


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2019-033

 CDR (Retired)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application and military records on December 1, 2018, and assigned it to the Deputy Chair to prepare the decision for the Board pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated January 10, 2020, 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 Commander in the Coast Guard, asked the Board to correct the Coast Guard & NOAA Retired Pay Account Worksheet and Survivor Benefit Plan Election Certificate (form CG-4700) that he completed and signed on July 1, 2013. Specifically, he asked the Board to correct the form to show that he elected to participate in the Survivor Benefit Plan (SBP) and designated his son's special needs trust (SNT)¹ as the beneficiary, instead of electing not to participate in SBP.

The applicant explained that when he retired from the Coast Guard on October 1, 2013, he elected not to participate in SBP. The applicant was divorced at the time and had one dependent who was severely disabled. At the time, SBP benefits were prohibited from being directed to a trust. Instead, the applicant's SBP benefits would have had to go directly to his disabled son. The applicant stated that designating his son to receive funds paid through SBP would have jeopardized his eligibility for Medicaid benefits, which he was receiving at the time. Given the restrictions on SBP at his time of retirement, the applicant elected not to participate in the program.

¹An SNT is a legal instrument designed for beneficiaries who are physically or mentally disabled. An SNT provides a means by which income for supporting the beneficiary's needs can be excluded from income for tax purposes thus preserving the beneficiary's eligibility for federal or state benefits such as Medicaid.

The applicant claimed that in 2018, he learned through reading an article in The Retiree Newsletter that the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 explicitly authorized SBP benefits to be directed to an SNT. The applicant stated that had this option existed at the time he retired, he would have initially elected to participate in SBP and designate his son’s SNT as the recipient of his benefits.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on May 20, 1992. Approximately ten years later, the applicant’s only child was born on December 25, 2002. Shortly after his birth, the applicant’s son was diagnosed with a rare, severely debilitating form of epilepsy known as West Syndrome/Infantile Spasms. This condition has rendered the applicant’s son globally delayed and severely disabled.

On July 7, 2011, the applicant and his wife divorced. In the divorce decree, the court recognized that the applicant’s son has severe and permanent mental and physical disabilities and that there is no expectation that he will ever be able to live independently and support himself. Accordingly, the applicant and his wife agreed that they shall both have an obligation to provide support for their son indefinitely.

While the applicant was serving in the Coast Guard, the applicant’s son was enrolled in Virginia’s Medicaid Program for severely disabled children. The applicant’s son received various services through the Medicaid program including attendant and respite care. His eligibility for the program was based on his income level.

The applicant retired from the Coast Guard on October 1, 2013, after more than 21 years of service. As part of his retirement processing, the applicant filled out the Coast Guard & NOAA Retired Pay Account Worksheet and Survivor Benefit Plan Election Certificate (form CG-4700). The SBP allows retirees to leave a portion of their retired pay to their survivors as an annuity, and the premiums are deducted from their retired pay. If retirees do not participate in SBP, their survivors do not receive an annuity from the Coast Guard. Typically, children become ineligible under SBP once they reach the age of eighteen. However, if a child is incapable of self-support because of a mental or physical disability that existed before the child’s eighteenth birthday, payments continue for the life of the child.²

The applicant elected not to participate in the SBP. At the time of the applicant’s retirement, SBP benefits had to go directly to the beneficiary. While the applicant had set up an SNT for his son to help fund his future needs, at the time of the applicant’s retirement, SBP benefits were not permitted to be directed to such a trust.

Two years after the applicant retired, section 624 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, amended

² UNITED STATES COAST GUARD, LAW/POLICY/RULES & REGULATIONS: HOW TO APPLY FOR YOUR RETIRED PAY & SURVIVOR BENEFIT PLAN GUIDE (2019).

Title 10, U.S. Code, Sections 1448, 1450, and 1455. This amendment explicitly authorized the payment of SBP benefits for a dependent child to an SNT.

On March 10, 2016, the United States Coast Guard released a memorandum regarding information about Special Needs Trusts. Specifically, the memorandum details who is eligible to designate an SNT to receive the payment of SBP benefits: “During the lifetime of a member or retiree, if they have previously elected Spouse or 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.”

VIEWS OF THE COAST GUARD

On May 22, 2019, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she concluded that the Board can determine that an injustice occurred and that the Board can direct the Coast Guard to correct the applicant’s record.

The JAG alleged that the applicant’s application was not timely filed. The JAG explained that the Pay and Personnel Center (PPC) actively sought to alert retirees about the change in the law regarding the Survivor Benefits Program (SBP): “the PPC sent a letter to retirees who elected child coverage and who had a disabled child alerting them to the change in the law permitting them to change coverage from the child to a SNT.” The JAG determined, however, that the applicant was not sent a letter since he did not elect child coverage when he retired. The JAG also claimed that the April 2016 edition of The Retiree Newsletter discussed the change to the SBP. The JAG concluded that since the Board can determine that an injustice occurred, the Board should not deny the application as untimely.

The JAG argued that SBP election decisions are ordinarily irrevocable. Additionally, the JAG argued that changes made in section 624 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 were only given prospective application: “the changes were not made retroactive and retirees were not provided an open season to request changes to a previously made SBP election.” As a result, the JAG stated there is no statutory authority that supports the applicant’s request.

The JAG acknowledged that although no errors were committed by the Coast Guard, the Board has the discretionary authority to correct injustices that are not caused by the Coast Guard. The Board has the authority to “decide whether an injustice exists in an applicant’s record on a case-by-case basis.”

The JAG recognized “the significant equitable interests that exist in applicant’s case due to his special needs child. Future possible SBP annuity payments may help to alleviate the child’s extraordinary needs.”

The JAG argued that if the Board concludes that an injustice occurred and directs a change to the applicant’s SBP selection, the applicant must file applicable documents with PPC. Additionally, the JAG argued that the Board should ensure the applicant remains responsible for

the payment of applicable SBP premium costs including retroactive child coverage costs dating back to his retirement date.

The JAG submitted the following documents with the advisory opinion:

- A copy of the applicant's retirement information including his SBP Election Certificate, dated July 1, 2013, which shows that he elected not to participate in SBP.
- A memo from the Coast Guard's Pay & Personnel Center regarding information about special needs trusts.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On May 23, 2019, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. No response was received.

APPLICABLE LAW AND POLICY

At the time the applicant retired in 2013, Title 10 U.S.C. § 1448 prohibited SBP benefits from being directed to a trust.

The Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (P.L. 131-291) permitted SBP benefits to be directed to an SNT by explicitly authorizing it through Section 624 of the Act:

Survivor Benefit Plan annuities for special needs trusts established for the benefit of dependent children incapable of self-support (sec. 624):

The Senate committee-reported bill contained a provision (sec. 625) that would amend sections 1448, 1450, and 1455 of title 10, United States Code, to authorize the payment of the Survivor Benefit Plan annuity to a special needs trust created under subparagraph (A) or (C) of section 1396p(d)(4) of title 42, United States Code, for the sole benefit of a disabled dependent child incapable of self-support because of mental or physical incapacity. The House bill contained no similar provision. The agreement includes this provision with a technical amendment. The report required on page 584 of the Joint Explanatory Statement accompanying the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66) is no longer required.

Title 10 U.S.C § 1448, as amended, states the following regarding SBP in pertinent part:

(b) Insurable Interest and Former Spouse Coverage.—

...

(6) Special needs trusts for sole benefit of certain dependent children.— A person who has established a supplemental or special needs trust under subparagraph (A) or (C) of section 1917(d)(4) of the Social Security Act (42 U.S.C. 1396p(d)(4)) for the sole benefit of a dependent child considered disabled under section 1614(a)(3) of that Act (42 U.S.C. 1382c(a)(3)) who is incapable of self-support because of mental or physical incapacity may elect to provide an annuity to that supplemental or special needs trust.

Article 2.D. of the Coast Guard's Civil Affairs Manual, COMDTINST M1700.1, explains SBP elections are irrevocable as follows:

2.D.6.d. Elections are Irrevocable

Except as provided below, elections are irrevocable after the award of retired pay and are not voided by recall to active duty. The following are exceptions; in these cases, an election may be changed or revoked:

(1) Changes within One Year of Acquisition. If a member elected to provide coverage for an insurable interested person, that election may be later terminated. It may also be changed to cover a newly acquired spouse or dependent child(ren), provided such election is received by PPC within one year of acquisition of the spouse and/or child(ren).

(2) Changes for Newly Acquired Spouse. If a member who was unmarried on the date of retirement elected to provide coverage for dependent child(ren), the election may be changed to cover a newly acquired spouse along with the child(ren) should the member subsequently marry, but the election must be done within one year of the marriage.

(3) Ineligibility of Children. A member may drop coverage for dependent child(ren) because of ineligibility of all children for an annuity.

(4) Member Declared Incompetent. Elections made by Commandant (CG-122) on behalf of a member declared incompetent may be changed or revoked by the member within 180 days after appropriate authority subsequently determines such member is mentally competent. (Article 2.E.11.c. of this Manual contains further information on) mental incompetence.

(5) Loss of all Eligible Beneficiaries and Subsequent Marriage. If a member with spouse, or spouse and child(ren), coverage loses all eligible beneficiaries, then later remarries, the member has the following options:

(a) Resume coverage at the original level for the new spouse.

(b) Increase coverage up to the maximum level based on full retired pay. This option requires the member to pay the difference between the SBP costs incurred and the costs that would have been incurred if the new level of participation had been elected originally.

(c) Elect not to have spouse coverage resumed.

(6) Election Submissions. SBP elections shall be submitted on Coast Guard & NOAA Retired Pay Account Worksheet and Survivor Benefit Plan Election, Form CG-4700, as prescribed in the Personnel and Pay Procedures Manual, PPCINST M1000.2 (series).

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.³ The applicant alleged that he discovered the amendment to the law which allowed payment of an SBP for a dependent child to an SNT by reading a 2018 edition of The Retirees Newsletter. The JAG admitted that the applicant was not personally notified of the new provision for SNTs by letter but stated that the law was first addressed in The Retirees Newsletter in April 2016. Because the applicant submitted his application in 2018, the preponderance of the evidence shows that the application was timely filed.
3. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.⁴

³ 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

⁴ *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

4. The JAG argued that changes made in section 624 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 were only given prospective application. As such, the JAG maintains there is no statutory authority that supports the applicant’s request. However, in its memorandum dated March 10, 2016, the Coast Guard permits members and retirees to change their SBP beneficiary to an SNT at any time so long as they previously elected to participate in SBP. Moreover, “while an action may be, in fact, in accordance with black-letter law, it may nevertheless lead to a harsh, unfair, or inequitable result. In other words, although the lawfulness of an action may support its justness, that attribute is not the only factor that contributes to a justness analysis.”⁵

5. The Coast Guard pointed out that the Board may grant relief in this case if the Board concludes that an injustice occurred. Under 10 U.S.C. § 1552, the Board is authorized to remove injustices, as well as errors, from any Coast Guard military record. For the purposes of the BCMRs, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.”⁶ The Board has authority to determine whether an injustice exists on a “case-by-case basis.”⁷ Indeed, “when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,”⁸ and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.”⁹ In addition, the Board may correct errors and injustices in military records even if the military service did not cause the prejudicial error [or injustice].¹⁰ Therefore, it is within the Board’s authority to grant relief and remove the injustice in this case.

6. The Board has determined by a preponderance of the evidence that the applicant’s inability to provide SBP benefits to his disabled son through an SNT constitutes an injustice. At the time of his retirement, the applicant could not elect to designate his son’s SNT as the recipient of his SBP benefits because it was not permitted under 10 U.S.C. § 1448. However, section 624 of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 explicitly authorized SBP payments to a dependent’s SNT. This language is evidence of Congress’s intent to provide financial security for disabled children of military personnel. As the record demonstrates, the applicant’s son is both severely and permanently disabled and receiving funds directly through SBP would have jeopardized his eligibility for Medicaid and other future benefits. The applicant’s case is precisely the kind of situation that section 624 was intended to remedy. Therefore, the Board finds that the applicant’s record should be corrected to show that he elected to participate in SBP at the time of his retirement and that his designated beneficiary was his son’s SNT.

⁵ *Peoples v. United States*, 87 Fed. Cl. 553 (Fed. Cl. 2009).

⁶ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

⁷ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

⁸ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

⁹ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

¹⁰ 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 and, to be made the basis for remedial action, the ‘error’ or ‘injustice’ need not have been caused by the service involved.”).

7. To effect appropriate relief in this case, the Coast Guard should correct the applicant's record to show that he elected to participate in SBP at the time of his retirement, designated his son as his beneficiary, and changed his beneficiary to his son's SNT as of the date of this decision.

8. The applicant is responsible for filling out all required documentation required by the Pay & Personnel Center to designate payment of SBP benefits to the SNT. Additionally, the applicant is responsible for the payment of applicable SBP premium costs including retroactive costs dating back to his retirement date.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application of CDR [REDACTED], USCG (Retired), for correction of his military record is granted as follows:

The Coast Guard shall correct his record to show that upon his retirement in 2013, he elected to participate in the Survivor Benefit Plan and designated his son as his dependent beneficiary and that upon the date of this decision, he changed his beneficiary to his son's special needs trust.

The Coast Guard shall assist him in completing the paperwork necessary to effect these corrections and is entitled to deduct from his retired pay both future premiums and the premiums that he would have paid for his son's dependent coverage if he had elected to participate in the Survivor Benefit Plan upon his retirement.

January 10, 2020

