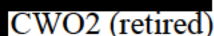
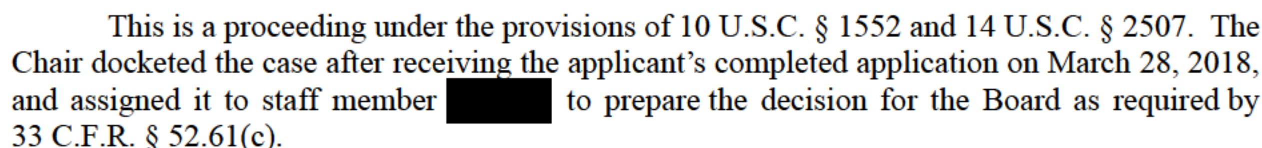
DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-114

 CWO2 (retired)

FINAL DECISION



This is a proceeding under the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the applicant's completed application on March 28, 2018, and assigned it to staff member [redacted] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 22, 2019, 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 served on active duty from January 24, 1995, until he retired on February 1, 2015. He asked the Board to backdate the date of transfer of his Post-9/11 GI Bill[1] education benefits to his dependents so that he will have served his obligated service requirement and successfully transferred his education benefits to his dependents before he retired. He stated that his current date of transfer of these benefits in DoD's Transfer Education Benefits (TEB) system is December 2, 2012. But because he retired on February 1, 2015, less than four years from the date of transfer, the transfer was not technically complete even though his daughter had begun to use his education benefits in 2014.

The applicant alleged that he actually transferred his unused education benefits to his three children in 2009 or 2010 when he was stationed aboard a river buoy tender. He and other members received training on the Post-9/11 GI Bill program at the office of the Shore Side Detachment. An Educational Services Officer (ESO) from Sector Ohio Valley instructed them on how to log into TEB and transfer their educational benefits to their dependents. The applicant

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[1] Post-9/11 Veterans' Educational Assistance Act of 2008, 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 can 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).

stated that the ESO was adamant that they should do so, especially if they had more than 15 years of service. The applicant alleged that because his cutter had no workstation with a CAC card reader, he logged into the website using a username and password and transferred his benefits. He alleged that he knew he was never going to use his educational benefits, so he transferred all 36 months' worth to his children at that time.

The applicant stated that he has no way to prove that he transferred the benefits to his kids through in 2009 or 2010. If he had any paperwork proving it, any such documents would have been in his home in [redacted], which was flooded in August 2016, when he had more than four feet of water in his house and he lost almost everything, including his training records. The applicant stated that he has reached out to the current Sector office to try to gather some evidence to support his claims but was told that they had not retained anything to show that he received training about the benefits transfer program in 2009 or 2010. He also attempted to reach out to members of his former command, but they have either retired or will not respond to his emails.

The applicant stated that after his eldest daughter was accepted to [redacted] in December 2012, he decided to amend his transfer so that she would receive all 36 months of his benefits. Therefore, he logged into TEB on December 3, 2012, using his CAC card "and it was like the first time I had ever logged on." And he did "[n]ot know[] that it was going to use that date as the 'New' TEB [transfer of educational benefits] date." The applicant stated that TEB treated his request as if it were his first transfer request, and thus his transfer request date became December 3, 2012, instead of sometime in 2009 or 2010. Therefore, he was required to complete another four years of obligated service, through December 2, 2016, for the transfer to be valid. The applicant alleged that the website must not have accepted his transfer in 2009 or 2010 "because of an outage of some sorts and did not record [his] login and transfer. It could have also been because we could not access correctly without our CAC cards. [He] truly feel[s] that this was an error with the portal and was not any fault of [his] own."

The applicant alleged after he retired on February 1, 2015, he did not notify the Department of Veterans' Affairs (VA), which had begun paying his educational benefits to [redacted] for his daughter's education in 2014, because he thought he was still eligible: "In my mind, I was going off the 2009-2010 date that I initially completed the transfer, and [it] did not even cross my mind that I did not meet my 4 years obligation."

Regarding his retirement, the applicant explained that he had chosen to retire in lieu of receiving non-judicial punishment (NJP) after he drank too much alcohol and had to be removed from an airline flight in August 2014. He explained that he has suffered severe anxiety and panic attacks for years but in the summer of 2014 flew to a five-week training without taking his anti-anxiety medication. Therefore, he claimed, he did not have access to his medication when, on the morning of his return, he had several bouts of anxiety and drank too much. Because he had a "past history with alcohol"[2] and had already undergone more than 90 days of inpatient and out-

[2] A CG-3307 in the applicant's record dated February 25, 2004, states that he had incurred his first "alcohol incident," been counseled about Coast Guard alcohol policies, and screened for alcohol abuse or dependence. As a result of the screening, he was required to attend basic alcohol prevention and education training but was found not to meet the criteria for abuse or dependence.

patient rehabilitation treatment, his command "made the determination that [he] should retire," and the applicant agreed. the applicant retired with 20 years and 7 days of active duty. The applicant's DD 214 shows that he was honorably retired for "Unacceptable Conduct" on February 1, 2015.

The applicant alleged that he only discovered that his first benefit transfer was never processed and that he had not successfully transferred his benefits on August 23, 2017, when he received a letter from the VA stating that he was ineligible to transfer his benefits because he had not completed the four years of obligated service through December 2016, and so all of the payments made to ███ were considered to be debts. (The applicant submitted information about how to appeal a VA decision but did not submit a copy of this letter.)

The applicant did submit a copy of a letter from the VA dated January 9, 2018, which was addressed to his daughter and states that her request for a waiver of the $56,663.90 debt had been denied by the VA Committee on Waivers and Compromises. The letter states that when DEERS records showed that the applicant had retired, "[b]ased on updated [DoD] records and in compliance with the law and Service directives, VA award actions stopped all Chapter 33 education benefits. This created your valid cumulative debt balances of tuition/fees $23,854.80, housing $29,850.76 and books and supplies $2,958.34." The letter noted that her father had incurred a service obligation date of December 3, 2016, and

> [b]oth you and your parent were responsible for knowing the terms and obligation required for the transfer of entitlement. Your award letters notified you of your responsibility to promptly notify VA of any changes in duty status or eligibility. Your failure to promptly notify VA of the change in duty status of your parent caused significant and unwarranted increase of your debt.
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> The Coast Guard revoked your benefits because your parent did not meet the service obligation established with the transfer benefit. Authority: 38 U.S.C. 3034(a), 3311(c)(4), 3319. You and your veteran parent bear the burden of this debt.
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> The regulations state that VA will treat all payments of educational assistance to dependents as overpayments if the transferor does not complete the required service. Any earned benefits will be restored to the veteran. Granting full waiver would allow you to keep monies and benefits to which the Coast Guard determined you were not entitled. This would result in unjust enrichment to you at the expense of the government and taxpayers.
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> You have no earned benefit entitlement to offset against consideration of granting a waiver and the Committee has no authority to offset your debt against the restored benefit entitlement of your parent. Regardless of fault, you collected government funds to which you were not entitled, receiving the full unearned benefit and therefore should be held responsible for repayment.

The VA letter notes that although it was an "unfortunate situation," the benefit had been rescinded because her father had retired before the contractual obligation date. It states, "Upon weighing the applicable elements of fault, undue financial hardship, unjust enrichment, benefit purpose and changed position, the Committee has determined that it is not against the standard of equity and good conscience to collect the debt." The letter also advises her that "[i]f there are extenuating circumstances related to the retirement or transfer benefit," her parent could apply to the Board for Correction of Military Records.

VIEWS OF THE COAST GUARD

On August 13, 2018, a judge advocate (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 submitted a May 16, 2018, email from the Coast Guard's GI Bill Program Specialist to PSC stating that he had "checked USCG records along with DMDC milConnect Transfer of Education Benefits (TEB) web application and there is no record of [the applicant] transferring or attempting to transfer his Post 9-11 GI Bill Education Benefits to his dependents prior to his December 3, 2012 request date." The specialist stated that on that day, the applicant had incurred an additional 48 months of obligated service, through December 3, 2016, to be eligible to transfer his education benefits to his dependents. The specialist stated that the applicant did not fulfill this obligated service requirement because he retired on February 1, 2015, and so his benefits transfer "request was eventually disapproved for failing to complete mandatory service requirement [in accordance with] DoDI 1341.13."

PSC stated that when the applicant submitted his request to transfer his education benefits on December 3, 2012, he incurred a four-year service obligation that he had to complete for the transfer to be effective,[3] which he did not complete. PSC noted that members may visit the TEB website "to check the status of their submission and the TEB obligation end date."

PSC concluded that relief should be denied because there is nothing in the applicant's record to show that he transferred or tried to transfer his Post-9/11 GI Bill benefits in 2009 or 2010, as he alleged. PSC stated that the applicant retired from the Coast Guard on February 1, 2015, and his 2012 transfer request was eventually denied because he had requested a voluntary retirement before completing the four-year obligated service requirement.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On August 21, 2018, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within 30 days. He responded on September 18, 2018, and disagreed with the recommendation of the Coast Guard.

In addition to restating many of the arguments he made in his application, the applicant stated that he clearly remembers receiving training about the transfer program in 2009 and that the Coast Guard ESO had him and other members in his unit create user names and passwords so they could log into the system and make the transfer. He stated that the cutter on which he was stationed at the time did not have a CAC reader so they had to log into the system manually, and he opined that this was the reason his transfer was not recorded properly. He also stated that after he transferred all 36 months of benefits to his daughter in December 2012 following her acceptance to ████ he made numerous attempts to contact the Coast Guard's benefit transfer representative to find out why his 2009 transfer request had not been processed, but he "could never get through."

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[3] PSC noted that there is an exception for members discharged early due to disability.

The applicant also argued that the Coast Guard's failure to timely notify him that his daughter was not eligible to receive his unused education benefits is an injustice because it caused her to miss several opportunities to receive money for her education under sponsored tuition-assistance programs. He noted that he was a resident of when he joined the Coast Guard in 1995 and thus his daughter would have been eligible to receive education benefits from the state of The applicant noted that his daughter had received a partial scholarship to attend in and that if she had known that she was not eligible to receive her father's education benefits then she could have accepted money under the to attend

The applicant also stated that his daughter missed out on receiving money for school in as a result of the Coast Guard's failure to timely notify him that she was not eligible to receive his education benefits. He stated that his daughter received Certificates of Eligibility from the VA for every semester at except the last two and argued that if he had known that she was not eligible for the money from the VA in the beginning then she could have applied for education assistance from the state of under its

The applicant's eldest daughter submitted an impassioned letter to the Board in which she described the substantial financial and emotional difficulties that she faces now that the VA has told her that she must repay the nearly $60,000 that the VA had paid her school over the past three years. She stated that she began attending in 2014 and received a COE from the VA at that time. She subsequently received COEs from the VA each semester and "[p]rior to retirement my father was also assured by his Commanding Officer that everything was on the up-and-up as it pertained to his GI Bill transferability." She stated that it was not until August 2017 that she received a letter from the VA stating that she was no longer eligible for the benefits and was owed the money back. She stated that she was in her third year of nursing school at and that the VA's demand that she repay the money was shocking because she had received Certificates of Eligibility from the VA each semester starting in 2014 and had no idea that eligibility for her father's GI Bill benefits was in jeopardy. She stated that since receiving the notification from the VA she has had trouble focusing at school and battled severe anxiety and depression. She stated that repaying the debt would have severe financial impacts on her and her family.

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APPLICABLE LAW AND POLICY

Title 38 U.S.C. § 3319 states the following in pertinent part:

(a) In general – (1) Subject to the provisions of this section, the Secretary concerned may permit an individual described in subsection (b) who is entitled to educational assistance under this chapter to elect to transfer to one or more of the dependents specified in subsection (c) a portion of such individual's entitlement to such assistance, subject to the limitation under subsection (d).

(2) The purpose of the authority in paragraph (1) is to promote recruitment and retention in the uniformed services. The secretary concerned may exercise the authority for that purpose when authorized by the Secretary of Defense in the National Security interests of the United States.

(b) Eligible individuals – An individual referred to in subsection (a) is any member of the uniformed services who, at the time of the approval of the individual's request to transfer entitlement to educational assistance under this section, has completed at least—

(1) six years of service in the armed forces and enters into an agreement to serve at least four more years as a member of the uniformed services; or

(2) the years of service as determined in regulations pursuant to subsection (j).

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(f) Time for transfer; revocation and modification.—

(1) Time for transfer.—Subject to the time limitation for use of entitlement under section 3321, an individual approved to transfer entitlement to educational assistance under this section may transfer such entitlement only while serving as a member of the armed forces when the transfer is executed.

(2) Modification or revocation.—

(A) In general.—An individual transferring entitlement under this section may modify or revoke at any time the transfer of any unused portion of the entitlement so transferred.

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(i) Overpayment.—

(1) Joint and several liability.—In the event of an overpayment of educational assistance with respect to a dependent to whom entitlement is transferred under this section, the dependent and the individual making the transfer shall be jointly and severally liable to the United States for the amount of the overpayment for the purposes of section 3685.

(2) Failure to complete service agreement.—

(A) In general.—Except as provided in subparagraph (B), if an individual transferring entitlement under this section fails to complete the service agreed to by the individual under subsection (b)(1) in accordance with the terms of the agreement of the individual under that subsection, the amount of any transferred entitlement under this section that is used by a dependent of the individual as of the date of such failure shall be treated as an overpayment of educational assistance under paragraph (1).

(B) Exception. [Death of individual or discharge due to disability or hardship]

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(j) Regulations.—(1) The Secretary of Defense, in coordination with the Secretary of Veterans Affairs, shall prescribe regulations for purposes of this section.

(2) Such regulations shall specify—

(A) the manner of authorizing the transfer of entitlement under this section;

(B) the eligibility criteria in accordance with subsection (b); and

(C) the manner and effect of an election to modify or revoke a transfer of entitlement under subsection (f)(2)."

Coast Guard ALCOASTs

The Coast Guard has issued numerous ALCOAST bulletins about the Post-9/11 MGIB educational assistance program and about the transferability of benefits under that program:

- ALCOAST 447/08, released on September 18, 2008, provides a brief introduction of the Post-9/11 Veterans Education Act of 2008 (Post-9/11 GI Bill). Paragraph 3.g. states that a "member may have the opportunity to transfer benefits to their spouse or dependent children," and that detailed guidance would be released ahead of the August 2009 implementation date.

- ALCOAST 044/09, released on January 16, 2009, provides details about the transferability of benefits to spouses and children under the Post-9/11 GI Bill and notes that the member will have to obligate an additional four years of active service to be able to transfer the benefits to dependents. It states that an application to transfer benefits would be submitted electronically through a DoD website, and those applications would be verified by the Coast Guard. Data in that website compiled from other sources, such as DEERS and Direct Access, would be used to determine eligibility.

- ALCOAST 116/09, released on February 24, 2009, stated that each support command would have a Career Development Advisor who would be subject matter experts on a variety of matters, including MGIB and the Post-9/11 GI Bill.

- ALCOAST 250/09, released on April 28, 2009, states that the VA would begin accepting applications for transfer of benefits on or about June 15, 2009. It also notes that the Secretary of Defense had not yet released the final policy on transferability, specifically as it relates to members who are retirement eligible between 2009 and 2012.

- ALCOAST 377/09, released on June 26, 2009, announced the Department of Defense and Coast Guard policy concerning Post-9/11 GI Bill benefits and the transferability of unused benefits to family members as follows (capitalization adjusted):

> 1. This ALCOAST supersedes [prior ALCOASTs] and announces DoD/Coast Guard policy concerning Post-9/11-G.I. Bill education benefits as outlined in [Directive-Type Memorandum (DTM) 09–003 and 38 U.S.C. Chap. 33]. Particularly, [DTM-09-003] provides detailed policy on transferability of unused education benefits to family members. Servicemembers are encouraged to review [DTM 09-003] and consult with their unit Education Services Officer (ESO) for guidance on the Post-9/11 G.I. Bill. [DTM 09-003] is currently available on the Coast Guard Personnel Service Center (PSC) website: http://www.uscg mil/psc/.
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> 2. The Post-9/11 G.I. Bill, authorized under [38 U.S.C. Chap. 33] is an automatic entitlement generally available to servicemembers with at least 90 days of active duty serv1ce on or after 11 SEP 2001. No action is required by members until they either apply to receive benefits, 2) seek to transfer benefit eligibility to dependents, or 3) are currently eligible for another education benefit (MGIB, MGIB-SR, REAP) and who seek eligibility under the Post-9/11 G.I. Bill.
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> 3. The Department of Veterans Affairs (DVA) is now accepting applications for the Post-9/11 G.I. Bill for members who wish to receive benefits. VA form 22-1990, Application for VA Education Benefits, is available online at: http://www.gibill.va.gov. Once DVA processes an application for Post-9/11 G.I. Bill benefits, the member will receive a letter explaining the DVA decision regarding eligibility. Payouts for the Post- 9/11 G.I. Bill are not anticipated prior to 15 AUG 2009.
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> 4. Individuals eligible under another education benefit (MGIB, MGIB-SR, REAP), seeking eligibility under the Post-9/11 G.I. Bill are directed to the DVA website. The application form requires that individuals make an irrevocable election to convert from their existing program to the Post-9/11 G.I. Bill. Members should review [DTM 09-003] and consult with their ESO prior to making an election.

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> 6. Transferability eligibility: Generally, 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 paragraph 3.a. of [DTM 09-003]. Family members eligible to receive transferred benefits are outlined in paragraph 3.b. of [the DTM].
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> 7. Transferability of Education Benefits (TEB) web application:
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> a. The TEB web application provides an eligible servicemember the ability to elect to transfer educational benefits to an eligible dependent. Via the TEB web application, all CG applications will be reviewed by the Coast Guard Personnel Service Center (PSC). Accepted applications are automatically sent to the VA for processing once the transfer is approved by PSC. Once approved, the dependent must apply to the DVA for a certificate of eligibility by submitting VA form 22-1990, Application for VA Education Benefits as indicated in paragraph 3. Servicemembers do not need to apply for education benefits through the VA prior to applying for transferability via the TEB web application.
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> b. The TEB web application is scheduled to open on 29 JUN 2009. The link is: https://www.dmdc.osd mil/teb/. This link will not be operational until 29 JUN 2009. Service members are directed to apply to their appropriate service component, active or reserve.
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> 10. Members with questions regarding VA education benefits are encouraged to contact their Education Services Officer (ESO) for clarification and guidance. ESOs are encouraged to familiarize themselves with general DVA guidelines concerning Post-9/11 G.I. Bill and direct members to the DVA website for detailed clarification. The DVA is the authority for the Post-9/11 G.I. Bill. Transferability policy, however, is directed by the Office of the Secretary of Defense (OSD) and detailed in [DTM-09-003]. ESO questions regarding transferability policy only may be directed to [name redacted], COMDT (CG-1221), at [phone number redacted].

- ALCOAST 443/09, issued on July 31, 2009, noted that applications to transfer education benefits to dependents under the Post-9/11 GI Bill that had been submitted through TEB would start being approved effective as of August 1, 2009, and that members could check the status of their applications by logging into the TEB web application and reading the "status indicator." It stated that as soon as an application was approved, the dependent could apply to receive the benefits and should visit a VA website for detailed information and FAQs. Members were encouraged to contact their ESOs or an ESO blog with FAQs about the Post-9/11 GI Bill.

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 1.a. of Attachment 2 to DTM 09-003 states that the "DVA is responsible for determining eligibility for education benefits under the Post-9/11 GI Bill. Generally, to be eligible for the Post-9/11 GI Bill, individuals must serve on active duty on or after September 11, 2001," for a specified period of time.

Paragraph 1.b.(8) of Attachment 2 states that members who are eligible for educational benefits under the MGIB or another program could elect to receive benefits under the Post-9/11 GI Bill instead and receive refunds of their contributions. Paragraph 1.e.(2) of Attachment 2 states that the method and process of making an election to receive educational assistance under the Post-9/11 GI Bill will be determined by DVA. Paragraph 1.e.(3) states that such an election is irrevocable.

Paragraph 1.e.(1)(f) of Attachment 2 states that even members who are not entitled to educational assistance under the MGIB, by reason of an election to disenroll, also "may elect to receive education assistance under [38 U.S.C. Chap. 33]" if, as of the date of the election, they meet the requirements for entitlement to educational assistance with [38 U.S.C. Chap. 33]." (During recruit training on February 7, 1995, the applicant signed a Statement of Disenrollment to disenroll from participation in MGIB.)

Paragraph 3 of Attachment 2 governs the transferability of unused education benefits to family members. Paragraph 3.a. states the following about eligibility:

> Any member of the Armed Forces on or after August 1, 2009, who, at the time of the approval of the individual's request to transfer entitlement to educational assistance under this section, is eligible for the Post-9/11 GI Bill, and
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> (1) Has at least 6 years of service in the Armed Forces (active duty and/or Selected Reserve) on the date of election and agrees to serve 4 additional years in the Armed Forces from the date of election, or
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> (2) Has at least 10 years of service in the Armed Forces (active duty and/or Selected Reserve) on the date of election, is precluded by either standard policy (Service or DoD) or statute from committing to 4 additional years, and agrees to serve for the maximum amount of time allowed by such policy or statute, or
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> (3) Is or becomes retirement eligible during the period from August 1, 2009, through August 1, 2013, and agrees 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).
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> (a) For those individuals eligible for retirement on August l, 2009, no additional service is required.
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> (b) For those individuals who have an approved retirement date after August 1, 2009, and before July 1, 2010, no additional service is required.
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> (c) For those individuals eligible for retirement after August 1, 2009, and before August 1, 2010, 1 year of additional service is required.
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> (d) For those individuals eligible for retirement on or after August 1, 2010, and before August 1, 2011, 2 years of additional service is required.
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> (e) For those individuals eligible for retirement on or after August 1, 2011, and before August 1, 2012, 3 years of additional service is required.

Paragraph 3.g.(1) of Attachment 2 states that the transfer must be made while the member is still serving on active duty or in the Selected Reserve.

Paragraph 3.h.(5)(a) of Attachment 2 states that if a member fails to complete the service required to transfer education benefits, "the amount of any transferred entitlement under paragraph 3.a. of this attachment that is used by a dependent of the individual as of the date of such failure shall be treated as an overpayment of educational assistance … and will be subject to collection by the DVA."

Paragraph 3.i. of Attachment 2 states that "[a]ll requests and transactions for individuals who remain in the Armed Forces will be completed through the Transferability of Educational Benefits (TEB) Web application at https://www.dmdc.osd.mil/TEB/. The TEB Users' Manual will provide instruction for enrollment; verification; and additions, changes, and revocations." Paragraph 3.g.(2) states that a member on active duty or in the Selected Reserve may also modify or revoke a transfer at any time through the TEB website.

TEB

On the TEB web portal, before a member can transfer his "Post-9/11 GI Bill, Chapter 33," education benefits to a dependent, the member must acknowledge the following by checking boxes:

a) I am eligible for the Post-9/11 GI Bill, the program I am applying to transfer.

b) I understand I may transfer up to 36 months (or my remaining months of eligibility, whichever is less) of my education benefits to spouse and/or children, and can modify or revoke my election at any time.

c) I understand that my spouse may use the benefit immediately and children (ages 18 – 26) after I have served 10 years.

d) I understand and agree to remain in the Armed Forces for the period required. I understand that failure to complete that service may lead to an overpayment by the Department of Veterans Affairs for any payments made. (Service documentation will remain on file with the Service.)

e) I understand that I am responsible for any overpayments due to not completing my additional obligated term of service agreement.

f) I understand that in order to request this transfer, if I'm eligible for the MGIB (Chapter 30, 38 USC), or the MGIB-SR (Chapter 1606, 10 USC) or REAP (Chapter 1607, 10 USC), I am converting from that program to the Post-9/11 GI Bill. This conversion is irrevocable.

g) I may not receive more than a total of 48 months of benefits under two or more programs.

h) If electing Chapter 33 in lieu of Chapter 30, my months of entitlement under Chapter 33 will be limited to the number of months of entitlement remaining under Chapter 30 on the effective date of my election. However, if I completely exhaust my entitlement remaining under Chapter 30 before the effective date of my Chapter 33 election, I may receive up to 12 additional months of benefits under Chapter 33.

i) My conversion to the Post-9/11 GI Bill is irrevocable and may not be changed. However, I retain the right to change or modify months of entitlement at any time until they are exhausted.

The TEB web portal advises members to contact the VA with questions about their eligibility for benefits under the Post-9/11 GI Bill and to contact a Service career counselor, personnel center, or website for questions about eligibility to transfer those benefits to a dependent.

Military Separations Manual, COMDTINST M1000.4

Article 1.B.36. of the Military Separations Manual describes the information that is provided to members who are separating. Article 1.B.36.f. states that members are advised "of their rights and benefits as a veteran before they depart from their last duty station" and that education benefits are one of the more important matters about which they are advised. Members are also advised of their right to apply to the BCMR.

COMDTINST 1900.1 states that one of the matters about which a member must be counseled upon separation is entitlement to educational benefits.

PREVIOUS BOARD DECISIONS

The Board has granted relief in two cases wherein the applicant alleged that prior attempts to transfer their educational benefits had failed:

- In BCMR Docket No. 2017-054, the applicant, who had been eligible to transfer his benefits without obligating additional service, submitted copies of documents showing that two attempts to transfer his benefits through the DMDC website had been rejected because of errors in his submissions.[6] He claimed that he had corrected those errors, submitted his transfer request a third time, and thought it had been accepted. The Coast Guard's program manager confirmed that these documents proved that the applicant had tried to transfer his education benefits in 2012. The Board found the following:

  > Although the applicant should have taken steps to ensure that his third transfer request was successfully processed before he retired from active duty, in light of the circumstances, the Board finds that his failure to follow-up on the processing of his third request should not prevent a 30-year veteran of the Coast Guard from receiving a valuable benefit. Therefore, his record should be corrected to show that he transferred his Post-9/11 GI Bill education benefits to his dependents before retiring from active duty.

- In BCMR Docket No. 2017-215, the Board granted relief by backdating the date of transfer for an applicant on active duty who was going to retire on September 1, 2018. She had submitted copies of emails showing that she had tried to transfer her educational benefits in TEB in March 2013 but was unsuccessful and could not understand why. She showed that she had received automatic replies from the Program Manager's office stating that due to hundreds of emails and phone calls concerning perceived cuts to the Post-9/11 GI Bill and sequestration, the office had temporarily suspended responding to emails except for emergencies. She stated that her calls to that office had also not been returned. The Board found that, although the applicant should have persisted in trying to apply through TEB, because she had proven that she had repeatedly attempted to transfer her benefits in March 2013, "her lack of successful persistence in 2013 should not prevent a 20-year veteran of the Coast Guard from receiving a valuable benefit."

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[6] According to the Coast Guard's "The Post-9/11 GI Bill" PowerPoint training, the DoD's Transfer of Education Benefits web portal shows both the date of transfer and the "Obligation End Date" four years later for an approved transfer.

The Board has also denied relief in cases where applicants asked the Board to backdate their dates of transfer:

- In BCMR Docket No. 2014-200, the Board denied relief to an applicant who had been discharged for alcohol abuse in 2014 and asked the Board to backdate the transfer of his education benefits to his dependents from 2011 to 2009 so that his record would show that he had completed his obligated service. He alleged that he should have been counseled about transferring his benefits earlier, but the Board found that he had been timely counseled when his enlistment was expiring.

- In BCMR Docket No. 2014-208, the Board denied relief to an applicant who retired in 2015 and asked the Board to backdate the transfer of her education benefits to 2009. She alleged that when she transferred her benefits in 2012 she was unaware of the obligated service requirement and that she would have transferred her benefits earlier if she had known. But the Board found that she had been timely counseled when her enlistment was expiring.

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.[7] The alleged error in this case is the date of transfer of the applicant's education benefits in the TEB web application. The applicant stated that he did not discover the error in his record until the VA informed him of his ineligibility to transfer his education benefits in August 2017. He stated that upon retirement, "In my mind I was going off the 2009-2010 date that I initially completed the transfer, and [it] did not even cross my mind that I did not meet my 4 years obligation."

3. The applicant admitted, however, that when he logged into TEB on December 3, 2012, "it was like the first time [he] had ever logged on," and so TEB must have shown an Obligation End Date of December 2, 2016. Also, the applicant would have been counseled about education benefits before his retirement.[8] Moreover, members can check the status of their benefits transfer on TEB at any time, which the applicant surely would have done before his retirement if, as his daughter claimed, he was concerned about the transferability of his benefits at the time. She claimed that he told her that he was concerned but that his commanding officer had assured him in 2015 "that everything was on the up-and-up as it pertained to his GI Bill transferability." Therefore, the Board finds that the applicant was on notice as of December 3, 2012, that he had a four-year service obligation through December 2, 2016. And because he

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[7] 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

[8] COMDTINST M1000.4, Art. 1.B.36.; COMDTINST 1900.1.

knew that he had that incurred that obligated service requirement to be entitled to transfer his education benefits to his daughter, the Board finds that the preponderance of the evidence shows that the applicant knew—or at least strongly suspected—no later than his retirement on February 1, 2015, that he had not completed his service obligation and so was ineligible to transfer his education benefits, including those that his daughter had already used. Since his BCMR application was received more than three years after he retired, it is untimely.

4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.[9] In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without "analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review"[10] to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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."[11] Pursuant to these directions, the Board finds the following:

a. The application should have been submitted by February 1, 2018, and was untimely by less than two months. Moreover, his daughter's continued receipt of COEs from the VA in 2015 and 2016 may have contributed to the applicant's delay in applying to this Board.

b. The Board's cursory review of the merits in this case shows that applicants with similar allegations have sometimes prevailed in the past. Therefore, and given the size of the debt and its impact on a third party—the applicant's daughter—the Board finds that it is in the interest of justice to conduct a full review of the merits in this case.

Accordingly, the Board will excuse the untimeliness of the application, waive the statute of limitations, and conduct a full review of the merits in this case.

5. The applicant alleged that the December 3, 2012, date of transfer of his education benefits to his dependents in TEB is erroneous and unjust. He alleged that he first made the transfer request in 2009 or 2010 but that the system failed to record it or his logging in with a CAC card in December 2012 erased his prior transfer. In considering allegations of error and injustice, the Board begins its analysis in every case by presuming that the disputed information in the military record is correct, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed information is erroneous or unjust.[12] Absent evidence to the contrary, the Board presumes that Coast Guard officials have carried out their duties "correctly, lawfully, and in good faith."[13]

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[9] 10 U.S.C. § 1552(b).

[10] *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

[11] *Id*. at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

[12] 33 C.F.R. § 52.24(b).

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

6. The applicant alleged that after he received training about the Post-9/11 GI Bill from an ESO at his cutter's Shore Side Detachment sometime in 2009 or 2010, he logged into TEB with a password and username because the cutter itself did not have a workstation with a CAC card reader. The applicant attributed the lack of any record of this transfer to either a system outage or the fact that he first logged in with a username and password and subsequently logged in which his CAC card. The applicant has no evidence to support his claim that he attempted to transfer his education benefits before December 3, 2012, however, and TEB, which is presumptively correct,[14] shows that he did not. Nor is there evidence of a system outage that allowed members to log in but failed to record their actions or evidence that logging into TEB with a CAC card in 2012 would somehow have erased the record of a prior transfer.[15]

7. In BCMR Docket Nos. 2017-054 and 2017-215, the applicants had trouble transferring their benefits, but the trouble was caused by their own data entry errors and TEB notified them that their attempts had failed. In addition, those applicants submitted documentary evidence proving their timely attempts to transfer their benefits to their dependents. In this case, the applicant did not claim or prove that he had experienced frustration when transferring his benefits in TEB in 2009 or 2010. He alleged that, like the applicant in 2017-215, he repeatedly tried to contact the program manager to no avail in December 2012 because TEB had not shown his prior transfer of benefits, but he did not submit evidence of those alleged attempts.

8. Any documentary evidence of a transfer or failed transfer attempts in 2009 or 2010 and any emails showing attempts to contact the program manager in December 2012 would presumably have been available to the applicant prior to his retirement in 2015—before the August 2016 flood—and might still be available to him through a Freedom of Information Act or Privacy Act request. According to what he told his daughter, the applicant was concerned about the transfer of his education benefits prior to his retirement in 2015, and he would only have been concerned if he knew or suspected that his retirement would make him ineligible to transfer his education benefits. But there is no evidence that at any time before his retirement, the applicant gathered the documentation still available to him or complained about TEB's lack of a record of a 2009 or 2010 benefits transfer.

9. Given the lack of evidence supporting the applicant's claims about having transferred his education benefits in 2009 or 2010 and given the evidence showing that he knew his Obligation End Date in TEB and so was concerned about the transfer of his benefits before he retired, the Board finds that the applicant has not proven by a preponderance of the evidence that the December 3, 2012, date of transfer of his education benefits in TEB is erroneous.

10. The applicant stated that after his daughter was accepted at ███, he decided to transfer all of his education benefits to her, instead of just one-third, on December 3, 2012. He stated that she began attending ███ in 2014 and started using his educational benefits. The VA began issuing her COEs in 2014, when the applicant was still on active duty, and continued issuing them before the start of each semester even after the applicant retired on February 1, 2015. The applicant and his daughter argued that the VA's erroneous continued issuance of the COEs

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[14] 33 C.F.R. § 52.24(b).

[15] If such evidence exists, it would presumably be in the records of DoD.

after his retirement created an unjust, financially devasting debt. And the Board has authority to correct injustices and to determine whether an injustice exists on a "case-by-case basis."[16] But the record shows that the applicant knew or strongly suspected in February 2015 that he had not completed his service obligation and so was not entitled to transfer his education benefits. Although he told his daughter that his commanding officer assured him that he was eligible to transfer his benefits when he retired, that claim is not credible because his commanding officer would have had no personal knowledge of the applicant's transfer date and so no knowledge of the applicant's eligibility to transfer his benefits. If the applicant actually asked his CO about his eligibility, the CO could only have told him to check TEB or talk to an ESO to determine his eligibility to transfer his education benefits.

11. The applicant argued that his retirement should not have caused the termination of his eligibility to transfer his education benefits because the final incident that led to his voluntary retirement resulted from his trying to quell a panic attack with excessive alcohol consumption before a flight home since he had not brought his anxiety medication with him to a five-week training. The Board is not persuaded that the alleged circumstances leading to the applicant's drunken behavior and removal from an airplane warrant relief in this case.

12. When the applicant retired, the Coast Guard promptly entered that information in DoD's DEERS database. (If it had not, the applicant would not have received his retired pay.) According to the VA's letter dated January 9, 2018, DEERS is the database that the VA checked in 2017 to find that the applicant had been retired before his Obligation End Date and so was ineligible to transfer his education benefits. Although the applicant and his daughter alleged that the VA should have discovered his ineligibility and stopped issuing COEs much earlier, the VA's letter shows that in administering the benefits, the VA places the burden on the retiree and the recipient to notify the VA of a change in status or eligibility:

> Both you and your parent were responsible for knowing the terms and obligation required for the transfer of entitlement. Your award letters notified you of your responsibility to promptly notify VA of any changes in duty status or eligibility. Your failure to promptly notify VA of the change in duty status of your parent caused significant and unwarranted increase of your debt.

The applicant has not shown that the VA's policy of placing this burden on the retiree and the recipient is erroneous or unjust.

13. The preponderance of the evidence shows that before he retired in February 2015, the applicant knew or at least strongly suspected that his Obligation End Date in TEB was in December 2016 and so he knew or strongly suspected that he was ineligible to transfer his benefits to his daughter. Under these circumstances and lacking any evidence supporting the applicant's claim that he tried to transfer his education benefits in 2009 or 2010, the Board finds that the applicant has not proven by a preponderance of the evidence that his benefits transfer date in TEB or the debt resulting from his loss of eligibility to transfer his education benefits to his

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[16] Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

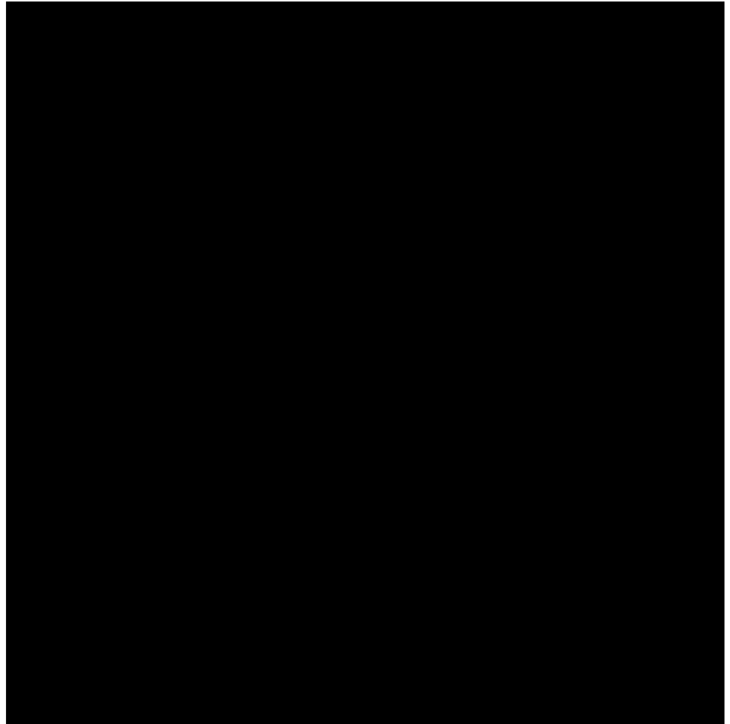
dependents constitutes an injustice even though the VA continued to issue COEs to his daughter after he retired.

14. The applicant has not proven by a preponderance of the evidence that the date of transfer of his education benefits in TEB and the debt resulting from the overpayment of education benefits are erroneous or unjust. Therefore, his request should be denied. The Board notes, however, that the applicant will be entitled to reconsideration if he submits material new evidence of the alleged error in the date of transfer of his education benefits in TEB.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of CWO2 ████, USCG (Retired), for correction of his military record is denied.



November 22, 2019