

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2014-202



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 September 2, 2014, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 22, 2015, 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 December 1, 2009, 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 his eligibility to transfer his unused educational benefits to his dependents before leaving active duty. He was on terminal leave during the summer of 2009 and had heard about the new authorization to transfer benefits and planned to take advantage of it. However, he was never told about the requirement that he transfer his benefits before leaving active duty. He alleged that if he had been properly counseled, he would have completed the paperwork to transfer the benefits before he retired.

The applicant stated that up until January 2014, he believed that his child would be able to use his educational benefits when it came time for her to attend college. But in January 2014, when she getting ready for college, the Department of Veterans' Affairs advised him that his child could not use his educational benefits because he had not transferred them before he retired.

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).

SUMMARY OF THE RECORD

The applicant retired from active duty with more than 25 years of service on December 1, 2009. Before retiring, the applicant did not transfer his Post-9/11 GI Bill educational benefits to his dependent, and there is nothing in the record to show that the Coast Guard counseled him about his Post-9/11 GI Bill educational benefits or his eligibility to transfer his educational benefits before his retirement from active duty.

The applicant's military records show that daughters were born to him and his wife in 1996 and 2003.

VIEWS OF THE COAST GUARD

On March 17, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant the applicant's request. The JAG adopted the findings and recommendation provided in a memorandum submitted by the Personnel Service Center (PSC).

PSC stated that pursuant to DTM 09-003,² which was issued by the Department of Defense (DoD) on June 22, 2009, members must be serving on active duty or in the Selected Reserve and must normally obligate additional active service to be eligible to transfer their Post-9/11 GI Bill educational benefits to their dependents. However, DTM 09-003 made an exception for those who retired from August 1, 2009, to July 1, 2010. For those retirees, no obligation of additional service was required. Therefore, before he retired on December 1, 2009, the applicant was eligible to transfer his benefits to his dependents.

PSC stated that although the Coast Guard issued several ALCOASTs³ with information about the benefits-transfer program in 2008 and 2009, in BCMR Docket No. 2012-121, the

² U.S. Department of Defense, DTM 09-003, Post-9/11 GI Bill (June 22, 2009) (hereinafter "DTM 09-003"); 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]").

³ 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

Board found that the ALCOASTs did not constitute individual counseling and that the Coast Guard had committed error by failing to provide the applicant with the documented, individual pre-separation counseling about the transferability of Post-9/11 GI benefits that is required by DTM 09-003. PSC noted that this duty to counsel became effective when DTM 09-003 was published on June 22, 2009. Because the applicant in this case is similarly situated in that he was fully eligible to transfer his benefits before he retired and was not counseled about the requirement to do so before leaving active duty, PSC recommended that the Board grant relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On March 25, 2015, the applicant responded to the views of the Coast Guard and stated that he has no objection to the Coast Guard's recommendation.

APPLICABLE REGULATION

Directive Type Memorandum (DTM) 09-003

DTM 09-003, 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 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.

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).

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 Board finds that the application was timely filed within three years of the applicant's discovery of the error in 2014, when his then 18-year-old daughter wanted to use his educational benefits to attend college.⁴

2. The applicant asked the Board to correct his record to show that he transferred his educational benefits to his dependent under the Post-9/11 GI Bill, which became effective on August 1, 2009.⁵ 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.⁶ Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties "correctly, lawfully, and in good faith."⁷

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.⁸ 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.

⁴ 10 U.S.C. § 1552(b).

⁵ 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).

⁶ 33 C.F.R. § 52.24(b).

⁷ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁸ 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.").

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 Principal 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 ON NEXT PAGE)

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 December 1, 2009, 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.

May 22, 2015

