DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-035

[redacted]

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. The Chair docketed the case after receiving the applicant's completed application on February 12, 2015, and assigned it to staff member [redacted] to prepare the draft decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 9, 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 October 31, 2007, 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 two sons before his retirement from active duty. He stated that the Post-9/11 Veterans Educational Assistance Act became law on June 30, 2008, but he did not become aware of the transferability of his education benefits until recently. He stated that he discovered the error on January 1, 2015, upon being told by the Department of Veterans' Affairs (DVA) that he was eligible for the Post-9/11 GI Bill. The applicant also argued that he should be allowed to transfer his unused education benefits because although he retired two years before the Post-9/11 GI Bill went into effect, Congress intended it to be retroactive to members who served on active duty for six years or more after September 11, 2001.

[1] Public Law 110-252, § 5001, 122 Stat 2323 (June 30, 2008), codified at 38 U.S.C. § 3319 (authorizing the Secretary of Defense in coordination with the Secretary of Veterans' Affairs to prescribe regulations so that members serving in the Armed Forces may transfer a portion of their entitlement to educational assistance under the Montgomery GI Bill program to their eligible dependents as of August 1, 2009, if the members have at least six years of service and agree to serve four more years or the amount of time prescribed by the regulations).

In support of his application, the applicant submitted a copy of a January 26, 2015, letter from the DVA, which notified him that he was "entitled to benefits for an approved program of education or training under the Post-9/11 GI Bill."

SUMMARY OF THE RECORD

The applicant served in the U.S. Coast Guard for more than twenty years and his DD 214 shows that he served from October 19, 1987, until his retirement on October 31, 2007. He did not transfer his Post-9/11 GI Bill educational benefits to his dependents before he retired, and his record does not contain anything to document that he was counseled about the 2008 Post-9/11 GI Bill before he retired.

APPLICABLE LAW AND POLICY

Post-9/11 Veterans Educational Assistance Act of 2008

On June 8, 2008, Congress passed the Military Construction, Veterans' Affairs, and Related Agencies Appropriations Bill, 2008.[2] Title V of that act, short title Veterans Educational Benefits, laid out the entire new educational benefits program for members of the Armed Forces that had served an aggregate of 36 months on active duty post-9/11. Section 5003(c) of the Act created the framework for the transferability of educational benefits, later codified in 38 U.S.C. § 3319. Section 5003(d) states "EFFECTIVE DATE. – This section [5003] and the amendments made by this section shall take effect on August 1, 2009."

Directive Type Memorandum (DTM) 09-003, June 22, 2009

On June 22, 2009, DoD set forth the policies and procedures for carrying out the Post-9/11 GI Bill in DTM 09-003. The DTM states that it is effective immediately and is applicable to the Office of the Secretary of Defense and the Military Departments including the Coast Guard by agreement with the Department. It states that the effective date of the Post-9/11 GI Bill is August 1, 2009. The regulation defined "Military Services" as the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Paragraph 3 of Attachment 2 (Procedures) states that the transferability program is designed to promote recruitment and retention of members of the Armed Forces.

Paragraph 3.a.(3) of Attachment 2 (Procedures) states that members eligible to transfer education benefits includes those members in the Armed Forces who are or become retirement eligible from August 1, 2009, through August 1, 2013, and agree to serve the additional period, if any, specified in paragraphs 3.a.(3)(a) through 3.a.(3)(e) of this attachment. A Service Member is considered to be retirement eligible if he or she has completed 20 years of active Federal service or 20 qualifying years as computed under section 12732 of Reference (b).

Paragraph 3.g.(1) of Attachment 2 (Time of Transfer) states that an individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement

[2] Pub. L. 110-252 (2008).

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.

Coast Guard ALCOAST 377/09, June 26, 2009

The Coast Guard released ALCOAST 377/09 on June 26, 2009 (internet release was authorized) announcing the Department of Defense and Coast Guard policy concerning Post-9/11 GI Bill benefits and the transferability of unused benefits to family members. Paragraph 6 of the ALCOAST states that to be eligible to transfer unused education benefits to a family member, an individual must be a member of the armed services (active duty or selected reserve) on or after August 1, 2009 and obligate required service in accordance with paragraph 3.a. of DTM 09-003. Paragraph 7.B. states that online applications for the transfer of benefits would be accepted beginning on June 29, 2009. The ALCOAST also states that the Department of Veterans Affairs is the authority for the Post-9/11 GI Bill, but that transferability policy is directed by the Office of the Secretary of Defense and the Under Secretary of Defense.

VIEWS OF THE COAST GUARD

On August 17, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in accordance with a memorandum submitted by the Commander, Personnel Service Center (PSC).

PSC argued that the application is untimely and should not be considered by the Board beyond a cursory review because the applicant was discharged in 2007 but did not submit his application until 2015. PSC argued that relief should be denied because the applicant retired from the Coast Guard on October 31, 2007, but the policies and entitlements contained in DTM 09-003—including the transferability of unused education benefits to family members—did not become effective until August 1, 2009. PSC also noted that according to the DTM, a member eligible to transfer their unused education benefits must be a member of the armed forces on or after August 1, 2009, and that this is consistent with information that was contained in ALCOAST 044/09, which states that the basic requirement to be eligible to transfer benefits to a dependent are that the member must be on active duty on August 1, 2009, must have a minimum six years active service since September 11, 2001, and must agree to serve an additional four years of active service effective on the date they elect to transfer.

PSC also argued that the transferability of the Post 9/11 GI Bill Education Assistance Benefit Program is not retroactive, and only qualifying members of the Armed Forces starting August 1, 2009, were able to transfer their unused benefits to their dependents. Moreover, PSC argued that one of the purposes of the transferability program it to promote recruitment and retention of members of the Armed Forces, and 38 U.S.C. § 3319 prohibits former service members from transferring their unused education benefits.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 18, 2015, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. The BCMR did not receive a response.

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 over this matter pursuant to 10 U.S.C. § 1552.

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice in his record.[3] Although the applicant retired from the Coast Guard in 2007 and the transferability program went into effect in August 2009, the applicant stated that he did not discover the alleged error in his record until he was notified by the DVA that he was eligible for Post-9/11 GI Bill benefits. He submitted a copy of the DVA's letter, and there is no evidence that the applicant became aware of the alleged error before he received the letter. Therefore, the Board finds that the application is timely because the applicant did not discover the alleged error until 2015.

3. The applicant alleged that his ineligibility to transfer his education benefits to his dependents is erroneous and unjust. He reasoned that his record should be corrected to show that he transferred his unused education benefits to his dependents because the Post-9/11 GI Bill did not exist when he retired in 2007 and argued that the benefits are retroactively available to those who served at least six years on active duty after September 11, 2001. The Board begins its analysis in every case 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.[4] 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."[5]

4. The timing of the law defeats the applicant's claim. Congress did not authorize the transfer of MGIB benefits until June 30, 2009. The statute shows that it did so "to promote recruitment and retention in the uniformed services," and so the benefit was made available only to those serving as a member of the Armed Forces when the transfer is executed. Congress authorized the Secretary of Defense to issue regulations prescribing the eligibility criteria, which the Secretary did in DTM 09-003 on June 26, 2009. Under DTM 09-003, which the Coast Guard adopted, a member must have served on active duty or in the Selected Reserve on or after August 1, 2009, to be eligible to transfer his benefits. In fact, the Glossary of DTM 09-003 specifically states that already retired members are not eligible members for the purpose of transferring benefits. Because the applicant retired in 2007 and has not served on active duty or in the

[3] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

[4] 33 C.F.R. § 52.24(b).

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

Selected Reserve since August 1, 2009, he is not legally entitled to transfer his benefits to his dependents.

5. The benefit-transfer program cannot be applied retroactively prior to August 1, 2009. Section 5503(d) of the 2008 law[6] that authorized the program expressly states, "This section [5003] and the amendments made by this section shall take effect on August 1, 2009." Additionally, 38 U.S.C. § 3319(f)(1), which provides when a transfer may take place, states a member can transfer benefits "only while serving as a member of the Armed Forces when the transfer is executed." The Board is bound by these laws. Moreover, the Supreme Court has ruled that a law should be given retroactive effect only if Congress clearly intends that the law be applied retroactively.[7] Thus, statutes are assumed to have only prospective effect unless Congress expressly states otherwise. In a unanimous opinion, the Supreme Court has stated, "Retroactivity is not favored in the law. … [C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[8] (Citation omitted.) There is nothing in the statute, 38 U.S.C. § 3319, to indicate that Congress intended the program to apply retroactively to members who were discharged or retired before August 1, 2009, and the Secretary of Defense did not attempt to apply the law to prior members or retired members in DTM 09-003.

6. Accordingly, the applicant's request should be denied.

(ORDER AND SIGNATURES ON NEXT PAGE)

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[6] Pub. L. 110-252 (2008).

[7] *See Landaraf v. USI Film Products.* 511 U.S. 244, 280 (1994); *see United States v. Security Indus. Bank*, 459 U.S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.").

[8] *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988).

ORDER

The application of [redacted], USCG (Retired), for correction of his military record is denied.

October 9, 2015

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