

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-123

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

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 after receiving the applicant's completed application on April 10, 2009, and assigned it to staff member J. Andrews to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 14, 2010, is approved and 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, who was honorably discharged from the Coast Guard Reserve on February 25, 1946, asked the Board to award him a Purple Heart. He alleged that during World War II he suffered a 30% hearing loss because he served in combat on a 3" gun crew on an LST.

The applicant alleged that he discovered the error in his record on February 8, 2008, when he learned from the Department of Veterans Affairs (DVA) that a hearing loss could be considered a combat injury.

In support of his allegations, the applicant submitted a copy of a DVA decision dated February 8, 2008, which stated that he has been awarded a 30% combined disability rating for hearing loss (20%) and tinnitus (10%), effective as of September 14, 2007.

SUMMARY OF THE RECORDS

On November 10, 1943, the applicant enlisted in the Coast Guard Reserve. The applicant was assigned the various training units before reporting aboard LST 168 on September 7, 1944. During his service, he advanced to radarman third class (RdM3c)

The applicant's military medical records show that while serving on active duty, he received an induction physical examination, several vaccinations, a physical examination to

determine his fitness for training as a radarman, a physical examination to determine his fitness for sea duty, four dental examinations, and a pre-discharge physical examination. None of the medical records contain any mention of a complaint of or treatment for hearing loss.

Prior to the pre-discharge physical examination, the applicant completed a medical questionnaire, on which he noted that he had not suffered any injuries or disabilities while in the service. In response to the question, "Were you treated for any illnesses which are not in your health record, but which you want noted," he wrote, "Yes, jungle rot." The applicant was found fit for discharge and he signed a form on February 15, 1946, agreeing with the physician's finding that he had no physical defects. The applicant also signed forms stating that he did not intend to file a claim for compensation or a pension from the Veterans' Administration.

A note in the applicant's record signed by the commanding officer of LST 168 states that he is "entitled to wear the following campaign ribbons with authorized stars as enumerated":

Asiatic-Pacific Theatre

1. Morotai Operation
1. Leyte Operation
1. Lingayen Gulf Operation
1. Balikpapan Invasion

Philippine Liberation ribbon (2) stars thereon.

Participated in occupation of Japan, Yokohama, Tokyo Bay. 9-14-45 to 9-23-45.

American Theatre

World War 2 Victory Medal

On February 16, 1946, the applicant was honorably discharged from the Reserve. A memorandum dated February 16, 1946, advised him that he was entitled to wear the American Area Campaign Ribbon, the Asiatic-Pacific Area Campaign Ribbon with four stars, the Philippine Liberation Campaign Ribbon with two stars, and the World War II Victory Ribbon.

On April 18, 1990, the applicant submitted a request for medals to the National Personnel Records Center (NPRC). On May 16, 1990, he was sent the medals listed in his military records, which did not include a Purple Heart.

On December, 13, 2006, the applicant again asked the NPRC for medals. The NPRC advised him that policy allowed each veteran to receive just one replacement of his awards and that the applicant had already received his awards.

APPLICABLE LAW

During World War II, the Coast Guard operated as a part of the Navy. Section 230.9 of SECNAVINST 1650.1H states that the Purple Heart is awarded to members of the Armed Forces who have been wounded in action against an enemy of the United States. Paragraph d of this section states that "the wound for which the award is made must have required treatment by a

medical officer at the time of injury,” unless the wound was received while the member was a prisoner of war.

Section 831.1 of SECNAVINST 1650.1H states that for World Wars I and II and the Korean War, the Purple Heart is only awarded to members “wounded as a direct result of enemy action.” (For later conflicts, the wound may be an indirect result of enemy action.) Paragraph d of this section states that if adequate document of the cause of the injury is not available “due to the complete or partial loss of an individual’s records, two sworn affidavits from eyewitnesses to the injury who were present at the time of the injury and have personal knowledge of the circumstances under which the injury occurred, may be submitted for consideration. (Statements from witnesses ‘after the fact’ will not be considered.)”

Similar criteria for the Purple Heart Medal appear in the Coast Guard Medals and Awards Manual, COMDTINST 1650.25D.

VIEWS OF THE COAST GUARD

On August 5, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny the applicant’s request. In so doing, he adopted the findings and analysis provided in a memorandum on the case by the Personnel Service Center (PSC).

The PSC noted that the application was not timely and that the applicant “provided no justification for the over 60 year delay in filing.” Regarding the applicant’s request for a Purple Heart, the PSC stated the following:

A review of the Applicant’s record does not support his entitlement to the Purple Heart Medal. There is no indication within the Applicant’s record that he was injured as a result of enemy action and received treatment by a medical authority for such injury. [Citation omitted.] While the Applicant has a service connected disability for hearing loss, such disability does not in and of itself qualify [him] for the award of the Purple Heart.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 6, 2009, the Chair sent a copy of the Coast Guard’s views to the applicant. and invited him to respond within 30 days. No response was received.

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 10 U.S.C. § 1552.
2. Under 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22, an application to the Board must be filed within three years after the applicant discovers, or reasonably should have discovered, the alleged error or injustice. The record shows that upon his discharge from active duty,

the applicant was notified in a memorandum of the awards he was entitled to wear. The memorandum does not mention a Purple Heart. The applicant's discharge papers also list his medals but no Purple Heart. Moreover, the record indicates that the applicant inquired about his medals in 1990 and did not claim or receive a Purple Heart. Therefore, the Board finds that the applicant clearly knew he had not received a Purple Heart several decades ago, and so his application is untimely.

3. Pursuant to 10 U.S.C. § 1552(b), the Board may excuse the untimeliness of an application if 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 to determine 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 164-65; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. Regarding the delay of his application, the applicant stated that he only recently realized he was entitled to a Purple Heart when the DVA awarded him a service-connected disability rating for his hearing loss. However, a finding of a service-connected disability by the DVA is not probative of whether a member is entitled to a Purple Heart. The applicant's explanation for his long delay is not compelling.

5. The Board's review of the applicant's military and medical records shows that there are no records supporting his claim that he suffered significant hearing loss while aboard the LST 168 as a result of enemy action. The fact that today, more than 60 years later, the applicant is suffering from hearing loss and tinnitus that the DVA has found to be service connected does not prove that he suffered an injury in action against the enemy that was sufficiently severe at the time to require medical treatment. Section 230.9 of SECNAVINST 1650.1H states that the Purple Heart is awarded to members who have incurred an injury in action against an enemy of the United States, and the injury "must have required treatment by a medical officer at the time of injury," unless the injury was received while the member was a prisoner of war. There is no evidence that the applicant was treated for hearing loss while aboard the LST 168 or prior to his discharge from the Service. Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

6. Accordingly, the Board will not excuse the untimeliness of the application or waive the statute of limitations. The applicant's request should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of former RdM3c xxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Donna M. Bivona

Evan R. Franke

James E. McLeod