

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02767

XXXXXXXXXXXX
(DECEASED MEMBER)

COUNSEL: NONE

XXXXXXXXXXXX
(APPLICANT)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

The service member submitted a handwritten note 12 months prior to their divorce indicating she was to remain the beneficiary of the SBP per the Circuit Court Order dated 18 Aug 94. Neither party was aware of the requirement to elect former spouse coverage. The Defense Finance and Accounting Service (DFAS) has stated they received a notice on 10 May 02 stating the service member divorced and remarried but still wanted his former spouse to remain as the beneficiary. However, DFAS states she was no longer eligible for the benefit as the deadline to elect former spouse coverage had expired. Despite this, DFAS continued to deduct payments for SBP premiums for an additional six years until coverage was fully paid on 1 Oct 08. He paid into SBP for over 31 years to provide her the SBP benefit and clearly thought she would receive the benefit.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the former spouse of a retired Air Force master sergeant (E-7).

On 11 Feb 61, the applicant and the former service member married.

On 1 Aug 77 according to Special Order XXXXXX dated 8 Apr 77, the service member retired from the Regular Air Force.

On 18 Aug 94, the applicant and her former spouse divorced. The divorce decree required the service member to provide SBP coverage for his former spouse. However, neither the former service member or the applicant filed a change to his SBP election under Title 10 United States Code, Section 1448(b)(3)(A)(iii) or 10 U.S.C. § 1450(f)(3)(C).

On 7 Oct 19, according to a Certificate of Death, provided by the applicant, the former service member passed away.

On 29 Jul 21, the Defense Office of Hearings and Appeal denied the applicant's claim for the former spouse SBP. DOHA stated neither the former service member nor the applicant filed a request to change his SBP to elect former spouse coverage within one year of the divorce. On 27 Aug 94, the former service member remarried. On 10 May 02, eight years later, the former service member wrote DFAS stating he did not want to change his SBP and that under the divorce

decree his former spouse would remain the beneficiary. The former service member paid into the SBP for over 30 years and his SBP coverage was fully paid up as of 1 Oct 08. On 7 Oct 19, the former service member died and on 21 Nov 19, the applicant completed a DD Form 2656-7, *Verification for Survivor Annuity*, dated 21 Nov 19. On 30 Mar 20 DFAS denied the claim finding that the divorce ended her SBP spouse coverage and DFAS did not receive an election change for former spouse coverage within one year of the divorce. DOHA considered the appeal but denied it on the same grounds. DOHA stated there were statutes that permitted the AFBMCR to correct a member's record and the applicant was provided the portal address for application to the AFBCMR.

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

APPLICABLE AUTHORITY/GUIDANCE

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) (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." Surviving spouses and former spouses may maintain their SBP eligibility for SBP until death, as long as they do not remarry before the age of 55.

10 U.S.C. § 1450(b)(2). If the annuitant remarries before age 55, annuity payments will stop. However, if the marriage of an annuitant (who remarried before age 55) later ends for any reason, their eligibility for the annuity is reinstated, effective on the first day of the month the marriage ends.

AIR FORCE EVALUATION

AFPC/DPFFF recommends granting the application in the interest of justice. There is no evidence of an error; however, there is documented proof the former service member intended for the SBP to be received by his former spouse, the applicant. The applicant must show proof she was not remarried prior to age 55 in accordance with the law.

The former service member was married to the applicant at the time of his 1 Aug 77 retirement and elected spouse coverage at the time. The parties divorced on 18 Aug 94, with the divorce decree awarding former spouse SBP coverage to the applicant. The former service member did not notify DFAS to change the election from spouse to former spouse and no deemed election was submitted by the applicant within the one year requirement following their divorce. The former service member later remarried and she passed away on 18 Aug 20. The former service member expressed his intent to honor the awarded SBP coverage for the applicant in a letter dated 10 May 02. The applicant's current spouse did not submit a SBP claim prior to her passing, which means there is no competing claimant for the SBP.

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 26 Sep 22, for comment (Exhibit D). The applicant's son, with power of attorney, in an email dated 26 Sep 22 stated the applicant never remarried since her divorce from the service member. She was also already age 55 at the time of her divorce. She was born in Jan 39 and the divorce was final on 18 Aug 94. She is 83 years old, lives alone in England and is limited in her ability to travel.

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, the Board concludes the applicant is the victim of an error or injustice. The Board concurs with the rationale and recommendation of AFPC/DPFFF and finds a preponderance of the evidence substantiates the applicant's contentions. Based on the evidence and the absence of a competing interest, the Board concludes sufficient evidence has been presented to show the deceased service member intended the applicant, his former spouse, to be the named SBP beneficiary. While AFPC/DPFFF states the applicant was required to show proof she was not remarried prior to age 55 in accordance with the law, as pointed out by her son in the rebuttal response, the applicant was already age 55 at the time of their divorce. The Board also notes per the DOHA memorandum dated 29 Jul 21, the former service member's premiums were paid in full; therefore, entitlement to the SBP is not contingent on any recoupment for unpaid premiums. Therefore, in the interest of justice, the Board recommends correcting the applicant's records as indicated below.
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 pertinent military records of the Department of the Air Force relating to the former service member be corrected to show that on 19 Aug 94, he submitted a timely and effective election for former spouse coverage under the Survivor Benefit Plan, based on the previous full level of retired pay, naming the applicant, the former spouse, as the eligible beneficiary.

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-2021-02767 in Executive Session on 26 Oct 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 8 Aug 21.

Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory, AFPC/DPFFF, w/atchs, dated 16 Sep 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Sep 22
Exhibit E: Applicant's Response, dated 26 Sep 22.

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