

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-01030

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

XXXXXXXXXXXX (APPLICANT)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her deceased former spouse's record be changed to show he made a timely election for former spouse coverage under the Survivor Benefit Plan (SBP).

APPLICANT'S CONTENTIONS

Her former spouse served in the Air Force for 20 years, and they were married for 16 of those years. He applied for SBP at the time of his retirement in 2006 to cover her and their children. He began having mental health issues during his service, and they increased after his retirement. They went to the Veterans Administration counselor, but did not receive any diagnosis or assistance. She was depressed and physically afraid of her former spouse, and although she still loved him, they divorced in 2009. The divorce decree stipulated her former spouse would pay her an income of one-half his military retirement for the balance of her lifetime. The term SBP was not specifically used in the divorce decree, but the intent was to provide her with income for the rest of her life. Her former spouse was unaware he had to re-apply for the former spouse SBP coverage after the divorce. At the time of the divorce, both children were over 21, but her former spouse continued to have SBP payments deducted from his retirement pay every month until his death in 2016, believing he was meeting his obligation under the divorce decree.

She began receiving 50 percent of her former spouse's retirement when they divorced and received a letter from the Defense Finance and Accounting Service (DFAS) in 2013 that stated she would continue to receive payments as long as the retiree did, unless otherwise stipulated in the divorce decree. Since their divorce decree did stipulate her benefit, they thought they had done everything required to continue the benefit. Her former spouse's health continued to decline and he was diagnosed with lung cancer in 2011, and brain cancer in 2013, and she became his caregiver. She transported him for treatment and eventually moved in with him, living as husband and wife. When he died in 2016, leaving her penniless, she was shocked to learn her SBP benefit ended with his death, rather than continuing for her lifetime as was his intention and stated in their divorce decree.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the former spouse of a retired Air Force technical sergeant (E-6).

On 27 Nov 93, according to a Certificate of Marriage, provided by the applicant, the former service member and applicant were married.

On 15 May 06, according to DD Form 2656, *Data for Payment of Retired Personnel*, the applicant elected Option B, *Coverage for Spouse and Children*, based on full retired pay.

On 1 Nov 06, according to Special Orders No. XXXXX, dated 18 Apr 06, the former service member retired from the Regular Air Force.

On 3 Jun 09, the service member and the applicant divorced. The divorce decree was silent on SBP coverage for the applicant [former spouse]. As of 2 Jun 10 [one year after divorce], the service member had not filed a change to his SBP election under Title 10 United States Code, Section 1448(b)(3)(A)(iii) (10 U.S.C. § 1448(b)(3)(A)(iii)), nor had the applicant filed a deemed election under 10 U.S.C. § 1450(f)(3)(C).

On 13 May 16, according to a Certificate of Death, provided by the applicant, the service member passed away.

On 21 Jul 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 (Deceased Retiree); SBP Marital Status Affidavit (Former Spouse).

On 10 Sep 21, the applicant returned all required completed affidavits.

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

APPLICABLE AUTHORITY

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)(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

AFPC/DPFFF recommends denying the application. There is no evidence of Air Force error or injustice in this case. Eligibility to receive a spouse SBP annuity terminates upon divorce; however, the law provides two mechanisms for changing spouse coverage to former spouse coverage. One of the following actions must be taken within the first year following divorce: (1) the retiree may file an election change, or (2) the former spouse may request the retiree be deemed to have made such a change on his or her behalf. In the latter case, the former spouse must provide legal documentation the member agreed, or the court ordered the member, to establish former spouse coverage. If neither the member nor the former spouse requests the election change during the one-year eligibility period, former spouse coverage may not be established thereafter. Even though a member fails to notify DFAS of the divorce and continues to pay SBP premiums afterwards, the former spouse is not eligible for annuity payments upon the member's death.

The applicant and service member were married on 27 Nov 93. DFAS records indicate the service member elected SBP coverage for spouse and children prior to his 1 Nov 06 retirement. They divorced on 3 Jun 09 and the divorce decree was silent on SBP. There is no evidence either the service member or the applicant submitted a valid election to change spouse coverage

to former spouse coverage within one year of their divorce. DFAS records did erroneously reflect the applicant as the eligible spouse beneficiary and SBP premiums were deducted from the service member's retired pay until his death on 13 May 16.

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 28 Sep 21 for comment (Exhibit D), and the applicant replied on 24 Oct 21. In her response, the applicant contended the advisory opinion was based upon three points: (1) The divorce decree was silent on SBP; (2) Neither party submitted a valid election to change spouse coverage to former spouse coverage within the first year following divorce; and (3) DFAS records reflect the applicant as the eligible spouse beneficiary and SBP premiums were deducted from the service member's retirement pay until his death.

The divorce decree stipulated that she be covered by military retirement benefits until her death. SBP equals military retirement benefits. The fact that a non-military attorney failed to use the term SBP should not deny her the benefit stipulated in the decree and elected and paid for by her former spouse. Neither she nor her former spouse were informed or aware that a change to former spouse coverage was required within a year of divorce, or one of them would have done it. They both thought she was covered and there was no notification – it is as simple as that. She questions if even DFAS had the information wrong, why would she or her former spouse have thought something needed to be corrected.

She has been pleading for this benefit for years and one of her advisors emailed her senator two years ago. The senator tried to get DFAS to reconsider, but it was not within their authority.

The applicant's complete response is at Exhibit E.

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, to include the applicant's rebuttal, the Board concludes the applicant is the victim of an error or injustice. While the Board notes the recommendation of AFPC/DPFFF against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. While the divorce decree did not specifically address SBP, the service member did not change his beneficiary and continued paying SBP premiums via deduction to his retired pay until his death, which is indicative of his intent to maintain SBP coverage for his former spouse. Additionally, there is no evidence of competing interest. 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 the MEMBER be corrected to show:

- a. On 4 Jun 09, he submitted a timely and effective election for former spouse coverage under the Survivor Benefit Plan (SBP), based on full retired pay, naming APPLICANT as the eligible beneficiary.

b. On 13 May 16, APPLICANT submitted a timely and effective claim for survivor benefit annuity.

c. Approval should be contingent upon recovery of SBP 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-2021-01030 in Executive Session on 19 May 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 13 Nov 20.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory, AFPC/DPFFF, dated 15 Jul 21.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Sep 21.
Exhibit E: Applicant's Response, w/atch, dated 24 Oct 21.

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