



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

No. 3443-20
Ref: Signature Date

[REDACTED]

Dear [REDACTED]

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 United States Court of Federal Claims in your case, dated 28 April 2020. After careful and conscientious consideration of relevant portions of your naval record and your application, the Board for Correction of Naval Records (Board) found the evidence submitted insufficient 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, considered your application on 20 April 2021. The names and votes of the panel members 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. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, relevant portions of your naval record, and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions contained in Director CORB letter 5819 CORB: 001 of 14 May 2020 and Office of the Assistant Secretary of Defense letter of 4 February 2021, as well as your response to these advisory opinions.

A review of your record shows that you entered service with the Navy in 1979 and worked as a Cryptologic Technician (Administrative). While assigned to [REDACTED] between 1983 and 1986, you assert that you were required to stand 12-hour shifts in a vault designed to store classified materials. Sometime during this three year period, you also assert that you were exposed to fumes, dust, and fibers from reconstruction of the vault door. At some point in 1989, you were diagnosed with Sarcoidosis and determined to be unfit for continued naval service as a result of your diagnosed condition. You were placed on the Temporary Disability Retirement List on 4 January 1990 and eventually transferred to the Permanent Disability Retirement List in 1994. During the various reviews of your disability condition by the Physical Evaluation Board, your lung condition was determined not to be a combat-related injury.

In 2018, you filed for Combat Related Special Compensation (CRSC) for your lung condition under the criteria for hazardous service. By memorandum dated 6 December 2018, the CRSC Board denied your claim based on their determination that there was insufficient evidence that

your lung condition was caused by combat-related events. You subsequently filed a request for reconsideration arguing that your exposure to fumes, dust, and fibers during your assignment to [REDACTED] qualified under the Instrumentality of War criteria. Alternatively, you argued that your duties while assigned to [REDACTED] qualified as hazardous duty. By memorandum dated 12 March 2019, the CRSC Board denied your reconsideration request. They concluded that even though exposure to dust and fibers from the vault reconstruction may have caused your lung condition, you do not qualify for CRSC since a vault is not an instrumentality of war. As a result, you filed suit in the U.S. Court of Federal Claims on 25 February 2020 alleging the CRSC Board failed to properly apply Department of Defense Instruction 1332.38 in denying your applications for CRSC. Specifically, you allege that your disability condition qualifies for CRSC under the exception contained in section E3.P5.2.2.4. On 28 April 2020, the U.S. Court of Federal Claims remanded your case directing the Board to consider the following questions:

1. Whether a vault is an instrumentality of war pursuant to Section E3.P5.2.2.4 of DoDI 1332.38;
2. Address whether plaintiff's exposure to fumes, dust, and fibers resulting from the reconstruction of a vault door caused his medical conditions within the exception of Section E3.P5.2.2.4 of DoDI 1332.38;
3. Address the CRSC Board's statement that even though "it is possible that exposure to dust and fibers from a vault may have caused the service connected disabilities listed above, this does not make the vault an instrumentality of war;"
4. Address any other issues, evidence, or arguments plaintiff submits in writing to the BCNR within 45 days of this order; and
5. Determine and explain whether plaintiff is entitled to any relief, including correction.

After you submitted supplemental matters for consideration on 12 May 2020, the Board requested an advisory opinion from Director of Compensation, Office of the Deputy Under Secretary of Defense (Military Personnel Policy), as required by Section 3.3.1 of Department of Defense Directive 1332.41. In addition, the Board requested an advisory opinion from the Director, Secretary of the Navy Council of Review Boards (CORB). Advisory opinions from the two offices were received on 4 February 2021 and 14 May 2020, respectively, and provided to you on 5 February 2021. You responded to the advisory opinions on 5 April 2021.

The Board carefully considered your arguments that you deserve CRSC since your lung condition developed as a result of your exposure to an instrumentality of war. Specifically, you argue that fumes, dust, and fibers from the [REDACTED] vault reconstruction occurring between 1983 and 1986 caused your lung condition. In your opinion, the vault qualifies as an instrumentality of war under DODI 1332.38, section E3.P5.2.2.4 since you believe your lung condition was a sickness directly caused by fumes and gases from the vault reconstruction. In your opinion, the exception language of section E3.P5.2.2.4 applies since the vault caused your injury similar to the example provided in the section of a ship's operation causing a service member to fall and become injured. Unfortunately, the Board disagreed with your rationale for relief. In making their findings, the Board substantially concurred with the advisory opinions in the case.

Section 1413a of Title 10, United States Code, provides the statutory authority for payment of CRSC. Based on procedures and criteria prescribed by the Secretary of Defense, it allows for payment of CRSC for combat-related disabilities incurred “through an instrumentality of war.” The Office of the Under Secretary of Defense issued a Directive Type Memorandum on 27 April 2004 that provided guidance on CRSC. Additionally, Department of Defense Regulation 7000.14-R (Financial Management Regulation) was issued that also addressed CRSC. In both of those references, instrumentality of war is defined as “a vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence or injury. It may also include such instrumentality not designed primarily for Military Service if use of or occurrence involving such instrumentality subjects the individual to a hazard peculiar to Military Service. Such use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits.” Further, the references allow for a determination that a disability is the result of an instrumentality of war if “the disability was incurred in any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or materiel.” Finally, the references provide an example similar to the one contained in DODI 1332.38 that explains that if the operation of a military vehicle causes an injury to the service member, then it would be considered as the result of an instrumentality of war. In comparing the current CRSC guidance and Section E3.P5.2.2.4 of DoDI 1332.38, the Board determined the language of Section E3.P5.2.2.4 of DoDI 1332.38 is essentially contained in the CRSC guidance issued by the Department of Defense after the promulgation of 10 USC § 1413a. However, the CRSC references issued after the statute provides clarifying guidance as to what constitutes an instrumentality of war.

Is a vault is an instrumentality of war pursuant to Section E3.P5.2.2.4 of DoDI 1332.38?

As directed by the Court, the Board considered whether a vault is an instrumentality of war under DoDI 1332.38, Section E3.P5.2.2.4. After a careful analysis, the Board concluded that a vault is not an instrumentality of war under that instruction.

DoDI 1332.38 allows for an injury to be caused by an instrumentality of war provided that a disability condition is incurred during any period of service as a result of such diverse causes as wounds caused by a “military weapon”, “accidents involving a military combat vehicle”, or “injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material.” Therefore, the Board concluded that in order for the vault to qualify as an instrumentality of war under this section of the DoDI, it would need to be a military weapon, military combat vehicle, military ordnance, military vehicle, or military material. Since a vault is not typically used as a weapon, vehicle, or ordnance, the Board considered whether it qualified as military material.

Material is generally defined as elements, constituents, or substances for which something is composed or matter that has qualities which give it individuality and by which it is categorized. Accordingly, the Board determined that in order for a vault to be considered “military material,” it would by definition need to be comprised of “military” elements, constituents, substances or possess qualities which could be categorized as “military.” As explained in the Director CORB advisory opinion, vaults are relatively common civilian structures and are not uniquely military in nature. They commonly are found in banks and civilian homes in different sizes to store varying items that require protection from theft due to their value. In examining the RAF

Mildenhall vault, the Board concluded it was being used for the same purpose as other civilian safes, i.e. to safeguard valuable items from potential theft. In the case of the military, it involved classified materials or similar items. While the items being stored may be military, the use of the vault to store uniquely military items did not change the nature of the vault to “military” since its use remained unchanged from its civilian use. Based on this analysis, the Board found that a vault is not an instrumentality of war since it is not considered a military weapon, military vehicle, military ordnance, or military material.

Did Petitioner’s exposure to fumes, dust, and fibers resulting from the reconstruction of a vault door cause his medical conditions within the exception of Section E3.P5.2.2.4 of DoDI 1332.38?

As directed by the court, the Board considered whether your medical condition qualified as a condition caused by an instrumentality of war the exception contained in DoDI 1332.38, Section E3.P5.2.2.4. After a careful analysis, the Board concluded your medical condition did not fall under the exception.

As previously explained, DoDI 1332.38 allows for an injury to be caused by an instrumentality of war provided that a disability condition is incurred during any period of service as a result of such diverse causes as wounds caused by a “military weapon”, “accidents involving a military combat vehicle”, or “injury or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material.” The section provides an example that a service member falling on the deck of a ship while playing sports would not normally be considered an injury caused by an instrumentality of war since the sporting activity, and not the ship, was the cause of the injury. An “exception” provided to this example states that a direct causal relationship between the injury and the instrumentality of war exists if the operation of the ship caused the fall. The Board determined this exception explanation applies only to the example scenario involving the fall on the ship and not any other part of the section since it only references the ship scenario in the explanation.

Therefore, the Board concluded that the example and its exception listed in DoDI 1332.38, Section E3.P5.2.2.4, describes how there must be a direct causal relationship between the “instrumentality of war” and the disability. In your case, the fumes, dust, and fibers resulting from the vault door reconstruction would not meet the “exception” since the vault was determined by the Board not to be an instrumentality of war. Since the vault is not considered an instrumentality of war, the Board concluded the fumes, dust, and fibers resulting from its reconstruction cannot be considered as caused by an instrumentality of war.

Address the CRSC Board’s statement that even though “it is possible that exposure to dust and fibers from a vault may have caused the service connected disabilities listed above, this does not make the vault an instrumentality of war”

The Board determined the CRSC Board correctly concluded that despite the possibility that your exposure to dust and fibers from the vault reconstruction may have caused your service connected disabilities, this does not make the vault an instrumentality of war.

As explained above, the Board determined that the vault at [REDACTED] does not qualify as instrumentality of war since it fails to meet the criteria for either DoDI 1332.38, Office of the

Under Secretary of Defense Directive Type Memorandum on 27 April 2004, or Department of Defense Regulation 7000.14-R. Specifically, the Board found that a vault is not a vehicle, vessel, or device designed primarily for military service and intended for use by the military nor a military weapon, a military combat vehicle, military ordnance, military vehicles, or military material. Therefore, a vault fails to meet the instrumentality of war definition regardless of whether exposure from its reconstruction had direct causal relationship with your disability condition.

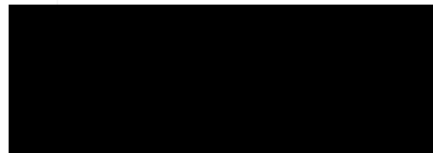
Address any other issues, evidence, or arguments plaintiff submits in writing to the BCNR within 45 days of the court order; and whether plaintiff is entitled to any relief, including correction

The Board considered all of the issues raised by you in your supplemental submission and advisory opinion response. Based on the analysis and findings provided above, the Board found no basis for granting CRSC to you based on your arguments that a vault was an instrumentality of war under the DoDI 1332.38 or the current CRSC guidance. Having determined that a vault was not an instrumentality of war, the Board also concluded that your conditions, even if caused by your exposure to the fumes, dust, fibers, and gases resulting from the reconstruction of the vault door, were not combat related. Additionally, the Board rejected your contention that it “must provide affirmative medical evidence based on sound medical and scientific evidence that a positive association does not exist between [your] *Stage IV* lung damage and the fumes, dust, fibers, gases, exposure during vault reconstruction.” First, the Board is not an investigative body and the burden of proof to establish any fact before it is on you. Second, it does not matter for the purposes of this inquiry whether your condition was the result of your exposure to fumes, dust, fibers and gases as a result of the vault reconstruction, since your condition would not be combat-related even if that exposure was the cause. Finally, the Board found no reason to request an additional advisory opinion as you requested in your advisory opinion response since it possessed sufficient information to adjudicate your application. Accordingly, the Board found insufficient evidence of error or injustice to warrant a change to your record.

You are entitled to have the Board reconsider its decision upon the 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,

4/26/2021

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Deputy Director

Signed by:

A black rectangular redaction box covering the name of the Deputy Director.