

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2019-00601

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His election of benefits under the Reserve Component Survivor Benefit Plan (RCSBP) be changed. Specifically, to convert spouse coverage to former spouse coverage.

APPLICANT'S CONTENTIONS

He incorrectly entered his current wife's name instead of his ex-wife's name, as required by divorce decree. He simply forgot about the decree requirement as several years had elapsed between the issuance of his final divorce decree and his retirement, when he entered his current wife's name. Failure to correct his records will result in additional legal action by his ex-wife and the courts to force compliance.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is retired Air Force Reserve major (O-4), receiving retired pay.

On 3 Apr 96, the applicant and his former spouse divorced. The divorce decree required the applicant to provide RCSBP coverage for his former spouse. As of 2 Apr 97 [one year after divorce], the applicant had not filed a change to his RCSBP election under 10 U.S.C. § 1448(b)(3)(A)(iii), nor had his former spouse filed a deemed election under 10 U.S.C. § 1450(f)(3)(C).

On 3 Jun 96, ARPC/DPKA sent the applicant the standard Notification of Eligibility for retired pay (20-year letter) informing him that he had completed the required years under the provisions of Title 10 United States Code, Section 12731 (10 U.S.C § 12731), and entitled to retired pay upon application prior to age 60. In addition, he was eligible to participate in the RCSBP and should receive detailed RCSBP information by certified mail within 60 days. The RCSBP information included instructions to reply within 90 days of receipt. The letter included an attachment with information on RCSBP and instructions to reply within 90 days of receipt.

On 15 Jun 96, according to a Certificate of Marriage, provided by the applicant, he married his current spouse.

On 11 Sep 96, according to ARPC Form 123, *Reserve Component Survivor Benefit Plan Election Certificate*, the applicant elected Option C, *Immediate Annuity for Spouse Only*, based on full retired pay.

On 2 Dec 96, according to Reserve Order XXXXX, dated 10 Dec 96, the applicant was assigned to the Retired Reserve Section and placed on the Air Force Reserve Retired List.

On 6 Aug 09, according to Reserve Order Number XXXXX dated 5 Aug 09, the applicant was authorized retired pay and placed on the USAF Retired List.

On 29 Aug 18, according to DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, the applicant elected to change his SBP coverage to Former Spouse.

On 27 May 21, the Board sent the applicant the following standard forms, in order to establish whether there are persons with competing interests in the case or who should receive notice of the requested correction to the record: SBP-Marital Status Affidavit (Former Spouse); SBP-Marital Status Affidavit (Retiree); SBP-Release of Benefits Affidavit (Current Spouse).

On 14 Sep 21, the applicant returned the completed affidavits. The applicant's current spouse signed an affidavit stating she understood the applicant's intention to comply with a court order naming the applicant's former spouse as the SBP beneficiary. Further, the current spouse indicated she would relinquish any competing interest she may have in the Arrears of Pay in favor of the applicant's former spouse.

For more information, see the excerpt of the applicant's record at Exhibit B and the advisory at Exhibit C.

APPLICABLE AUTHORITY

10 U.S.C. § 1448(a)(2)(B). "Participants in the plan. The Plan applies to the following persons, who shall be participants in the Plan: ... Reserve-component annuity participants. A person who (i) is eligible to participate in the Plan under paragraph (1)(B), and (ii) is married or has a dependent child when he is notified under section 12731(d) of this title that he has completed the years of service required for eligibility for reserve component retired pay, unless the person elects (with his spouse's concurrence, if required under paragraph (3)) not to participate in the Plan before the end of the 90-day period beginning on the date on which he receives that notification."

DoD 7000.14-R, *Financial Management Regulation*, Vol 7B, Chapter 540401. "Any member who is notified of his or her completion of the years of service required for retired pay eligibility for non-regular retirement may elect to participate in RCSBP before the end of the 90-day period. A member who is married or has a dependent child, and who receives notice of eligibility for retired pay, after January 1, 2001, is automatically an immediate participant in RCSBP unless the member elects (with spousal concurrence, if required) not to participate or to defer the decision or delay coverage before the end of the 90-day period."

DoD 7000.14-R, Volume 7B, paragraph 540402. "A member electing to participate must designate an immediate election, a deferred election, or indicate a decision to delay the election until reaching retirement age. These are described as Options A, B, or C."

10 U.S.C. § 1448(b)(3)(A)(iii). "An election to convert spouse coverage to former spouse coverage, "must be written, signed by the person making the election, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment."

10 U.S.C. § 1450(f)(3)(A) and (C). If a court has ordered a service member to elect former spouse SBP, then a former spouse can submit his or her own request to DFAS for former spouse SBP coverage. This is known as a "deemed election request." There is a time limit: "An election may not be deemed to have been made ... unless the Secretary concerned receives a

request from the former spouse of the person within one year of the date of the court order or filing involved.”

AIR FORCE EVALUATION

ARPC/DPTT recommends denying the application. In accordance with DoDI 1332.42, *Survivor Benefit Plan*, former spouse coverage is not automatic upon divorce, dissolution, or annulment. A court order alone does not create coverage. A member who elects to provide former spouse coverage pursuant to a requirement contained in a court order or written agreement must do so within one year after the date of decree of divorce, dissolution, or annulment. Additionally, a member, who is required by court order, or who executes a written agreement that is incorporated, ratified, or approved by a court order, or filed with a court in accordance with applicable state law, to elect former spouse or former spouse and child SBP or RCSBP coverage, and who does not make such an election at the base amount, within one year, will be deemed to have made the required election if the Director, DFAS, receives from the former spouse or the former spouse’s legal representative, including an attorney, DD Form 2656-10, *Survivor Benefit Plan (SBP) Former Spouse Request for Deemed Election*, requesting that former spouse coverage be in place, within one year from the date of the court order or filing involved.

Prior to 1 Jan 01, a member was only enrolled in RCSBP when they elected to do so within 90 days of receipt of notification of completion of required years of service for retired pay. The applicant completed 20 years satisfactory service on 15 May 95, and was notified of RCSBP eligibility on 3 Jun 96. At the time of receipt, the applicant was not married; however, upon marriage to his current spouse twelve days later, he acquired an eligible beneficiary within the 90-day period, and would have had to elect coverage for her within 90 days of 3 Jun 96. The applicant’s election was received outside the 90-day window, and his account defaulted to Option A, *I decline to make an election until age 60*.

When the applicant began receiving retired pay at age 60, he was auto-enrolled in spouse coverage for his current spouse. In order for the applicant to have established former spouse coverage, he must have submitted a voluntary former spouse election within one year of the divorce decree in accordance with 10 U.S.C. § 1448 (b)(3)(A). Alternatively, the former spouse could have requested a deemed former spouse election on the applicant’s behalf within one year of the court order in accordance with 10 U.S.C. § 1450(f)(3)(C). However, neither the applicant nor the former spouse took any action within one year of the court order.

The complete advisory opinion is at Exhibit C.

APPLICANT’S REVIEW OF AIR FORCE EVALUATION

The Board sent a copy of the advisory opinion to the applicant on 3 Feb 22, for comment (Exhibit D), and the applicant replied on 8 Feb 22. In his response, the applicant acknowledged there were errors made in the submission of the court-issued final divorce decree that resulted in the present situation that he is attempting to correct. Both he and his current spouse recognize the impact of the requested change and would appreciate if the Board would revise his records to designate his former spouse as the beneficiary of his SBP benefits upon his death, as was intended in their original divorce. It is clearly possible a correction can be ordered and there is no disadvantage in doing so as everyone in this situation agrees the SBP was subject to a court order.

The errors made were simply the result of a lack of understanding about the rules and procedures associated with processing the divorce decree. There was no malice or fraud involved and all parties are in agreement. Failure to correct his records will result in a significant financial burden on his former spouse who supported him throughout his military career and deserves to

receive his survivor benefits upon his death. Due to that impact, the courts will continue their actions to enforce compliance.

The applicant's complete response is at Exhibit E.

FINDINGS AND CONCLUSION

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
2. The applicant exhausted all available non-judicial relief before applying to the Board.
3. After reviewing all Exhibits, the Board concludes the applicant is the victim of an error or injustice. While the Board notes the recommendation of ARPC/DPTT against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. The applicant failed to make an election within the 90 days required by law, which resulted in a default election of Option A, *I decline to make an election until age 60*. At age 60, the applicant had spouse premiums deducted from his retired pay with his current spouse named as beneficiary. However, the applicant's current spouse was fully advised of her right to RCSBP benefits, and relinquished any competing interest she may have in favor of the applicant's former spouse. There is no evidence of an Air Force error in this case, and absent a competing claimant, it may be appropriate to enforce the parties' court-ordered agreement to provide former spouse coverage. To deny the request would be to deny the former spouse an asset awarded to her by the court. Therefore, the Board recommends correcting the applicant's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected to show that:

- a. On 11 September 1996, he submitted a valid election for Option C (*Immediate Annuity for Former Spouse*) under the Reserve Component Survivor Benefit Plan, based on full retired pay, naming FORMER SPOUSE as the eligible beneficiary.
- b. Approval is contingent upon recovery of Survivor Benefit Plan premiums. If applicable, the monthly survivor benefit annuity will be applied to the premium debt until the total amount of premiums owed is recovered.

CERTIFICATION

The following quorum of the Board, as defined in Air Force Instruction (AFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 1.5, considered Docket Number BC-2019-00601 in Executive Session on 21 Apr 22:

- , Panel Chair
- , Panel Member
- , Panel Member

All members voted to correct the record. The panel considered the following:

- Exhibit A: Application, DD Form 149, w/atchs, dated 11 Oct 18.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory, ARPC/DPTT, dated 21 Jan 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 3 Feb 22.

Exhibit E: Applicant's Response, dated 8 Feb 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by AFI 36-2603, paragraph 4.11.9.

X

Board Operations Manager, AFBCMR