

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02349

XXXXXXXXXXXXX (DECEASED MEMBER)

COUNSEL: NONE

XXXXXXXXXXXXX (APPLICANT)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

She and the decedent were married from 1990 until 2014, when she asked for a divorce after he was caught molesting her 4-year-old granddaughter in Jan 14. Their divorce was final on 27 May 14. He began his prison sentence on 2 Jun 14 and remained in prison until his release 30 months later. He verbally agreed to take her to complete DD Form 2656, *Data for Payment of Retired Personnel*, for SBP former spouse coverage. They traveled to the base on 27 May 14 and met with an employee who completed some forms for him. She was led to believe he was completing the proper forms, but it is possible the employee at the base did not file the correct forms that day. She had no way of knowing if the correct documents were completed and was not allowed to question the decedent as he was always right, was the authority on military details, and was a controlling and manipulative person. She was mentally and verbally abused by the decedent during their 24-year marriage; he was terrible to her and caused her to go on various psychiatric medications. She was under the care of a psychiatrist for 30 years for depression, bipolar disorder, and anxiety. She felt she had no worth or control over her life and he made all the decisions.

She had no knowledge of the one-year time limit, or that he did not complete the correct paperwork. She had very basic knowledge of how SBP works. She questions why he would not have completed the correct forms since he was paid up on premiums in approximately 2010 or 2011. He was 19 years older than her and always promised she would be taken care of when he died. In addition, he only had three business days to complete paperwork during the one-year time period as he was incarcerated the week after the divorce was finalized. It is possible he was not mentally capable of completing the correct paperwork as he was facing a lengthy prison sentence at 82-years old. When he died, she began the process of filing for SBP and was shocked to receive a denial letter stating he never completed the forms. She is requesting the SBP as his former spouse they completed on 27 May 14.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the former spouse of a deceased retired Air Force senior master sergeant (E-8).

On 1 Jun 70, according to Special Order Number XXXXX, dated 18 Feb 70, the decedent retired from the Regular Air Force.

On 30 Mar 90, according to a Certificate of Marriage, provided by the applicant, she married the decedent.

On 27 May 14, the applicant and the decedent divorced. The divorce decree was silent on the matter of SBP. As of 26 May 15, the decedent 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 27 May 14, according to VA Form 21-4138, *Statement in Support of Claim*, provided by the applicant, the decedent reported his divorce and requested reduction in his service-connected disability compensation, accordingly.

On 2 Jun 14, according to a 2014 document, [State] vs. [Decedent], provided by the applicant, the decedent was remanded into the custody of a Correctional Center for a period of 30 months.

On 14 Nov 15, according to a letter from the decedent to DFAS, provided by the applicant, the decedent notified DFAS of his divorce from the applicant, and named her as his survivor.

On 24 May 17, according to a letter from the decedent to DFAS, provided by the applicant, the decedent reported the applicant as his former spouse under SBP, using her maiden name.

On 21 Apr 21, according to a Certificate of Death, provided by the applicant, the service member passed away.

On 14 May 21, according to DFAS letter, provided by the applicant, her claim for an SBP annuity was denied in full.

On 30 Dec 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 Release of Benefits Affidavit (Arrears of Pay).

On 13 Apr 22, the applicant returned the 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 error or injustice on the part of the Air Force, and no basis in the law to grant the applicant's request. A person's 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 service member agreed, or the court ordered the service member, to establish former spouse coverage. If neither the service 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 service member fails to notify DFAS of the divorce and continues to pay SBP premiums, the former spouse is not eligible for annuity payments upon the service member's death.

The decedent was previously married at the time of his retirement on 1 Jun 70. Although SBP did not become available until 1972, the decedent did elect coverage for his spouse and children at that time. His spouse passed away in 1985 and the decedent married the applicant on 30 Mar 90, at which time, she became the eligible beneficiary for SBP spouse coverage.

On 27 May 14, the parties divorced, and there is no mention of an award of SBP, for the now former spouse, in the divorce decree. Additionally, there is no evidence the decedent submitted a voluntary valid election to change spouse to former spouse SBP coverage. Nor was there a deemed election from the applicant within the first year following the divorce as the law requires.

The SBP paid-up provision became effective 1 Sep 11, prior to their divorce, and no further premiums were deducted from the decedent's retirement pay. Although DFAS-CL records continued to erroneously reflect the applicant as the eligible spouse beneficiary, the now former spouse is not eligible to receive the annuity as she was not lawfully married to the service member at the time of his death.

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 23 Aug 22, for comment (Exhibit D), but has received no response.

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 concludes the applicant is the victim of an 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. The decedent only had three business days following his divorce and before he was incarcerated leaving little time to get his affairs in order. Nevertheless, he showed intent when he immediately attempted to elect former spouse SBP coverage, albeit with the incorrect Agency, and while still incarcerated he sent a letter to DFAS inquiring about his former spouse's eligibility. Furthermore, although the divorce decree did not specifically address SBP, the decedent did not change his beneficiary and continued paying SBP premiums via deduction to his retired pay until his SBP paid-up provision became effective, which is indicative of his intent to maintain SBP coverage for his former spouse. Finally, 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 FORMER MEMBER be corrected to show:

a. On 27 May 14, he submitted a timely election for former spouse coverage under the Survivor Benefit Plan, based on full retired pay, naming APPLICANT as the eligible beneficiary.

b. On 13 Apr 21, 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-2021-02349 in Executive Session on 18 Nov 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 1 Jun 21.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.

Exhibit C: Advisory, AFPC/DPFFF, dated 17 Aug 22.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Aug 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.

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Board Operations Manager, AFBCMR