

**DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for Correction of
Coast Guard Record of:

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

BCMR Docket
No. 2002-058

FINAL DECISION

This is a proceeding under section 1552 of title 10 and section 425 of title 14 of the United States Code. It was docketed on February 12, 2002, upon the Board's receipt of a complete application for the correction of the applicant's military record.

This final decision, dated November XX, 2002, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant's widow filed this application asking that a correction be made in the applicant's military record. The applicant had been an officer in the Coast Guard, until he retired on October 1, 1983, after approximately 22 years on active duty. He died on May 24, 1994.

The applicant's widow asked the Board to correct his record to show that he changed the beneficiary under his survivor benefit plan (SBP) from his minor child to his widow during the open enrollment period from April 1, 1992 until March 31, 1993.

On September 12, 1983 prior to retirement, the applicant signed a SBP certificate electing coverage for his minor child from a previous marriage but not for his widow. According to his widow, he was required to provide coverage for the minor child pursuant to a divorce judgment until the child reached majority or graduated from high school. The record indicates that the minor child was born on June 17, 1974.

Sometime in 1992, the applicant developed cancer and died approximately two years later. The applicant's widow stated that she contacted the Coast Guard pay center (now Human Resource Service and Information Center (HRSIC)) about changing the applicant's SBP coverage from his minor child to her. She stated that HRSIC informed her that a change could not be made because the open season had closed two months earlier. HRSIC gave the applicant the same information when he inquired. She stated that the applicant wrote a letter in May 1994 requesting that HRSIC make a hardship exception in his case.

Subsequent to the applicant's death, his widow wrote a letter dated September 21, 1994 to a United States Senator. She asked for his assistance in having her listed as the beneficiary on the applicant's SBP. She indicated that she received no reply to this letter.

In another letter to a different United States Senator, dated May 15, 2001, the applicant's widow stated that the announcement about the open enrollment period was published in the Commandant's Bulletins. She stated that the applicant was too ill between cancer treatments to read or absorb anything and she was too busy taking care of him and reviewing insurance paperwork to read anything else except the drug interaction sheets.

In this letter, the applicant's widow stated that she and the applicant should have been informed by first class mail about the open enrollment season. In comparison, she stated that, "[a federal Credit Union] sent [her] three separate first class mailing with return postcards trying to sell [her] a \$1000 accident policy. How much more important is a pension for almost 23 years of military service - they could not have sent ONE first class letter that would have been opened and read."

On July 24, 2001, a Coast Guard Commander responded to the Senator's letter. He stated that the applicant's widow contacted the Human Resource Service Information Center (HRSIC) on May 26, 1993. She was informed by HRSIC that the applicant's SBP election could only be changed during an open enrollment period. He verified that the open enrollment period had ended on March 31, 1993. He further stated that the SBP open season period was announced several times in the *Retiree Newsletter*. The Commander further stated as follows:

On May 31, 1994, HRSIC received a letter from the applicant dated May 14, 1994. In this letter he requested that HRSIC accept his late enrollment into SBP on a hardship basis. While HRSIC was responding to [the applicant's] request, HRSIC was informed that the [the applicant] had died on May 24, 1994 and all action was stopped on the request. If HRSIC had been able to accept [the applicant's] request, the [applicant's widow] would still have ended up with no SBP benefits. Federal Law would have required [the applicant] to remain alive for two years in order for [the applicant's widow] to be eligible for benefits.

Views of the Coast Guard

On September 25, 2002, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the Board deny relief in this case.

With respect to notification, the Chief Counsel stated that the Coast Guard

notified all its retirees about the "open enrollment" period through the Coast Guard Retiree Newsletter. He stated that the Coast Guard was under no regulatory obligation to use any other means of notification.

The Chief Counsel stated that the applicant's widow failed to demonstrate an error in the Coast Guard's refusal to change the applicant's beneficiary under the SBP program from his daughter to the widow. He stated that the Article 18-F-6a. of the Personnel Manual provides that :

Any election not to participate or to participate at a reduced base amount, if not rescinded or changed prior to the first date of entitlement to retired pay, is irrevocable. Therefore if coverage is declined for a spouse at the time of retirement, this decision is irrevocable and coverage for that spouse cannot be provided at any later point in time. Consequently, any decision not to participate or to participate at a reduced amount should be reviewed very carefully.

The Chief Counsel stated that the applicant did not exercise his option to change his SBP beneficiary during the open season. He stated that any change made during the open enrollment (from April 1, 1992 to March 31, 1993) would not have taken effect for two years from the date of the change. He stated that according to Article 430901.D of Volume B of the Department of Defense Financial Management Regulation provides that "an annuity is not payable under the open enrollment election for a period of 2 years. Further, the Chief Counsel argued that that the rules governing the change of an election for SBP do not permit retroactive action.

Applicant's Reply to the Views of the Coast Guard

The applicant stated that she understood that she was not designated as a beneficiary when the applicant retired. Her complaint is with the "open season only being advertised in the Retiree Newsletter." She queried whether retirees were worth one first class stamp. She claimed that if she had been notified by first class mail she would have read it and acted accordingly. She stated that a rule or regulation should be in effect to make sure the services are available to all persons eligible. She further opined that to "enforce the letter of a regulation with no compassion or concern for the intent of the regulation does a disservice to everyone.

FINDINGS AND CONCLUSIONS

The Board makes the following findings of fact and conclusions of law on the basis of the submissions of the parties:

1. The application was not submitted within three years of the alleged error or

injustice, as required by section 1552 of title 10, United States Code. It is not timely.

2. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22.

3. The Board may still consider the application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See Dickson v. Secretary of Defense, 68 F. 3rd 1396 (D.D.C. 1995).

4. The applicant's widow did not indicate the date she discovered the alleged error. However, based on the evidence of record, she should have discovered the alleged error or injustice in 1994 (the last time she and the applicant were told by HRSIC that the applicant could not change his SBP election.). She stated that they learned in May 1993 that the SBP open enrollment period had closed on March 31, 1993 and the applicant could not make a change to his SBP election at that time because the open enrollment period had closed. The applicant last contacted HRSIC in May 1994 about changing his SBP election but was told he could not do so. Subsequently, he submitted a request to HRSIC requesting a change in his SBP election due to hardship. Before HRSIC could reply, the applicant died on May 24, 1994.

5. After the applicant passed away, his widow wrote a letter to a U.S. Senator dated September 21, 1994 asking for help in having her listed as the applicant's SBP beneficiary, to which she did not receive a reply. The record indicates that the applicant's widow took no further action in this matter until May 15, 2001, when she wrote another letter to a different senator asking for assistance. The only explanation given by the applicant's widow for not taking any action from September 1994 until May 15, 2001 was emotional and physical exhaustion. She finally filed an application with the Board on February 12, 2002. Approximately one year elapsed between the date of her May 15, 2001 letter to the second Senator and February 12, 2002, the date she filed her application with the Board. The Board finds that the applicant has submitted insufficient evidence showing that she could not or should not have acted sooner in this case.

6. The Board finds that it is not likely that the applicant's widow would prevail on the merits of this claim, even if the Board were to waive the statute of limitations. Although she complained about the method in which retirees were notified about the open enrollment period, she has not provided any evidence that any other type of notification was required either by law or regulation. Also, she has not stated that she and the applicant failed to receive the Retirees Newsletters, but only that they failed to read them due to their extenuating circumstances. She has failed to establish an error or

injustice with respect to the manner in which the Coast Guard notified retirees about the SBP open enrollment period.

7. According to the Personnel Manual, SBP elections are irrevocable. However, Public Law 101-189 (29 Nov 89) established an open enrollment period for SBP from April 1, 1992 to March 31, 1993. Neither the applicant nor his widow inquired about changing the SBP election until May 1993, a month after the enrollment period had closed. She has not presented any law or regulation that permitted changes to an SBP after the close of the open enrollment period.

8. Article 430901.D of volume B of the Department of Defense Financial Management Regulation states that elections made during the open season under Public law 101-189 were not valid unless the member lived for two years from the effective date of election.¹ Even if the applicant had been able to make an election in May 1993 (after the close of the open enrollment period) he would not have lived the necessary two years for his election to be valid. He died on May 24, 1994.

9. In addition, according to the applicant's widow, the applicant was required by a divorce judgment, to list his daughter as the beneficiary until the minor reached age 18. That did not occur until June 17, 1992, which would have been the earliest the applicant could have removed the daughter as beneficiary from his SBP. Therefore, even if the applicant had made the election in June 1992, he still would not have lived the full two years having passed away on May 24, 1994.

10. Based on the length of the delay, the lack of persuasive reasons for not acting sooner to correct the applicant's record, and the probable lack of success on the merits of the claim, the Board finds it is not in the interest of justice to waive the three year statute of limitations in this case.

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

[ORDER AND SIGNATURES ON NEXT PAGE]

¹ The law also required that premiums be deducted during the two-year survival period, and it required an additional premium based on the number of years that had elapsed since the member's retirement.

ORDER

The application to correct the military record of XXXXXXXXXXXXXXXXXXXX
USCG (Ret.) is denied.

