

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-119


 E-7 (Retired)

FINAL DECISION

This proceeding was conducted according to 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 April 16, 2019, and this decision of the Board was prepared pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 12, 2020, 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 in 2012 as a  E-7) after serving more than 20 years on active duty in the Coast Guard, asked the Board to allow him to change the percentage of his unused education benefits under the Post-9/11 Veterans Education Act of 2008 (Post-9/11 GI Bill)¹ that his two dependents are eligible to receive. He stated that during the August 2009 rollout of the GI Bill transfer program he designated each of his two dependents to receive 0% of his unused benefits and that, before his retirement in 2012, he was not told that having them listed as 0% would affect his ability to change the designation following his retirement.

The applicant retired from the Coast Guard in 2012 but stated that he discovered the alleged errors in his record on March 15, 2019. Regarding the delay in submitting his application, he argued that the Board should find it in the interest of justice to consider his application because "justice is served by reinstating my additional dependents' eligibility to utilize a VA benefit regularly offered to other dependents when proper training and counseling has occurred."

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 the Coast Guard on August 31, 2012, after serving 20 years, 5 months, and 6 days on active duty. There is nothing in his official military record to show that he was counseled about the Post-9/11 GI Bill program or that he received counseling about the program before he transferred his Post-9/11 GI Bill educational benefits to his dependents, listing them as receiving 0% each. There is nothing in his record to show that he completed the Transition Assistance Program (TAP)² class prior to retirement in 2012.

APPLICABLE LAW AND REGULATIONS

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

On June 22, 2009, the Department of Defense (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.a.(3) of Attachment 2 (Procedures) states that members eligible to transfer education benefits include 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).

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 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 and expressly excludes retired members.

Department of Defense Instruction (DoDI) 1341.13

DoDI 1341.13 was issued on May 31, 2013, and establishes policy, assigns responsibilities, and prescribes procedures for implementing DoD authorities and responsibilities for the Post-9/11 GI Bill. Enclosure (2), Paragraph 4.g., states that the service must provide and document pre-separation counseling on Post-9/11 GI Bill benefits. It also incorporated and cancelled DTM 09-003, and revised the counseling requirements articulated in the DTM 09-003. Specifically, it removed the requirement to “provide ... individual pre-separation or release from active duty counseling” and replaced it with “direct pre-separation counseling...”

² TAP prepares military members separating or retiring from the Coast Guard for their transition to civilian life. All eligible members are required to complete the standardized components of the TAP, including pre-separation counseling, the transition seminar, encompassing the transition goals, plans, and Success (GPS) core curriculum, <http://www.dcms.uscg.mil/Our-Organization/Assistant-Commandant-for-Human-Resources-CG-1/Health-Safety-and-Work-Life-CG-11/Office-of-Work-Life-CG-111/Transition-Assistance-Program/> (last visited on September 12, 2017).

VIEWS OF THE COAST GUARD

On November 6, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion and adopted the findings and analysis in a memorandum submitted by the Commander, Personnel Service Center (PSC). PSC argued that the application is untimely, but recommended granting relief because there is nothing in the applicant's record to show that he was provided individual counseling regarding the transfer of his education benefits. Moreover, PSC stated that he "clearly did not understand the associated limitations" when he used the Defense Manpower Data Center (DMDC) website to transfer his education benefits. PSC added that although the applicant had direct access to information about the transfer program through the DMDC site and the published ALCOASTs, his record still lacks the documentation of individual counseling.

In addition to agreeing with the recommendations provided by PSC, the JAG argued that the Board should grant relief because in BCMR Docket No. 2012-054 the Board determined that the DTM 09-003 requires the Coast Guard to provide individualized pre-separation counseling and to document that counseling and that the instant case is analogous to the facts, circumstance, and conclusions set forth in that case. Furthermore, the JAG stated, because DTM 09-003 was in effect at the time of his retirement and there is no evidence that the applicant received documented, individual, pre-separation counseling, he is entitled to relief.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 15, 2019, the BCMR sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. He responded on December 9, 2019, and agreed with the Coast Guard's recommendation.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions based on 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.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The applicant retired from the Coast Guard on August 31, 2012, and submitted his application to the Board on March 25, 2019, more than three years after he was retired. He claimed to have discovered the error on March 15, 2019, but did not explain the circumstances of his discovery. The applicant knew upon his retirement that he had transferred none of his educational benefits to his children, which is the alleged error he wants the Board to correct. What he apparently discovered in 2019 is his inability to transfer his benefits by raising those percentages after his retirement. Because there is no documentation of counseling in the record, the Board finds that the preponderance of the evidence shows that the application was timely filed.

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

3. The applicant alleged that the 0% transfers of his education benefits to his children are erroneous and unjust and asked the Board to allow him to raise those percentages. When considering allegations of error and 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.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 applicant stated that during the Post-9/11 GI Bill rollout he elected to have his two dependents receive 0% of his unused education benefits. He indicated that he made this election in 2009, but there is nothing in his record to document that he was counseled about the transfer program in 2009 or immediately before his retirement in 2012. The Coast Guard recommended that the Board grant relief, arguing that the applicant's record does not contain any individual pre-separation counseling on the Post-9/11 GI Bill, as required by DTM 09-003. Moreover, the Coast Guard noted that this case is analogous to BCMR Docket No. 2012-054, wherein the Board determined that the DTM 09-003 requires the Coast Guard to provide individualized pre-separation counseling and to document that counseling.

5. The Board agrees with the JAG's recommendation and finds that the applicant has proven by a preponderance of the evidence that he was not properly counseled about the Post-9/11 GI Bill benefit-transfer program before his retirement. Although the applicant stated that he enrolled in the transfer program in 2009, his record does not contain any record of individual counseling in 2009 or prior to his retirement in 2012, as required by DTM 09-003. The applicant designated that each of his two dependents receive 0% of his unused education benefits, presumably under the impression that he could change that allocation later, but under paragraph 3.g.(1) of Attachment 2 of DTM 09-003, members may transfer entitlements to family members only while they are still in the service. The Board finds that the lack of documented, individual counseling when he enrolled in the Post-9/11 GI Bill program or when he retired in 2012 is sufficient to prove by a preponderance of the evidence that the applicant was not properly counseled and did not understand before he retired that he could not raise the percentage of his transfers after he retired.

6. The Board finds that the applicant is entitled to relief because he has proven by a preponderance of the evidence that he was not properly counseled about his Post-9/11 GI Bill education benefits in 2009 or before his retirement from active duty in 2012. Accordingly, he should be given a one-time reasonable opportunity to raise the percentage of his education benefits that each of his dependents is eligible to receive, as long as he does not transfer more than he currently retains (because he could have used some of his education benefits since his retirement). And the Coast Guard should assist him with the paperwork necessary to accomplish this transfer of benefits.

(ORDER AND SIGNATURES ON NEXT PAGE)

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).

ORDER

The application of [REDACTED], USCG (Retired), for correction of his military record is granted. The Coast Guard shall contact him within 30 days of the date of this decision and allow him a 21-day opportunity to raise the percentages of his Post-9/11 GI Bill education benefits that each of his dependents is entitled to use. The total percentage transferred to his dependents shall not exceed the total percentage he has remaining (if he has used any of these education benefits). The Coast Guard shall assist him with the paperwork necessary to accomplish this transfer of benefits.

June 12, 2020

