding started again in 1978. [A] Navy doctor found a carcinoma tumor [and I] had a resection and was left with a colostomy. [The] pathological report of the tumor found wire segments inside. [The] accident investigation found the vent system had been inoperative on the buoy.

The applicant provided the pathology report of the rectal lesion specimen obtained on June 1, 1978. It offered the following microscopic description: "Section through the entire specimen reveal fragments of a tumor composed of glandular structure sometimes separated by marked desteoplastic reaction with acute and chronic inflammatory cell infiltration. The cells are polyhedral, sometimes with hyperchromatic nuclei and vesicular nucleoli. Some of the fragments are partially covered by benign colonic glands."

The applicant also submitted the pathology report of the specimen obtained during his surgery on June 12, 1978. This report noted the tumor measured 6 cm longitudinally and 5 cm transversely and appeared to infiltrate the entire thickness of he colonic wall. The report further stated, "The specimen consisted of a segment of grayish tissue measuring 5 x 1.5 x 1 cm. Within the tissue are wire sutures. Sections reveal pink tan cut surfaces."

CRSC Processing

The applicant filed his application for CRSC in 2003. The Coast Guard denied the application on December 19, 2003. In denying the CRSC application, the applicant was advised to consider documenting the following:

Your hearing loss in both ears is not documented by the [DVA] as a disability. In addition, it does not appear that your disabilities resulting from the exploded buoy were caused by an instrumentality of war - under the strict definition of CRSC criteria. An instrumentality of war must have an intended military purpose. If you can demonstrate a particular military purpose for the buoy in question, we will reconsider your application. Such demonstration might include documented proof that the buoy was used to mark a military quarantine area - and that use was the buoy's sole use.

On February 7, 2004, the applicant requested reconsideration of the decision denying his CRSC claim. In a statement, he noted that the DVA had rated his hearing loss as 20% disabling, and found that it was directly linked to the exploding buoy and exposure to the noise from a 3/50 gun mounted on the ship. With respect to the alleged injury to his rectum, he submitted a statement from his the deck supervisor, a retired BMC. This individual's description of the explosion was the same as that provided by the applicant. The BMC further stated that the buoy was a marker for the Navy's bombing range and was struck by a stray rocket severing the electrical system. According to the BMC, the applicant was replacing a battery and standing inside the rim of the buoy when a spark caused hydrogen gas to explode. The chief stated that the accident investigation found the vent system was inoperative due to the Navy rocket damage on May 10, 1960.

On March 22, 2004, upon reconsideration, the Coast Guard denied the applicant's request for CRSC. On April 7, 2004, the applicant objected to the Coast Guard denial of his CRSC application and encouraged further consideration.

On April 29, 2004, the Coast Guard informed the applicant that the CRSC board³ had determined that he met the overall criteria for CRSC for his hearing related difficulties. The CRSC panel also determined that "any disability you may have suffered as a result of your unfortunate buoy accident is combat-related." The CRSC panel awarded the applicant a 10% combat related disability for his hearing loss and 10% for his tinnitus, for a combined 20% CRSC rating. The applicant was advised that his CRSC claim for disability due to malignant growths of the digestive system could not be approved without further medical evidence. The CRSC panel stated it required "further medical evidence that it is at least as probable as not that the metal fragments you've documented as being in your rectum contributed to the cancer found in your rectum."

³ Hereafter, CRSC board will be referred to as the CRSC panel to avoid confusion with the use of the term Board which refers to the BCMR panel.

On June 22, 2004, the applicant responded to the CRSC's letter. He asked the CRSC panel to consider granting him a disability rating for the scarring on his face and for skin cancers that the applicant claimed were related to the buoy explosion. The applicant also contributed his urinary condition to the removal of the malignant tumor growth of the digestive system, which he alleged along with his heart and hiatal hernia were caused by "my free trip into orbit and slamming back on the buoy body before rolling over board." The applicant stated that the doctor who performed the surgery to remove the digestive tumor had passed away, but he submitted a statement from a Dr. M about the wire fragments that were found in his body.

Dr. M stated that in addition to burns on his face and torso, the applicant sustained rectal bleeding as a result of injuries sustained when the buoy exploded. He stated that the cause of the applicant's rectal bleeding was not elicited and the applicant stated that it eventually stopped. Dr. M. further stated:

It has been brought to my attention that during his initial resection for cancer, some remnants of wire were found within the wall of his colon at a site in proximity to his cancer. This is confirmed by his pathology report. It is my opinion that the wire itself is/was not responsible for him developing rectal carcinoma. However, it is reasonable to infer that if his preceding injury from an explosion resulted in metal fragments in the wall of his colon as a result of the blast, then it is also possible if not probable that other foreign debris from the explosion such as plastic fragments, battery acids, grease, dirt, etc would have been introduced in a similar fashion. It is possible that some carcinogenic substance could have been introduced into the rectum as a result of his traumatic event. The presence of the wire remnants validate that this area was indeed involved in his blast injury.

On July 6, 2004, the CRSC responded to the applicant's June letter. The panel granted the applicant an additional 10% disability rating for scars to the head, face or neck, but continued to deny the applicant's request for a disability rating due to malignant growths of the digestive system. The CRSC panel told the applicant that it required "further medical opinion that it is more probable than not" that the buoy accident was the cause of the applicant's rectal cancer. The panel recommended that the applicant consult a colorectal oncologist.

On August 19, 2004, the applicant responded to the CRSC panel's July letter and submitted an email report from the Georgia Cancer Institute. The email stated the following:

Unfortunately we do not have enough information to really answer your questions adequately and we try to avoid giving really specific answers to

individuals. To answer your question in GENERAL terms, yes, scars can generate cancer and they usually are adenocarcinoma; long-term exposure to chemicals and carcinogenic agents can also cause cancer, often different kinds (example: benzene associated with transitional cell carcinoma, asbestos with mesothelioma). Most university cancer centers have genetic or risk assessment tools (in NC, Duke or UNC-Chapel Hill) that may help you find a specific answer, but they would need to know the exact pathology of the cancer, the exact component analysis of what was removed, your own personal health history (smoking, etc).

RELATED EXCEPTS FROM THE MILITARY RECORD

The applicant enlisted in the Coast Guard January 31, 1957. In 1960, he was involved in the buoy accident. The medical records show that he was hospitalized from May 10-17, 1960, for treatment of first and second degree burns to his forehead, eyelids, neck, right forearm, left forearm, and ankles. There is nothing in medical reports suggesting that the applicant received any other injuries as a result of the buoy explosion.

Later, on February 2, 1977, after earning 20 years of active service, the applicant was placed on the temporary disability retired list (TDRL) with a combined 40% disability rating for electrical conductive cardiac defect, hiatal hernia, and a slight disfiguring scar. The applicant's heart disease triggered the medical board and subsequent physical disability evaluation proceedings. During a medical evaluation for heart disease in 1974, a medical examination of the applicant revealed the following pertinent information with respect to the colon: "The abdomen revealed bowel sounds within normal limits. No organs were felt. There was also no tenderness. Rectal examination was normal. Stools were guaiac negative. Genitalia were normal. Back revealed no CVA tenderness. Neurological examination was within normal limits."

While on the TDRL, the applicant was required to undergo periodic medical examinations. During a periodic medical examination in June 1978, the applicant complained of intermittent rectal bleeding occurring over an approximately three-month period. Neoplasm was found during the rectal examination and plus was in the applicant's stool. Upon on further examination, the applicant was diagnosed with adenocarcinoma of the rectum. On June 12 1978 the applicant underwent an abdominoperineal resection.

On October 11, 1978, the surgeon wrote a letter on the applicant's behalf addressed to whom it may concern. The surgeon wrote the following:

There is no question in my mind that when a lesion reaches the size of [the applicant's] lesion that it has been present for some time. According to the

recent theories on doubling rates of tumors, a lesion this size should have been present from seven to ten years for it to reach a cm or greater in size. Therefore, I suspect that the lesion was present at least in situ at the time of [the applicant's] retirement from the service. In that regard, I would think that this is a service related disability.

From March 16, 1981, through March 25, 1981, the applicant was hospitalized for a medical examination to determine whether he should be permanently retired from the Coast Guard due to physical disability. The medical report for this evaluation did not contain any mention that fragments from the buoy explosion contributed to or were suspected of contributing to the applicant's colon cancer.

On April 7, 1981, the Formal Physical Evaluation Board found the applicant unfit to perform the duties of his rating and recommended his permanent retirement with a 100% disability rating, as follows: 100% for resection of adenocarcinoma of the rectum, rated by analogy to colostomy; 30% for left bundle branch block, rated by analogy to arteriosclerotic heart disease; and (3) 10% for hiatal hernia, with two or more symptoms of less severity.

The applicant was permanently retired by reason of physical disability effective May 18, 1981.

VIEWS OF THE COAST GUARD

On August 26, 2005, the Board received an advisory opinion from the Office of the Judge Advocate General (JAG). He recommended that the applicant's request for relief be denied.

The JAG argued that the applicant offered no evidence to support his claim that the CRSC panel erred or committed any injustice. The JAG stated that it is abundantly clear from the record that the Coast Guard Personnel Command exhaustively worked with applicant concerning his CRSC disability compensation claim. In this regard, he stated that the applicant was informed that the CRSC panel required further medical opinion in order to substantiate the applicant's claim of disability, even to the detail of what type of specialist he should consult. The JAG noted that the applicant has repeatedly failed to produce any additional information to substantiate his request for a 100% CRSC. The JAG stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037 (1992). Moreover, he stated that the applicant bears the burden of proving error under 33 C.F.R. § 52.24.

The JAG attached comments from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. In addition to comments

similar to those of the JAG, CGPC offered the following: The applicant has failed to produce any additional information to substantiate his request for 100% [CRSC]. The information presented in [the email from gacancer.com] is too general to be considered a "medical opinion that it is more probable than not" that the buoy accident the Applicant suffered was the cause of the cancer found in [the applicant's] rectum."

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 26, 2005, the BCMR received the applicant's response to the views of the Coast Guard and he disagreed with the recommendation that relief should not be granted in his case.

The applicant contended that if he failed to carry the burden of proof it is because several colorectal oncologists advised him that the cancerous tissue specimen would have to be available in order to determine if the fragments caused the cancer to form. Apparently, none of the specimen was saved. He stated that he attempted to have one of the oncologists read his pathological report but was advised that they would only see him if he had an active cancer problem.

The applicant argued that the same debris that struck him in the face and neck was of the same type that entered his colon. He stated that his underwear and dungarees were blown away with a force that lifted his 160-pound frame twenty-five feet into the air.

The applicant stated that the record shows that wire fragments were in the specimen removed from his colon in 1978. Relying on an article from an Internet site, the applicant argued that "fire fragments caused colon polyps to develop when chromosome damage occurs in the cells of the inner lining of the colon, when chromosomes are damaged, growth becomes uncontrolled resulting in masses of extra tissue (polyps) these polyps are initially benign but over the years benign colon polyps can acquire additional chromosome damage to become cancerous adenocarcinomas . . . "

APPLICABLE LAW AND GUIDANCE

10 U.S.C. 1413a.

Section 1413a. (Combat-related special compensation) of title 10 of the United States Code provides for the following:

"(a) Authority. The Secretary concerned shall pay each eligible combat-related uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b).

"(b) Amount. (1) Determination of month amount. Subject to paragraphs (2) and (3), the monthly amount to be paid an eligible combat-related disabled uniformed services retiree under subsection (a) for any month is the amount of compensation to which the retiree is entitled under title 38 for that month, determined without regard to any disability for the retiree that is not a combat-related disability . . .

"(c) Eligible retirees. For purposes of this section, an eligible combat-related disabled uniform services retiree referred to in subsection (a) is a member of the uniformed services entitled to retired pay who--(1) has completed at least 20 years of service in the uniformed services that are creditable for purposes of computing the amount of retired pay to which a member is entitled to retired pay under section 12731 of this title . . . (other than by reason of section 12731b of this title . . . (2) has a combat-related disability.

"(d) Procedures. The Secretary of Defense shall prescribe procedures and criteria under which a disabled uniformed services retiree may apply to the Secretary of a military department to be considered to be an eligible combat-related uniform services retiree. Such procedures shall apply uniformly through out the Department of Defense.⁴

* * *

"(f) Combat-related disability. In this section, the term 'combat-related disability' means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that -- (1) is attributable to an injury for which the member was awarded the Purple Heart; or (2) was incurred (as determined under the criteria prescribed by the Secretary of Defense)-- (A) as a direct result of armed conflict; (B) while engaged in hazardous service; (C) in the performance of duty under conditions simulating war; or (D) through an instrumentality of war."

⁴ CGPC informed the BCMR staff that it follows the CRSC guidance provided by the Department of Defense in processing its CRSC claims.

Department of Defense (DOD) CRSC Program Guidance

DOD Combat-related Special Compensation Revised Program Guidance January 2004 states that the following criteria, terms, definitions, explanations will apply to making combat-related determinations in the CRSC program.

Direct Result of Armed Conflict - The disability is a disease or injury incurred in the line of duty as a result of armed conflict. The fact that a member incurred the disability during a period of war or an area of armed conflict or while participating in combat operations is not sufficient to support a combat-related determination. There must be a definite causal relationship between the armed conflict and the resulting disability.

Armed conflict includes a war, expedition, occupation of an area or territory, battle skirmish, raid invasion, rebellion, insurrection, guerilla action, riot, or any other action in which Service members are engaged with a hostile or belligerent nation, faction, force, or terrorists.

Armed conflict may also include such situations as incidents involving a member while interned as a prisoner of war or while detained against his or her will in custody of a hostile or belligerent force while escaping or attempting to escape from such confinement, prisoner of war, or detained status.

While Engaged in Hazardous Service - Such service includes, but is not limited to aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. A finding that a disability is the result of such hazardous service required that the injury or disease be the direct result of actions taken in the performance of such service. Travel to and from such service, or actions incidental to a normal duty status not considered hazardous are not included.

In the Performance of Duty Under Conditions Simulating War - in general this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training, repelling and negotiation of combat confidence and obstacle courses. It does not include physical training activities such as calisthenics and jogging or formation running and supervised sport activities.

Instrumentality of War - Incurrence during an actual period of war is not required. However, there must be a direct causal relationship between the instrumentality of war and the disability. The disability must be incurred incident to a hazard or risk of the service.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The CRSC panel has determined that any disability that the applicant suffered as a result of the buoy explosion in 1960 is combat-related. In accordance therewith, the CRSC panel has granted the applicant a combined 30% CRSC disability rating for bilateral hearing loss, bilateral tinnitus, and scarring of the face and/or neck. The Board accepts the favorable findings of the CRSC panel. Therefore, the primary issue before this Board is whether the applicant has proven that his colorectal cancer is combat-related for which he should receive CRSC.

4. The Board finds that the applicant has not proven by a preponderance of the evidence that his colorectal cancer was caused by the 1960 buoy explosion. The applicant argued that according to the pathology report, wire fragments were found during the biopsy of the tumor that was removed during his surgery on June 12, 1978. Bothersome to the Board is the characterization of the pathology finding as wire fragments or segments when in fact the pathology reports states that "within the tissue are wire sutures." A suture is " a loop of thread, catgut, or similar material used to secure apposition of the edges of a surgical or accidental wound; also called a stitch." See Dorland's Illustrated Medical Dictionary, 29th edition, p. 1739. By using the word suture, the pathologist indicates the placement or attempted placement of stitches in the colon, maybe from the earlier specimen removed from the applicant's colon prior to his surgery. Therefore, the Board is not persuaded that "wire sutures" is synonymous with "wire fragments" as the applicant uses that term in this case. Accordingly, the applicant has submitted insufficient evidence to prove that *wire fragments from the buoy explosion* were found in his colon.

5. However, even if the Board were to accept that the terms wire fragments and wire sutures are synonymous, the applicant has still failed to prove that such wire fragments resulted from the buoy explosion and caused or contributed to his cancer. In support of his contention in this regard, he offered a statement from Dr. M. The problem with Dr. M's statement is that he doubted that the wire itself was responsible for the applicant developing rectal carcinoma, which undermines the applicant's central

contention in this case. However, Dr. M stated that if metal fragments from the explosion were in his colon "it is possible if not probable that other foreign debris from the explosion . . . would have been introduced in a similar fashion." He further stated, "It is possible that some carcinogenic substance could have been introduced into the rectum as a result of his traumatic event." The problem with this speculation is there is no evidence in the record of any other debris or carcinogen having entered the applicant's system/colon.

6. The applicant then asks the Board to accept an email from gacancer.com explaining the various causes of cancer. It offers no opinion that the alleged wire fragments contributed to or caused the applicant's colorectal cancer. The email explained, as the CRSC panel did, that the applicant would need to obtain an opinion from a colorectal cancer expert that the buoy explosion probably caused or contributed to the colon cancer. Such a statement is particularly important since eighteen years had elapsed between the buoy explosion and the diagnosis of the applicant's cancer in 1978.

7. As the applicant explained, the explosion occurred over 40 years ago and he had no idea at that time that he would need to be concerned about preserving the specimen from his colon. Therefore, the Board would be inclined to believe that the applicant's colorectal cancer could possibly have been due to the explosion if the medical reports corroborated his allegation that he had rectal bleeding at the time of hospitalization for the burns from the explosion. The medical reports do not contain any suggestion that the applicant had rectal bleeding during his approximately five days of hospitalization. The first report of rectal bleeding in the record by the applicant was during a periodic examination after his 1977 placement on the TDRL. The Board would also be inclined to believe that foreign objects might have entered the applicant's body during the explosion, if as the applicant claimed his clothes and underwear were torn off during the explosion. The medical record makes no mention that the applicant's clothes were torn off or that he suffered any abdominal wounds. Moreover, the burns he suffered seem to have occurred only on those portions of the body that would not be covered by clothing during the spring of 1960, when the buoy explosion occurred. The retired BMC does not state that the applicant's clothing was blown off. In addition the applicant underwent at least five physical examinations for various purposes (reenlistment, overseas duty) between October 1960 and July 1975, and none indicated that the applicant suffered from rectal/anus problems. The Board finds no corroboration for the applicant's claims that he suffered from rectal bleeding at the time of treatment for burns caused by the explosion, that his clothes, including his underwear, was torn off during the explosion, or that projectiles entered his abdomen during the explosion.

9. The applicant indicated in his submissions that he wanted a CRSC rating for his bladder condition and for his skin cancer. The bladder condition could well be related to the colon cancer but since the applicant has failed to prove his claim in that

regard, no basis exists for granting CRSC with respect to the bladder. The applicant has no DVA rating for his skin cancer, a requirement for CRSC. Therefore, it is not necessary for the Board to make a finding with respect to the skin cancer.

10. The applicant also claimed that he is being treated by the DVA for post-traumatic stress and pancreatitis. However, there is no evidence that the applicant has DVA ratings for these conditions, a requirement for CRSC; nor did he submit evidence that such conditions are combat-related.

11. The applicant has not proved by a preponderance of the evidence that the 1960 buoy explosion caused or contributed to his colorectal cancer. Accordingly, his application should be denied.

[ORDER AND SIGNATURES ON FOLLOWING PAGE]

ORDER

The application of former BMCS xxxxxxxxxxxxxxxxxxxx, USCG (Ret.), for correction of his military record is denied.

Kevin M. Walker

Richard Walter

Kenneth Walton