



CUI//SP-MIL/SP-PRVCY

**UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS**

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF:

Work-Product
(DECEASED MEMBER)

Work-Product
(APPLICANT)

DOCKET NUMBER: BC-2019-01340-2

COUNSEL: **Work-Product**

HEARING REQUESTED: YES

APPLICANT'S REQUEST

The Board reconsider his request the deceased service member be posthumously awarded the Purple Heart (PH) Medal.

RESUME OF THE CASE

The deceased service member retired as an Air Force major (O-4).

On 13 Jun 44, the service member while serving as a co-pilot of a B-24 aircraft and in aerial flight against the enemy was attacked by enemy aircraft, forcing the aircrew to abandon the aircraft. The former service member was captured as a prisoner of war (POW).

On 19 Mar 45, while a POW, he was awarded the Distinguished Flying Cross (DFC) for extraordinary achievement while serving as a co-pilot over Germany in aerial flight against the enemy on 13 Jun 44.

On 29 Apr 45, he was repatriated to United States military control after spending almost 11 months as a POW.

The former members signed WD AGO Form 53, *Military Record and Report of Separation Certificate of Service*, issued 20 Jan 47, for the period 5 Dec 43 to 20 Jan 47, Block 30, *Wounds Received in Action*, reflects "None."

The Report of Medical Examination dated 26 Jul 50 reflects the former member reported having pain in his back after parachuting from his aircraft.

The Chronological Record of Medical Care note dated 18 Apr 57 reflects the former member reported he strained his back and that he had trouble with his back previously since his bail out of his aircraft in 1944.

The Report of Medical Examination dated 23 May 57 states the former member had a traumatic back injury as a result of a bailout in 1944 (no fractures).

The Report of Medical Examination dated 26 May 58 states the former member sprained his back as a result of a bail out in 1944.

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The Report of Medical Examination dated 18 May 59, states the former member had a sprained back as a result of a bailout in 1944.

The Report of Medical Examination dated 8 Mar 61, states the former member had a back injury in 1944 during a bailout of his aircraft.

On 1 Sep 61, the former member retired in the grade of major (O-4). He was credited with 20 years, 6 months, and 27 days of active duty service.

The Medical Record, POW Summary Sheet, dated 30 May 90, reflects the former member was seen at the Department of Veterans Affairs (DVA) Medical Center in Spokane, WA on 9 Mar 90 for a POW examination. The evaluator noted his injury to his back in the bailout and his recurrent episodes of back pain, his flack injury to the back of his right leg with scar and his injury to his right epididymis, spermatic cord were related to the bailout of his aircraft in 1944 and to his POW experience.

Per the certificate of death provided by the applicant, the former service member died on 9 Sep 96.

In a DD Form 149, *Application for Correction of Military Record*, dated 18 Jan 19, the applicant requested the deceased service member be awarded the PH. In support of his request, he provided a transcript from the recorded phone interview with the navigator on 23 Jul 98. He stated they were shot down. They lost their number one engine and dropped out of formation as they could not keep up. They needed cover because there were eight enemy aircraft on them. He looked out and saw they were also having trouble with the number three and four engines smoking. The pilot then pushed the bailout buzzer. He saw the former service member had been wounded in the calf. Although wounded, he helped him, the gunner and bombardier from the aircraft. The applicant also cited three AFBCMR cases as precedent to grant relief and provided medical notes.

On 15 Jul 20, the Board considered and denied the applicant's request the deceased service member, be awarded the PH posthumously. The Board agreed with AFPC/DP3SP there was insufficient evidence to confirm the deceased service member's injuries were a result of enemy action and therefore the request did not meet the PH criteria established by law. The Board also noted the request for award of the PH was denied previously by AFPC/DP3SP on 23 Jul 18 and 9 Jan 19. Moreover, the Board found the cited AFBCMR cases included detailed accounting of the injuries received by the applicants as a direct result of enemy actions. Accordingly, the Board found the deceased service member was not similarly situated and similar concessions should not be conferred upon him. The Board also found the applicant did not file a timely application and did not find it in the interest of justice to waive the three year filing requirement.

For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings at Exhibit F.

In a Court Order dated 30 Aug 23, the United States District Court for the District of Maryland remanded the applicant's request to the AFBCMR for reconsideration. The Court noted the AFBCMR denied the applicant's request that the deceased service member be awarded the PH as they were unable to substantiate his injury was directly caused by enemy action. However, the AFBCMR provided no analysis of the three cited cases (BC-2004-01258, BC-2012-05293 and BC-2014-04119), the 1958 medical examination, the 1990 DVA examination and a follow-up note from the same DVA physician dated 2020, the witness interview and the absence of other medical records due to the former service member's POW status immediately following the 1944 aircraft incident. The Court also noted the legal standard for PH eligibility found in the Air Force regulation was slightly different than that cited by the AFBCMR. The Court also noted the AFPC advisory opinion did not make a finding regarding wounds "treated by a medical professional other

than a medical officer.” In this case, a medical officer included a statement in the former service member’s record that the extent of the wounds was such that they would have required treatment by a medical officer if one had been available to treat them.

On 27 Sep 23, counsel, on behalf of the applicant requested reconsideration of his request and noted the Court remanded the case to the AFBCMR for full reconsideration. In view of the Court’s remand, counsel provided the following evidence: (1) Letter from the former service member’s doctor dated 4 Nov 20. (2) AFBCMR cases as precedent to grant relief and (3) DVA Study of Former POW. The deceased service member was a hero who served bravely and selflessly, enduring significant wounds at the hands of enemy forces. In light of the evidence and the AFBCMR’s obligation to follow precedent and in recognition of the deceased service member’s service, the AFBCMR has ample reason to resolve any doubt in his favor and grant the posthumous PH medal.

The applicant provides a letter dated 4 Nov 20 from the deceased service member’s physician. It states he was a staff physician at the DVA and gave the former service member a POW protocol physical examination. He examined three injuries, all of which were service connected and due to enemy action over northern Italy on 13 Jun 44. The injuries were a traumatic back injury, flack wounds to the back of his right leg and right testicle. He wrote there was no doubt the injuries would have required examination and treatment at the time they were incurred. It went without saying that two of the injuries caused him life-long pain. It was truly an injustice he was never awarded the PH.

The applicant cited three AFBCMR cases in his prior case as precedent to grant relief. The applicant contended the Board granted award of the PH in these cases despite the absence of medical documentation in the applicants’ records confirming the wounds required treatment. However, the Board concluded the cited cases included a detailed accounting of injuries received and that the deceased service member in this case was not similarly situated. The Court, however, in its remand noted the Board failed to provide any analysis of the following cases:

- a. BC-2004-01258: On 30 Jun 04, the Board granted the applicant award of the PH. AFPC/DPPR recommended denial indicating there was no report of an injury in his records. The applicant contended he was a crewmember on a B-24 when he was hit in the right shoulder. He was treated by medical personnel on the plane and when they landed back at base. The Board found the witness statements of his crewmembers attesting to his injuries sustained on 1 Nov 44 sufficient to conclude the criteria for award of the PH was satisfied.
- b. BC-2012-05293: On 4 Sep 13, the Board granted the applicant award of the PH. AFPC/DPSID recommended denial stating there was no medical documentation to verify the wound required treatment. The Board noted the applicant sustained burns on 23 Sep 44 during a combat mission. The Board concluded the absence of corroborating evidence should be resolved in the applicant’s favor. The Board also noted he was out of military control for three months while a POW.
- c. BC-2014-04119: On 22 Jul 15, 29 Jul 15 and 25 Feb 16, the Board considered and granted the applicant’s request for a PH. AFPC/DPSID and SAF/MRBP recommended denial citing there was no medical documentation substantiating there was an injury that required medical treatment. The Board found the applicant’s frost bite to his hands and feet on 8 Dec 45 during a forced march satisfied the requirements for a PH. The Board also found the absence of information pertaining to the asserted wounds were not surprising given his nearly one year absence from military control while a POW.

In the request for reconsideration, counsel listed the following additional cases as precedent to award the former service member the PH:

- a. BC-2002-00722: On 8 Jan 02, the Board granted the applicant award of the PH. The applicant contended he suffered combat wounds to his face and scalp while on a B-24 flying mission when was hit by enemy ground fire on 13 Sep 44. Due to his status as a POW, his unit did not complete the paperwork for the PH. The applicant provided a witness statement from the pilot who indicated the applicant was hit by flack on his head, which caused severe scalp wounds. The Board Majority believed it was possible the wounds were sustained as a direct result of the enemy fire and noted it was not surprising there was an absence of documentation in view of the nearly one half year absence from military control due to his POW status.
- b. BC-2001-03083: On 28 Mar 02, the Board granted the applicant award of the PH. AFPC/DPPR recommended denial stating there was no evidence to substantiate the injury he received was the result of enemy action. The Board found the applicant met the criteria for award of the PH. While on a flying combat mission, the applicant's aircraft was hit and caused him to bail out. He injured his back when he landed on the ground. The Board found the absence of information in the existing records was not surprising in view of his half year of absence from military control while he was a POW. The Board also found the statements from two former POWs corroborating he suffered from back pain while he was a POW persuasive and concluded any doubt should be resolved in the applicant's favor.
- c. BC-2002-01327: On 3 Oct 22, the Board granted the applicant award of the PH. AFPC/DPPPR recommended denial noting his injury on 9 Feb 45 was the result of his own action in delaying the opening of his parachute and was an accident. However, the Board found his decision to delay opening his parachute while descending into occupied territory was prudent and that it was reasonable to conclude he would not want to prolong his exposure as a floating target. While the documentation regarding treatment for injuries was lacking, there was no basis to doubt the veracity of his story. The Board also found it unlikely the enemy would document the wounds and medical treatment of a POW. Therefore, the Board concluded any doubt should be resolved in the applicant's favor.
- d. BC-2002-03107: On 3 Apr 03, the Board granted the applicant award of the PH. The applicant incurred injuries when in action against an enemy in a B-17 aircraft on 25 Jun 43. AFPC/DPPPR recommended denial indicating his back injury was the result of a badly packed parachute and not a result of bailing out. There was also no medical documentation showing treatment until 1981. The Board found the witness statement provided by the co-pilot stating it was possible he sustained a back injury during the bailout persuasive. The Board also noted the absence of any information was not surprising in view of his status as a POW for a two year period. It was the Board's opinion any doubt should be resolved in the applicant's favor.
- e. BC-2002-04058: On 8 Jul 03, the Board granted the applicant award of the PH. The applicant contended he was wounded when his plane was shot down on a bombing mission on 11 Jan 44 and he was a POW from Jan 44 to May 45. AFPC/DPPPR recommended denial. The applicant's records were destroyed in a fire at the National Personnel Records Center (NPRC) in 1973 and there were no medical records documenting any wounds. On 23 Apr 86, the applicant claimed he received scars on his right arm and right cheek from shell fragments during an attack on his aircraft. The

Board found his assertions and his former commander's notarized statement of enemy fire persuasive. The Board Majority found the absence of any information pertaining to the wounds from existing records was not surprising in view of the fact he was taken as a POW after bailing out of his damaged aircraft. The Board Majority opined that any doubt should be resolved in the applicant's favor.

- f. BC-2002-03107: On 3 Apr 03, the Board granted the applicant award of the PH. The applicant contended he injured his back while using a bad fitting parachute when he bailed out of a B-17 after it received enemy fire on 25 Jun 43. He landed hard and was captured. He was then a POW for nearly two years. AFPC/DPPPR recommended denial stating the back injury was a result of a badly packed parachute. The Board was persuaded the applicant's assertions concerning his back injury and the supporting statement by the former co-pilot satisfied the requirement for award of the PH. The Board also found the absence of information from the existing records was not surprising in view of his status as a POW for almost two years.
- g. BC-2002-03224: On 10 Aug 04, the Board granted the applicant award of the PH. The applicant contended he should be awarded the PH for his injuries sustained after his capture on 5 Dec 44 and during his time as a POW. The Germans struck him many times with their pistols and rifles. AFPC/DPPPR recommended denial and noted his report of separation did not reflect him having received any wounds in action. There was no report available until 1991 when he reported to the DVA that he was beaten with sticks and stones by civilians after his capture. The Board believed it was possible he sustained wounds as a direct result of enemy fire and that the absence of any information from the existing records was not surprising considering he was captured and held as a POW, which may have deprived him of appropriate medical care and prevented proper documentation. The Board opined that any doubt should be resolved in his favor.
- h. BC-2007-01675: On 4 Dec 07, the Board granted the applicant award of the PH. The applicant contended he was hit by shrapnel when his plane was shot down by enemy fire on 4 Aug 44 and that he was treated for his wounds by the Germans while he was a POW. In support of his request, he provided a statement from his former squadron commander and a personal statement detailing the events of his capture on 4 Aug 44. The Board Majority found the applicant's assertions, corroborated by other former POWs stating he was shot in the left ankle, injured during combat and received medical treatment by his captors persuasive. The Board Majority noted the absence of any information from existing records was not surprising as he was captured and held as a POW for almost one year, which prevented proper documentation of his medical records. The Board Majority opined any doubt concerning his entitlement to the PH should be resolved in his favor.

The Court remand order is at Exhibit G and the applicant's complete submission is at Exhibit H.

AIR FORCE EVALUATION

AFPC/DP3SP recommends denial. The applicant's request does not meet the established criteria for award of the PH. There is no documentation to substantiate the wound was a direct result of enemy action at the time or upon return to United States control after his POW status. There was no medical documentation from official sources indicating the wounds received in 1944, after the said incident. While the Casualty Questionnaire may have been completed by another individual, the applicant more likely provided the information to the individual. The documentation provided

only provides the recollection of the incident and medical treatment received 13 years (1958 and 1990) after the incident.

An additional review of the request for award of the PH remains unable to be verified. Executive Order 11016 (Authorizing award of the PH) provides the minimum PH criteria and each service secretary establishes further criteria. The former service member's injury was in 1944. Therefore, Army Regulation (AR) 600-45, dated 22 Sep 1943 would apply. AR 600-45 states "The PH is awarded to members of the armed forces of the United States serving with the Army who are wounded in action against an enemy of the United States, or as a direct result of an act of such enemy, provided such would necessitate treatment by a medical officer." In addition, "When a person entitled to the award is treated for a wound, the commanding officer of the hospital, or the medical officer who treats the wound, will furnish the commanding officer of the wounded person a certificate describing the nature of the wound and certifying to the necessity of the treatment. A wounded soldier's unsupported statement may be accepted in unusual or extenuating circumstances when, in the opinion of the officer making the award, no corroborative evidence is obtainable. However, the statement will be substantiated if possible."

Air Force Regulation (AFR) 30-14, dated 21 May 1953 (replaced AR 600-45). It states the wound must have necessitated medical treatment and must have been received as a direct result of an act of the enemy. Indirect results of enemy action, such as disease, exposure or personal injury not directly attributable to an act of the enemy are not a basis for an award.

The wound appears to have occurred in 1944; however, there is no substantiated documentation until the former member received a physical examination in 1958. Therefore, AFPC/DP3SP was unable to verify the wound was a result of the incident in 1944. An eyewitness statement was provided which states he heard the pilot saying he was being jumped by enemy fighters; however, this does not validate an injury occurred. The former service member became a POW for 10 months (1944 to 1945). The documentation provided states the applicant's repatriation document was completed by another individual. However, POWs were medically examined when returned to United States control and based on review, there is no medical documentation presented indicating a wound occurred during or prior to his POW status.

The applicant underwent a physical examination in 1958 (13 years after the 1944) incident, which the applicant states the wound was documented by a medical officer. However, documentation between 1945 and 1958 is absent. At the time of his retirement in 1961, the DD Form 214, *Armed Forces of the United States Report of Transfer or Discharge*, signed by the applicant did not indicate there were any wounds.

The applicant provided medical documentation dating years after the incident occurred. However, the medical inputs do not meet the established criteria indicating the wound "necessitated medical treatment" at the time of the wound/injury. AFPC is not an investigative body and therefore must rely on official sources and the documentation presented by an applicant to verify eligibility criteria is met. In this case, the provided documentation does not meet the established criteria and they are unable to validate the claim the injury was a direct result of enemy action at the time. The AFBCMR has also denied two previous requests and the additional documents do not add new or relevant evidence of an error or injustice. To grant the request would be contrary to the criteria established by Executive Order 11016, DoDI 1348.33, Army Regulation 600-45 and AFR 30-14.

The complete advisory opinion is at Exhibit I.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 4 Feb 24 for comment (Exhibit J) and counsel replied on 17 Feb 24. In his response, counsel contends the advisory opinion states

the 1958 annual physical and 1990 POW examination are the only two medical documents in the record that show the deceased reported injuries from his 1944 bailout. He also reported back pain in another examination in 1957 and indicated to his provider that he previously had trouble with his back since his bailout in 1944. He reported his injuries from the bailout in 1958, 1959, 1961 and 1990.

The advisory opinion mischaracterizes the individual casualty questionnaire documentation as a repatriation document but it is clearly not. The advisory opinion also suggests that repatriation examinations were conducted on all POWs upon return; however, this was not the case per the POW: Study of Former Prisoners of War.

The AFBCMR has a legal obligation to address all non-frivolous arguments. Adopting a deficient AFPC/DP3SP opinion without engaging in an analysis for this Court ordered remand would further run afoul of the agreed upon terms for this Court ordered remand. The AFBCMR should disregard the AFPC/DP3SP opinion in its entirety. The advisory opinion fails to consider the crux of the issues related to the absence of contemporaneous medical treatment records and arbitrarily and capriciously ignored material evidence. It is difficult to imagine circumstances more unusual or extenuating than where the obtainability of medical treatment evidence was encumbered by the deceased service member's ten and a half month of captivity as a POW. The advisory opinion also fails to consider the AFBCMR decisions granting the PH in materially similar cases and does not acknowledge the argument or any of the similar cases. This case warrants the same consideration. If the AFBCMR adopts the advisory opinion without grappling with these decisions, it will be in violation of the Administrative Procedure Act (APA).

Counsel provides Chronological Record of Medical Care, which shows the applicant reported pain his back on 10 Jan 56 and 26 Sep 56.

The applicant's complete response is at Exhibit K.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the deceased service member is the victim of an error or injustice. While the Board notes the recommendation of AFPC/DP3SP against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. In this respect, the Board finds the medical documentation over the years, to include the POW summary on 30 May 90 and the medical review by the same DVA physician on 4 Nov 20, and the phone transcript of 23 Jul 98, with the navigator of the 13 Jun 44 mission persuasive to find the deceased service member injured his back and right testicle and received a flack wound to his right leg when he bailed out of his aircraft on 13 Jun 44 due to an attack by enemy aircraft. The Board finds the absence of information pertaining to the asserted wounds from existing records is not unexpected considering the deceased service member was captured and held as a POW for almost 11 months, which deprived him of appropriate medical care and prevented the proper documentation of his injuries in his medical records. Moreover, as ordered by the Court in the remand order, the Board conducted a review and analysis of the cited AFBCMR cases and find the deceased service member is similarly situated. In the cited cases, the AFBCMR granted award of the PH despite the lack of medical documentation and recognized medical documentation may have been absent due to their status as a POW. The cited cases, like the applicant's request, included witness testimony and medical evidence, albeit at a later date, confirming injuries

sustained as a result of an enemy attack. However, prompt medical documentation following the injuries was not recorded due to their status as POW. In view of the available evidence and in recognition of their service to the United States, the Board concluded any doubt concerning the entitlement for award of the PH should be resolved in their favor. The Board finds similar dispensation should be conferred on the applicant's request that his deceased father be awarded the PH posthumously. Further, the Board recognizes that previous Boards denied the applicant's request. The Board concludes that prior Boards may not have had all of the available information or did not give the request due consideration. Therefore, the Board recommends correcting the applicant's records as indicated below.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to the DECEASED SERVICE MEMBER be corrected to show his official military personnel record be corrected to reflect the award of the Purple Heart for wounds received on 13 Jun 44.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2019-01340-2 in Executive Session on 12 Mar 24:

<i>Work-Product</i>	Panel Chair
<i>Work-Product</i>	Panel Member
<i>Work-Product</i>	Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit F: Record of Proceedings, w/ Exhibits A-E, dated 30 Sep 20.
Exhibit G: United States District Court, dated 30 Aug 23.
Exhibit H: Application, DD Form 149, w/atchs, dated 27 Sep 23.
Exhibit I: Advisory Opinion, AFPC/DP3SP, dated 2 Feb 24
Exhibit J: Notification of Advisory, SAF/MRBC to Applicant,, dated 4 Nov 24
Exhibit K: Applicant's Response, w/atchs, dated 17 Feb 24.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.12.9.

4/3/2024

Work-Product

Board Operations Manager, AFBCMR

Work-Product