

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

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Application for Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2017-280**



**FINAL DECISION**

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the case after receiving the completed application on September 19, 2017, 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 July 6, 2018, 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, a retired [REDACTED] asked the Board to correct his record by retroactively cancelling his Survivor Benefit Plan (SBP) election. He explained that he was discharged on February 3, 2003, with severance pay due to medical disability. Congress passed the 2008 National Defense Authorization Act (NDAA), which gave certain veterans the option to apply to a Department of Defense (DoD) Physical Disability Board of Review (PDBR) to determine if their disability ratings should be raised. After he applied, the PDBR recommended that the applicant's rating be retroactively changed from 10% to 30%, and the Coast Guard agreed with this recommendation. The applicant stated that with a 30% disability rating, he was eligible for a disability retirement and retroactively placed on the Permanent Disability Retirement List (PDRL).

The applicant stated that after this decision was made, he received paperwork in the mail which he completed and returned to the Coast Guard. He claimed that he was given a "retroactive bill for premiums from February 3, 2003 to 2010 when [he] first received notification" of the change to his record. He stated that he attempted to "change it" (presumably the SBP election) but claimed that he was told there was a two-year window<sup>1</sup> in which such a change could be made which had passed. The applicant asserted that he was "not able to take advantage of that 2 to 3

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<sup>1</sup> In accordance with 10 U.S.C. § 1448a, there is a one-year window to cancel a SBP election two years after retired pay begins.

year window because [he] was not retired yet in 2005 and 2006.” He stated that he contacted the Coast Guard Pay and Personnel Center (PPC) and spoke with them but they never answered his questions. He asserted that he was never provided with any retirement guidance on his benefits. The applicant claimed that the PDBR was new at the time and the Coast Guard only had a handful of applicants. He stated he did not desire SBP coverage and he was never given the opportunity to change his coverage selection due to his retroactive retirement. He therefore asked that the Board correct his record to show that he selected no SBP coverage on February 2, 2003, “or at worse to February 3, 2005.”

Regarding the timeliness of his application, the applicant stated that he did not know how to fix this issue and he only recently learned about applying to this Board. In support of his application he provided several documents which are discussed below in the Summary of the Record.

### **SUMMARY OF THE RECORD**

The applicant was originally honorably discharged on March 2, 2003, with a narrative reason of “Disability Severance Pay.” He had served on active duty for more than ten years.

On June 4, 2010, the Designated Decision Authority for the Coast Guard made a decision regarding the applicant’s PDBR case. He accepted the DoD PDBR’s recommendation to modify the applicant’s combined disability rating from 10% to 30% effective on the date of his separation for disability, which as a result would be recharacterized as a disability retirement. This recharacterization would result in the applicant’s placement on the PDRL. The applicant was asked to “review and complete the enclosed retirement pay and survivor benefits plan guide.” If he had any questions he was given the address and phone number of the PPC.

On June 30, 2010, the applicant filled out and signed a Coast Guard Retired Pay Account Worksheet and Survivor Benefit Plan Election. He stated that he was married and he designated his wife as the beneficiary for unpaid retired pay at his death. In section VI, titled Survivor Benefit Plan Election, the applicant elected “I elect coverage for spouse and child(ren)” and “I elect coverage based on full gross retired pay.” He entered his wife’s name and the names of his children in the appropriate boxes. The applicant and a witness signed the form.

On July 13, 2010, the Coast Guard authorized the applicant’s separation to be retroactively changed to a medical retirement with a 30% combined disability rating. The authorization states that the “recommendation of the DoD PDBR to modify [the applicant’s] combined rating of 10% to 30% effective the date of [the applicant’s] separation for disability with severance pay on 3 February 2003, is approved. The recharacterization of [his] separation as a disability retirement will result in [his] placement on PDRL.” In addition to being medically retired, the applicant was retroactively enrolled in the SBP with coverage for his spouse and children.

The applicant provided an exchange of emails with PCC dated from July 2, 2012. He began by asking, “How do I cancel the SBP?” He stated that he was a PDBR retiree as of 2010, which was made retroactive to 2003. He asked if this meant he would have had to cancel the SBP in 2005 or 2006. He stated, “I wasn’t yet retired so how could I? I was billed back to 2003 when

I wasn't retired until 2010. This is extremely confusing and I was never given any retirement information other than a packet of information since I was retroactively discharged to 2003." The same day, a PPC employee responded. She stated that her supervisor was helping her "muddle through the policy and [they were] getting guidance from several authorities." She clarified that "it will not take away the debt for the back SBP" if that is what the applicant was trying to effect with his inquiry. The applicant replied and thanked her for the response. He provided no additional emails.

On August 10, 2010, the DoD released a memorandum titled Retired Pay and Benefits for Members Originally Separated for Disability. The purpose of the memorandum was to provide guidance on retired pay and participation in the SBP for veterans who were originally discharged but subsequently had their discharge recharacterized as a disability retirement pursuant to a recommendation by the PDBR. It states:

The Office of the Secretary of Defense, as required by title 10, United States Code, section 1554a, has established the Physical Disability Board of Review (PDBR) to examine the character of certain disability separations and make recommendations to the Secretary concerned regarding the dispositions of those separations, which may result in a prior separation with disability severance pay being recharacterized as a retirement for disability. The policy attached is applicable in these cases and augments the guidance provided in enclosure 3, paragraph 6.b. of DoD instruction 6040.44, regarding the PDBR recoupment policy.

A member paid disability severance pay or other lump-sum payment at separation, based on service in the armed forces, who is later qualified for retired pay under title 10, United States Code, chapter 61 pursuant to the PDBR process described above, shall have such retired pay reduced until the total of such disability severance pay or other lump-sum payment is recovered by the government as required by title 10, United States Code, section 1554a(e)(2). Additionally, any previously separated member who becomes entitled to military disability retired pay based on a correction of the member's record, shall be afforded the opportunity to participate in the SBP program. Details are in the attachment.

Attached is a memorandum titled Guidance for Retired Pay and Benefits for Members Originally Separated for Disability. It is a two-page document providing an overview of relevant pay and benefit provisions. The guidance states that members who received severance pay and subsequently qualified for retired pay "shall have deducted, from any retired pay otherwise due, an amount equal to the total amount of the disability severance pay previously paid, without regard to any withholding for taxes." This amount would also be reduced by any amount recovered by the Department of Veterans Affairs (VA) in order to avoid duplicate collection. When a veteran is awarded a military disability retirement, "recoupment action must be taken to recover any disability severance pay previously paid to a member." A veteran who is entitled to retroactive retired pay will have that pay applied toward the recoupment of any disability severance pay that was originally paid to them.

Regarding SBP membership, the guidance states that veterans who were married on their effective retirement date would automatically receive full spouse coverage unless they made an affirmative election for less than full coverage within 90 days. Any election for less than full spousal coverage had to include the spouse's concurrence.

## VIEWS OF THE COAST GUARD

On February 20, 2018, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board deny relief in this case. The JAG stated that the applicant was not timely filed because the applicant elected SBP coverage in 2010. The JAG argued that the applicant did not provide sufficient justification for his delay in filing his application and asserted that there was little likelihood that he would succeed on the merits of his claim.

The JAG stated that the applicant was sent a retirement package as part of receiving retroactive disability retirement in 2010. The JAG argued that as part of his retirement processing, the applicant “voluntarily requested SBP spouse and child coverage.” The applicant continues to pay his premiums and continues to have SBP coverage. “In the event of his death, applicant’s spouse will receive 55% of his retired pay until her death. If she predeceases him, applicant’s children will receive the survivor benefit until their coverage ages out.” SBP elections are irrevocable pursuant to 10 U.S.C. § 1448(a)(4)(A).<sup>2</sup> Members are able to discontinue their election in the SBP at any time in the one-year period beginning on the second anniversary of the date on which payment of retired pay commenced. Spousal concurrence is required to discontinue SBP participation.

The JAG stated that implied in the applicant’s request was reimbursement of the SBP premium costs. The JAG argued that there is “no evidence that the Coast Guard committed any error in the processing or maintenance of the applicant’s SBP account.” The applicant elected spouse and child coverage in 2010 and has maintained that coverage since retirement. Pursuant to DoD’s guidance, the SBP coverage was backdated to the date the applicant had been separated with severance pay – February 3, 2003. As a result, the applicant was required to pay SBP premium costs for the retroactive coverage.<sup>3</sup> The applicant owed a total of \$1,670.06 in premiums, which were deducted from the lump sum of retired pay that was owed to him as a result of the retroactive retirement. The JAG added that the applicant had the option to cancel his SBP coverage, with the concurrence of his spouse, between the second and third year of his receipt of retired pay.

The JAG pointed out that in the applicant’s application, he made multiple references to this cancellation window being from 2003 to 2005. The JAG stated that this window was between July 13, 2012, and July 13, 2013, because that is the two-year anniversary date of the July 13, 2010, authorization for his receipt of retired pay.<sup>4</sup> The JAG asserted that there is no evidence that the applicant attempted to cancel his SBP coverage during this time frame. He noted that the applicant provided only emails “indicating that there were discussions about retroactive SBP costs but there is no evidence of any communications concerning termination of SBP.” Further, the JAG argued, revocation of SBP coverage is not permitted by law.<sup>5</sup>

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<sup>2</sup> COMDTINST M1700.1, Article 2.D.6.

<sup>3</sup> DOD Financial Management Regulation Volume 7B, Chapter 4, Section 040603 E.

<sup>4</sup> The Coast Guard authorized the applicant’s separation to be retroactively changed to a medical retirement on July 13, 2010.

<sup>5</sup> Title 10 U.S.C. § 1448(a)(4)(A).

The JAG stated that it is “important for the Board to consider that the applicant has already benefited from SBP coverage.” While he has not passed away, he has and continues to receive financial protection due to his coverage for his beneficiaries in the event of his death. The JAG argued that he “has the knowledge that his spouse and children are financially protected by coverage. It would be an inappropriate benefit now to the applicant for the Board to cancel SBP coverage and direct reimbursement of premiums when the applicant has had the benefit of SBP coverage.” The JAG asserted that the applicant provided no evidence of an error or injustice. He elected SBP coverage in 2010 and he received and continues to receive the elected coverage. The JAG therefore recommended that the Board deny the applicant’s request.

### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On March 27, 2018, the Chair sent the applicant a copy of the Coast Guard’s views and invited him to respond within 30 days. On April 11, 2018, the applicant responded and stated that he disagreed with the Coast Guard’s advisory opinion.

Regarding the timing of his application, the applicant stated that when he was initially discharged in 2003 there was no reason for him to apply to this Board. He stated that he applied to the PDBR in 2009 and received a retroactive retirement in 2010. He claimed that he has not received any retired pay from the Coast Guard due to the VA recouping disability pay. The applicant stated that as he understood the SBP policy, the cancellation window did not begin in 2012, but it began in 2005 because that was two years after his retroactive retired pay began. He stated that he had tried to discuss these problems with PPC in July 2012 with PPC and “no solution was found” after their initial email. The applicant asserted that if the timeline for cancelling the SBP did begin in July 2012, though, he did email PPC in July 2012 and he had provided those emails with his application. He further claimed that the “Coast Guard has never withheld any SBP payments from [his] VA compensation” so he would not benefit from SBP coverage in the event of his death as the JAG claimed because he is eligible for Dependents Indemnity Compensations (DIC) through the VA. The applicant stated that he has his wife’s concurrence and he wished to cancel the SBP as he had attempted to do previously.

### **APPLICABLE REGULATIONS**

Title 10 U.S.C. § 1448 discusses the applicability of the SBP. It states:

(a)(2) Participants in the Plan. – The plan applies to the following persons, who shall be participants in the Plan:

(A) Standard annuity participants. – A person who is eligible to participate in the Plan ... and who is married or has a dependent child when he becomes entitled to retired pay, unless he elects (with his spouse’s concurrence ...) not to participate in the Plan before the first day for which he is eligible for that pay. ...

(4) Irrevocability of elections. –

(A) Standard annuity. – An election under paragraph (2)(A) is irrevocable if not revoked before the date on which the person first becomes entitled to retired pay.

Title 10 U.S.C. § 1448a is titled Election to Discontinue Participation: One-Year Opportunity after Second Anniversary of Commencement of Payment of Retired Pay. It states:

(a) Authority. – A participant in the Plan may, subject to the provisions of this section, elect to discontinue participation in the Plan at any time during the one-year period beginning on the second anniversary of the date on which payment of retired pay to the participant commences.

Title 10 U.S.C. § 1450 provides the following regarding SBP and DIC:

(c) Offset for amount of dependency and indemnity compensation.--

(1) Required offset.--If, upon the death of a person to whom section 1448 of this title applies, the surviving spouse or former spouse of that person is also entitled to dependency and indemnity compensation under section 1311(a) of title 38, the surviving spouse or former spouse may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation. ...

(e) Refund of amounts deducted from retired pay or CRSC when DIC offset is applicable.--

(1) Full refund when DIC greater than SBP annuity.--If an annuity under this section is not payable because of subsection (c), any amount deducted from the retired pay or combat-related special compensation of the deceased under section 1452 of this title shall be refunded to the surviving spouse or former spouse.

(2) Partial refund when SBP annuity reduced by DIC.--If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted before the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the surviving spouse or former spouse.

DOD Financial Management Regulation, Volume 7B, Chapter 4, Section 040601, states that when the Secretary approves a recommendation from the PDBR to award a disability retirement, any disability severance pay previously paid to the member must be recouped. Section 040603 states a member whose record is changed to a military disability retirement by reason of the PDBR process and who was married on the retirement effective date “will receive automatic full spouse coverage under the SBP, unless the member makes an affirmative election ... for less than full spouse coverage.”

The Military Civil and Dependent Affairs manual, COMDTINST M1700.1, Article 2.D.6.d. states that SBP “elections are irrevocable after the award of retired pay.” Article 2.D.4.c. states that a member may elect to participate in the SBP at a reduced rate or not to participate at all with the written consent of his spouse. Article 2.D.11.f. states that “[a] military retiree who has been rated as 100 percent disabled by the Department of Veterans Affairs continuously for ten or more years, or if for a lesser period, not less than five years from the last separation from the service, may discontinue SBP participation. This provision also allows a retiree to resume SBP participation if the VA disability is reduced from 100 percent at a later date.”

## 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.
2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.<sup>6</sup> The applicant was retroactively medically retired and made his SBP election in 2010. Therefore, the preponderance of the evidence shows that the applicant knew of the alleged error that he wants corrected—his SBP election—in July 2010, and his application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>7</sup> In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”<sup>8</sup> to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted 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.”<sup>9</sup>
4. Regarding the delay of his application, the applicant explained that he did not know “until recently” that he could apply to this Board. The Board finds that the applicant's explanation for his delay is not compelling because he failed to show that anything prevented him from seeking correction of the alleged error or injustice more promptly.
5. A cursory review of the merits of this case indicates that the claim lacks potential merit. The record shows that upon his retroactive retirement in 2010, the applicant intentionally elected SBP coverage for his dependents based on his full retired pay. The applicant submitted evidence showing that in July 2012 he made one inquiry about cancelling his SBP election and received a prompt response from a technician indicating that further investigation was required but that cancelling his SBP election would not “take away the debt for the back SBP.” The technician stated that she would follow up with the applicant, and the Board must presume that she did.<sup>10</sup> She did not tell him that he could not cancel his SBP, and there is no evidence that the applicant made any further inquiries or any attempts to cancel his SBP during the authorized window starting in July 2012.<sup>11</sup> The applicant also argued that his SBP coverage is unnecessary and unjust because his dependents will receive DIC through the VA. The record does not reveal whether the DIC

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<sup>6</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>7</sup> 10 U.S.C. § 1552(b).

<sup>8</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>9</sup> *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

<sup>10</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

<sup>11</sup> According to 10 U.S.C. § 1448a, a veteran may cancel his SBP election two years after his retired pay commences for a period of one year. The applicant apparently believed that his window would have been February 3, 2005, to February 3, 2006, but his retired pay commenced on July 13, 2010. Therefore, as the JAG stated, his window for cancelling his SBP election was July 13, 2012, to July 13, 2013, in accordance with 10 U.S.C. § 1448a.

payments will entirely offset the SBP annuity, however, and in any case, the law provides that the SBP premiums are refunded to the survivors who receive DIC instead.<sup>12</sup> Based on the record before it, the Board finds that the applicant's claim cannot prevail on the merits.

8. Accordingly, the Board will not excuse the application's untimeliness or waive the statute of limitations. The applicant's request should be denied. The Board notes that the applicant did not specifically challenge the SBP premiums for the period from 2003 to 2010 when he was not actually enrolled and the Coast Guard did not address this issue. Therefore, the Board is not addressing this issue.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

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<sup>12</sup> 10 U.S.C. § 1450(e). The Board notes that the applicant may discontinue his SBP participation if he is ever rated 100% disabled by the VA, pursuant to Article 2.D.11 f. of COMDTINST M1700.1.



**ORDER**

The application of retired [REDACTED], USCG, for correction of his military record is denied.

July 6, 2018

