

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2017-046



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 after receiving the completed application on December 9, 2016, and assigned it to staff attorney [REDACTED] to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated May 26, 2017, 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 changing his Survivor Benefit Plan (SBP) beneficiaries from Spouse Only to Spouse and Child to include his disabled son. The applicant stated that he originally had his son listed as an SBP beneficiary, but in 2012 had him removed. The applicant asked that in the interest of justice, the Board reinstate his disabled son as SBP beneficiary.

The applicant explained that while he listed his disabled son as an SBP beneficiary when he retired, he removed his son in 2012 because he learned that he could not have SBP payments made to a trust, which would cause his son considerable financial hardship. The applicant stated that on December 19, 2014, Section 624 of the [REDACTED] National Defense Authorization Act (NDAA) for FY2015 ("FY2015 NDAA") amended Title 10 of the U.S. Code to give military members and retirees the option to have SBP payments made directly into a dependent child's Special Needs Trust (SNT).

The applicant stated that he learned of this change in the law in August 2016 when he received a letter from the Coast Guard Pay and Personnel Center (PPC). He stated that he later learned that he was not able to take advantage of the change in law, which he stated "is most unfortunate for disabled children like [his] son...because there is no avenue available to add (or in [his] case, re-add) the disabled child as an SBP beneficiary."

In support of his application, the applicant included a letter to the Board explaining the circumstances leading to his application. The letter included the following:

In August 2016 I received a letter from [PPC] informing me of a change in Federal law that gave military members and retirees the option to direct payment of a SBP annuity for a dependent child to a [SNT]. My current SPB election is "spouse only"...I contacted PPC to see if I could change my SBP election and I was told that the new law does not grant them the authority to change my SBP election, and that if I wanted to add my son...as an SBP beneficiary I would have to pursue a BCMR...

On 19 June 2009, in anticipation of my upcoming retirement, I completed a...Coast Guard Retired Pay Account Work Sheet and Survivor Benefit Plan Election form in which I elected "spouse and children" coverage for my wife and my two dependent children. Sometime in 2012 I learned that I made a potentially devastating financial mistake with my SBP elections – devastating not for me, but for my son... Up until that time I was under the false impression that if/when Vincent received an SBP annuity, the annuity could be paid in a SNT and it would not affect his government benefits...¹

There are strict laws that govern income and assets for disabled persons receiving government benefits...Parents of children with disabilities are often faced with a dilemma: if they leave assets directly to the disabled child, he or she will not qualify for most government benefit programs. One solution...is the SNT. The purpose of a SNT is not to hide assets, nor does it replace the benefits a disabled person receives from government benefit programs. A disabled person can have a SNT and still qualify for government benefits. A SNT can allow a disabled person to receive government benefits and still have a source of funds to pay for extras that government programs do not provide. In this way, these trusts can enhance quality of life...

In 2012 I could have created a SNT on [my son's] behalf; but receipt of the SBP annuity would likely have rendered [him] ineligible for most or all of his government benefits... For those in my shoes the only known solution was to apply to modify the SBP election. No one, including myself, ever believed this would ever change. I sent a letter to PPC...dated 14 August 2012 in which I requested to discontinue SBP child beneficiary coverage and continue with "spouse only." I received a response...dated 30 August 2012, granting my request.

I would like to address something in my 14 August 2012 letter. I stated, "I did not submit medical documentation that would otherwise qualify [my son] for continued SBP beneficiary coverage." I believe this is incorrect. While I was on active duty with the Coast Guard I applied for and received approval for Basic Allowance for Housing (BAH) dependency determination on [my son's] behalf... On 25 July 2012, my wife and I became [my son's] legal guardians. On 2 July 2014, my wife and I established [my son's] SNT as part of a larger family trust. I appeal to you in the interest of justice and equity to render a decision favorable to my son... My wife and I both love him dearly and we want what is best for him and his future.

The applicant provided several documents which are summarized below in the Summary of the Record. In addition, he provided a copy of two articles discussing the SBP and SNTs, both of which were published prior to the passing of the FY2015 NDAA. They both discuss the "dilemma" that the applicant addressed in his letter regarding designating a disabled child as an SBP beneficiary and the consequences that has for the dependent child receiving government benefits. In the first article, the applicant emphasized a portion stating, "According to an attorney lobbyist for people with disabilities...Congress would have to change the US Code to allow the trust to 'prevent' receipt by the disabled child (and it is unlikely that Congress will do that)." In the second article, the applicant emphasized portions discussing a retired military member's options, and how application to the BCMR may be required to make changes to SBP beneficiaries.

¹ Government benefits includes Medicaid, public housing, job training and assistance, and caregiver supervision.

SUMMARY OF THE RECORD

The applicant submitted a February 1, 2008, memorandum from the Personnel Service Center (PSC) that approved an application for BAH dependency. Included with this memorandum was a letter of Medical Sufficiency regarding the applicant's son's disabilities. The letter states that his son has a diagnosis of athetoid quadriplegia cerebral palsy which occurred due to a severe brain injury as a complication of a caesarean section. The applicant's son was determined to be wheelchair-bound and entirely dependent upon caregivers for assistance with his daily living activities, despite the fact that he is cognitively intact. The level of incapacitation was determined to be permanent and to have existed prior to his 23rd birthday.

On June 22, 2009, as part of his retirement processing, the applicant elected Spouse and Child SBP coverage. The applicant had two children eligible for coverage at that time – his disabled son and his daughter.

The applicant retired from the Coast Guard on October 1, 2009, after serving for over 26 years.

On August 14, 2012, the applicant sent a letter to PPC requesting that his children's SBP coverage be discontinued because neither was eligible for continued SPB coverage as they were both over the age of 18. The applicant stated that he wished to discontinue coverage for his son due to his disability; he stated that while he checked the box that indicated his son is disabled he "did not submit medical documentation that would otherwise qualify [his son] for continued SBP beneficiary coverage." The applicant also stated that he wished to discontinue coverage for his daughter because she was ineligible since she was over 18 and no longer attending school. He therefore requested that his SBP coverage be changed to "spouse only."

On August 30, 2012, PPC responded to the applicant's August 14, 2012, letter and confirmed discontinuation of his children's SBP coverage. PPC stated that his spouse coverage continued.

On August 22, 2016, the applicant received a letter from PPC informing him of the change in law brought about by section 624 of the FY2015 NDAA. The letter included the following:

A SNT is a legal instrument specifically designed for the benefit of a person with a disability. Such a trust provides a means by which income supporting the disabled beneficiary's special needs can be excluded from income for tax purposes. In some cases, this may preserve the beneficiary's eligibility for other federal or state benefits. Directing payment to a SNT is done through an irrevocable substitute election to a member or retiree's SBP election. The member or retiree must have previously elected Spouse and Child or Child Only coverage under the SBP. If one or the other of these two elections is on record, upon completion of the paperwork...payment can be directed to a SNT on behalf of a disabled annuitant.

Who May Make the Election? – During the lifetime of a member or retiree, if they have previously elected Spouse and Child or Child Only coverage under the SBP, they may make the designation to direct payment on the behalf of a beneficiary to a SNT at any time...

Irrevocability – Please be aware that the election to make payment to a SNT on behalf of a SBP beneficiary is irrevocable.

On November 8, 2016, PSC sent a letter to one of the applicant's Senate representatives. The letter stated that the applicant's 2009 SBP election, and his 2012 modification, were both made prior to the law being changed. PSC stated that aside from a few exceptions not applicable here, SBP elections are irrevocable. PSC therefore stated that the Coast Guard had no authority to change the applicant's SBP election, and that his only recourse was to apply to the BCMR.

VIEWS OF THE COAST GUARD

On April 28, 2017, the Judge Advocate General (JAG) provided an advisory opinion in which he recommended the Board grant relief due to an injustice in the applicant's record. The JAG stated that the applicant's disabled son was eligible for SBP coverage for the rest of his life, despite the fact that SBP coverage for children usually terminates at 18 years of age or 22 years of age if the child is in school, because of his permanent disability. The JAG noted that when the applicant elected Spouse and Child for SBP coverage, he did not realize that his son's receipt of SBP annuity payments could disqualify him for certain government benefits.

The JAG stated that the applicant predicated the 2012 request to remove the applicant's disabled son from SBP coverage on the allegation that he did not provide medical documentation supporting coverage. PPC approved the applicant's request, and therefore his current records reflect Spouse Only SBP coverage. The JAG stated that he did not take the applicant's assertion that he did not provide proper medical documentation as an allegation of error on the part of the Coast Guard. The JAG instead stated that he believed the applicant's claim to the Board is based on justice and equity brought about by the 2014 change in the law.

The JAG stated that Section 624 of the FY2015 NDAA gave members who had previously chosen Spouse and Child or Child Only as SBP beneficiaries were eligible to receive direct SBP payments to an SNT. While SBP annuity payments used to be disallowed from being paid into a trust, the FY2015 NDAA changed the law to allow for such direct trust deposits. The JAG argued that with limited exceptions not applicable here, SBP elections are irrevocable. Additionally, the changes in law brought about by the FY2015 NDAA were not made retroactive and retirees were not provided with an open season to request changes to SBP elections. The JAG therefore argued that the Board should not give Section 624 of the FY2015 NDAA retroactive application, meaning that there is no statutory authority that supports granting the applicant's request.

Despite the fact that no errors were committed by the Coast Guard, the JAG argued that the Board has the authority to correct injustices on a case-by-case basis. The JAG stated that the applicant has the burden of proving by a preponderance of the evidence that an injustice occurred. The JAG also argued that for the reasons stated in the application, there are significant equitable interests due to the special needs of his child. The JAG emphasized that the Coast Guard did not cause the injustice in this case, but that the Coast Guard recognizes that there are unique circumstances present to warrant finding that an injustice is present in the applicant's military record. The JAG therefore recommended that the Board determine that an injustice occurred in this individual case and grant relief to allow the applicant's record to reflect that he

selected a Spouse and Child SBP election. The JAG added that this correction should be contingent upon recovery of appropriate SBP premium costs.²

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 2, 2017, the Chair sent a copy of the Coast Guard's advisory opinion to the applicant and invited a response within 30 days. On May 8, 2017, the applicant responded and stated that he had no objections to the Coast Guard's recommendation. He added:

On behalf of our son, [name redacted], we want to express our gratitude to you and to the Coast Guard for everything you have done for our child. My wife and I cannot put into words what this means to all of us. Thank you.

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 concerning this matter pursuant to 10 U.S.C. § 1552. The application was timely filed within three years of the applicable statutory change, which was effective on December 19, 2014.

2. The applicant asked the Board to correct his military record by changing his SBP selection from Spouse Only to Spouse and Child. While the applicant acknowledged that the Coast Guard committed no error, he claimed that his SBP election remaining Spouse Only constitutes an injustice. 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.³ 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."⁴

3. Section 624 of the FY2015 NDAA did not provide a way for retired members to retroactively list their disabled adult children as beneficiaries, and so the applicant cannot change his SBP election in order for his disabled adult child to benefit from the new provision allowing SBP annuities to be paid into an SNT. The Board agrees with the JAG that the Coast Guard committed no error in declining to change his SBP election when the applicant learned of the change in the law in 2016, or when they changed his election in 2012 when he stated that his children were no longer qualified for coverage. The Board may correct injustices that are not caused by the Coast Guard,⁵ however, and the Board does find that due to the unique

² The JAG stated that SBP premium child costs are minor – they were 27 cents per month in 2012. However, the applicant will incur these costs if his record is corrected to allow Spouse and Child SPB election.

³ 33 C.F.R. § 52.24(b).

⁴ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁵ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning

circumstances of this case, the applicant's military record contains an injustice. The record reflects that the applicant originally listed his disabled son as a beneficiary and removed him in 2012 only because—under the law then in effect—his son's receipt of SBP upon his father's death would make his son ineligible for other government benefits. After the passage of the 2015 NDAA, though, he was unable to re-change his election in order to have his disabled son listed as a beneficiary again. The Board therefore finds that the applicant's military record should be corrected to enable his son's SNT to receive SBP payments upon his father's death.

4. Accordingly, the applicant's request should be granted. The Coast Guard should correct his record to show that he elected Spouse and Child coverage upon his retirement, that he did not change this election to Spouse Only, and that his disabled son remains a listed beneficiary of his SBP. The applicant should remain responsible for ensuring that the SBP payments are directed to an SNT for his son and pay any applicable SBP premium costs.

(ORDER AND SIGNATURES ON NEXT PAGE)

and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved.”).

ORDER

The application of [REDACTED] USCG (Retired), for correction of his military record is granted. The Coast Guard shall correct his record to show that he elected “Spouse and Child” coverage upon his retirement; that he did not change this election to “Spouse Only”; and that his disabled son remains a beneficiary. The applicant is responsible for ensuring that the SBP payments are directed to an SNT for his son and for paying any applicable SBP premium costs.

May 26, 2017

