



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE RD SUITE 1001  
ARLINGTON VA 22204-2490

BAN  
Docket No. NR06955-13  
28 January 2014

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: [REDACTED]

Ref: (a) Title 10 U.S.C. 1552

- Encl:
- (1) DD Form 149 w/attachments
  - (2) Survivor Benefit Plan Program Manager Navy Casualty Assistance (PERS-13) Advisory Opinion memo of 12 Nov 2013
  - (3) State of California, County of San Diego, Marriage Certificate of 29 Jul 1972
  - (4) Superior Court of California, County of San Diego Divorce Decree of 27 Feb 1998
  - (5) Defense Finance and Accounting Service, Retired and Annuity Pay ltr of 19 May 2008
  - (6) Defense Finance and Accounting Service, Retired and Annuitant Newsletter of Feb 2011
  - (7) Defense Finance and Accounting Service, Retired and Annuity Pay ltr of 12 Nov 2013
  - (8) State of California, County of San Diego, Certificate of Death in care of [REDACTED] dtd [REDACTED]
  - (9) [REDACTED] response to the Advisory Opinion dtd [REDACTED]

1. The Petitioner in this case is [REDACTED], former spouse of [REDACTED] (Subject), United States Navy, (Ret) (Deceased).

2. Pursuant to the provisions of reference (a) Petitioner filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to show Subject submitted a timely written request for conversion from spouse to former spouse coverage under the Survivor Benefit Plan (SBP) electing [REDACTED] within one year of their divorce.

3. The Board, consisting of Messrs. Zsalman, Ruskin and George,

reviewed Petitioner's allegations of error and injustice on 27 January 2014 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

4. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. In May 2013, Petitioner [REDACTED] applied to BCNR requesting to correct her deceased former spouse's [REDACTED] record to show that he elected former spouse coverage within one year of his divorce, pursuant to a divorce decree, enclosure (1).

c. Subject married Petitioner on 29 July 1972, enclosure (3).

d. On 1 September 1975, Subject transferred to the Retired List. He was married at that time and elected maximum SBP spouse category of coverage.<sup>1</sup>

e. On 27 February 1998, Subject and Petitioner were divorced. Under the terms of their divorce decree, there contained a former spouse provision regarding maintaining SBP coverage at the full base amount for Petitioner, enclosure (4). The divorce decree also noted that premiums would be paid for by Subject but would be reported as income to Petitioner. In essence, Petitioner was taxed on all SBP premium payments but is unable to reap the benefit of said payments.

f. On 19 May 2008, Subject was notified by the Defense Finance Accounting Service (DFAS) that effective 1 October 2008, his SBP premiums would be automatically stopped since he met the "paid-up" requirements.<sup>2</sup> In addition, his SBP spouse annuity

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<sup>1</sup> Enclosure (2), erroneously states Subject elected minimum SBP spouse category of coverage.

<sup>2</sup> Under this law, premiums for the SBP and Retired Serviceman's Family Protection Plan (RSFPP) will be terminated effective 1 October 2008, for all members who are at least 70 years old and have paid SBP or RSFPP premiums for

coverage would remain in effect at no further cost, enclosure (5).

g. Although Subject should have elected former spouse SBP coverage pursuant to the divorce decree, within one year, he failed to do so. Additionally, Petitioner also failed to deem her election to DFAS requesting former spouse SBP coverage within one year of their divorce, as required by law.

h. Subject never remarried, but continued to pay SBP premiums in the spouse category of coverage. However, in April 2011, Subject, in an effort to keep his records current at DFAS, submitted a copy of his divorce decree from 1998, enclosure (6). At that time, DFAS, responded to Subject on 12 November 2013, enclosure (7), stating that he was entitled to a refund of SBP premiums from the date of his divorce to present. However, due to the Barring Act, DFAS would only refund him six-years worth of SBP premiums that he had already paid in the amount of approximately \$18,945.55.

i. On 25 February 2013, Subject died.

j. Enclosure (2), recommended that no relief be granted, stating "SBP participants with spouse coverage who become divorced and desire to maintain their former spouses as their beneficiaries must specifically elect such coverage within one year after the date of the divorce", which was never done by either Subject or Petitioner. Furthermore, the advisory opinion states that Subject accepted the refund a SBP premiums, knowing that his SBP coverage for spousal coverage would be terminated.

k. Petitioner received a copy of the unfavorable advisory opinion and responded, that "in good faith, neither [REDACTED] nor I were aware that a change of spouse form DD 2656-1 was to be filed". She also stated that in July 2009, Subject told her that he was "paid-up" with SBP premiums and told her the amount of SBP that she would be receiving. Finally, she also claims that in 2011, Subject showed a marked change in his personality and thought process, indicating that he was getting senile when he accepted the SBP refund from DFAS, and that he was not fully aware of the implications, enclosure (9). Petitioner is aware that she would be subject to payment of premiums that were refunded to the Subject.

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360 or more months (30 years). This is commonly referred to as "paid-up" SBP.

CONCLUSION:

Upon review and consideration of all the evidence in the record, the Board concludes that Petitioner's request warrants favorable action. The Board found that the following factors militated in favor of relief: That their divorce decree stated that Subject would be required to provide SBP pension for his former spouse, in accordance with the court order. Although the Board recognized that Petitioner, at that time, did not submit a deemed election within one year from the date of divorce as required by law, the Board believed Petitioner had a reasonable expectation that Subject requested his former spouse election for SBP coverage since Petitioner included the premium payments as taxable income. The Board also understood and carefully considered the comments made in enclosure (2). However, balancing the factors that militate in favor of relief against those that militate against, the Board finds that, as an exception to policy, Petitioner's request should be granted favorable action.

RECOMMENDATION:

That Subject's naval record be corrected, where appropriate, to show that:

a. Subject executed a written request for conversion from "spouse" to "former spouse" SBP coverage, at the same level of coverage as previously elected, naming [REDACTED] as the sole beneficiary. The request was received by cognizant authority and became effective 28 February 1998, the day following the date of divorce.

b. The request was in compliance with a court order.

c. Subject died on [REDACTED].

d. All SBP costs that would have been deducted from Subject's retired pay will be deducted from Petitioner's benefits. No annuity will be paid to Petitioner until all unpaid costs have been reimbursed. No waiver of unpaid costs will be granted.

e. That a copy of the Report of Proceedings, be filed in the Petitioner's naval record.

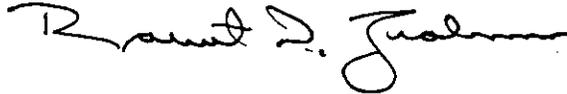
4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)) it is certified that quorum was

present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN  
Recorder

  
BRONIE I. MONTGOMERY  
Acting Recorder

5. The foregoing action of the Board is submitted for your review and action.



ROBERT D. ZSALMAN  
Acting Executive Director

Reviewed and approved:

 4/15/14

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