

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2018-082

████████████████████
██████████ FN (Retired)

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 application upon receipt of the completed application and military records on February 6, 2018, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated October 26, 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 was medically retired from the Coast Guard on March 7, 1977, at age 19 because of an eye injury. At the time, he elected to participate in the Survivor Benefit Plan (SBP) and named his mother as an “insurable interest” beneficiary. The applicant asked the Board to correct his record to show that he changed his SBP election to spouse coverage within a year of his marriage in 2009. The applicant stated that he originally named his mother as his beneficiary because he was not married, and he continued to pay the premiums for decades. No one told him that if he ever got married, he would have only a year to change his beneficiary. He stated that after he married in 2009, he repeatedly received erroneous advice, was told to wait two years, and was never told that he could only change his SBP beneficiary to his spouse within a year of marrying. The applicant stated that he is both visually and mentally impaired and he should not be punished for not receiving proper counseling about the SBP.

SUMMARY OF THE RECORD

The applicant enlisted on November 3, 1975, at age 18. After completing recruit training, he was assigned to a cutter. On August 24, 1976, the applicant was brought to a hospital emergency room by a shipmate who stated that while trying to straighten out a kink in a sewage hose, the applicant had fallen headfirst about 20 to 25 feet off a ship in drydock, hit his head, and lost consciousness. The doctor reported that the applicant was confused and lethargic, complained of pain in his head, back, and neck, and was photophobic. He was diagnosed with “head

trauma” and admitted to the hospital for two days, but neurological testing showed normal results. Upon discharge from the hospital, he was told to go to the eye clinic if he had any problems with his vision. In the following week, the applicant went to the eye clinic several times complaining of fuzzy vision in his right eye.

On an Initial Medical Board Report, dated November 23, 1976, an ophthalmologist reported that the applicant had 20/20 vision in his left eye but his right eye could only “count fingers four feet.” Examination revealed that macular edema (swelling) in his right eye had progressed to a “macular hole.” The medical board found that he had suffered a permanent loss of the central vision in his right eye and recommended that he be separated because his impaired vision left him unfit for duty.

On January 10, 1977, a Central Physical Evaluation Board recommended that the applicant be retired with a 30% disability rating. The report states that his vision in his right eye was 5/200. The applicant accepted the board’s recommendation on January 31, 1977. The recommendation was approved by the Chief of the Office of Personnel on February 18, 1977, and the applicant was retired with a 30% disability rating on March 7, 1977. Before retiring, he completed an SBP Election Form on which he noted that he was not married and had no children. He elected “insurable interest coverage” for his mother, whose date of birth was noted as [REDACTED]

VIEWS OF THE COAST GUARD

On May 22, 2018, the Board received the advisory opinion of the Coast Guard from the Judge Advocate General (JAG), who recommended that the Board grant relief in this case. The JAG stated that although the application was not timely filed and the Coast Guard has not erred by refusing to change his SBP beneficiary more than a year after his marriage, denying relief would cause an injustice and so the Board should not deny the application as untimely.

The JAG explained that the applicant elected full SBP coverage for an insurable interest in 1977, which is more expensive than coverage for a spouse or child. He named his mother as his insurable interest and has continued to pay the premiums for that coverage. The JAG stated that the applicant married in 1981 and was divorced in 1991 and did not change his SBP beneficiary at the time. Because he never canceled his “insurable interest” coverage, his mother remained his beneficiary and would have received a monthly annuity if he had predeceased her.

On October 3, 2009, the applicant remarried. The JAG stated that Coast Guard records show that on August 31, 2011—more than a year after his remarriage—the applicant sent the Pay and Personnel Center (PPC) a fax about his marriage, but the fax did not mention his SBP. The applicant then made inquiries about changing his SBP coverage in 2016 and 2017. In 2016, PPC sent him a form for changing his SBP election as if he were still eligible to do so, but he was not. In 2017, PPC advised him to apply to the BCMR.

The JAG stated that a member who has no spouse upon retirement but later acquires a spouse may elect to participate in the plan and elect spousal coverage within a year of the marriage, in which case spousal coverage begins upon the first anniversary of the marriage. But

if the retiree marries and divorces without timely electing spousal coverage—as the applicant did—the retiree may not then elect SBP for a later acquired spouse. Therefore, by law, to be eligible to receive spousal coverage, the applicant should have changed his election within a year of his first marriage in 1981.

The JAG stated that the applicant has been paying for full coverage for an “insurable interest,” but it may be canceled at any time. With his current coverage, if the applicant predeceases his mother, she would receive a monthly SBP annuity payment. (The applicant’s SBP election form, signed on March 1, 1977, shows that his mother was born on [REDACTED] and so is 25 years older than him.) The JAG argued that because the applicant has been receiving the benefit of “insurable interest” coverage, it would be inappropriate to backdate the cancellation of this coverage and direct a reimbursement of premiums.

The JAG stated that retirees are responsible for notifying PPC about changes in their circumstances, and PPC frequently reminds retirees about their notification responsibilities with respect to SBP. However, the applicant’s submission shows his confusion and PPC may have contributed to his confusion when they sent him the form in 2016 as if he were legally eligible to elect spousal coverage. Given the Board’s equitable authority to remove injustices, however, the JAG recommended that the Board grant relief because “an injustice would occur if applicant were not permitted to change coverage from insurable interest to his current spouse. The Coast Guard bases this conclusion on the fact that applicant has made 40 years of SBP premium payments on behalf of his mother,” the applicant’s confusion, and the fact that the Coast Guard might have contributed to his confusion, albeit long after the one-year period when he could have elected spousal coverage following his first marriage in 1981.

Therefore, the Coast Guard recommended that the Board permit the applicant to change his SBP coverage from insurable interest to spouse coverage effective as of the date of the Board’s decision.

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On July 10, 2018, the Board received the applicant’s response to the advisory opinion. He stated that he has no objection to changing his beneficiary from his mother to his spouse.

APPLICABLE LAW

The SBP is authorized under 10 U.S.C. §§ 1447 *et seq.* Section 1448, “Application of Plan,” states the following in pertinent part:

(a) General rules for participation in the Plan.--

• • •

(5) Participation by person marrying after retirement, etc.--

(A) Election to participate in Plan.--A person who is not married and has no dependent child upon becoming eligible to participate in the Plan but who later marries or acquires a dependent child may elect to participate in the Plan.

(B) Manner and time of election.--Such an election must be written, signed by the person making the election, and received by the Secretary concerned within one year after the date on which that person marries or acquires that dependent child.

(C) Limitation on revocation of election.--Such an election may not be revoked except in accordance with subsection (b)(3).

(D) Effective date of election.--The election is effective as of the first day of the first calendar month following the month in which the election is received by the Secretary concerned.

Title 10 U.S.C. § 1448(b)(1)(B) states that an election for coverage for a beneficiary who is not the former spouse of a retiree may be terminated by submitting a request to discontinue participation to the Secretary concerned, and the discontinuation shall be effective on the first day of the next month.

Title 10 U.S.C. § 1452(c) states that retired pay is reduced by 10% to provide coverage for an “insurable interest” who is older than the retiree. Bigger reductions are made when the insurable interest is younger than the retiree. Under § 1452(a), the reduction in the retired pay of a medically retired member to provide spouse-only coverage is either 6.5% or “[a]n amount equal to 2½ percent of the first \$337 (as adjusted after November 1, 1989, under paragraph (4)) of the base amount plus 10 percent of the remainder of the base amount”—whichever is more favorable to the member.

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 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.¹ The applicant's statement shows that he was aware that his spouse was not covered by SBP at the time of his marriage in 2009. Therefore, the Board finds that the application is untimely.
3. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.² 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”³ 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.”⁴ Although the applicant in this case did delay filing his application, the Board finds that it is in the interest of justice to excuse the untimeliness of the application because the Coast Guard has identified a significant injustice that may be prevented.

¹ 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

² 10 U.S.C. § 1552(b).

³ *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

⁴ *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995).

4. As the JAG noted, by law, the applicant was eligible to cancel his mother's coverage and elect spousal coverage during the first year of his first marriage in 1981, but he did not do so. Therefore, the Coast Guard's refusal to change his coverage is correct under the law.

5. The record shows that the applicant received his counseling about the SBP at age 19 when he was being medically retired after he fell headfirst 20 to 25 feet off a cutter in dry-dock, suffered a traumatic brain injury, and lost much of his sight in his right eye. Based on whatever counseling he received, the applicant elected full SBP coverage for his mother as an "insurable interest," and consequently his disability retired pay has been reduced by 10% for decades. The record also shows that the applicant is visually and mentally impaired and has been confused about the SBP requirements. His mother, if she is still alive, is 25 years older than him and so the insurable interest coverage for which he has paid so much is unlikely to ever benefit her. Therefore, the Board agrees with the JAG that it would be in the interest of justice to grant relief in this case.

6. Accordingly, relief should be granted by directing the Coast Guard to correct the applicant's record to show that he has "spouse only" SBP coverage effective as of November 1, 2018, and that he has canceled his insurable interest coverage effective as of the same date.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of FN [REDACTED], USCG (Retired) for correction of his military record is granted as follows: The Coast Guard shall correct his record to show that, effective as of November 1, 2018, he has “spouse only” coverage under the Survivor Benefit Plan and has canceled his insurable interest coverage for his mother.

October 26, 2018

