

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2005-048

[REDACTED]

FINAL DECISION

[REDACTED]

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on January 12, 2005, upon receipt of the applicant's completed application and military records.

This final decision, dated November 17, 2005, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant asked the Board to correct his Coast Guard military record by showing that his hearing loss and tinnitus were incurred during combat in Vietnam, while on active duty with the Coast Guard.

The applicant is a retired member of the Air Force, having retired from that Service in 1980. He served in the Coast Guard from 1957 to 1968.

On September 2, 2004, the Air Force denied the applicant's claim for Combat Related Special Compensation (CRSC),¹ because it determined that his hearing loss and tinnitus were not combat-related. To be eligible for combat-related special compensation a retired member must have 20 years of active service and either a

¹CRSC is a recently (2002) enacted law that allows certain retirees to receive both retired pay and disability compensation.

combat-related disability or a Purple Heart-related disability that the DVA has rated to be at least 10% disabling. The applicant has a service-connected disability for hearing loss and tinnitus from the Department of Veteran Affairs (DVA).

The Coast Guard cannot grant CRSC to this applicant because under the law and Department of Defense regulation that determination is left to his parent service, the Air Force. However, this Board can determine if the applicant's Coast Guard records are in error or unjust by not containing documentation or acknowledging that he was injured during combat in Vietnam while on active duty in the Coast Guard. If the Board were to direct such a correction in this case, the applicant would still be required to ask the Air Force for reconsideration of his denied CRSC claim.

APPLICANT'S ALLEGATIONS

The applicant alleged that he incurred his hearing loss during combat in Vietnam while serving on active duty in the Coast Guard, but did not discover the alleged error in his record until April 9, 2002. He stated that the Coast Guard cutter he was assigned to performed missions with the Navy and was under constant fire. He stated that as a result of the constant firing of guns and other munitions he began to have constant ringing in his ears. He stated that he went to the hospital for treatment but when he got there and saw other individuals with more severe injuries he felt foolish and left without treatment. He stated that he learned to live with the ringing in his ears until he was told during his Air Force retirement physical to apply to the DVA for disability. The applicant stated that he believes that his hearing loss is combat-related and that it worsened during his military career.

SUMMARY OF THE RECORD AND SUBMISSIONS

The applicant enlisted in the Coast Guard on September 27, 1957. On September 20, 1961, he underwent a physical examination for the purpose of extending his enlistment. The medical examination identified no changes from his earlier enlistment medical examination and the applicant was fit for duty/extension.

On May 5, 1962, the applicant underwent a medical examination for the purpose of performing overseas duty. No problems were noted during the examination and the applicant was found fit for duty.

On July 10, 1962, the applicant was medically examined for the purpose of reenlisting in the Coast Guard. No significant changes were noted from his earlier medical examination and he was found fit for duty and permitted to reenlist for six years on July 20, 1962.

On May 5, 1965, the applicant underwent a medical examination for overseas assignment and was found fit for that duty.

On May 4, 1966, a page 7 (administrative remarks page) was entered into the applicant's record stating that he had served on board a Coast Guard cutter for 10 months and 15 days and that he was entitled to the Vietnam Service Medal.

On June 21, 1968, the applicant underwent a medical examination for the purpose of discharge from the Coast Guard. No problems were noted with his hearing or with tinnitus, and he was found fit for discharge.

On July 19, 1968, he was honorably discharged from the Coast Guard by reason of expiration of enlistment.

On October 15, 1971, the applicant enlisted in the Air force and served until his retirement.

On July 10, 1979, the applicant underwent an Air Force periodic examination where his hearing loss was noted for the first time. The applicant was still qualified for worldwide assignment.

On October 16, 1980, the applicant's Air Force retirement medical examination noted the applicant's hearing loss, but found him qualified for retirement/separation. The medical report stated that the applicant made the following comments about his hearing loss: "Hearing loss since 1961, no treatment indicated, examinee states he was exposed to hazardous noise throughout his military career in noisy kitchen area, operating river gun boats in S. Vietnam and working close to flight line area. In his opinion this exposure caused his acoustic trauma." The medical report noted in Sep 1979 that the applicant had a bilateral high frequency sensori-neuro hearing loss and was given permanent H-3 physical profile.

DVA Records

On September 3, 1986, the DVA granted the applicant a 10% disability rating for tinnitus and a 10% disability rating for bilateral hearing loss for a combined rating of 20%. The rating decision document states that the applicant's records from September 30, 1957 to October 14, 1971 were unverified.

A May 30, 1986, DVA medical note reported the applicant as suffering from deafness and continuous tinnitus. The note also reported the applicant as saying that he first became aware of the hearing loss approximately 11 or 12 years earlier when he noticed that he was having difficulty in communication in his daily work and that he noticed ringing in his ears approximately 8 to 10 years earlier.

On May 24, 2004, the applicant requested an increased disability evaluation from the DVA. A July 28, 2004, audiologist's report stated that the applicant reported that he was a loader for firing 81-mortars while on a Coast Guard cutter and that he began to notice difficulties hearing and understanding speech at that time.

On December 18, 2004, a DVA rating decision dated noted that the applicant's prior (Coast Guard) service had not been verified, but based on recent diagnostic testing test, his hearing loss disability would be increased from 10% to 40% and his tinnitus disability would be continued at 10%, for a combined 50% disability rating.

VIEWS OF THE COAST GUARD

On May 23, 2005, the Board received an advisory opinion from the Office of the Judge Advocate General (JAG). He recommended that the applicant's request for relief be denied because it was untimely and for lack of proof of error or injustice.

In recommending denial of relief, the JAG 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 may waive the statute of limitations and consider the case if an applicant presents sufficient evidence that it is in the interest of justice to do so. The JAG stated that 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.

The JAG stated that the applicant filed his application more than 36 years beyond the statute of limitations alleging that he did not discover the alleged error or injustice until the Air Force denied his CRSC claim in 2004, but did not otherwise explain the delay. According to the JAG, the applicant has not provided good cause for not filing his application sooner.

With respect to the merits of his claim, the JAG argued that the applicant has not presented evidence that a factual or legal error occurred in his case. He stated that although the applicant offers ample evidence of his service-connected disability, he offers nothing beyond his brief statement to show that his hearing loss is linked to combat service with the Coast Guard. The JAG stated that in contrast to the applicant's view, there are numerous physical examinations including the discharge medical examination that show no hearing loss. The JAG 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, he stated that the applicant bears the burden of proving error under 33 C.F.R. § 52.24, and that he has failed to meet his burden in this case. In this regard, the

JAG stated that the Coast Guard committed no error and worked no injustice and therefore, the applicant is not entitled to relief.

The JAG attached comments from the Commander, Coast Guard Personnel Command (CGPC) as Enclosure (1) to the advisory opinion. CGPC offered the following comments with respect to the applicant's request:

A thorough review of the Applicant's record shows no evidence that he suffered any hearing impairments while in the Coast Guard. While it is possible that the Applicant's bilateral hearing loss might be related to his service in South Vietnam, the Applicant's subsequent years in Coast Guard service and physical evaluations make a direct linkage implausible. The Applicant was evaluated in 1961, 1965, and 1968 and successfully reenlisted in the United States Air Force in 1971 with no diagnosis associated with hearing loss.

At the time of his discharge, the Applicant was physically examined and found to be fit for separation in 1968. The cause for the Applicant's separation was due to Expiration of Enlistment. I find no error in that finding.

While being processed for retirement from the United States Air Force in 1980, the Applicant stated in his retirement examination that he experienced hearing loss since 1961. However at that time he had already been separated from the Coast Guard for more than 12 years.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On June 2, 2005, the BCMR received the applicant's response to the views of the Coast Guard. With respect to the delay in filing his claim, he stated that since he believed that his hearing loss was combat-related and there was no CRSC until recently, there was no reason for him to file a claim earlier.

The applicant reasserted his belief that his hearing loss was linked to combat in Vietnam while serving on active duty with the Coast Guard.

APPLICABLE LAW AND GUIDANCE

10 U.S.C. 1413a.

Section 1413a. (Combat-related special compensation) of title 10 of the United States Code provides for the following:

"(a) Authority. The Secretary concerned shall pay each eligible combat-related uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b).

"(b) Amount. (1) Determination of monthly amount. Subject to paragraphs (2) and (3), the monthly amount to be paid an eligible combat-related disabled uniformed services retiree under subsection (a) for any month is the amount of compensation to which the retiree is entitled under title 38 for that month, determined without regard to any disability for the retiree that is not a combat-related disability . . .

"(c) Eligible retirees. For purposes of this section, an eligible combat-related disabled uniform services retiree referred to in subsection (a) is a member of the uniformed services entitled to retired pay who--(1) has completed at least 20 years of service in the uniformed services that are creditable for purposes of computing the amount of retired pay to which the member is entitled or is entitled to retired pay under section 12731 of this title . . . (other than by reason of section 12731b of this title . . . and (2) has a combat-related disability.

"(d) Procedures. The Secretary of Defense shall prescribe procedures and criteria under which a disabled uniformed services retiree may apply to the Secretary of a military department to be considered to be an eligible combat-related uniform services retiree. Such procedures shall apply uniformly throughout the Department of Defense.²

"(f) Combat-related disability. In this section, the term 'combat-related disability' means a disability that is compensable under the laws administered by the Secretary of Veterans Affairs and that -- (1) is attributable to an injury for which the member was awarded the Purple Heart; or (2) was incurred (as determined under the criteria prescribed by the Secretary of Defense)-- (A) as a direct result of armed conflict; (B) while engaged in hazardous service; (C) in the performance of duty under conditions simulating war; or (D) through an instrumentality of war."

Department of Defense (DOD) CRSC Program Guidance

DOD Combat-related Special Compensation Revised Program Guidance January 2004 states that the following criteria, terms, definitions, explanations will apply to making combat-related determinations in the CRSC program.

² CGPC informed the BCMR staff that it follows the CRSC guidance provided by the Department of Defense in processing its CRSC claims.

"Direct Result of Armed Conflict - The disability is a disease or injury incurred in the line of duty as a result of armed conflict. The fact that a member incurred the disability during a period of war or an area of armed conflict or while participating in combat operations is not sufficient to support a combat-related determination. There must be a definite causal relationship between the armed conflict and the resulting disability.

"Armed conflict includes a war, expedition, occupation of an area or territory, battle skirmish, raid invasion, rebellion, insurrection, guerilla action, riot, or any other action in which Service members are engaged with a hostile or belligerent nation, faction, force, or terrorists.

"Armed conflict may also include such situations as incidents involving a member while interned as a prisoner of war or while detained against his or her will in custody of a hostile or belligerent force while escaping or attempting to escape from such confinement, prisoner of war, or detained status.

"While Engaged in Hazardous Service - Such service includes, but is not limited to aerial flight, parachute duty, demolition duty, experimental stress duty, and diving duty. A finding that a disability is the result of such hazardous service required that the injury or disease be the direct result of actions taken in the performance of such service. Travel to and from such service, or actions incidental to a normal duty status not considered hazardous are not included.

"In the Performance of Duty Under Conditions Simulating War - In general this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses, grenade and live fire weapons practice, bayonet training, hand-to-hand combat training, repelling and negotiation of combat confidence and obstacle courses. It does not include physical training activities such as calisthenics and jogging or formation running and supervised sport activities.

"Instrumentality of War - Incurrence during an actual period of war is not required. However, there must be a direct causal relationship between the instrumentality of war and the disability. The disability must be incurred incident to a hazard or risk of the service."

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 section 1552 of title 10 of the United States Code.

2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.

3. The applicant's request is not timely. To be timely, an application or request for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. The statute of limitation on the applicant's claim expired in July 1971, prior to his enlistment in the Air Force. In this regard the Board notes that the applicant was discharged from the Coast Guard in July 1968 and enlisted in the Air Force in October 1971. Therefore, his application was filed approximately 33 years beyond the statute of limitations.

4. However, the Board may still consider the application on the merits, if it finds 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 in assessing 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 stated 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, 165. See also Dickson v. Secretary of Defense, 68 F.3d 1396 (D.C. Cir. 1995).

5. The applicant's statement that he did not discover the alleged error until April 9, 2002 is not persuasive. Based on the numerous Coast Guard medical examinations, including his separation physical, the applicant should have known at the time of his discharge from the Coast Guard that there were no medical findings that he suffered from a hearing loss or tinnitus, and that none of his military records at that time contained any documentation that he suffered a combat-related injury of any sort. Accordingly, if the applicant disagreed with these medical findings and his military record, he should have submitted an application for correction earlier.

6. With respect to the merits of his claim, the Board finds that the applicant is not likely to prevail on them. Therefore, his claim should be denied because it is untimely. However, if the applicant had put forth persuasive evidence that his hearing loss and tinnitus were linked to combat in Vietnam, the Board probably would have waived the statute of limitations in the interest of justice because Congress only recently (2002) enacted the law that granted certain members entitlement to both retired pay and disability compensation. Prior to the enactment of the CRSC law in 2002, there was no real benefit to be gained from having a disability designated combat-related as opposed

to service-connected. Therefore, if evidence were present in the record that the applicant suffered a combat-related injury, the Board would probably waive the statute of limitations in the interest of justice. However, the evidence of record, as discussed below, does not establish that the applicant is likely to prevail on his claim.

7. Although the applicant served in Vietnam for approximately ten months, there is nothing in the Coast Guard military record, including his medical record, that connects the applicant's current hearing loss and tinnitus to combat in Vietnam. None of his Coast Guard medical examinations show that he even incurred a hearing loss or tinnitus while in the Coast Guard. In addition, his Air Force medical examinations fail to corroborate his claim. The applicant's hearing loss was not documented by the Air Force until 1979 during a medical examination eleven years after his discharge from the Coast Guard. The examining physician did not offer a medical opinion or explanation for the cause of the applicant's hearing loss. Neither did the 1980 Air Force retirement medical examination report offer a medical opinion or explanation for the cause of the applicant's disability. It only reported *the applicant's statement* that "he was exposed to hazardous noise throughout his military career in noisy kitchen area, operating river gun boats in S. Vietnam and working close to flight line area," which is insufficient to establish that his disabilities resulted from combat in Vietnam. Further, the DVA medical reports are not corroborative of the applicant's claim because, again, they only report what the applicant told clinicians. The DVA admitted that it did not verify the applicant's Coast Guard service. The applicant has not provided proof by a preponderance of the evidence that his hearing loss and tinnitus are directly related to combat in Vietnam. Accordingly, he has not shown that his Coast Guard record is in error or unjust.

8. By way of explanation, even if the Board were to correct the applicant's record (which it will not) to say that his hearing loss and tinnitus were related to combat in Vietnam while on active duty with the Coast Guard, such is probably insufficient to establish combat relatedness for CRSC purposes. In this regard, DOD Combat-related Special Compensation Revised Program Guidance January 2004 states, "An uncorroborated statement in a record that a disability is combat-related will not, in and of itself, be considered determinative for purposes of meeting the combat-related standards for CRSC prescribed herein."

9. Accordingly, due to the length of the delay, the reason for not filing his application sooner, and the probable lack of success on the merits of his claim, the Board finds that it is not in the interest of justice to waive the statute of limitations. The application should be denied because it is untimely.

ORDER

The application of former [REDACTED], USCG, for correction of his military record is denied.

