

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2013-101



FINAL DECISION

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 Chair docketed the application after receiving the applicant's completed application on April 17, 2013, and subsequently assigned it to [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated January 23, 2014, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant, who retired from active duty on June 30, 2010, asked the Board to correct his record to show that he transferred his benefits under the Post-9/11 Veterans' Educational Assistance Act of 2008 ("Post-9/11 GI Bill")¹ to his dependent before retiring from active duty. The applicant alleged that he was never counseled about the requirement to transfer his unused educational benefits to his dependents before leaving active duty until after he retired and tried unsuccessfully to transfer them. He alleged that if he had been properly counseled, he would have completed the paperwork to transfer the benefits before retiring since he knew his daughter would be attending college. In support of his claim, the applicant submitted a copy of Coast Guard guidance on this issue, ALCOAST 044/09, dated January 16, 2009, which says nothing about the requirement to transfer one's benefits before leaving active duty.

SUMMARY OF THE RECORD

The applicant retired from active duty with more than 20 years of service on June 30, 2010. Before retiring, the applicant did not transfer his Post-9/11 GI Bill educational benefits to his dependents, and there is nothing in the record to show that the Coast Guard counseled him

¹ 38 U.S.C. § 3319 (2010) (authorizing members on active duty with at least six years of active service to transfer part of their educational benefits to their dependents if they agree to obligate four more years of service or "the years of service as determined in regulations pursuant to subsection (j), which authorizes the Secretary of Defense to prescribe regulations for purposes of this section).

about his Post-9/11 GI Bill educational benefits or his eligibility to transfer his educational benefits before his retirement.

VIEWS OF THE COAST GUARD

On August 16, 2013, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant the applicant's request.

The JAG noted the several ALCOASTs that it issued about the new transferability of Post-9/11 GI benefits for those on active duty² but also noted that the Board has already found in the final decision in BCMR Docket No. 2012-054 that the Coast Guard erred by failing to provide its members with the documented, individual, pre-separation counseling about their Post-9/11 GI benefits required by DTM 09-003,³ which was issued by the Department of Defense (DoD) on June 22, 2009, and expressly adopted by the Coast Guard. The Coast Guard stated that this applicant should receive the same relief as the applicant in Docket No. 2012-054 because the facts and circumstances of their cases are similar.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On September 6, 2013, the applicant responded to the views of the Coast Guard and stated that he agreed with them.

APPLICABLE REGULATION

Directive Type Memorandum (DTM) 09-003

DTM 09-003,⁴ issued by the Department of Defense (DoD) on June 22, 2009, sets forth the policies and procedures for carrying out the Post-9/11 GI Bill, which became effective on August 1, 2009. The DTM states that it is effective immediately and that it is applicable to the Office of the Secretary of Defense and the Military Departments including the Coast Guard by

² U.S. Coast Guard, ALCOAST 447/08 (Sept. 18, 2008), para. G ("Transferability: A member may have the opportunity to transfer benefits to their spouse or dependent child. Members must be on active duty at the time of this election, must have served six years since 9/11, and must agree to serve an additional four years of active service. Detailed guidance is being developed in conjunction with DOD and will be released ahead of the August 2009 implementation date."); ALCOAST 044/09 (Jan. 16, 2009), para. 4 ("Transferability: The basic requirements to be eligible to transfer this entitlement to a dependent (spouse or child) are that a member must be on active duty on 1 August 2009; must have a minimum of six years active service since 11 September 2001 and must agree to serve an additional four years of active service effective on the date they elect to transfer."); ALCOAST 250/09 (April 28, 2009), para. 3 ("Eligibility: The Post-9/11 GI Bill ... is an automatic entitlement generally available to servicemembers with at least 90 days of active duty service following 11 September 2001. No action is required by members until they either 1) apply to receive benefits, 2) seek to transfer benefit eligibility to dependents, or 3) are currently eligible for another education benefit ... and who seek eligibility under the Post-9/11 GI Bill."); para. 5.b. ("The Office of the Secretary of Defense has not yet released the final policy on transferability."); ALCOAST 377/09 (June 26, 2009) (acknowledging DTM 09-003 as Coast Guard policy and stating in paragraph 6 that "[g]enerally, to be eligible to transfer unused education benefits, an individual must be a member of the armed forces (active duty or SELRES) on or after 1 Aug 2009 and obligate required service as outlined in [DTM 09-003]"); ALCOAST 443/09 (July 31, 2009) (encouraging members to review DTM 09-003 and to seek guidance).

³ U.S. Department of Defense, DTM 09-003, Post-9/11 GI Bill (June 22, 2009) (hereinafter "DTM 09-003").

⁴ *Id.*

agreement with the Department of Homeland Security. The DTM defines “Military Departments” and “Military Services” as the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Paragraph 3 of Attachment 1 (Responsibilities) to DTM 09-003 states that the Secretaries of the Military Departments “shall ... b. Ensure that all eligible active duty members . . . are aware that they are automatically eligible for educational assistance under the Post-9/11 GI Bill program upon serving the required active duty time established in Chapter 33 of [Title 38 of the United States Code]. ... g. Provide active duty participants and members of Reserve Components with qualifying active duty service individual pre-separation or release from active duty counseling on the benefits under the Post-9/11 GI Bill and document accordingly.”

Paragraph 3.a.(3)(b) of Attachment 2 (Procedures) to DTM 09-003 states that a member may transfer his benefits to his dependents without obligating additional military service if he is on active duty on August 1, 2009, and has an approved retirement date prior to July 1, 2010.

Paragraph 3.g.(1) of Attachment 2 states that an individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement to the individual’s family member only while serving as a member of the Armed Forces. The DTM’s Glossary defines “member of the Armed Forces” as a member serving on active duty or in the Selected Reserve.

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 submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicant’s retirement.⁵

2. The applicant asked the Board to correct his record to show that he transferred his educational benefits to his dependents under the Post-9/11 GI Bill, which became effective on August 1, 2009.⁶ He alleged that he was eligible to do so but was erroneously never informed of the requirement to transfer his benefits before he retired. When considering such allegations of error or injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.⁷ Absent evidence to the contrary, the Board presumes that Coast Guard officials and

⁵ 10 U.S.C. § 1552(b); *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers’ and Sailors’ Civil Relief Act of 1940, the BCMR’s three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member’s active duty service).

⁶ 38 U.S.C. § 3319 (2010) (authorizing members on active duty with at least six years of active service to transfer part of their educational benefits to their dependents if they agree to obligate four more years of service or “the years of service as determined in regulations pursuant to subsection (j),” which authorizes the Secretary of Defense to prescribe regulations for purposes of this section).

⁷ 33 C.F.R. § 52.24(b).

other Government employees have carried out their duties “correctly, lawfully, and in good faith.”⁸

3. The applicant was entitled to documented, individual, pre-separation counseling about his Post-9/11 GI Bill benefits before he retired, including his eligibility to transfer his benefits to his dependents only while still on active duty.⁹ The applicant alleged that he was not counseled about his benefits under the Post-9/11 GI Bill, and there is no documentation or other evidence of individual, pre-separation counseling in his record. Therefore, the applicant has proved by a preponderance of the evidence that he was not properly counseled before he retired about his benefits under the Post-9/11 GI Bill—specifically, the necessity of transferring benefits to dependents while still on active duty.

4. The timeliness of the application persuades the Board that if the applicant had been timely counseled about his eligibility under the Post-9/11 GI Bill to transfer to his educational benefits to his dependents and about the necessity of doing so before he retired, the applicant would have transferred his educational benefits to his dependents before he retired.

5. In BCMR Docket No. 2012-054, the Board determined that DTM 09-003 requires the Coast Guard to counsel eligible individuals about their Post-9/11 GI Bill educational benefits before they separate and to document that counseling. The Board found that the issuance of the ALCOASTs did not constitute constructive notice and did not satisfy the counseling requirement in DTM 09-003. Because the Coast Guard erred by failing to provide such counseling, the Deputy General Counsel approved the relief recommended by the Board in Docket No. 2012-054 and several subsequent similar cases, which was to correct the applicant’s record to show that he had transferred his benefits to his dependents before he retired. Like the applicant in 2012-054, the applicant in this case was eligible to transfer his educational benefits before he retired, was entitled to individual, pre-separation counseling about his eligibility, and was not so counseled. Therefore, the applicant in this case is entitled to the same relief that the applicant in 2012-054 received.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

⁸ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁹ DTM 09-003, Attach. 1, para. 3.g. (requiring the Service to “provide active duty participants . . . with qualifying active duty service individual pre-separation or release from active duty counseling on the benefits under the Post-9/11 GI Bill and document accordingly.”).

ORDER

The application of [REDACTED] USCG (Retired), for correction of his military record is granted. His record shall be corrected to show that before retiring from active duty on June 30, 2010, he transferred his Post-9/11 GI Bill educational benefits to his eligible dependents. The Coast Guard shall assist him with the paperwork necessary to accomplish this transfer of benefits.

January 23, 2014

