Work-Product

CUI//SP-MIL/SP-PRVCY

UNITED STATES AIR FORCE
BOARD FOR CORRECTION OF MILITARY RECORDS

Work-Product

ADDENDUM TO RECORD OF PROCEEDINGS

IN THE MATTER OF: Work-Product Work-Product

DOCKET NUMBER: BC-2011-04796-4

COUNSEL: Work-Product

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Through counsel, the Board reconsider her request to change her deceased spouse's records to reflect he elected her as the Reserve Component Survivor Benefit Plan (RCSBP) beneficiary.

RESUME OF THE CASE

The applicant is the surviving spouse of an Air Force master sergeant (E-7).

On 15 August 2012, the Board considered and denied the applicant's initial request to change her deceased spouse's records to reflect he elected her as the RCSBP beneficiary concurring with the Air Force Office of Primary Responsibility (OPR) rationale and recommendation and finding that the applicant had provided insufficient evidence of an error or injustice to justify relief. For an accounting of the applicant's original request and the rationale of the earlier decision, see the AFBCMR Letter and Record of Proceedings (Exhibit E).

On 4 June 2015, the applicant submitted a request for reconsideration (Exhibit F). In her request, she submitted an ARPC Form 123, *Reserve Component Survivor Benefit Plan Election Certificate*, dated 8 June 1994, which reflects her deceased spouse did in fact, name her as the RCSBP beneficiary. She was told her deceased spouse never filled out the proper paperwork prior to his death; however, she found the election form in April 2015. The ARPC Form 123 was completed by her deceased spouse in June 1994; the form reflects he elected spouse and children coverage based on full retired pay.

On 7 March 2017, the Board reconsidered the applicant's appeal and again denied the request. The Board determined that the applicant's ability to then produce a RCSBP Election Certificate, dated and signed 8 June 1994, does not overcome the fact that the deceased service member did not submit an initial election, thereby declining an election until age 60, and the fact that he was afforded two other Open Seasons to apply for RCSBP in 1999-2000 and 2005-2006 (Exhibit G).

In a new DD Form 149, *Application for Correction of Military Record*, dated 9 April 2019 (Exhibit H), the applicant again requested reconsideration of her request. She again contended her deceased spouse elected spouse and children coverage under RCSBP and the lack of any record of a lawful election by the deceased service member is due to an Air Force error.

According to the binding law in 1994, when her deceased spouse received his Notification of Eligibility for Retired Pay at Age 60 and participation in the RCSBP letter dated 12 April 1994, "a married person who is eligible to provide a standard annuity may not without the concurrence of the person's spouse elect not to participate in the plan." Title 10 United States Code, Section (10 U.S.C.) §1448(a)(3)(A)(i) (1998). "A service member with a spouse or dependent child is automatically enrolled in the plan unless, before the date of his or her retirement, that member affirmatively elects not to participate in the plan." Stolpe v. US., 26 Fed. CL. 259, 261 (1996) (citing 10 U.S.C. §1448)s)(2) (1994)). Notice must also be provided if such a decision is made and "the notice must provide a service member's spouse both with an awareness of the service member's decision and an explanation of the consequences of that decision." Stolpe, 26 Fed. Cl. At 263. Further, "the notice required by the statute had to include, in addition to notice of the election itself, counseling about its consequences." Id. At 263-264 (citing Barber v. US., 230 Ct. CL. 287, 297 (1982)).

The applicant contends that "Congress intended to prevent a serviceman's wife from learning for the first time that she was left without support at her deceased spouse death, by providing her notice and participation in the counseling that was to precede a decision to elect out" Barber, 230 Cr. Cl. at 295. The deceased service member had both a spouse and dependent children when the Air Force claims he made no election, but the applicant never received the above notice required by statute to be advised of same but has been denied benefits, nonetheless. Given the law at the time this issue occurred, there is no lawful reason to deny the applicant the benefits she is entitled to from her deceased spouse's service with the Air Force.

She further contends her deceased spouse believed he did not elect out of the RCSBP and that neither one was aware that the Air Force had automatically enrolled him in Option A, and that being afforded two opportunities to elect something other than his original choice of Option C, did not require a response.

On 12 September 2019, the AFBCMR Executive Director determined the applicant's request did not meet the criteria for reconsideration stating reconsideration is authorized only where newly discovered relevant evidence is presented which was not available when the application was submitted (Exhibit I).

The applicant filed suit in the United States District Court. On 17 June 2020, a judge ordered her claim be remanded to the Air Force Board for Correction of Military Records (AFBCMR) to determine the following:

Whether the Air Force notified the applicant, in compliance with Title 10 U.S.C. §§1448 and 1455, that her late husband failed to elect participation in the RCSBP at the maximum level.

The United States District Court Remand Order is at Exhibit J.

APPLICABLE AUTHORITY/GUIDANCE

Participation in RCSBP is governed by 10 U.S.C. §1448(a)(2)(B). The statute applied different rules to members of the Regular component and members of the Reserve component. According to 10 U.S.C. §1448(a)(2)(B) (1994), members of the Reserve component were presumed not to participate unless the service member made an affirmative election to participate.

The Plan applies – to a person who elects to participate in the Plan (and makes a designation under subsection (e)) before the end of the 90-day period beginning on the date, he receives such notification.

A person described in subclauses (i) and (ii) of clause (B) who does not elect to participate in the Plan before the end of the 90-day period referred to in such clause shall remain eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A).

The 1994 statute requires spousal concurrence from a Regular component service member who elects not to participate in the Plan (10 U.S.C. §1448 (a)(3)(A)(i), whereas no such concurrence requirement applies to a Reserve component service member who does not participate in the Plan (10 U.S.C. §1448 (a)(3)(B)).

Prior to a 1985 amendment, 10 U.S.C. §1448(a)(3) required notification to the spouse of a Regular component service member who elected not to participate or elected less than full participation, and a Reserve component service member who did not elect to participate at the maximum level:

(A) If a person who is eligible under paragraph (1)(A) to participate in the Plan and who is married elects not to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, or elects to provide an annuity for a former spouse under subsection (b)(2) that person's spouse shall be notified of that election.

(B) If a person who is eligible under paragraph (1)(B) to participate in the Plan and who is married does not elect to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, or elects to provide an annuity for a former spouse under subsection (b)(2), that person's spouse shall be notified of that action.

The requirement to notify a Reserve component service member's spouse when the Reserve component member did not elect to participate in the Plan at the maximum level was eliminated by the 1985 amendment.

The version of 10 U.S.C. §1448(a)(3)(B) in effect in 1994 required spousal concurrence when a service member affirmatively elects to provide a Reserve component annuity, but elects to provide an annuity at less than the maximum level or for a dependent child but not the person's spouse:

A married person who elects to provide a Reserve component annuity may not without the concurrence of the person's spouse elect: (i) to provide an annuity for the person's spouse at less than the maximum level; or (ii) to provide an annuity for a dependent child but not for the person's spouse.

The applicant cites two court decisions in her appeal. In *Stolpe v. United States*, the U.S. Court of Federal Claims considered a claim by the widow of a Regular component service member who had, prior to 1985, affirmatively elected not to participate in the Survivor Benefit Plan, claiming the notification provided by the Public Health Service did not satisfy statutory requirements. Applying the statutory rules that apply to Regular component service members, the court noted, "A service member with a spouse or dependent child is automatically enrolled in the Plan unless, before the date of his or her retirement, that member affirmatively elects not to participate in the Plan.

10 U.S.C. §1448(a)(2)." *Stolpe v. United States*, 36 Fed. Cl. 259, 261 (1996). The Stolpe court cited Barber v. United States, 230 Ct. Cl. 287 (1982), also cited by applicant in her DD Form 149. In both cases cited by the applicant, Regular-component service members affirmatively elected not to participate in the Plan. Both of the cited decisions apply portions of the law specific to the Regular component, which have notable differences from the provisions specific to the Reserve component. These decisions also apply the law in effect prior to the 1985 amendment, which

required spousal notification if less than full participation was elected by a Regular component service member.

According to 10 U.S.C. §1455(a), "the President shall prescribe regulations to carry out this subchapter. Those regulations shall, so far as practicable, be uniform for the Armed Forces, the National Oceanic and Atmospheric Administration, and the Public Health Service. Those regulations shall:

(1) Provide that before the date the member becomes entitled to retired-pay-

(A) If the member is married, the member and the member's spouse shall be informed of the elections available under §1448(a) of this title and the effects of such elections;

[1]Addressing the notice previously required by the provisions of 10 U.S.C. §1448(a)(3) prior to 1985, the Stolpe court stated:

[T]o be sufficient under the statute; the notice must provide a service member's spouse both with an awareness of the service members decision and an explanation of the consequences of that decision [and] make the spouse "fully aware of the implications of the [retiree's] decision." Stolpe at 263, quoting Barber at 297.

The Barber court held that when a technician's general practice was to send notification to a service member's spouse, but the technician did not specifically recall sending notification to that particular service member's spouse or have any record or evidence of sending notification, those facts did not overcome the spouse's testimony of having never received notification for purposes of summary judgment. Barber at 299-300.

AIR FORCE EVALUATION

ARPC/DPTS recommends denying the application. The question posed by the court for the AFBCMR to answer is whether the Air Force notified the applicant, in compliance with 10 U.S.C. §§1448 and 1455 that her deceased spouse failed to elect participation in the RCSBP at the maximum level. The answer to that question is that the Air Force was not obligated to notify the applicant that her deceased spouse failed to elect participation in the RCSBP because Congress removed that requirement in a 1985 amendment.

The 1994 version of 10 U.S.C. §1448(a)(3)(B) requires the Air Force to obtain concurrence from a Reserve component service members spouse when the service member affirmatively "elects to provide a Reserve component annuity" to the members spouse at below the maximum level. The deceased service member did not elect to provide an annuity to his spouse. Failure to make an election or an affirmative election not to provide an annuity is not an election "to provide a Reserve component annuity." Therefore, no spousal concurrence is necessary. An interpretation that requires spousal concurrence for a non-election resulting from a failure to respond within the 90-day time limit is contrary to the language of the statute and would render 10 U.S.C. §1448(a)(2)(B) nugatory, which is contrary to the rules of statutory interpretation.

The Stolpe and Barber decisions provide no guidance to the deceased service member's situation. Both decisions deal with rules applying to service members in the Regular component, which presume participation unless the member affirmatively elects non-participation. Both decisions dealt with service members who affirmatively elected not to participate in the plan, rather than

[1] The *Stolpe* court specifically addressed whether the notice provided **in response to a member's election not to participate** in the SBP was sufficient. It did not address the general notice requirement for the RCSBP. Stolpe at 263.

service members who failed to make an election within 90-days of notification. Both decisions deal specifically with the notice required by the repealed version of 10 U.S.C. §1448(a)(3), which does not apply to the applicant's situation.

In order for the notification to be satisfactory under Stolpe, it must (i) provide a service member's spouse both with an awareness of the service member's decision and (ii) provide an explanation of the consequences of that decision [and] make the spouse fully aware of the implications of the [retiree's] decision. ARPC's practice of providing a packet with lengthy explanations of each option and its effect on the service member and any potential beneficiaries satisfies the Stolpe requirements.

While ARPC does not have a copy of the packet, it sent out in 1994, ARPC believes the only changes to the packet since that time frame reflect amendments to the statute, but do not impact the effectiveness of the explanation of the options available or their effects. Unlike the Barber case, where the technician who claimed to have sent the notification to the service member and his spouse had no evidence of mailing notification other than his vague recollection and his general practice of mailing notification, ARPC has a PS Form 3811, *Domestic Return Receipt*, supporting its assertion that it sent the packet as was its general practice. This PS Form 3811 corresponds with ARPC's declared intent to mail a packet with detailed information within 30 days of its 12 April 1994 letter. Understanding that the 90-day period for response begins with "notification," which requires detailed information regarding election options and its effects, ARPC's practice is not to send the initial letter via certified mail, but to send the information packet via certified mail so that it can accurately calculate the 90-day period. Such interpretation of the available evidence is consistent with ARPC's practice and is more substantial than the evidence presented by the government in Barber.

The applicant contends that her discovery of her deceased spouse's signed ARPC Form 123 in his private papers in 2005 should satisfy the statutory requirement that he responded to the Air Force within 90-days of receipt of notification. The applicant contends the Air Force's failure to accept a copy of the form over 10 years after the deadline amounts to an Air Force error, or alternately, that her deceased spouse submitted a copy of this form within the 90-day limit and an Air Force error is the reason there is no record of this having taken place. Unfortunately, there is insufficient evidence to suggest the deceased service member submitted a properly executed election within the 90-day limit. Neither ARPC nor the applicant has presented any evidence that this form was actually submitted in compliance with statutory requirements. The deceased service member may have elected to retain the form in his personal papers rather than submit the form to ARPC for any number of reasons, any of which would require conjecture rather than a reasonable inference of error by the Air Force, which is supported by the preponderance of the evidence.

Therefore, based on the above aforementioned reasons ARPC concludes that it was not required to inform the applicant of her deceased spouse's failure to elect RCSBP coverage at the maximum level because no statutory requirement existed at the time. Regardless, ARPC provided satisfactorily notified both the deceased service member and applicant of the RCSBP options available, an explanation of the consequences of her former spouse's decision, and that notification was sufficient to make him and the applicant fully aware of the implications of the deceased service member's decision.

ARPC/DPTS opines it satisfied all notification requirements under both 10 U.S.C. §§1448 and 1455. ARPC repeats its position from the applicant's previous Board decisions that, though unfortunate, there is insufficient evidence to conclude the deceased service member provided the Air Force with a lawful election within the 90-day statutory time limit and that the lack of any record of this alleged election is due to an Air Force error. ARPC does not believe the discovery

of the deceased service member's ARPC Form 123 over 10 years after it should have been submitted to ARPC constitutes an injustice perpetrated by the Air Force.

The complete advisory opinion is at Exhibit K.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant, through counsel, on 1 Apr 21 and 5 May 21 for comment (Exhibit L), and the applicant replied on 25 May 21. In her response, through counsel, the applicant contended the Air Force cannot cite or produce evidence establishing it "notified the applicant in compliance with 10 U.S.C. §§ 1448 and 1455, that her deceased spouse failed to elect participation in the RCSBP at the maximum level." Therefore, for this reason alone the Board "should conclude the Air Force did not properly notify her and should direct her deceased spouse's records be corrected to reflect he elected Option C, *Provide immediate annuity to spouse and children following death*. Whether before or after reaching age 60, based on the full retired pay amount," as suggested in the alternative by the Air Force should the Board disagree with ARPC's assessment of the court's question on remand or ARPC's recommendation regarding the applicant's prior appeals.

Instead of answering the question posed by the court on remand, the Air Force engages in a lengthy and irrelevant discussion as to whether it was statutorily obligated to notify the applicant of the elections available to her deceased spouse to participate in the RCSBP. The Air Force concludes it was not required to notify the applicant of the election options available to her deceased spouse under the RCSBP and recommends the Board again deny the applicant's application. The Air Force reaches this conclusion on the contention that the United States Code applicable at the time allegedly differentiated the Air Force's obligations of notifying spouses of Reserve component service members from its obligations of notifying spouses of Regular component service members. This contention, conclusion and recommendation are illogical and incorrect for several reasons:

First, a basic review of the plan language of the Court's 18 June 2020, Order on Remand (and the simple question therein) establishes the Court has already ruled the Air Force was mandated under 10 U.S.C. §§ 1448 and 1455 to notify the applicant that her deceased spouse failed to elect participation in the RCSBP at the maximum level. In no manner therein did the Court order, instruct, or even request the Board to interpret or determine whether the Air Force was obligated under 10 U.S.C. §§ 1448 and 1455 to notify and counsel the applicant of the elections available to her deceased spouse under the RCSBP.

The Air Force's own legal counsel in this matter acknowledged to the Court the Air Force was required to notify and counsel the applicant of the elections available to the deceased service member under the RCSBP, specifically stating:

Under the law in 1994, when the deceased service member received notice of his eligibility to participate in the RCSBP, 10 U.S.C. §§ 1448(a)(6)(C) and 1455 required the appropriate military branch to notify a service member's spouse if the member elected to: (1) opt-out of the SBP entirely; (2) provide a spousal annuity at less than the maximum level; or (3) select an annuity for a dependent child but not the spouse. In several cases involving service widows who were not notified of their spouse's elections to opt-out of the SBP, courts have held that such an election is not binding on the surviving spouse unless the statutory notice requirement is satisfied. See *Stolpe v. United States*, 36 Fed. Cl. 259, 263-66 (1996); McFarlane v. Secretary of the Air Force, 867 F. Supp. 405, 409-410 (E.D. Va 1994). (See Exhibit 2).

Even if the Board were ordered to interpret the obligations of the Air Force under the United States Code in notifying service member spouses, the plain and unambiguous language of 10 U.S.C.

§1455 effective at the time required the Air Force to notify ALL spouses of every election under SBPs available to ALL service members, regardless of whether they were Regular component or Reserve component, and the effects of such elections available. There is no language in 10 U.S.C. to differentiate between the obligations the Air Force owed to spouses of Regular component service members and Reserve component service members. The language of 10 U.S.C. §1455 expressly states:

The President shall prescribe regulations to carry out this subchapter. Those regulations shall, so far as practicable, be uniform for the Armed Forces…Those regulation shall – (1) provide that before the date the member becomes entitled to retired pay – (A) if the member is married, the member and the member's spouse shall be informed of the elections available under section 1448(a) of this title and the effects of such elections.

There is no distinction in this plain language between spouses of Regular service members and spouses of Reserve service members. All spouses of all service members are entitled to receive notification of the elections available to the service member and the effects of such elections.

The obligation to notify the applicant of her deceased spouse's obligation under the RCSBP in accordance with 10 U.S.C. §1445 is supported by case law. The Air Force attempts to distinguish these cases and the well-settled law therein with this matter before the Board on the basis that the deceased service members in those cases served in the Regular component of their respective branches of the military and the applicant's deceased spouse was a Reserve component service member. The fact the deceased service members in these cases were members of the Regular component of the military is coincidental, and their level of service, whether Regular or Reserve, was not a factor whatsoever in the rulings by the courts in these opinions.

The courts in these opinions unequivocally ruled that all spouses of all service members were entitled to notification and counseling of the elections available under SBPs in accordance with 10 U.S.C. §1445. *Stolpe v. United States*, 36 Fed. CL. 259, 263-66 (1996); Barber v. United States, 230 Ct. Cl. 287, 290-292, 676 F. 2d 651, 654 (1982). See also McFarlane v. Secretary of the Air Force, 867 F. Supp. 405, 409-410 (E.D. Va 1994); *Sumakeris v. United States*, 34 Fed. CL. 246 (1995).

The Court in Stolpe, 36 Fed, Cl. At 263, recognized Congress' intent in enacting 10 U.S.C. §1455:

This provision makes clear that Congress intended the required notice to include something more than the bare notification of the fact that a certain election was about to be (or had been) made. Instead, the notice called for by the statute is intended not only to inform a spouse of the election contemplated by the retiring service member, but also to inform the spouse, before the member's actual retirement date, of the "elections available and the effects of such elections." Thus, to be sufficient under the statute, the notice must provide a service member's spouse both with an awareness of the service member's decision and an explanation of the consequences of that decision."

Counseling about the consequences of the service member's election choice "was to be an integral part of the notice given to the spouse." Id. At 264 (quoting Barber, 676 F. 2d at 658). The Court in Sumakeris, 34 Fed. Cl. at 253, recognized that enacting 10 U.S.C. §1445, "Congress intended to reduce the possibility that a service member's dependents, inadvertently, might be left without coverage." The Court in Sumakeris, 34 Fed Cl. at 254, even quoted the House Report as to why the military must notify all spouses of all service members of the elections available under SBP and counsel them as to the effects of each election:

The rights in retirement pay accrue to the retiree and ultimately, the decision is his or hers as to whether or not to leave part of that retirement pay as annuity to his or her survivors. However, the Committee wants every effort made to be sure that the advantage is not lost through neglect or lack of understanding and that the spouse fully understands the election may profoundly affect his or her future welfare. H.R. Rep. No. 92-482, 92d Congress, 1st Sess, at 8-9.

Nowhere in the House Report quoted in Sumakeris was the duty to notify and counsel spouses differentiated between spouses of Regular or Reserve component service members.

Furthermore, the available evidence reflects in 1994, the Air Force did not differentiate between its obligations to notify spouses of Regular component service members and its obligations to spouses of Reserve component service members of the elections available under the SBPs.

Attachment 1 to the Air Force's memorandum reflects the deceased service member acknowledged notification of his eligibility for retired pay at age 60 and audit of his retirement points on 8 June 1994. On the same date, the deceased service member executed the RCSBP Election Certificate (titled ARPC Form 123, Feb 92), indicating he chose "Option C, *I elect to provide an immediate annuity beginning on the day after my death, whether before or after age 60*. (See, Exhibit 3[2]).

If a service member did not elect coverage for his or her spouse or coverage that was less than the full maximum amount, ARPC Form 123, Feb 92, required the service member's spouse to affix their signature, further acknowledging that they "have received information that explains the options available and the effects of those options." (See, Exhibit 3, Back Page). ARPC Form 123, Feb 92, a form specific for Reserve component service members, implies that separate notification and counseling regarding the service members options were to be sent to the spouse, as required under 10 U.S.C. §1445, regardless of what election the service member opted.

It is inconceivable that 10 U.S.C. §1445 did not require the Air Force to notify and counsel spouses of Reserve component service members of the elections available under the RCSBP and the effects thereof if the service member failed to return their paperwork within 90 days of its receipt as suggested by ARPC/DPTS. The ARPC Form 123, Feb 22 has never been contested or disputed by the Air Force.

The Air Force continues to refuse to acknowledge the deceased service member's election of survivor benefits for his surviving family on the Survivor Plan Election Certificate. It has been suggested the deceased service member's signature on the certificate was forged; however, the burden of proven any alleged forgery is upon the Air Force. In addition, it was suggested the applicant failed to produce new evidence for consideration of her application.

Now the Air Force wants to change its obligations under 10 U.S.C. §1445 after acknowledging their obligations to a U.S. District Court.

The Air Force was statutorily required to provide the applicant with notice of her deceased spouse's options under the RCSBP and counseling on the implications of his decision under 10 U.S.C. §§ 1448 and 1445. The applicant presented evidence in her 9 April 2019, application for reconsideration that she was never provided the statutorily required notices. At a minimum, the

[2] The AFBCMR must take notice that both deceased's service member's signatures on Attachment 1 to the Advisory Opinion, dated 24 March 2021 and Exhibit 3 are dated 8 June 1994, by the deceased service member. It is dubious at best that the Air Force is able to retain and produce Attachment 1 and it is unable to locate Exhibit 3 when both documents were signed on the same date. The deceased service member's intentions as to exercising Option C on the RCSBP on Exhibit 3 on 8 June 1994 are corroborated and supported by his signing of Attachment 1 on 8 June 1994, and subsequently delivery to and retention by the Air Force.

Air Force has a burden of demonstrating the applicant was in fact notified and counseled of her deceased spouse's alleged decision. Reviewing the facts and evidence in favor of the applicant, the Air Force cannot demonstrate it satisfied its obligation to her under 10 U.S.C. §§ 1488 and 1445. It is this fact alone that is required to be determined by the AFBCMR on Remand.

The AFBCMR must correct the deceased service member's military record to reflect that he elected "Option C, *Provide immediate annuity to spouse and children following death, whether before or after reaching age 60, based upon full retired pay amount*." In turn, the AFBCMR should instruct the Air Force to begin paying the applicant the monthly annuity benefits due to her under 10 U.S.C. §1447, et seq, including any and all past annuity benefits due and owing from the date of the service member's death with interest.

The applicant's complete response is at Exhibit M.

ADDITIONAL AIR FORCE EVALUATION

On 15 Nov 21, the Board staff requested an additional advisory opinion to address the applicant's rebuttal response to the ARPC/DPTS advisory opinion. Subsequently, by an undated memorandum ARPC/DPTT opines the applicant's counsel continues to rely on case law that implements the law prior to amendment and to individuals who are clearly and meaningfully distinguishable from the current situation. Unfortunately, counsel representing the Air Force in Federal Court appears to be confused.

As explained in length in the previous advisory opinion, the statute in effect in 1994 clearly made a distinction between members entitled to a Regular retirement (10 U.S.C. §1448(a)(1)(A)) and members "eligible for Reserve component retired pay but for the fact that they are under age 60" (10 U.S.C. §1448(a)(1)(B)) and the notification requirements for those receiving a standard annuity (10 U.S.C. §1448(a)(3)(A)) and a Reserve component annuity (10 U.S.C. §1448(a)(3)(B)). The applicant's counsel fails to make the distinction between the obligation under 10 U.S.C. §1455 to inform a member and the member's spouse of the options available and their implications, and the obligation under 10 U.S.C. §1448 to inform the member's spouse, only under certain clearly identified circumstances, which do not apply to the applicant's case of a Reserve component member's affirmative election to participate in the RCSBP at less than the full level.

According to 10 U.S.C. §1455 and its implementing regulations, the Air Force was obligated to notify the member and the member's spouse of their options and the implications of those options. The only evidence available, a PS Form 3811, supports the position that the Air Force satisfied that obligation on 28 April 1994.

However, it does appear that the Air Force committed an error or injustice in this case when it adopted the legal arguments of the applicant's counsel and petitioned the court for a remand to the AFBCMR. The remand, as drafted, includes a misrepresentation of the law and presents the AFBCMR with a perplexing question, asking whether the Air Force fulfilled a legal obligation that did not exist. The question to be answered on remand is:

Whether the Air Force notified the applicant, in compliance with Title 10 U.S.C. §§ 1448 and 1455, that her deceased spouse failed to elect participation in the RCSBP at the maximum level.

The Air Force was not obligated to inform the applicant of her deceased spouse's failure to make an RCSBP election, and therefore did not give her any such notification. The only available evidence suggests that the Air Force did; however, satisfy the only notice requirement in effect at the time, imposed under 10 U.S.C. §1455, by providing the applicant and her deceased spouse

with detailed information on their RCSBP options and their implications. In other words, the Air Force's actions in 1994 were in compliance with 10 U.S.C. §§ 1448 and 1455, but the Air Force did not notify the applicant that her deceased spouse failed to elect participation in the RCSBP at the maximum level because there was no requirement to do so in this case. Had Air Force counsel properly understood the law, it would very likely have taken a different approach to the federal lawsuit. The Air Force's failure to do so has likely resulted in additional legal fees for the applicant. In this respect, the applicant appears to be the victim of an Air Force error.

The circumstances of this appeal are truly tragic, both in a human and legal sense. It is most unfortunate that the PS Form 3811, the best available evidence, suggests, by a preponderance of the evidence, that the deceased service member and his spouse were properly notified, per 10 U.S.C. §1455, of his RCSBP options and his response requirements and deadlines, but that he failed to mail his response to ARPC. It is unspeakably tragic that the service member passed away at 57 years of age. It is also unfortunate that counsel representing the Air Force appears to have adopted the applicant's counsel's legal argument and petitioned the Court for remand to the AFBCMR, seeking an answer to a legally fraught question. The AFBCMR is tasked by the court with determining whether the applicant notified the applicant [sic] as required by 10 U.S.C. §§ 1448 and 1455 of a requirement that is not to be found in the law. The Air Force satisfied its statutory obligations but did not inform the applicant "that her late husband failed to elect participation in the RCSBP at the maximum level." Taking the court's question at face value, the answer is no, the Air Force did not inform the applicant that her late husband failed to elect participation in the RCSBP.

More broadly, the AFBCMR is charged with determining whether the applicant is the victim of an error or injustice perpetrated by the Air Force. Sadly, the evidence does not suggest any culpability by the Air Force for the applicant's heartbreaking circumstances as they transpired in 1994. Though beyond the question presented on remand, Air Force counsel's misunderstanding of the law and its application in 1994 was an error and may have resulted in additional legal fees to the applicant. Additionally, the Board may consider asking the applicant's counsel for additional evidence surrounding the executed ARPC Form 123 located in her deceased spouse's papers. Currently, there is no evidence to suggest the deceased service member sent the form to the Air Force as required by statute as opposed to retaining the executed form in his personal papers, whether intentionally or by mistake. If the applicant can provide additional information suggesting the form she found in her deceased spouse's personal papers was only a copy and that the original form had been sent in, such evidence might greatly influence the analysis of whether the Air Force erroneously recorded that her deceased spouse failed to respond and was therefore not enrolled in the RCSBP.

The complete advisory is at Exhibit N.

APPLICANT'S REVIEW OF ADDITIONAL AIR FORCE EVALUATION

The Board sent a copy of the additional advisory opinion to the applicant on 5 Jan 22 for comment (Exhibit O), and the applicant replied on 1 Feb 22. In her response, through counsel, the applicant reiterates some of, but not all of her initial contentions and contends the Air Force should reject the opinions set forth in the additional advisory opinion. First and foremost, the court remanded this matter to the Board to answer this specific question:

On remand, the AFBCMR will determine whether the Air Force notified the applicant, in compliance with 10 U.S.C. §§ 1448 and 1455, that her deceased spouse failed to elect participation in the RCSBP at the maximum level. The short and only answer to this simple question on remand to the AFBCMR is "NO."

The Air Force's own legal counsel in this matter acknowledged to the Court that the Air Force was required to notify and counsel the applicant of the elections available to her deceased spouse under the RCSBP, expressly stating in a motion to the Court: (1) Opt-out of the SBP entirely; (2) Provide a spousal annuity at less than the maximum level; or (3) Select an annuity for a dependent child, but not the spouse.

The Air Force acknowledges that it has caused confusion for the parties, the Board and the Court by now contradicting its earlier interpretation of 10 U.S.C. §§ 1448(a)(6)(C) and 1455 before the US District Court. The only explanation given now changing its interpretation in its most recent advisory opinion is the ARPC attorney was unavailable to assist the U.S. attorney representing due to illness, and this is the reason why it previously offered a purportedly incorrect interpretation of the law to the Court. The applicant and counsel are empathetic towards the attorney's health issues; however, this does not represent the type of excusable neglect required of any legal counsel that is necessary for changing an interpretation of law before a deciding authority. Nor does the Air Force explain how or why the U.S. attorney came to the purported incorrect interpretation of 10 U.S.C. §§ 1448(a)(6)(C) and 1455.

The Board should note there is no evidence before it, such as an affidavit or declaration, from the U.S. attorney representing the Air Force, stating his interpretation of these statutes before the Court were in fact incorrect. Nor does the Air Force allege its counsel before the Court was incompetent in making its interpretation before the Court. At most, the statements in the Air Force advisory opinion reflect there simply exists a disagreement amongst its competent legal counsel as to the interpretation of 10 U.S.C. §§ 1448(a)(6)(C) and 1455.

Further, the Board should take notice that the U.S. District Court agreed with the applicant and the U.S. attorney's interpretation of these statutes. If the applicant and the U.S. attorney were incorrect, the Court would not have remanded this matter for the answer to a simple question and instead would have interpreted the statutes as the Air Force now wishes. To now contend the Board should interpret 10 U.S.C. §§ 1448(a)(6)(C) and 1455 differently is to infer and imply the U.S. attorney and the Court were incorrect and in error when the matter was before them.

Now the Air Force additionally infers, without any evidence to support such inference, that the applicant's deceased spouse "failed to mail his response to ARPC," and it asks the applicant to "provide additional information suggesting the form she found in her deceased husband's personal papers was…only a copy and the original; form had been sent in." Without any evidence to support this inference, the Air Force implies the ARPC Form 123 produced by the applicant was the originally executed copy of the same and not a copy. Such inference again wrongly implies the applicant is engaging in fraud before the Board. Nevertheless, in order to satisfy the Air Force's request, the applicant will concurrently produce a proper declaration the ARPC Form 123 she found in her deceased spouse's personal papers were in fact only a copy.

It is improper and unacceptable for the Air Force at this time to require the applicant to prove to the Board that the originally executed AFPC Form 123 was mailed by the deceased service member. All the evidence produced by the applicant demonstrates ARPC Form 123 was timely mailed to the Air Force. The Air Force has not produced and cannot produce any evidence to contradict this fact. Therefore, the applicant has established a preponderance of the evidence the deceased service member elected for his surviving family to receive survivor benefits immediately upon his death.

The Board should acknowledge the Air Force's immoral reproach in addressing this matter. From accusing the applicant of fraud to its admitted neglect in interpreting statutory authority and representations to either this Board or a U.S. District Court, it has repeatedly shown the applicant has been the victim of an injustice perpetrated by the Air Force. In addition to excessive legal fees

incurred by the applicant and now acknowledged by the Air Force in its advisory opinion, the applicant has incurred prejudicial and unnecessary legal fees in addressing this matter.

The Air Force has the burden of demonstrating the applicant was in fact notified and counseled of her deceased spouse's alleged decision. The Air Force acknowledges it did not in fact notify the applicant and counsel her deceased spouse's decision as conceived by the Air Force.

Nevertheless, the applicant has demonstrated by a preponderance of the evidence her deceased spouse elected for his surviving family to receive survivor benefits immediately upon his death. Viewing the evidence in her favor, the Air Force has provided no evidence to contradict the applicant's deceased spouse elected for his surviving family to receive survivor benefits immediately upon his death.

The applicant has undoubtedly shown she has been the victim of both an error and injustice perpetrated by the Air Force. Therefore, the Board must correct the deceased service member's military record to reflect he elected "Option C, Provide *immediate annuity to spouse and children following death*, whether before or after age 60, based on the full retired pay amount." In turn, the Board should instruct the Air Force to begin paying to the applicant the monthly annuity benefits due to her under 10 U.S.C. §1447, et seq, including any and all past annuity benefits due and owing from the date of her deceased spouse's death with interest. The Board should consider reimbursing the applicant for the legal expenses she incurred because of the Air Force's errors, some of which are acknowledged by the Air Force in its latest advisory opinion.

The applicant's complete response is at Exhibit P.

On 29 Sep 22, the Board voted to deny the applicant's request. Specifically, the Board noted that there was no law in place at the time that required spousal notification of non-selection.

On 4 Oct 22 counsel notified the Board staff that the applicant found an original ARPC Form 123, *Reserve Component Survivor Benefit Plan Election Certificate*, dated 8 Jun 94 and would like to send to the Board.

On 12 Oct 12, through counsel, the applicant provides two copies (one readable/one unreadable (page 6)) of the previously submitted ARPC Form 123, *Reserve Component Survivor Benefit Plan Election Certificate*, dated 8 Jun 94. Again, the applicant reiterates some of, but not all of her initial contentions and contends the Air Force had a duty and failed to notify her that her late husband failed to elect participation in the RCSBP at the maximum level. In addition, the applicant states the Air Force's own legal counsel acknowledged to the court that the Air Force was required to notify and counsel her of the elections available to her late husband under the RCSBP and due to the Air Force's failure, she is entitled survivor benefits. Furthermore, the applicant states the Board should pay her legal fees.

On 17 Oct 22, the Board staff reviewed the copies of the ARPC Form 123 submitted by the applicant; however, it appears to be the same documents previously provided and reviewed by the Board. On this same date, the Board staff notified and requested counsel provide a clear copy (page 6) of the above aforementioned documents. Subsequently, on 20 Oct 22, counsel requests the Board disregard the additional documentation provided on 12 Oct 22, as it is a duplicate of the previously submitted documentation. In addition, the applicant again states the Air Force was required to notify and counsel her on the election available to her late husband under the RCSBP. Further, the applicant states she is owed roughly over $16K based on $123.00 per month and must continue monthly through her natural life.

The applicant's complete response is at Exhibit Q

FINDINGS AND CONCLUSION

1. The application was timely filed.

2. The applicant exhausted all available non-judicial relief before applying to the Board.

3. After reviewing all Exhibits, the Board remains unconvinced the evidence presented demonstrates an error or injustice. Counsel contends the applicant's deceased spouse elected spouse and child coverage under RCSBP and the lack of any record of a lawful election by her deceased spouse is due to an Air Force error. Also, counsel contends the applicant's deceased spouse believed he did not elect out of the RCSBP and that neither one was aware the Air Force had automatically enrolled him in Option A, and that being afforded two opportunities to elect something other than his original choice of Option C, did not require a response. In this respect, the Board notes the applicant's deceased spouse was sent and acknowledged the RCSBP Briefing sent by ARPC as annotated on the PS Form 3811, *Domestic Return Receipt.* However, when the applicant's deceased spouse failed to make an election within 90-days, an automatic election of Option A, "*Defer election to age 60*," was required by the law in effect at the time. As a result of the confusion, counsel requests the Board to correct the applicant's deceased spouse record and address the issues contained in the United States District Court remand order, filed, 17 June 2020.

The United States District Court remanded the applicant's case to the AFBCMR and ordered the Board to explain whether the Air Force notified the applicant, in compliance with Title 10, U.S.C. §§ 1448 and 1455, that her deceased spouse failed to elect participation in the RCSBP at the maximum level. In this respect, the Board notes the Air Force was not required to notify the applicant that her deceased spouse (Reserve Component service member) failed to elect participation in the RCSBP because Congress eliminated this requirement in a 1985 amendment. Further, counsel contends the Air Force cannot cite or produce evidence establishing it "notified the applicant in compliance with Title 10 U.S.C. §§ 1448 and 1455, that her deceased spouse failed to elect participation in the RCSBP at the maximum level. However, the Board notes the applicant's deceased spouse did not fail to make an RCSBP election of less than the maximum level, but instead he failed to make any election within the 90-day statutory time limit as required by law.

Therefore, the Board concurs with the rationale and recommendation of ARPC/DPTS and finds a preponderance of the evidence does not substantiate the applicant's contentions.

4. The applicant has not shown a personal appearance, with or without counsel, would materially add to the Board's understanding of the issues involved.

RECOMMENDATION

The Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.5, considered Docket Number BC-2011-04796-4 in Executive Session on 29 Sep 22 and 18 Oct 22:

Work-Product, Panel Chair
Work-Product, Panel Member
Work-Product, Panel Member Work-...

All members voted against correcting the record. The panel considered the following:

Exhibit E: Record of Proceedings, w/Exhibits A-D, dated 4 Sep 12.
Exhibit F: Applicant, Request for Reconsideration/atchs, dated 4 June 2015.
Exhibit G: Addendum ROP, signed 28 March 2017.
Exhibit H: DD Form 149, w/atchs, dated 9 April 2019.
Exhibit I: Notification of Reconsideration Denial, SAF/MRBC to Applicant, 12 December 2019.
Exhibit J: Court Order (REMAND), dated 17 June 2020.
Exhibit K: Advisory Opinion, ARPC/DPTS to Counsel, w/atchs, dated 24 Mar 21.
Exhibit L: Notification of Advisory, SAF/MRBC to Counsel, dated 1 April 2021.
Exhibit M: Rebuttal, Applicant, w/atchs, dated 25 May 21.
Exhibit N: Advisory Opinion, ARPC/DPTT, undated.
Exhibit O: Notification of Advisory, SAF/MRBC to Counsel, dated 5 January 2022.
Exhibit P: Rebuttal, Applicant, w/atchs, dated 1 February 2022.
Exhibit Q: Rebuttal, Applicant, w/atchs, dated 12 and 17 October 2022.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.12.9.

4/21/2023

X Work-Pro...

Work-Product
Board Operations Manager, AFBCMR
Signed by: USAF