

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-079

XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case, upon receipt of the applicant's completed application and military records on January 30, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated November 12, 2009, 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 asked the Board to correct his record by amending his Survivor's Benefits Plan (SBP) Election Certificate (DD Form 1883) dated September 3, 1995, to show that he elected spouse only full coverage rather than spouse and child coverage.

The applicant retired from the Coast Guard by reason of sufficient service for retirement effective December 1, 1995. Prior to his effective retirement date he executed a SBP election certificate for spouse and child coverage based on his full retired pay. The child coverage was for his adult son who has been disabled since his birth. According to his January 1996 Retiree Annuitant Statement, \$260.96 was deducted monthly for spousal SBP coverage and .48 was deducted monthly for child coverage.

On September 13, 1995, the applicant and his wife became the legal guardians for their 22 year old disabled son pursuant to an order of the Circuit Court of the [REDACTED]. The applicant stated that his son receives monthly Social Security Supplemental Income (SSI) benefits as well as Medicaid assistance to pay for group home care, day support, transportation, case management, medication, and psychiatric service, all of which amounts to a yearly benefit of approximately \$105,333.21. The applicant stated that should he and his wife pass away, the income his son would receive from SBP would make him ineligible for SSI and Medicaid. The applicant stated that under SBP, his son would receive only approximately \$40,000 per year

which is insufficient to cover the services and care he is currently receiving through the Medicaid program.

The applicant asserted that his SBP election of spouse and child coverage was based upon erroneous advice and guidance from Coast Guard Personnel during a retirement transition seminar on June 12-13, 1994. He further stated the following:

During the retired pay/survivor benefit plan portion of the seminar PO [I] strongly urged the attendees with incapacitated children to elect a "lifetime coverage for an incapacitated child." . . . To drive the point home, attendees were provided with a document entitled "Common Questions about SBP." On page two of this document SBP is termed a "must" and "an extremely good buy" in the case of an incapacitated child . . .

I did not learn how egregiously wrong the advice was that I received from Coast Guard Personnel at the 1994 seminar that prompted me to mistakenly elect SBP coverage for my son until I received [an email] on 9 November 2008 from Mr. [S], a retired Navy commander with an incapacitated daughter and a fellow director of the ██████████ Services Board. Attached to Mr. [S's] email was an article that clearly outlines the dangers of electing SBP coverage for a disabled child that receives [SSI] and Medicaid support. If my SBP election for coverage of my incapacitated son, which was based on extremely poor or incorrect advice from Coast Guard personnel is allowed to continue in effect, my son will lose his group home where he receives 24/7 supervision and support and he will become ineligible for Medicaid Waiver funded day support, transportation support, case management, and psychiatric support.

The applicant stated that he is not asking to recoup any past monies paid for child coverage; he just wants to ensure that his son continues to receive the care and support he needs.

In support of his application, the applicant submitted his SBP Election Certificate dated September 3, 1995; transition seminar agenda and personal notes; a handout addressing common questions about SBP that was distributed at the seminar; documents from Mr. S; the appointment of legal guardianship for his son; two documents from the Social Security Administration; a letter from the son's group home; email from the executive director of the Chesapeake Community Services Board stating the estimate of the cost of his son's Medicaid benefits; copy of his DD 214 and retirement orders; and a January 1996 and April 2008 Retiree Annuitant Statement.

VIEWS OF THE COAST GUARD

On April 16, 2009, the Judge Advocate General (JAG) of the Coast Guard submitted a memorandum from the Commander, Coast Guard Pay and Personnel Center (CGPPC) as the advisory opinion. CGPPC recommended that the Board deny the applicant's request.

CGPPC stated that the BCMR may correct a record when necessary to correct or remove an injustice. Further CGPPC stated that the Board may only correct a record in favor of the service member, never against him. *Doyle v. United States*, 599 F.2d 984, *amended on other grounds* 609 F.2d 990, *cert. denied* 446 U.S. 982 (1980) (superseded by statute on other grounds). Absent statutory exceptions in 10 USC § 1448(a)(3)(B), a married person who is eligible to participate in SBP may not, without the concurrence of that person's spouse, elect: (1) not to participate; (2) provide an annuity amount less than the maximum level; or (3) provide an annuity for a dependent child but not the person's spouse. A participant in the plan may elect to discontinue participation at any time during the one-year period beginning on the second anniversary after they started receiving retired pay; but, absent statutory exceptions, a married participant may not make such an election without the concurrence of their spouse. CGPPC stated that the applicant did not elect out of SBP and instead elected child and spouse coverage, and that there is no evidence in the record that either the applicant or his spouse did not want SBP at the time of election. Further, the applicant did not elect to discontinue participation within the statutorily permitted time; therefore, his SBP election is irrevocable.

CGPPC stated that materials presented at transition seminars are of a general nature and it is impracticable to argue that the Coast Guard members who present retirement briefs should know the intricacies and impact of designating a handicapped child a SBP beneficiary and the effect of unearned income vis-à-vis SSI payments and Medicaid law. CGPPC further asserted that it is hard to comprehend how a parent with an incapacitated child would rely solely on the representations of a seminar presenter as the applicant claims he did.

CGPPC stated that the applicant did not state when his son moved into the group home or when the SSI and Medicaid laws affected him. If the applicant's son was already in the group home at the time of the 1995 SBP election, the applicant was surely aware that unearned income attributed to him would count against SSI payments dollar-for-dollar. CGPPC argued that even if the applicant's son was placed in the group home after the SBP election, it was beneficial to him because there was no SSI or Medicaid offset concerns at the time the election was made.

CGPPC argued that the applicant and his wife made an informed decision and that his arguments of an error or injustice in his record are without merit. CGPPC noted that the applicant failed to seek legal counsel regarding his SBP election between the date of the transition seminar and his November 30, 1995 retirement date when he could have revoked his SBP election before drawing retired pay.

Although CGPPC recommended that the Board deny relief, it recognized that the Board could grant the relief requested by the applicant or other alternative relief on equitable grounds. In this regard, CGPPC stated that the Board could order a correction to the base amount of SBP that lowers the benefit that the applicant's son would receive so that his payment would not exceed the maximum allowed for SSI/Medicaid. CGPPC submitted an Army BCMR (ABCMR) decision No. AR20070013115 in support of its contention. In that case, the service member had died and his widow requested the correction to his record to show that he elected to have SBP payments for his disabled paid to the son's trust so that the SBP payments would not be counted as income to the son. The ABCMR denied this request stating that under the law payments could not be made to a trust. However, the BCMR directed alternative relief by recommending that all

Department of Army records of the individual concerned be corrected by correcting the record to show he elected to participate in the SBP for child only coverage at a reduced base amount of \$1000.00. (In fashioning the alternative relief, the ABCMR knew the exact amount of the disable son's annuity and SSI payments and could calculate with some degree of certainty the impact that the correction would have on that dependent child's SSI coverage.)

CGPPC stated that the applicant wishes to have the best of both worlds – he wants full SBP coverage for his wife and none for his son. CGPPC stated that unfortunately the applicant and his wife made a final SBP election inconsistent with that wish and under the law that election is irrevocable. CGPPC recommended that the Board deny the applicant's request, but if the Board approves the request as a matter of equity, it should only approve a change to a lower base amount.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 22, 2009, the Board received the applicant's response to the views of the Coast Guard expressing his disagreement with them. He offered the following chronology in pertinent part:

- On April 10, 1994, the applicant's son (an only child) turned 21 and became eligible for SSI.
- On June 12-13, 1995, the applicant attended the retirement transition seminar where SBP was discussed.
- On December 1, 1995, the applicant officially retired from the Coast Guard.
- In the fall/winter 1996, the applicant's son was placed on the state's list for placement in a group home.
- In May 1997, the applicant was notified that a slot had opened for his son in a group home.
- On September 7, 1997, the applicant's son moved into a group home where he resides today.
- In November 2008, the applicant became aware of the negative impact that the receipt of SBP benefits could have on his son's eligibility for SSI and Medicare.
- In January 2009, the application filed for a correction of his military record.

In response to comment in the advisory opinion that he did not elect to discontinue participation within the statutorily permitted time, the applicant stated that he never had any intention of discontinuing or electing anything other than full coverage for his wife. He stated that prior to 2008, there was no reason for them to doubt the advice provided about the SBP coverage for disabled children.

With respect to the statement in the advisory that the applicant should have known the intricacies and impact of unearned income on SSI, the applicant stated that there is no one government or non-government agency or “magic” road map to tell parents of disabled individuals what they must or must not do and when they must take certain actions. The applicant stated that when he elected full coverage for his spouse and son, he had no reason to suspect that he needed legal assistance on the matter. He stated that on the contrary he had a written handout from the Coast Guard stating that SBP was an extremely good buy in the case of an incapacitated child.

The applicant stated that he finds the alternative relief recommended by the Coast Guard that his record be corrected to show a lower base amount unattractive because it puts him in a position of having to decide whose life is more important his wife’s or his son’s. In support of his request, he cited three other BCMR cases: one from the Navy (BCNR) and two from the Air Force (AFBCMR).

1. In BCNR No. 01489-09, dated April 20, 2009, the applicant asked that his record be corrected to show a timely written request to disenroll from SBP under the child category for his disabled daughter that he had earlier elected on December 11, 1992. He alleged that he was encouraged to elect SBP for a disabled child, and at the time no negative ramifications of the election were discussed or known to the seminar facilitators. Subsequently, he learned that SBP payments to his daughter upon his death would severely negatively impact her eligibility for Medicaid related services. The BCNR directed that that applicant’s record be corrected to show that “he executed a written request to disenroll from his [SBP] coverage under the “child only” category for his disabled daughter . . . [and] the request was received by the cognizant authority and became effective on 1 April 2009.”

2. In AFBCMR No. 98-02123, the applicant (who retired in 1977) requested that his record be corrected to show that he elected spouse only SBP coverage rather than spouse and child coverage. He alleged that his mentally incapacitated son’s receipt of SBP benefits would severely negatively impact his receipt Medicaid benefits. He alleged that if he had been told of this negative impact on his son’s other benefits at the time he was signing up for SBP he would not have included his son as a SBP beneficiary. The AFBCMR did not find an error in the case, but it did find a probable injustice. The AFBCMR stated that “in view of the fact that applicant’s incapacitated son’s medical will be stopped if his son receives SBP premiums, we believe that it would be unjust to deny the relief requested. Furthermore, it appears that the applicant may not have been provided information concerning the adverse impact that receiving SBP premiums would have on his son’s other benefits.” The AFBCMR ordered that applicant’s record corrected to show: “a. His 8 September 1977 [SBP] election for “spouse and child coverage” be, and hereby is, declared void and removed from his record. b. On 30 November 1977, he elected spouse coverage only under the [SBP] based on full retired pay.”

3. In AFBCMR No. BC-2004-00450, the applicant asked that his military record be corrected to show that he terminated his SBP coverage for his handicapped son, who then resided in a group home. The applicant contended that he included his son in the SBP plan only because of the low cost (approximately \$1 for his son) and he did not realize that if his spouse

predeceased his son, which she did, that his SBP premiums would be recalculated and significantly increase. AFBCMR found an injustice because the applicant's son would not benefit from the SBP coverage as the applicant intended and that it was possible that the applicant was not counseled that the cost would be recalculated if the spouse predeceased the son. The ARBCMR directed that applicant's record to be corrected to show "that on 29 September 1982, he elected spouse coverage, rather than spouse and child coverage under the [SBP] based on full retired pay."

The applicant concluded his response to the advisory with the following statement:

As a distressed parent concerned about his incapacitated son's future welfare, I respectfully and urgently request that you use the three BCMR cases above as precedent and conclude, as in Air Force BCMR 98-0223 that "it would be unjust to deny the relief requested." Without relief my son is doomed. In addition to being a concerned father, as a husband, I owe it to my wife to provide for her well-being after my death. Therefore, following the example in Air Force BCMR 98-02123, I further request that my original SBP election of spouse and child be voided and a substitute election of spouse only based upon full retired pay be entered into my official record.

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 submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The application was not timely. 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 C.F.R. 52.22. The applicant elected SBP for his spouse and dependent child on September 3, 1995 and retired effective December 1, 1995. The applicant knew when he elected SBP coverage that his disabled son was eligible for SSI albeit at a reduced rate. He also knew approximately within one year of the commencement of his retired pay that his son would require residential care through Medicaid. The applicant had sufficient opportunity to research the impact of future SBP on his son's eligibility for continued SSI/Medicare benefits within three years from December 1, 1995. Although the applicant stated that he discovered the alleged error or injustice on November 9, 2008, the Board is persuaded that he could have discovered it within three years of his retirement from the Coast Guard if he had acted diligently in investigating the impact of future SBP payments upon his son's current SSI/Medicaid benefits.

3. Although the application is not timely, the Board must still perform at least a cursory review of the merits to determine whether it is the interest of justice to waive the statute of limitations. In *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992), the court stated that in assessing

whether the interest of justice supports a waiver of the statute of limitations, the Board “should analyze both the reasons for the delay and the potential merits of the claim based on a cursory review.” The court further stated 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.” *Id.* at 164, 165.

4. The Coast Guard did not commit an error in this case because Article 18.f.6.a. of the Personnel Manual states that “[a]ny election not to participate or participate at a reduced amount, if not rescinded or changed prior to the first date of entitlement to retired pay, is irrevocable.” However, as the Coast Guard advisory opinion stated the BCMR, pursuant to 10 USC 1552, has the authority to make a change to an SBP election after a member retires, if it determines that an error or injustice exists.

5. In this case, the Board notes that an injustice exists. If the applicant’s original SBP election is allowed to remain, the applicant’s disabled adult son will probably become financially ineligible for SSI or Medicaid upon the death of the applicant. Since the applicant’s son is an only child there are no siblings upon whom he can depend for care once his parents are deceased. Additionally, whether or not the applicant should have known to investigate the impact of SBP on his son’s SSI/Medicaid benefits earlier, the Board is persuaded that he did not realize the effect of SBP on those benefits until recently. Further, the portion of the SBP premium covering the child is only a few cents compared to over \$200 per month for the applicant’s spouse. Also, permitting the requested correction alleviates the Coast Guard’s obligation toward the dependent child upon the death of his parents. Therefore, the Board fails to see how the Coast Guard will be harmed by correcting the applicant’s record to show that he did not elect child SBP coverage. Accordingly, despite the untimeliness of the application, the Board waives the statute of limitations in the interest of justice and grants the applicant’s request for a correction to his record to show that in 1994 he elected spouse only coverage. He is not entitled to a refund of any premiums paid under the SBP program as a result of this correction.

6. The Board will not accept the Coast Guard’s recommendation to correct the record by lowering the SBP base amount because we do not know what amount would qualify the applicant for Medicaid benefits. Moreover, a correction lowering the SBP base amount, even if we knew the current Medicaid income limitations, might not be sufficient to ensure that the son would qualify for future Medicaid benefits upon the parent’s death because the requirements could change. With respect to the Coast Guard’s argument that a change to the applicant’s SBP election circumvents the law, the Board finds that Congress by enacting 10 USC 1552 allowed for the correction of records in cases of error and/or injustice. In this case as stated above, the Board finds that an injustice exists in the record that is detrimental to the applicant’s disabled son by leaving him without sufficient funds to cover his residential and medical care upon the death of the applicant.

7. Accordingly, the application should be granted.

ORDER

The application of XXXXXXXXXXXXXXXX, USCG (Retired), for correction of his military record is granted. His record shall be corrected to show that on September 3, 1995, he elected spouse only coverage, rather than spouse and child coverage, under the Survivor Benefit Plan based upon full retirement pay. He is not entitled to a refund of any premiums as a result of this correction.

