

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2008-204

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

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 September 17, 2008, 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 October 22, 2009, 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 applicant¹ asked the Board to correct his military record to show that he was awarded a Purple Heart for an injury he received when his ship, the USS CAVALIER, was torpedoed by a Japanese submarine on January 30, 1945. The applicant stated that despite his injury, he remained above deck for the duration of the incident. However, afterward, he "was unable to sign the wounded blotter." The applicant explained that he "did not go below deck to put his name on the roster due to the threat of possible further danger." The applicant included with his application a letter about the incident that he wrote to a congressional representative in 1985, in which he stated the following:

On the 30th of January 1945 at 1:30 a.m. in the morning, my ship attack transport, USS CAVALIER A.P.A. #37, was struck by an enemy Japanese submarine. I had finished the 8 p.m. to 12 p.m. watch in the engine room and was in my bunk when the ship was struck.

The torpedo struck just ahead of the ship's propellers flooding the shaft tunnel stopping the ship's engine turbines and other power equipment. I was thrown out of my bunk to the steel deck. Since all the lights were out we had to grope thru the darkness to get to our battle general quarters stations in the engine room and elsewhere. After general quarters were secured, many of us were very leery of going below because we did not know if there would be another attack.

¹ The applicant died on May 7, 2009, while his application for correction was pending. His daughter continued the case as his representative.

During this time, my broken nose had stopped bleeding and the pain had subsided somewhat that I decided as many of the others to not go below. I did not go to sick bay below not knowing what may happen next.

As you can imagine, during the highly stressful moments of that night, not only was I concerned for my own safety but also any attempts we could employ to fight back against the Japanese.

After 40 years I wish to come forward with my request in hopes that I may receive this honor as proof of valiant and loyal service to my country.

The applicant submitted photocopied pages from a history book stating that about an hour and a half after midnight on January 31, 1945, when the USS CAVALIER was "forming up" in a convoy to return to Leyte from the Zambales Province landings in Luzon, an underwater explosion jammed the propellers and the ship had to be "towed to safety by mincraft *Rail*." The book states that the explosion was believed to have been caused by a torpedo and that a Japanese submarine was spotted from an airplane later that afternoon about 60 miles to the northeast.

The applicant stated that he discovered the error in his record on July 28, 1981, but argued that the Board should excuse the untimeliness of his application because "[b]ravery in military service should be recognized regardless of the time frame." The applicant noted that a crewmate on the USS CAVALIER had recently been awarded a Purple Heart for an injury incurred the night the torpedo hit the ship.²

SUMMARY OF THE RECORDS

On April 3, 1942, the applicant enlisted in the Coast Guard Reserve. He attended machinist mate school and was initially assigned to duty in the New York Harbor Area.

From January 1944 to September 1945, the applicant served aboard the USS CAVALIER. On May 28, 1944, the ship's doctor diagnosed the applicant with a deviated nasal septum. The medical notes state the following:

DIAGNOSIS: Deviation, Nasal Septum.

NOT MISCONDUCT: Incident of service.

HISTORY: This man injured in nose 1 wk. ago since when he has had persistent nasal obstruction. One year ago because of septal deformity and obstruction of airway he was due to have sub-mucous resection, but has always been on active duty since.

EXAMINATION: This date after 1 week's treatment with mucosis membrane shaping medication show bilateral obstruction to air way.

Recommend outpatient duty consultation for possible repair.

² Final Decision, BCMR Docket No. 2007-032, in which the Board ordered the Coast Guard to review the applicant's record to determine whether he was entitled to a Purple Heart Medal because although the applicant did not request the medal, a note in his medical records stated that "on January 30, 1945, he received an abrasion to the right wrist and forearm and a contusion to the right chest as a result of enemy action, for which he was treated in sick bay by a medical officer."

An undated medical note on the same page made at a Naval Hospital in San Francisco states the following:

SPECIAL EXAMINATION AND TREATMENT REPORT:

Nasal obstruction for past year. no discharge or post-nasal drip. Occas[ional] frontal headache. Frequent headcolds, allergy negative. Ears – hearing fair. Had otalgia 10 years ago. Throat – often sore. Tonsils out 12 years ago.

EXAMINATION: Ear canals and drums ok. Nose – mucosa pin. Septum thickened anteriorly and deflected to left, producing considerable obstruction. Post nasal negative. High narrow palate. Tonsils out ok.

DIAGNOSIS: Deviation nasal septum. Recommend surgical correction.

A list in the applicant's record signed by the commanding officer of the USS CAVALIER shows that from June 1944 through January 1945, he participated in the initial invasion of the Island of Saipan; the initial invasion of the Island of Tinian in the Marianas; the initial invasion and liberation of the Island of Leyte in the Philippines; the initial assault on Luzon in Lingayen Gulf in the Philippines; and the assault on Luzon at San Antonio in the Zambales Province. The list also shows that as a result of his service aboard the USS CAVALIER, the applicant became entitled to wear the American Area Campaign Ribbon, the Asiatic-Pacific Area Campaign Ribbon with three bronze stars, and the Philippine Liberation Campaign Ribbon with two bronze stars. The notation for the last ribbon notes that the ship had been under attack on three occasions in the Philippines, including a torpedo hit on January 30, 1945.

After the USS CAVALIER was damaged by the torpedo, it underwent repairs in Leyte and then drove to Pearl Harbor for further repairs. On September 6, 1945, the applicant was transferred from the USS CAVALIER while it was still docked at Pearl Harbor. His record contains a memorandum addressed to him dated September 6, 1945, and signed by the Executive Officer, stating that he was entitled to wear the American Area Campaign Ribbon, the Asiatic-Pacific Area Campaign Ribbon with three bronze stars, and the Philippine Liberation Campaign Ribbon with two bronze stars. The applicant was transferred to Cleveland, Ohio, his hometown, for treatment of his deviated septum prior to discharge.

On November 26, 1945, the applicant underwent surgery at the U.S. Marine Hospital in Cleveland for a "deflection of nasal septum due to trauma," which made it hard for him to breathe through his nose. The condition was noted to be an "incident of service" and "not due to own misconduct." The medical record also states the following:

HIST: Pt. states he has had difficulty in breathing since May '44, but had some nasal obstruction prior to that time. Both nostrils seem to discharge a clear secretion. Throat feels dry – the mornings. No headaches. Ears stop up at times and if nostrils are held and patient blows nose his ears open up.

P. EXAM: Essentially negative except: Nose: Externally the lobule of the nose tilts forward and downward. Nasal septum is deviated to the left and rt. anteriorly due to a split cartilage. There is obstruction posteriorly on the right. Wings of upper lateral nasal cartilages protrude downward to the vestibule and are prominent. ...

TREAT & CARE: Admitted on 11-21-45. Temp. normal. Routine care given. Sedatives given. Ice collar to nose. Sulfa routine. C.M.A. nose gtts tid. 12-4-45 Discharged. Fit for duty. Submucous Resection done on 11-26-45.

Upon his release from the hospital on December 4, 1945, the applicant was given 30 days of leave. On January 16, 1946, he underwent a physical examination pursuant to his pending discharge and signed a statement agreeing with a physician's finding that he had no physical defects or disabilities.

On January 17, 1946, the applicant was honorably discharged from the Reserve, having served three years, nine months, and fifteen days on active duty. In addition to the awards noted above, his discharge papers show that he is entitled to wear the World War II Victory Medal. No mention of a Purple Heart appears in his record.

On June 3, 1946, the applicant submitted a disability pension claim for the following diseases and injuries: "Nose injury 6/44; Diarrhea 6/44; Severe Headaches 6/44; Operation 11/45."

On September 26, 1946, the Veterans Administration notified the applicant that he had been awarded compensation of \$13.80 per month "on account of disability resulting from the following conditions held to have been incurred or aggravated during your wartime service: Nose disability. Your claim has been rated under the 1945 schedule for rating disabilities."

On December 6, 1950, the Veterans Administration notified the applicant that his claim for disability benefits had been carefully reviewed and that based upon a physical examination on November 29, 1950, his 10% disability rating for a service-connected nose disability would be continued.

APPLICABLE LAW

In 1945, 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 January 12, 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.

The JAG stated that the application was not timely because he "knew or should have known" that he had not received the Purple Heart at least by 1985 when he first inquired about the medal through his congressional representative. The JAG also adopted the findings in a memorandum on the case prepared by the Coast Guard Personnel Command (CGPC).

CGPC stated that the applicant's records do not show that he has met the criteria for a Purple Heart in Chapter 2.A.11. of the current Medals and Awards Manual, which require that the member incur a wound that is a direct result of any enemy action and that "required treatment by a medical authority (except in the case of a prisoner of war)." CGPC stated that although the USS CAVALIER was attacked on January 30, 1945, while the applicant was aboard, there is no evidence supporting his claim that he was injured during that attack or received medical treatment in the aftermath of the attack. Instead, his medical records show that he sought treatment for a nose injury in May 1944 and that his deviated septum was treated in November 1945. CGPC stated that there is nothing in the record to indicate that the applicant's nose injury was a result of enemy action. Therefore, CGPC recommended denying relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 26, 2009, the Chair sent a copy of the Coast Guard's views to the applicant and invited him to respond within 30 days.

On February 23, 2009, the applicant responded stating that the delay of his application is irrelevant as it has no bearing on what happened in 1945. He noted that many veterans, including one of his crewmates, have received their Purple Hearts decades after their military service. He stated that his daughter has helped him with his application and has used the Internet, which did not exist years ago. The applicant requested an extension of the time to respond to the advisory opinion in order to obtain more records from the Department of Veterans' Affairs.

The Chair granted the applicant, who died on May 7, 2009, and his daughter extensions of the time to respond to the advisory opinion through August 13, 2009, but received no further submissions of evidence. On September 17, 2009, the Chair sent the applicant's daughter notification that unless the Board received another request for an extension by September 30, 2009, the case would be deliberated and decided by the Board in October 2009. The Board has received no further response.

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 on September 6, 1945, the day he left the ship, the applicant was notified in a memorandum from the Executive Officer of the USS CAVALIER of the awards he had received while aboard the ship. 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 receiving a Purple Heart through his congressman in 1985. 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 argued that his bravery in military service should be recognized regardless of how long he delayed applying for the Purple Heart. The Board agrees that bravery in military service should be recognized but also notes that if the applicant had timely sought the medal, the Coast Guard could have questioned his crewmates and the medical officers aboard the ship about his alleged injury on January 30, 1945. Because of the applicant's delay, only his military and medical records are available to review for evidence supporting his allegations.

5. The Board's review of the applicant's military and medical records shows that there are no records supporting his claim that his nose was injured as a result of enemy action on January 30, 1945. Purple Heart Medals are awarded to members wounded as a result of enemy action, and the applicant's medical records clearly show that his nose was injured in May 1944, a few weeks before the USS CAVALIER first engaged in action against the enemy during the invasion of Saipan in June 1944. In addition, there is no evidence that the applicant sought medical treatment for any injury in the aftermath of the torpedo attack on January 30, 1945, and only injuries requiring medical treatment qualify a member for a Purple Heart unless the member was a prisoner of war at the time. SECNAVINST 1650.1H, § 230.9; COMDTINST 1650.25D, Chap. 2.A.11. The applicant's military and medical records are presumptively correct. 33 C.F.R. § 52.24(b). 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 waive the statute of limitations. The applicant's request should be denied.

ORDER

The application of former MM2c xxxxxxxxxxxxxxxxxxxxxx, USCGR, for correction of his military record is denied.

Lillian Cheng

Francis H. Esposito

Janice Williams-Jones