



Australian Government

Defence Honours and Awards Appeals Tribunal

Emerson and the Department of Defence [2014] DHAAT 31 (22 July 2014)

File Number(s) 2013/034

Re Mr Ernest Emerson
APPLICANT

And Department of Defence
RESPONDENT

Tribunal Ms C. Heazlewood (Presiding Member)
Professor D. Horner AM

Hearing Date 19 June 2014

DECISION

On 22 July 2014 the Tribunal decided to set aside the decision under review that Mr Ernest Emerson should not be awarded the 1939-45 Star and substitute its decision that Mr Ernest Emerson is to be recommended for the award of the 1939-45 Star.

CATCHWORDS

DEFENCE AWARD – 1939-45 Star – Small Ships - US Certificates of Release and Discharge – service afloat.

LEGISLATION

Defence Act 1903 – ss 110V(1), 110VB(2)

Defence Force Regulations 1952 - reg 93C and Schd 3

Commonwealth Navy Order of 11 September 1945

United Kingdom Command Paper 6833 June 1946

Summary of the Conditions of Award of the Campaign Stars, the Defence Medal and the War Medal, December 1948 (Merchant Navy)

REASONS FOR DECISION

Introduction

1. The applicant, Mr Ernest Frederick Emerson (Mr Emerson), seeks review of the decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the award of the 1939-45 Star. On 3 December 2009 Mr Emerson had lodged an application for the award of three medals, 1939-45 Star, the Pacific Star and the War Medal 1939-45. He was awarded the War Medal 1939-45 in September 2010 and the Pacific Star on 4 October 2013. The Directorate rejected Mr Emerson's application that he be awarded the 1939-45 Star on 4 October 2013. Mr Emerson sought review of the decision to reject his claim for the 1939-45 Star in his application to the Tribunal dated 9 October 2013. Mr Emerson was assisted by Mr Ernest Flint, the President of the US Army Small Ships Association.

The Tribunal's Jurisdiction

2. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence award in response to an application. The Directorate made a decision to refuse to recommend Mr Emerson for the 1939-45 Star following his application. Reg 93C of the *Defence Force Regulations 1952* defines a *defence award* as being those awards set out in Part 2 of Schedule 3. Included in the defence awards set out in Part 2 is the 1939-45 Star. Therefore the Tribunal has jurisdiction to review this decision.

Steps taken in the conduct of the Review

3. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011 (No.1)*, on 21 November 2013, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Emerson's application for review and requesting that he provide a report. On 12 December 2013, the Directorate on behalf of the Secretary provided the Tribunal with a report. A copy of the report of the Directorate was forwarded to Mr Emerson for comment. Mr Flint on behalf of Mr Emerson provided written responses to the Tribunal received on 20 January, 10, 12, and 17 February and 16 and 22 June 2014.

The 1939-45 Star

4. The 1939-45 Star is a campaign medal of the British Commonwealth, established to recognise service in certain operations during the Second World War. The criteria that must be satisfied to be awarded the 1939-45 Star are set out in a number of documents.¹ For the purposes of determining eligibility in the Australian armed forces after the Second World War the conditions were set down in the *Summary of the Conditions of Award of the Campaign Stars, the Defence Medal and the War Medal* issued by the Hon John Dedman, Minister of State for Defence in December 1948 (the Dedman Paper).

¹ Air Ministry Order A.M.O. A.755/1943, 3 August 1943, *Introduction of Africa and 1939-43 Stars, etc.*; Committee on the Grant of Honours Decorations and Medals in Time of War – Campaign Stars and the Defence Medal, HMSO, London, May 1945. Available at www.northeastmedals.co.uk/britishguide/hmsocampaign_stars_defence.htm; and United Kingdom Command Paper No 6833, June 1946.

5. The Dedman Paper provides that the 1939-45 Star is awarded for service in operations between 3 September 1939 and 2 September 1945. The qualifying conditions for members of the Navy are:

1(ii) Navy – (a) The qualification is six months service afloat in the areas of active operations during the period from the 3rd September, 1939, to the 2nd September, 1945, inclusive. These areas are:-

(i) ...

(ii) ...

(iii) From 10th June, 1940, to the 8th May, 1945, anywhere at sea.

(iv) From the 9th May, 1945, to the 2nd September, 1945, the areas are the Pacific Ocean

...

(v) Merchant Navy. – The Merchant Navy receive the 1939-45 Star under the same conditions as the Royal Navy, except that six months service at sea will qualify, provided that at least one voyage was made through one of the specified areas of active operations. ...

Part VI of the Dedman Paper sets out the areas of operation and these include New Guinea and surrounding islands plus the Central Pacific.

6. Commonwealth Navy Order 400/45 of 11 September 1945 referred to the qualifications for the 1939-45 Star and noted that there needed to be six months service afloat to be eligible. Paragraph 1(A) of Section III defined the expression ‘Service afloat’ as meaning *service while borne for pay on the books of:-*

...

(c) A commissioned ship for such other seagoing service as the Naval Board may declare to qualify for this purpose. In this category will be included:-

(i) Service while embarked for duty in merchant ships ...

(B) the following shall not be regarded as service afloat:-

(a) Service in stationary depot ships which only went to sea when proceeding from port to port (e.g., for the purpose of changing base for refit, etc.).

(b) Service at shore bases and depots.

(c) Service in vessels employed wholly or mainly within boom protected waters, or where no boom existed, within the limits or smooth waters.

Background

7. The United States Army Transportation Service (USATS) employed Mr Emerson as an Able Seaman in 1943. USATS organised and managed the United States Army Small Ships (USASS) Section on behalf of the United States Army in the Pacific. The ships and vessels used by USASS were Australian ships obtained by various means. USATS employed persons to crew the fleet. The role of USASS was to transport troops, ammunition, food and medical supplies in support of the allied forces in New Guinea and the surrounding islands. Later in the war the small ships travelled as far as Manila.

8. In 2008/9 the Defence Honours and Awards Tribunal (the old Tribunal established administratively prior to the establishment of the Tribunal under the Defence Act) conducted an Inquiry into the eligibility of Australian civilians employed by USATS as crew on the small ships, to receive Australian or Imperial medals. On 2 August 2009 the old Tribunal provided its report to the Parliamentary Secretary for Defence Support. The Government accepted the recommendations and civilians employed by USATS became eligible for Australian or Imperial recognition on the same basis as members of the Merchant Navy.

Mr Emerson's Service

9. According to the Certificate of Discharge dated 11 October 1945 issued by the United States Army Forces Western Pacific, Mr Emerson was employed as an Able Seaman on 10 August 1943 and discharged on 13 November 1945. The two Certificates of Release or Discharge from Active Duty (DD Form 214 corrected by DD Form 215), reveal that Mr Emerson was employed on active duty on the following ships:

- 10 August 1943 to 1 February 1944 – *S 164 Nanagai*
- 2 February 1944 to 19 August 1944 – *S 133 Valkyrie*
- 3 October 1944 to 2 January 1945 – *S 164 Nanagai*
- 3 January 1945 to 2 February 1945 – *Bobbie*
- 7 March 1945 to 16 April 1945 – *Bobbie*
- 17 April 1945 to 15 August 1945 – *S 583 ST 468*
- 16 August 1945 to 13 November 1945 – *S 583 ST 468*

The DD forms are official documents issued by the United States Department of Defense.

Mr Emerson's Submission

10. Mr Flint provided numerous submissions on behalf of Mr Emerson including a submission emailed to the Tribunal the day before the hearing. The Tribunal conducted a hearing on 19 June 2014 which Mr Emerson attended by telephone. Mr Emerson was assisted by his son Mr Russell Emerson and Mr Flint.

11. In his submissions Mr Flint argued that all of Mr Emerson's employment on active service between 10 August 1943 and 13 November 1945 should be considered service afloat in operational areas. The two official Certificates of Release (Form 214 corrected by Form 215) were proof of his service afloat. Mr Flint could not understand why Mr Emerson had not been awarded the 1939-45 Star.

12. In further submissions Mr Flint noted that Mr Emerson had served for three years from the age of 17 years in the USASS. He had received medals from the United States and the Philippines acknowledging his service. Mr Flint explained that service on the Small Ships was different from other forms of service. The role of small ships was to transport troops and their equipment to New Guinea and the surrounding islands. The ships would be loaded at major ports such as Milne Bay and sailed to their destinations, which were usually small villages. The ships often sailed through uncharted waters with the danger of hitting reefs. The ships were usually loaded and unloaded at night to avoid attack by Japanese aircraft. Towards the end of the war the ships would travel as far as Manila.

13. Employees of USATS were discharged on 15 August 1945 and were immediately re-employed on the next day and finally discharged on 30 September 1945. Mr Flint refuted the Directorate's argument that because the official Australian ship movement records did not show the movement of ships when Mr Emerson served on them, there was no evidence that Mr Emerson had served on the *Bobbie* and *ST 468*. Mr Flint submitted that the evidence was the Certificates of Release. He stated that once the ships had been acquired by the USATS, the Australian Authorities no longer officially recorded their movements. Therefore the official Australian records would be unlikely to record any small ship's movements after the ship was acquired by USATS. Mr Flint also refuted the Directorate's argument that there was little evidence that Mr Emerson had been 'afloat' when he had served on the Small Ships.

Mr Flint referred again to the Certificates of Release noting that they recorded that Mr Emerson had been 'on active duty'. Mr Emerson's Certificate of Discharge from the United States Army Forces Western Pacific stated that Mr Emerson had been employed as an Able Seaman from 10 August 1943 to 13 November 1945.

14. At the hearing Mr Emerson told the Tribunal that he had kept a logbook when he had served on the *ST 468*. Mr Emerson proceeded to read excerpts from the logbook that revealed that on 25 April 1945 he was travelling as part of a convoy to the Philippines. He travelled to Manila in May 1945 and was sailing to Japan when the war ended. Mr Emerson said that the *ST 468* was responsible for bringing barges back to the mainland towards the end of the war.

15. Mr Emerson recalled that when he sailed on the *Bobbie* it travelled to Finschhafen in New Guinea and when he was on the *Nanagai* they took troops on R&R to Milne Bay. In 1944 they transported troops to Samarai Island on the *Nanagai*. The *Valkyrie* was the Commander's personal flag ship and when Mr Emerson served they sailed it from Milne Bay to Finschhafen.

The Directorate's Submission

16. The Directorate explained that the administration of Imperial awards for World War II was delegated to the Australian Government in 1948. The Dedman Papers became the authority for issuing these awards. The authority for administration of these awards was subsequently delegated to the Directorate.

17. The Directorate noted that a member of the Small Ships must spend six months afloat between 8 December 1941 and 2 September 1945 and must have made at least one voyage into the Pacific Theatre of War. The Directorate examined the ships' movement records and concluded that Mr Emerson had aggregated 28 days service afloat. To be awarded the 1939-45 Star he must have six months service afloat. For this reason Mr Emerson was not eligible to be awarded the 1939-45 Star.

18. The assessment and working papers revealed that the assessor found that Mr Emerson had entered the Pacific Theatre in the last six months of the War. However the assessor was not able to find that Mr Emerson had spent 180 days afloat because the Merchant Navy Ship movements' records showed that *ST 468* was afloat in the Pacific Theatre between 17 April and 14 May 1945 only, a period of 28 days. There was no record of the *Bobbie/Bobby* in the Ship listing records.

19. Specifically the records showed no movement of the *Nanagai* after 14 May 1943 and for the *Valkyrie* after December 1942. Copies of the Certificates of Discharge were included in the Directorate's papers but were not referred to in the assessment of Mr Emerson's service with the Small Ships. In the Directorate's letter of rejection of 4 October 2013, Mr Emerson's service on the *Nanagai* and *Valkyrie* was acknowledged. However the Directorate noted there was no documentary evidence showing the locality of either ship when Mr Emerson served on them. For this reason Mr Emerson's application was rejected.

Findings of Fact

20. The Tribunal finds that Mr Emerson was employed as an Able Seaman on active service by USATS on the Small Ships as follows:

- 10 August 1943 to 1 February 1944 – *S 164 Nanagai*

- 2 February 1944 to 19 August 1944 – *S 133 Valkyrie*
- 3 October 1944 to 2 January 1945 – *S 164 Nanagai*
- 3 January 1945 to 2 February 1945 – *Bobbie*
- 7 March 1945 to 16 April 1945 – *Bobbie*
- 17 April 1945 to 15 August 1945 – *S 583 ST 468*
- 16 August 1945 to 13 November 1945 – *S 583 ST 468*

21. The evidence in support of this finding is the Certificate of Release and Discharge, the official document of service provided by the United States Department of Defense. The Tribunal has no hesitation in accepting these documents as evidence of Mr Emerson's service. They are official documents of the United States Government and unless there is significant evidence refuting this documentary evidence, they must be accepted as an accurate record of service. The Directorate should not have relied on the official Australian records of ship movements to determine Mr Emerson's service record. It was provided with clear evidence by the United States Department of Defense of Mr Emerson's service record and it should have relied on this evidence.

22. Based on Mr Emerson's evidence and the written histories of the Small Ships², his service on the Small Ships involved sailing around New Guinea visiting islands in that area and towards the end of the War travelling to Manila. The ships he served on transported troops and their equipment and towed barges to New Guinea and the islands in that vicinity.

Conclusion

23. The Tribunal accepts that the Directorate has correctly set out the law in relation to the award of 1939-45 Star. That is, a member of the Small Ships must have spent at least six months *service afloat in the areas of active operations during the period from the 3rd September, 1939, to the 2nd September, 1945*. Members of the Merchant Navy must spend at least six months afloat including at least one voyage through one of the specified areas of active operations. The Directorate has accepted that Mr Emerson spent 28 days afloat on the *ST 468* in the Pacific Theatre, one of the specified areas of active operations, between 17 April and 14 May 1945. Therefore Mr Emerson satisfies the requirement that he had at least one voyage through a specified area of operations between December 1941 and September 1945.

24. The only matter in issue is whether Mr Emerson spent at least six months service afloat. The term 'service afloat' is defined in the *Commonwealth Navy Order* as service for pay on merchant vessels. Mr Emerson's service with USATS was on merchant vessels for longer than six months and was service for pay. Sub paragraph 1(B) of the Order sets out three exceptions when the person will not be considered to be serving afloat. The first exception applies to stationary depot ships. Service travelling to another port on depot ships is not counted as service afloat. Mr Emerson's evidence was that the small ships he served on were mainly engaged in transporting troops and equipment around the islands of New Guinea. He was able to refer to particular journeys on the various ships when they towed barges, visited Finschhafen and Milne Bay and transported troops on R&R. There is no evidence that any of the small ships Mr Emerson served on was a stationary depot ship.

² Ladislav Reday, *The Raggle Taggle Fleet*, San Francisco Maritime Museum, 2003; Bill Lunney and Frank Finch, *Forgotten Fleet*, Forfleet Publishing, Medowie NSW, 1995; Bill and Ruth Lunney, *Forgotten Fleet 2*, Forfleet Publishing, Medowie NSW, 2004; and Ernest Flint, *The Formation and Operation of the US Army Small Ships in World War II*, self published, Coomba Park, 2013.

25. The second exception refers to service at shore bases or depots. Mr Emerson's service record indicates that he served on vessels for approximately 25 months. The remaining months may have been served at shore bases or depots. Therefore this exception does not apply. The third exception refers to service aboard vessels in wholly or mainly boomed, protected waters. Once again there is no evidence that Mr Emerson's service was on such vessels. Mr Emerson's evidence is that the ships he served on travelled around New Guinea and as far as Manila. These waters were not boom protected nor were they within the limits or still waters. The Tribunal accepts Mr Emerson's evidence and finds that he served afloat for at least six months of his service in the USASS.

26. The Tribunal concludes that Mr Emerson satisfies the requirements to be awarded the 1939-45 Star. He served afloat for at least six months between May 1941 and September 1945. During that period he served in the Pacific Theatre of War, a specified area of active operation.

DECISION

27. The Tribunal decided to set aside the decision under review that Mr Ernest Emerson should not be awarded the 1939-45 Star and substitute its decision that Mr Ernest Emerson is to be recommended for the award of the 1939-45 Star.