

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

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 2002-142

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 July 24, 2002, upon the Board's receipt of a complete application for the correction of the applicant's military record.

This final decision, dated April 8, 2003, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant asked the Board to correct his record to show that he elected coverage for his developmentally disabled adult son under the survivor benefit plan (SBP).¹ The applicant retired on April 30, 1966, which he stated was prior to the existence of the SPB program. On August 23, 1973, he was afforded an opportunity to participate in the SBP program and elected coverage for his wife but not for any of his dependent children.² The SBP election certificate contained the following warning: "The decision you make with respect to participation in this Survivor Benefit Plan is a permanent irrevocable decision. Please consider your decision and its effect very carefully."

The applicant stated that he was recently divorced and had asked the retired affairs office to designate his son as his beneficiary under the SBP program. He stated that he was told by that office that coverage for his son had to have been made at the time he retired.

The applicant stated that he understood that "it was a spousal benefit, no

¹ The purpose of the SBP is to establish a survivor benefit program for military personnel in retirement to complement the survivor benefits of social security.

² Article 18.F.3.e. 2. of the Coast Guard Personnel Manual states that a dependent child means an unmarried child who meets the following criteria: "a. Under 18 years of age, or at least 18, but under 22, if pursuing a full-time course of study or training in a high school . . . or b. Incapable of self-support because of mental or physical incapacity which existed before the 18th birthday or which was incurred before age 22 while pursuing a full-time course of study or training."

mention of children. I paid for almost 30 years." He stated he recently learned that children can be made beneficiaries in special cases and that his son has had a Coast Guard identification card for a number of years. He stated, "I don't feel there is necessarily any injury or injustice. More a matter of lack of information." The applicant listed August 2001 as the date he discovered the alleged error or injustice but provided no further explanation.

Views of the Coast Guard

The Board received an advisory opinion from the Chief Counsel of the Coast Guard, dated January 24, 2003. He recommended that the Board deny relief in this case.

The Chief Counsel stated that the applicant failed to demonstrate an error in the Coast Guard's refusal to change his beneficiary under the SBP program. He stated that on August 23, 1973, the applicant elected "spouse only" coverage.

The advisory opinion contained a memorandum from the Commander of the Coast Guard Personnel Command. He stated that although the applicant's son was eligible for SPB child coverage at the time the applicant made his SBP election, the applicant did not elect coverage for the child or any of his children. CGPC stated that the SBP election form clearly warned members to carefully consider their decision regarding dependent children coverage because the election once made is irrevocable.

CGPC stated that Article 43.C.3. of Volume 7B of the Department of Defense Financial Management Regulation states that a member who "refuses coverage for his or her dependent children, and elects coverage for spouse only, is barred from electing child coverage at a later date." He further stated that original elections might be changed only to add dependent children born after the original election is made.³

CGPC stated that the applicant's situation does not meet any of the special circumstances under law and regulation that would permit a retroactive change to his SBP election.

Applicant's Reply to the Views of the Coast Guard

On February 20, 2003, the Board received the applicant's reply to the views of the Coast Guard. He stated that at the time of his election he was not aware of the extent of his child's disability. He also requested that the Board consider the fact that he paid into the SBP program for almost 30 years.

³ Article 18.F.6.d. (Elections are irrevocable) of the Personnel Manual states SBP elections are irrevocable after the award of retired pay, however an election may be changed or revoked to cover a newly acquired spouse or dependent children.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the submissions of the applicant and of the Coast Guard, the applicant's military record, and applicable law:

1. The Board has jurisdiction of the case pursuant to section 1552 of title 10 of the United States Code. It was not timely.

2. 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).

3. 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. The applicant retired in 1966. Subsequently in 1973, he elected to participate in the SBP and chose coverage for his spouse only. Approximately 29 years after that decision, he filed an application with the Board asking for a change to his SBP election.

4. Although the applicant listed August 2001, as the date he discovered the alleged error or injustice, the Board finds that he has submitted insufficient evidence showing that he could not or should not have discovered the alleged error sooner. He commented that he recently learned that in special cases children could be designated as beneficiaries, but he did not explain how he discovered this information and why he could not have discovered it sooner. He also stated that he did not know the extent of his son's disability at the time he made his SBP election, but he failed to state when he discovered the extent of his son's disability, whether the disability existed at the time he made his SBP election, or the nature of the disability.

5. The Board further finds that it is not likely that the applicant would prevail on the merits of this claim, even if the Board were to waive the statute of limitations. According to the Coast Guard Personnel Manual and the Department of Defense Financial Management Regulation, SBP elections not to cover dependent children are irrevocable, except in some cases for children born after an SBP election was made. The applicant's son could have been covered at the time of the applicant's election in 1973. The applicant presented no evidence, and the Board is not aware of any, that allows a member who decided not to elect SBP coverage for an existing child to subsequently change that election, even for disabled children. The applicant alleged he suffered from a "lack of information" but did not provide any evidence that the lack of information resulted from Coast Guard error or injustice.

6. Based on the length of the delay, the lack of persuasive reasons for not acting sooner to correct his 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.

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

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXX for the correction of his military record is denied.

