

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

Application for Correction
of Coast Guard Record of:

BCMR Docket No. 2006-004

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX; S1c (former)

FINAL DECISION

AUTHOR: Ulmer, D.

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on October 7, 2005, upon receipt of the completed application and military records.

This final decision, dated July 13, 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 include "the fact that he was wounded and the nature and circumstances surrounding [his] wounds . . . in [his] military record." Based on earlier correspondence between the applicant and the Coast Guard, the Board believes that the applicant is requesting to have this information included in his record so that he will be eligible for the Purple Heart.

The applicant enlisted in the Coast Guard on July 23, 1943, and was honorably discharged on February 18, 1946. He alleged that he was wounded in combat by enemy mortar rounds at the Battle of Iwo Jima while serving in the Coast Guard aboard the USS LST 792. He submitted a notarized letter from a former crewmember who was a CPhM (pharmacist's mate) on board the ship. The pharmacist's mate stated that he remembered the applicant and offered the following events:

The first incident I recall was the Invasion of Iwo Jima, when on February 23rd, we were beached on Yellow Beach. [T]hat night we were hit 13 times by Japanese Mortars from the cave on the hill. I remember so well because it was the beginning of a very busy [e]vening. We [were] hit on the starboard side . . . We were also hit on the main deck [where a crewmember] was severely wounded in the chest. A twenty mm gun was

also hit right near my battle station . . . You [the applicant] were one of four wounded at that spot. If I remember you had a face full of shrapnel [that] looked quit serious, but when the blood was washed away it was not serious. We were fortunately still afloat [and] slowly made our way to Saipan for repairs. We went to . . . Okinawa . . . where you had a series of problems. I recall you tripped over the anchor chain on the way to General Quarters and had severe abrasions all over your legs. I had to place you on the Binnacle List for a couple of weeks. I remember that because I had to explain to the Deck officer . . . why you had to be off duty so long. Seems that I recall that you had a problem with sleepwalking and the guys in your compartment were worried because they were afraid that you would hurt them or yourself during one of these episodes.

The applicant also submitted a September 8, 2005 letter that he received from a Coast Guard captain on behalf of the Secretary of the Department. The letter advised the applicant to submit an application to the BCMR because the Coast Guard could not approve his request for a Purple Heart. The captain told the applicant that the documentation that he had submitted to CGPC did not substantiate awarding the Purple Heart because there was no documentation of the injury in the applicant's official medical record.¹ The captain told the applicant that the BCMR had the authority to enter documentation of his wound into his military record. The captain advised the applicant of the following with respect to the requirements for the Purple Heart:

As the Nation's oldest award, the rules for the Purple Heart Medal are stringent. The stipulations for its award were established by the President of the United States through Executive Order 11016, dated April 26, 1972, and as such, cannot be overturned by the United States Coast Guard. The Medal is awarded in the name of the President of the United States, to those who suffer injury or death as a result of hostile military action. Injuries which lead to the award of the Purple Heart Medal must have required treatment by a medical officer and been documented in the official medical records. In addition, the records must clearly show that the injury was sustained as a direct result of enemy action.

The applicant stated that although the date of the error was February 18, 1946, he did not learn of the procedures for amending his record until 2005.

VIEWS OF THE COAST GUARD

On February 21, 2006, the Board received the advisory opinion from the Judge Advocate General (JAG) of the Coast Guard recommending that Board deny relief. The

¹ Prior to this letter, the applicant had received two earlier letters on this subject: One from the Navy Personnel Command Liaison Office and one from a Commander, in the Office of the Coast Guard Personnel Command. Each letter told the applicant the same thing: his records failed to substantiate his eligibility for the Purple Heart.

JAG stated that the application should be denied because it is untimely. The JAG stated that applications for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. 33 CFR § 52.22. The JAG said that the Board may still consider the application, if the applicant provides sufficient evidence to warrant a finding that it is in the interest of justice to excuse the failure to file timely. As the JAG pointed out, in determining whether it is in the interest of justice to waive the statute of limitations, the Board should consider the reasons for the delay as well as the likelihood of the applicant's success on the merits of his claim.

In this regard the JAG noted that the applicant admitted on his DD Form 149 that he discovered the alleged error at the time of his discharge approximately 60 years ago, but was not aware of the BCMR process until 2005. The JAG noted that even if the applicant was unaware of the BCMR process, he did not begin his quest for the Purple Heart until 2004.

The JAG stated that if the Board waives the statute of limitations in the interest of justice, the application should still be denied because the applicant has failed to carry his burden of production and persuasion. In this regard, the JAG stated the following:

. . . Applicant does not present sufficient evidence to overcome the presumption of regularity afforded those medical personnel who maintained his medical record in 1945. Although Applicant presents evidence that he was struck by shrapnel during the battle, he presents no evidence of medical personnel treating those wounds. In fact, the [pharmacist's mate] described Applicant's wounds as "not serious" and made no mention of follow-on care or treatment. Applicant's medical record contains a February 1945 entry for a fungus infection. Given this, it seems likely that medical personnel assigned to USS LST-792 would have documented Applicant's shrapnel wounds--also sustained in February 1945--if they had been serious enough to require treatment. Furthermore, it would be improper to base an entry correcting Applicant's medical record solely upon a recount of events obtained over 57 years after the fact, especially one that lacks specific treatment details and the full extent of injuries sustained.

The JAG stated that in Executive Order 9277, the President authorized and directed the Secretary of the Navy to award the Purple Heart to those sailors, Marines, and Coast Guardsmen who: ". . . are wounded in action against an enemy of the United States, or as a result of an act of such enemy, provided such wound necessitates treatment by a medical officer." The JAG further stated the applicant has not presented any evidence to overcome the presumption of the commanding officer (CO) not to award the Purple Heart to the applicant. The JAG noted that the CO recommended awarding the medal to two of the five men wounded that day. "Sixty-one years later, it is difficult for any one to second-guess the commanding officer, who presumably knew the facts and circumstances surrounding the injuries to his men."

The JAG stated that in an effort to resolve this matter, the Coast Guard contacted the individual who served as the deck officer and the applicant's department head in 1945. The former deck officer was unable to recall the names of his wounded shipmates and the details of their injuries and any subsequent medical care. The JAG stated that based on the totality of the evidence, the Board should deny relief to the applicant for failing to prove by a preponderance of the evidence that his medical record is erroneous and that his shrapnel wounds necessitated treatment by a medical officer.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 7, 2006, the Board received the applicant's reply to the views of the Coast Guard. He commented on the two issues he states that were raised in the advisory opinion. They are: "1. I waited longer than 3 years to have my military records corrected. 2. My wounds were not serious enough."

With respect to waiting longer than three years to file an application, the applicant stated that in the years following World War II he was trying desperately to get his life back on track, but it was difficult because he could not get any help for his medical problems that were incurred during the war. He stated that between 1946 and 1949 there was no place for him to turn for help because the war was over and the military was cutting back on everything.

In regard to the seriousness of his wounds, the applicant stated that Executive Order 9277 did not require wounds to be of a certain severity to qualify for the Purple Heart.

The applicant attached a cover letter to his reply to the advisory opinion. He wrote the following:

After writing my response [to the advisory opinion], my thoughts returned to 1945 and what it was like for us during the battle . . . Our ship was under Kamikaze attack for some 4 days during which time we were at battle stations and manning our guns on a 24-hour basis. During many of these days, our LST was resting on the beach with its bow-doors open. The dead and wounded were everywhere, and we were continuously being shelled and mortared.

It was terrifying and chaotic. There was only one thing on everyone's mind: to stay alive long enough to get the job done so we could go home. Then, what no one was concerned about were medical records. In fact, I didn't even know there was such a thing as a medical record. Not during the war and not until many years after the war when I needed help for my service connected health problems, did I become aware of medical records.

It is important to point out that neither I nor any one else on my ship was ever advised to make sure that their medical records were current and, if not, to get them corrected within three years. Therefore, I respectfully submit that it makes no sense to hold service personnel to requirements they weren't told about or for that matter, perhaps, didn't even exist.

APPLICABLE REGULATIONS

Executive Order 9277 of December 3, 1942 stated in pertinent part:

1. The Secretary of the Navy is authorized and directed to award the Purple Heart in the name of the President of the United States to persons who, while heretofore or hereafter serving in any capacity with the Navy, Marine Corps or Coast Guard of the United States, are wounded in action against an enemy of the United States, or as a result of an act of such enemy, provided such wound necessitates treatment by a medical officer.² [There have been subsequent executive orders authorizing the Purple Heart, but the eligibility requirements have remained the same.]

The Coast Guard Medals and Awards Manual states the following at Article 2.B.11.c.&d.:

"c. Definition. A "wound" is defined as an injury to any part of the body from an outside force or agent, sustained while in action . . . A physical lesion is not required, provided the concussion or other form of injury received was a direct result of the action engaged in, and required treatment by a medical officer.

"d. Limitations. Except in the case of a prisoner of war, the wound for which the award is made must have required treatment by a medical officer . . . "

FINDINGS AND CONCLUSIONS

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

1. The BCMR has jurisdiction over this matter pursuant to section 1552 of title 10, United States Code.

2. The application was not timely. It was filed approximately 60 years after the applicant's discharge from the Coast Guard.

3. However, the Board may still consider the application on the merits, if it finds it is in the interest of justice to do so. In Allen v. Card, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing whether the interest of justice supports a waiver of the statute of limitations, the Board "should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review." The court further instructed that "the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review." Id. at 164, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

4. The applicant explained that he did not file his application sooner because he did not know there was such a thing as a medical record until seeking medical help for

² See <http://www.presidency.ucsh.edu/ws/index.php?pid=60972&st=&st1=>

his alleged combat-related wounds many years after the war had ended. He stated that he only learned of the procedure for amending his records in 2005. However, the Board is not persuaded by the applicant's reason for delay. In this regard, the Board finds that a bit of diligence on the applicant's part would have revealed the existence of the Board for Correction of Military Records, which has been in existence since 1946.

5. Although the applicant's reasons for not filing his application sooner are not persuasive, the Board must still perform a cursory review of the merits to determine the strength of the applicant's claim that the evidence of his alleged wound and treatment during the battle of Iwo Jima should be included in his military record. After a review of the evidence, the Board finds that it is unlikely that the applicant will prevail on the merits of his claim. The applicant has submitted insufficient evidence to establish that he suffered a wound during the battle of Iwo Jima for which he received treatment from a medical officer. The Board is persuaded in this finding by the fact that the applicant's military record contains no entries of any wounds incurred by the applicant during the battle of Iwo Jima, while clearly showing that he participated in it. In this regard, the Board notes that the applicant's military record has a Transcript of Medical History that records nine instances in which the applicant received medical treatment from December 1944 to September 13, 1945, while attached to the USS LST 792. The battle of Iwo Jima occurred in February and March 1945³ and the Transcript of Medical History shows that the applicant was treated only once during this two-month period for a fungus. The absence of entries in the medical record for treatment of wounds incurred during Iwo Jima is strong evidence that the applicant did not sustain a wound that required treatment. The Board finds that if the applicant had been treated for shrapnel to the face or any other wound during this period, it is very likely such treatment would have been recorded in the applicant's military record.

6. The letter from the pharmacist's mate does not persuade the Board that the applicant suffered wounds for which he received medical treatment during the period in question. The letter states that the applicant received shrapnel to the face, but it also states that when the blood was washed off it was not serious. It does not describe the wound; nor it does not state that the applicant received medical treatment for the wound. The pharmacist's mate also mentioned that the applicant incurred severe abrasions to his legs from a fall during general quarters. Neither this event nor treatment for it is documented in the military record during the period of the Iwo Jima battle. The transcript of medical history shows that in December 1944, prior to Iwo Jima, the applicant was treated for a wound to the right leg. However, there is no indication in the record that this December 1944 wound was combat-related. Even if the pharmacist's mate's statement were more detailed, the Board would be hesitant to correct the applicant's record on the basis of that one statement. The applicant was discharged from the Coast Guard approximately sixty years ago and memories tend to fade over time. Significantly, the commanding officer did not recommend the applicant for a Purple Heart at the time and that speaks volumes.

³ See <http://www.answers.com/topic/battle-of-iwo-jima>

7. Until the applicant can establish by a preponderance of the evidence that the Coast Guard committed an error by failing to include evidence that he was wounded in the battle at Iwo Jima and was treated by a medical officer for that wound, the Board will not place such information in his military record. According to Executive Order 9277 and Article 2.B.11.d of the Medals and Awards Manual, the wound for which the Purple Heart is given "must have required treatment by a medical officer."

8. Therefore, due to the passage of time, the applicant's less than compelling reasons for the 60-year delay, and the lack of sufficient evidence establishing that the Coast Guard failed to include evidence of his alleged combat-related wounds and treatment in his military record, the Board finds that it is not in the interest of justice to waive the statute of limitations in this case.

9. Accordingly, this request should be denied.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former S1c XXXXXXXXXXXXXXXXXXXX USCGR, for correction of his military record is denied.

Philip B. Busch

Dorothy J. Ulmer

Richard Walter