


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

Application for Correction
of Coast Guard Record of:

BCMR Docket
No. 2003-106

XXXXXXXXXXXXXXXXXXXXXXX

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. It was docketed on June 30, 2003, upon the BCMR's receipt of the applicant's complete application for the correction of his military record.

This final decision, dated March 25, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

RELIEF REQUESTED

The applicant asked the Board to correct his discharge document to show that he earned the American Defense Medal, Good Conduct Medal, World War II Victory Medal, American Area Campaign Ribbon, and Asiatic-Pacific Area Campaign Ribbon. He stated that they are omitted from the "Notice of Separation from the U.S. Navy Service -- Coast Guard" (NAVCO 553) that he received on March 1, 1946, the date of his separation.

The applicant claimed that he discovered the alleged errors on September 11, 2002. He did not offer an explanation why he could not have discovered the alleged errors sooner or why it is in the interest of justice to waive the three-year statute of limitations in this case.

EXCERPTS FROM RECORD

The applicant's military record contains a letter addressed to the applicant from his commanding officer (CO) dated March 1, 1946, advising the applicant that he was authorized the following awards: American Area Campaign Ribbon, Asiatic-Pacific

Area Campaign Ribbon, and the World War II Victory Ribbon. The letter further contained the following advice:

This letter of authorization is of vital importance, inasmuch as it will serve as the basis upon which medals will be issued to you. Upon public announcement of the availability of the medals, one of the two copies of this letter furnished you will be used for the issuance of appropriate medals.

A copy of this letter will be filed in your service record.

VIEWS OF THE COAST GUARD

On November 7, 2003, the Board received an advisory opinion from the office of the Judge Advocate General (TJAG) of the Coast Guard. He recommended that the Board deny relief to the applicant.

In recommending denial of relief, TJAG argued that the application was untimely. He stated that applications for correction of military records must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. 33 CFR § 52.22. He said that the Board could waive the statute of limitations and consider the case if the applicant presents sufficient evidence that it is in the interest of justice to do so. As the TJAG argued, the length of the delay, the reasons for the delay, and the likelihood of the applicant's success on the merits of his claim are factors to be considered in deciding whether to waive the statute of limitations.

In this case, TJAG noted that the alleged error occurred more than 50 years ago and applicant's claim that he did not discover the alleged error until September 11, 2002, does not overcome the fact that he should have discovered it sooner. He also argued that the Board should not waive the statute of limitations in this case because there is very little likelihood that the applicant will prevail on the merits of his claim. In this regard, TJAG stated that the awards earned by the applicant are properly documented in his military record, and they were not required to be listed on the separation document because there is no place on the 1946 notice of separation document to list them. He further asserted that the applicant was ineligible for a Good Conduct Award because of he received on one 3.8 mark in conduct mark during a three-year period rather than a perfect 4.0, as required by Coast Guard Medals and Awards Manual. Neither was the applicant entitled to the American Defense Medal, according to TJAG, because he did not serve during the eligibility period from September 8, 1939 to December 7, 1941. The applicant entered active duty on December 30, 1942.

TJAG stated that the applicant offered no evidence to support his claim that the Coast Guard erred in any way in this case. He further stated that absent strong evidence to the contrary, government officials are presumed to have carried out their duties correctly, lawfully, and in good faith. Arens v. United States, 969 F.2d 1034, 1037

(1992). Moreover applicant bears the burden of proving error. 33 CFR § 52.24. Here, applicant offers no evidence that the Coast Guard committed an error or injustice at the time of his separation. To the contrary, the record shows that the applicant was properly credited for the awards he earned.

APPLICANT'S RESPONSE TO COAST GUARD VIEWS

On November 10, 2003, the Board sent a copy of the views of the Coast Guard to the applicant together with an invitation to submit a response within 30 days. No response was received from the applicant.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and the Coast Guard, the military record of the applicant, and applicable law.

1. The BCMR has jurisdiction of the case pursuant to section 1552 of title 10, United States Code. The application was not timely.

2. To be timely, an application for correction must be filed within three years of the date the alleged error or injustice was, or should have been, discovered. See 10 U.S.C. § 1552, 33 CFR § 52.22. The Board can excuse the failure to file timely if it finds that it is in the interest of justice to do so. In making such a determination, the Board should consider the length of the delay, the reasons (or lack thereof) for the delay, and the likelihood of success on the merits of the claim. Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

3. The applicant stated that he discovered the alleged error on September 11, 2002, more than 50 years after his discharge. He did not provide an explanation why he could not have discovered the alleged errors sooner. His signature on the Notice of Separation is evidence that he was aware or should have been aware at that time that no medals were recorded on the discharge document. The letter from the CO to the applicant dated March 1, 1946, informed the applicant of the awards that he had earned, which did not include the Good Conduct Award or the American Defense Medal. The applicant should have discovered that he had not been awarded the Good Conduct Award or the American Defense Medal at the time he received the CO's letter.

4. With respect to the merits of the applicant's claim, the Board finds that he is not likely to prevail on them. The Coast Guard has asserted that the applicant's discharge document is correct because there is no block on the 1946 Notice of Separation document to list medals. The applicant has presented nothing challenging the Coast Guard on this point. The applicant was discharged prior to the creation for the DD Form 214 and the regulations pertaining to that document do not apply in this case. Moreover, the medals and awards earned by the applicant are documented in his service record.

5. In addition the applicant has not presented any evidence that he was entitled to the Good Conduct Award or the American Defense Medal. According to Enclosure (8) and sections 5.B.1.b.(1)(3) and 5.B.5.b.(2)6. of the Coast Guard Medals and Awards Manual, the applicant was not entitled to a Good Conduct Award because he did not have an average mark of 4.0 mark in conduct; nor was he entitled to the American Defense Medal because he did not serve during the time period required to earn this award. The applicant has presented nothing to rebut these conclusions. The Board finds, based on the evidence of record, it is unlikely that the applicant will prevail on the merits of this claim.

6. Based on the length of the delay, the lack of any persuasive reason for not filing his application sooner, and the probable lack of success on the merits of his claim, the Board finds it is not in the interest of justice to waive the statute of limitations in this case.

7. Accordingly, the applicant's request should be denied because it lacks merit and because it is untimely.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of former XXXXXXXXXXXXX USCG, for correction of his military record is denied.

