

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 July 2024

DOCKET NUMBER: AR20230014337

APPLICANT REQUESTS: reconsideration of his previous requests for the Purple Heart.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- Two DD Forms 149 (Application for Correction of Military Record)
- DA Form 1594 (Daily Staff Journal or Duty Officer's Log)
- Summary of applicant's service treatment records (STR)
- Three letters of support
- Two extracts from Record of Proceedings (ROP) for Army Board for Correction of Military Records (ABCMR) Docket Number AR20190011287
- Extract from ROP for ABCMR Docket Number AR20170000159
- ROP for ABCMR Docket Number AR20220000834
- Two sets of Standard Forms 600 (Health Record – Chronological Record of Medical Care)
- U.S. District Court Remand Order
- Photograph of Vehicle

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's cases by the Army Board for Correction of Military Records (ABCMR) in Docket Numbers:

- AR20150004873, on 29 October 2015
- AR20170000159, on 25 September 2018
- AR20190011287, on 26 September 2019
- AR20220000834, on 29 July 2022

2. Through counsel, the applicant states:

a. The applicant meets the criteria for the award of the Purple Heart; he suffered a wound caused by the enemy, the wound required treatment by qualified Army medical personnel, and the qualifying medical personnel made a note of the treatment in the applicant's medical records. Despite the preponderance of the evidence available in the

applicant's records and that which the applicant has provided, the Board declined to make the requested correction.

b. The ABCMR must address relevant issues raised by the applicant; the Board's decision was arbitrary because it did not respond to and offer an analysis of two of the applicant's arguments:

- In response to the Board's 2019 decision, the applicant submitted a statement from his doctor, which concluded the ABCMR's earlier findings were "scientifically unlikely"
- The applicant's medical records "more likely describe treatment for a laceration, not an insect bite"

c. The ABCMR's decision runs counter to the evidence presented by the applicant. The ABCMR thought the laceration incurred just 2 months prior lacked any "nexus" to the medical treatment later recorded in the applicant's medical records; instead, relying on a single notation in those records to render its decision. Previous decisions by the U.S. Court of Appeals, District of Columbia (USCADC) have instructed the Board against declining corrections due to gaps or missing notations in an applicant's records; "hypothetical" findings cannot be maintained under a presumption of regularity.

(1) Evidence in the record. The single note cited by the ABCMR in its denial decision ascribes the applicant's elbow infection to an insect bite, not a laceration; however, the note is only one of two such notes addressing the cause of the applicant's infection. The other note indicates the infection resulted from a laceration. (Counsel refers the Board to Attachment A, pages 9 to 10 (from applicant's statement), 12 (counsel's summary of applicant's STR entries), 14 (letter from applicant's primary care physician), and 23 to 24 (statements by two former members of applicant's platoon).

(2) Evidence not in the record. The ABCMR based its decision heavily on notes that were missing from the applicant's records. "Instead of recognizing and addressing evidence in the [applicant's] records, the ABCMR focused on notes that were not in the [applicant's] records and referred to the omissions as 'evidence.'" Counsel directs the Board's attention to Attachment B, page 10 (paragraph 2f under Board Discussion for ABCMR Docket Number AR20190011287) and Attachment C, page 8 (paragraphs 5b and 5c in the ROP for ABCMR Docket Number AR20220000834).

(a) "The ABCMR found that when the [applicant] eventually went to the hospital, the ABCMR expected that a qualifying medical provider would have mentioned an origin of the [applicant's] injury in the notes." "Specifically, the ABCMR assumed (emphasis by counsel) that when the provider decided what caused the injury and what treatment

would be necessary, the provider would make notes of the origin of a wound and its treatment accordingly."

(b) "Because the provider did not note an ordnance blast or any wound origin, the ABCMR found the medical records could not be connected to the ordnance blast that injured the [applicant]."

(c) The USCADC has instructed the Board against rendering decisions by speculation and hypothesizing and cautioned the Board not to betray its mission of correcting medical records when they are insufficient. "The ABCMR's reasoning, outside of the note of the insect bite, has no basis. The ABCMR cited missing notes as 'evidence,' but missing notes are not evidence in the record (emphasis by counsel)." "The ABCMR thought the medical records did not qualify because there should have been a note of the wound's origin." However, the Board failed to cite any Army regulation to explain why an origin would need to appear in notes as a standard practice.

(d) The ABCMR has already conceded that the [applicant] has sufficiently shown enemy forces caused his laceration. (Counsel cites AR20190011287, where it states, "The applicant has demonstrated by a preponderance of evidence that he suffered an injury of some degree on 9 February 1969 as a result of an enemy landmine explosion that damaged an armored personnel carrier (APC) in which the applicant and a number of fellow Soldiers were passengers"). "The ABCMR did not correct the [applicant's] records because the [applicant's] records apparently did not note the origin of his wound." Denying a correction because of insufficient medical records is contrary to the ABCMR's mission.

d. The ABCMR's reasoning did not use the preponderance review standard.

(1) First, the ABCMR did not explain its decision by comparing the weight of the evidence on both sides of the claim. The preponderance review, by law, is a comparative task, and the ABCMR's decision lacked any comparative analysis.

(a) "The entity charged with making a factual determination, i.e., the ABCMR, must compare the evidence for or against a proposition and flesh out its comparative analysis." "The ABCMR should have identified any evidence that demonstrated the existence of error or injustice, and then compared it with evidence suggesting the absence of such error or injustice."

(b) "Under a preponderance standard, the ABCMR needed to explain how the 'considerable' evidence against the [applicant's] eligibility compares to the evidence for the [applicant's] eligibility." The applicant is "bound to demonstrate his eligibility for correction also under the preponderance standard, traditionally described in terms of

probability as 'more likely than not.'" As such, the applicant need only submit proof indicating that it is more likely than not that an error or injustice occurred; the standard does not require evidence that is undeniable.

(2) Second, the rationale effectively required the applicant to submit evidence that "establish[ed]..." the existence of an error or injustice. "By requiring his medical record to 'establish' the injury and records are linked, the ABCMR asked more of the [applicant] than required to warrant correction." Rather than seeking to establish a link between the applicant's injury and his medical records, the Board should instead have determined whether the evidence "more likely than not" showed an error or injustice. Counsel argues the applicant's evidence exceeds the "more likely than not" threshold. Counsel cites case law to support his contentions.

e. Conclusion. This Vietnam War Veteran has provided the ABCMR with sufficient evidence to show that, by a preponderance of evidence, he is entitled to the Purple Heart. If the Board decides not to grant the applicant's request, it must explain its reasons, comparing the evidence for and against the applicant's claim.

3. All evidence submitted by counsel and the applicant have been previously considered by the Board.

4. On 22 March 2024, counsel sent a "Notice of Proposed Petition for Writ of Mandamus" and stated, since mailing the applicant's request for reconsideration, counsel's staff has sent multiple inquiries requesting a status update. On 31 October 2023, his staff emailed the ABCMR and quickly responded when asked for the "PB Number." "Then, your office could not find [applicant's] application in your system, but your office advised that it may take 90 days to register his application. After 90 days has passed, we inquired again with proof that the ABCMR received his application but received no response. "Your delay in processing the Veteran's application is unacceptable....since it has been nearly six months since sending his request, the Veteran may have no option but to seek a court order directing the ABCMR to process his application."

5. A review of the applicant's service records shows the following:

a. On 14 November 1967, the Army of the United States (AUS) inducted the applicant for a 2-year term of active duty service. Upon completion of initial entry training and the award of military occupational specialty 11B (Light Weapons Infantryman), orders transferred him to Vietnam, and he arrived in country on 28 April 1968. Orders further assigned him to the 5th Battalion, 60th Infantry Regiment and he arrived at his new unit, on or about 3 May 1968.

b. Effective 15 September 1968, the applicant transferred to the 1st Battalion, 16th Infantry Regiment. The applicant's STR contains an SF 600 with entries showing the following:

- 16 April 1969 – "Pt complaining of pain on ① arm; T°100'4, infected wound (laceration) on ① elbow ① (not legible) on ① axilla"
- 17 April 1969 – "GI who has been in field and sick for approximately 24 hrs with weakness, mild dyspnea, fever, occasional vomiting, and an area of infection of ① elbow 2° to (?) insect bite"; "Impression: (1) Cellulitis ① elbow"

c. On 27 April 1969, the applicant completed his tour in Vietnam and orders reassigned him to an infantry battalion at Fort Riley, KS; he arrived at his new unit on 6 June 1969. On 19 September 1969, the AUS honorably released him from active duty, due to an early release policy, and transferred him to the U.S. Army Reserve. His DD Form 214 (Armed Forces of the United States Report of Transfer or Discharge) shows he completed 1 year, 10 months, and 6 days of his 2-year AUS obligation. The report additionally reflects the following:

(1) Item 24 (Decorations, Medals, Badges, Commendations, Citations and Campaign Ribbons Awarded or Authorized):

- National Defense Service Medal
- Vietnam Service Medal
- Republic of Vietnam Gallantry Cross with Palm Unit Citation
- Republic of Vietnam Campaign Medal with Device (1960)
- Combat Infantryman Badge
- Marksman Marksmanship Qualification Badge with Rifle Bar
- Two overseas service bars

(2) Item 30 (Remarks): While item 22e (Foreign and/or Sea Service) indicates 1 year served in USARPAC (U.S. Army, Pacific), item 30 does not list the dates of the applicant's Vietnam service.

d. On 7 January 1985, the applicant wrote the U.S. Army Reserve Components Personnel and Administration Center requesting the Purple Heart. He described how, in March 1968, he and his platoon were performing a reconnaissance when an armored personnel carrier ran over an enemy land mine; he incurred a wound to his left elbow but, due to the mission, he was not medically evacuated to receive treatment. Ultimately, medical authority transported him to a hospital when his wound became severely infected. On 25 February 1987, the U.S. Army Military Personnel Center responded, stating they could only award the Purple Heart when they had conclusive proof that the applicant's wounds were the direct result of enemy action; in reviewing the

applicant's records, they only saw an entry showing a doctor believed an insect bite caused the applicant's infection.

e. On 19 February 2015, the applicant petitioned the ABCMR, requesting the Purple Heart. With his request, he included his self-authored statement and two letters of support, prepared by former members of his platoon in Vietnam; all statements affirmed that enemy action had caused the applicant's wounds. On 29 October 2015, the Board voted to deny relief, concluding it lacked evidence to award the Purple Heart.

f. On 30 August 2016, the applicant requested reconsideration of his Purple Heart request. The applicant submitted a photograph of the armored personnel carrier and an extract from his STR. On 25 September 2018, the Board denied the applicant's request, stating, there is no documentary evidence, generated at the time, which verifies the left elbow injury that eventually became infected was the direct result of hostile action; he does offer his own version of events, as supported by two former members of his unit.

g. On 4 April 2019, a U.S. District Court remanded the applicant's case for reconsideration by the Board and required the Board to apply the guidance articulated in *Haselwander v. McHugh*. On 26 September 2019, the Board reevaluated the applicant's prior petitions and, after considering the guidance in *Haselwander v. McHugh*, voted to deny relief.

(1) "In *Haselwander*, the void/omission in the contemporaneous medical records was the error the applicant sought to be corrected and the injustice that prevented him from receiving a Purple Heart. The error in the record was the missing entry of his medical treatment records that his wounds were sustained in enemy action. In the case currently before the Board, the ABCMR previously denied relief on the basis, at least in part, that "no documentary evidence generated at the time (in 1969)...verifies the left elbow injury that eventually became infected was the direct result of hostile action." Similar to *Haselwander*, the alleged error in the record may be the missing entry in the military records that his injury/wound was the direct result of hostile enemy action."

(2) "Even if the ABCMR determines a preponderance of the evidence supports a finding that there was an error in the applicant's military medical records and in his DA Form 20 (Enlisted Qualification Record) in failing to show he was wounded in action against the enemy or that his laceration was the result of hostile enemy action, pursuant to AR [Army Regulation] 600-8-22 (Military Awards) a laceration wound must be of a severity requiring treatment by a medical officer to warrant a Purple Heart. With respect to the later developed left arm infection – that appears to be the result of an infection and not the original laceration."

(3) "After reviewing the application and all supporting documents, and applicable regulation, the Board did not find that a preponderance of the evidence supports relief in this case."

(a) "The applicant has demonstrated by a preponderance of evidence that he suffered an injury of some degree on 9 February 1969 as a result of an enemy landmine explosion that damaged an armored personnel carrier (APC) in which the applicant and a number of fellow Soldiers were passengers. The applicant's statement and witness statements indicate that the explosion from the enemy mine affected the applicant's left elbow. The elbow was not fractured or bleeding so profusely such that acute medical treatment was needed right away. Instead, the applicant attended to the injury himself and continued to perform his military duties. Thus, the record is fairly clear that the applicant's injury did not receive medical treatment immediately after the injury. Nor did the injury receive medical treatment during the 10th through 28th of February 1969; the 1st through the 31st of March 1969; or from the 1st through the 15th of April 1969."

(b) "On 16 April 1969, his left elbow was treated at a Battalion Aid Station. The Board carefully reviewed the medical records made contemporaneously with the applicant's visit to the aid station in April 1969. Those records do not establish that the elbow ailment for which he was being treated was proximately related to the injury he received two months earlier. This disconnect is significant because one must assume that a medical care provider would take great care in determining the origin of an injury he or she is about to treat. One would also assume that a medical care provider might treat an injury that resulted from an ordnance blast (which might include shrapnel imbedded into the skin and other tissue) differently from an injury that resulted from a dive into a foxhole or from collisions with jungle trees or bushes. Consequently, one would expect that an injury's origin would (a) be an inquiry of significant importance and (b) be conspicuously annotated in the medical records. In the applicant's case, the medical records do not refer to an explosion, to shrapnel, or to combat fire as a cause for the applicant's elbow problems. As for the infection in the elbow, the medical records attribute the infection as being due to an insect bite."

(c) "The applicable Army regulation provides that "[w]hen contemplating eligibility for the [Purple Heart], the two critical factors commanders must consider is the degree to which the enemy or hostile force caused the wound and was the wound so severe that it required treatment by a medical officer." Here, the facts and circumstances of the case do not match the overall criteria and standards for the Purple Heart. The facts and circumstances that are inconsistent with award's criteria include the two-month delay in receiving medical treatment and the uncertainty as to whether the symptoms that motivated the visit to the aid station were proximately caused by the landmine blast or, instead, caused by an insect bite or some other injury."

(4) "As for whether this case falls within the holding articulated by the U.S. Court of Appeals for the D.C. Circuit in *Haselwander v. McHugh*, this Board believes the applicant's case is distinguishable."

(a) "In *Haselwander*, there was virtually no dispute that the applicant was truly wounded in combat; virtually no dispute that the wound he received truly required medical attention; and virtually no dispute that he truly did receive the required medical attention. The issue that vexed the ABCMR in *Haselwander* was that no contemporaneous medical documentation was created to memorialize the applicant's receipt of the requisite medical treatment" "The USCADC, however, declared that the ABCMR had the authority, and therefore the obligation in appropriate circumstances, to correct an applicant's medical records to reflect that the applicant actually received medical treatment for a wound that otherwise met the Purple Heart criteria."

(b) "In *Haselwander*, there was a clear evidentiary nexus between the enemy inflicted wound and the medical treatment received. But in this case, the preponderance of evidence does not support that the applicant's enemy-inflicted wound required medical treatment or that he actually received treatment for the enemy-inflicted wound. In this case, there is considerable evidence that the wound did not require medical treatment, including the evidence that the applicant received no medical treatment for 65 days and that in the meantime he was able to perform his duties. Considerable evidence also exists that the elbow problems for which he received treatment in April 1969 were not due to the enemy-inflicted wound. Such evidence includes the absence of any mention in the medical record of the landmine blast and the existence of an annotation indicating the infection was due to an insect bite."

h. On 3 August 2021, the applicant again requested the Board's reconsideration of his requests for a Purple Heart.

(1) Counsel argued that "due to the inherent activities of war, the applicant's medical records do not accurately reflect the reason for the hospital visit nor the origin of the wound that he sustained and prior treatment received. The applicant's medical records incorrectly attribute the wounds to an insect bite (puncture wound). However, this diagnosis contradicts the military record made the day before. In that record, the encounter was referred to as a laceration (a deep cut or tear in the skin). Further, the medical treatment does not equate to a simple bug bite but instead a laceration to the applicant's arm." In support of his contentions, counsel resubmitted evidence previously considered and added the following:

(a) DA Form 1594, detailing events that occurred on 8 February 1969 but not mentioning the applicant or an armored personnel carrier running over an enemy land mine.

(b) Letter from the applicant's primary care physician affirming that the applicant had given him a detailed account of an injury sustained while in Vietnam. The physician opined the applicant's described symptoms of fever, nausea, and vomiting were "consistent with sepsis – a systemic response to an infection such as cellulitis. [Applicant] reports he was diagnosed with a cellulitis and required approximately 10 days of IV penicillin and IV fluids. This would be distinct from an insect bite, which I would not expect to cause such a significant infection or result in a systemic illness such as sepsis requiring many days of antibiotics. It is well within medical reason that his improperly treated elbow wound eventually worsened, causing a cellulitis and sepsis requiring medical attention, especially given the environment in which he was serving at that time."

(2) On 29 July 2022, the Board voted to deny relief, stating, "Based upon a preponderance of the evidence, and the previous court-remanded case, the Board determined there is insufficient evidence to amend the previous Board's decision."

6. A review of the applicant's available service record is void of any orders or documentation indicating he was either wounded in action or awarded the Purple Heart. DA Form 20, item 40 (Wounds) is blank; item 41 (Awards and Decorations) does not list the award of the Purple Heart.

7. The Vietnam Casualty Roster identifies, by name, Soldiers who were casualties during the Vietnam War; it is commonly used to verify the entitlement to the award of the Purple Heart. The applicant is not listed on this roster.

8. A review of the Awards and Decorations Computer-Assisted Retrieval System, an index of general orders issued during the Vietnam era between 1965 and 1973, maintained by HRC, failed to reveal orders for the Purple Heart pertaining to the applicant.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on law, policy, and regulation. The Board determined to be awarded the Purple Heart, the regulatory guidance requires all elements of the award criteria to be met; there must be proof a wound was incurred as a result of enemy action, that the wound required treatment by medical personnel, and that the medical personnel made such treatment a matter of official record. The Board did not find documentary evidence that clearly or explicitly shows criteria for award of the Purple Heart. Based on the evidence, the Board determined the applicant does not meet the criteria for award of the Purple Heart.

2. Prior to closing the discussion, the Board noted and concurred with the analyst of record's administrative notes below.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis for amendment of the ABCMR decision rendered in Docket Numbers AR20150004873 on 29 October 2015, AR20170000159 on 25 September 2018, AR20190011287 on 26 September 2019, and AR20220000834 on 29 July 2022.

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

ADMINISTRATIVE NOTE(S):

1. Department of the Army General Orders (DAGO) Number 43, dated 1970, awarded the 5th Battalion, 60th Infantry Regiment the Valorous Unit Award, for the period 6 to 12 May 1968. DAGO Number 53, dated 1970, awarded the 1st Battalion, 16th Infantry Regiment the Republic of Vietnam Civil Actions Honor Medal, First Class Unit Citation, for the period October 1965 to 7 April 1970.

2. Amend the applicant's DD Form 214, ending 19 September 1969, as follows:

a. Item 24. Delete the Vietnam Service Medal and add the Vietnam Service Medal with four bronze service stars, the Valorous Unit Award, and the Republic of Vietnam Civil Actions Honor Medal, First Class Unit Citation.

b. Add the following comment to item 30: "Service in Vietnam, from 28 April 1968 to 27 April 1969."

REFERENCES:

1. AR 600-8-22 (Military Awards), currently in effect, prescribes policies and procedures for military awards. Regarding the Purple Heart, the regulation states:

a. Paragraph 2-7 (Purple Hearts) states the Purple Heart is awarded in the name of the President of the United States to any member of an Armed Force of the United States under the jurisdiction of the Secretary of the Army who, after 5 April 1917, has been wounded, killed, or who has died or may hereafter die of wounds received, under any of the following circumstances:

- In any action against an enemy of the United States
- In any action with an opposing armed force of a foreign country in which the Armed Forces of the United States are or have been engaged
- While serving with friendly foreign forces engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party
- As the result of an act of any such enemy or opposing Armed Forces
- As the result of an act of any hostile foreign force

b. To qualify for the Purple Heart, the wound must have been of such severity that it required treatment, not merely examination, by a medical officer.

- A medical professional is defined as a civilian physician or a physician extender; physician extenders include nurse practitioners, physician assistants, and other medical professionals qualified to provide independent treatment
- A wound is defined as an injury to any part of the body from an outside force or agent. A physical lesion is not required.
- Additionally, the wound's treatment must be documented in the Soldier's medical records

2. AR 15-185 (ABCMR), currently in effect, states:

a. The ABCMR decides cases on the evidence of record; it is not an investigative body. Additionally, the ABCMR begins its consideration of each case with the presumption of administrative regularity (i.e., the documents in an applicant's service records are accepted as true and accurate, barring compelling evidence to the contrary).

b. The applicant bears the burden of proving the existence of an error or injustice by presenting a preponderance of evidence, meaning the applicant's evidence is sufficient

for the Board to conclude that there is a greater than 50-50 chance what he/she claims is verifiably correct.

//NOTHING FOLLOWS//