

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-02933

XXXXXXXXXXXXXXXXXX

COUNSEL: XXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXX

HEARING REQUESTED: YES

APPLICANT’S REQUEST

The deceased service member’s record be corrected to show she made a timely claim to the child Survivor Benefit Plan (SBP) annuity.

APPLICANT’S CONTENTIONS

Counsel, on behalf of the applicant, states she should have received the full eligible dependent child annuitant during the period her father was remarried from Jul 05 to Sep 19. The Defense Finance and Accounting Service (DFAS) and DFAS Office of Hearings and Appeals (DOHA) denied her request and referred her to the AFBCMR so she may receive the full \$346,683 SBP annuity payments she should have received.

Her mother died in Jun 04 when she was six months old. Upon her death, her father submitted the DD Form 2656-7, *Verification for Survivor Annuity*, and listed her as the dependent child. He notified DFAS when he remarried and his SBP annuity was terminated on 1 Jul 05. The DFAS did not send any notification or information for her eligibility to receive the child SBP annuity.

Upon her father’s divorce in 2018, a tragedy assistance program (TAP) counselor informed him her mother had elected spouse and child SBP coverage and she should have received the annuity payment while he was married and assisted her father in submitting a new DD Form 2656-7 on her behalf. The DFAS agrees she was eligible for the SBP annuity; however, denied the claim because it was not submitted within six years.

She provides a letter of support from her father, the surviving spouse, stating that when his wife died in 2004 he had no idea about the assistance available for him and his six month old child. There was no master list of benefits or tragedy assistance. He was reliant on a casualty assistant and was never told about an SBP option for his daughter and that her assistance could continue after he remarried. He never received any paperwork. Logically, there is no reason he would not have signed for his daughter as it was a benefit for them at no cost. His daughter is entitled to the election her late mother set aside for her even after the time limit has passed because they did not know about the benefit. They were only made aware of the benefit after he was remarried by a diligent case worker for the TAP.

In a letter dated 24 Feb 21, the DFAS informed her father’s Congressman that they did not have the authority to change the record to reflect her claim for the annuity was submitted in a timely manner without the authorization of the AFBCMR.

The applicant’s complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the surviving daughter of a deceased retired Air Force major (O-4).

According to DD Form 2656, *Data for Payment of Retired Personnel*, dated 5 Feb 04, the former service member elected Option B, *Coverage for Spouse and Child[ren]*, based on full retired pay.

On 8 Mar 04, the former service member was discharged and placed on the temporary disability retirement list (TDRL), effective 9 Mar 04.

On 27 Jun 04, the service member died per the Department of the Air Force Report of Casualty Report, dated 8 Jul 04.

On 12 Jul 04, the applicant's father submitted DD Form 2656-7, *Verification for Survivor Annuity*, for his claim to the spouse SBP annuity. The applicant's name, social security number and date of birth were noted in Section 3(b), *Are there Children Under Age 23 or Incapacitated of the Deceased Member*.

According to the license and certificate of marriage provided by the applicant, her father remarried on 2 Jul 05. In a letter dated 25 Jul 05, the applicant's father notified DFAS of his marriage and his entitlement to SBP was suspended.

On 22 Aug 19, the applicant's father divorced, per the decree of divorce provided by the applicant. In a DD Form 2656-7 dated 2 Jul 20, he requested his SBP spouse annuity be restarted. He also submitted DD Form 2790, *Custodian Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces*, with the applicant's name listed as the dependent child.

On 4 Aug 20, the applicant's claim regarding her entitlement to the SBP annuity was denied. The reason was the Barring Act, 31 U.S.C. § 3702, which bars payment of any claim not received within six years from the date it accrues. The applicant's first claim for the annuity was received on 2 Jul 20.

On 7 Dec 20, the DOHA denied the appeal for the child SBP annuity. The service member died on 27 Jun 04, which is the date the claim for the SBP accrued. On 12 Jul 04, the surviving spouse claimed the spouse SBP annuity. While both he and the applicant were eligible for the SBP, he was the primary beneficiary. When he remarried under the age of 55 in Jul 05, the SBP coverage passed to the child. However, a DD Form 2656-7 was not filed in order for her to receive the child SBP annuity until 2 Jul 20, which is not within the six-year statute of limitations.

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

APPLICABLE AUTHORITY

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."

31 U.S.C. § 3702 (Barring Act): Authority to Settle Claims: The claim must be received by the Government official responsible for settling the claim or by the agency that conducts the activity from which the claim arises within six years after the claim accrues. A claim that is not received in the time required shall be returned and no further communication is required.

AIR FORCE EVALUATION

DFAS-JFBEB/CL states they do not have the authority to waive the Barring Statute. If the Board should authorize waiver of the Barring Statute, the applicant would be entitled to the SBP annuity for the period of 1 Jul 05 to 30 Sep 19.

The former service member retired on 9 Mar 04. Upon retirement, she elected spouse and child SBP coverage. The service member died on 27 Jun 04. On 13 Jul 04, her spouse submitted DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS to apply for his spouse's SBP annuity. He received the SBP annuity payments from 28 Jun 04 to 31 May 05. He then received a partial SBP payment for the entitlement period of 1 Jun 05 to 31 Jul 05, upon the Veterans Affairs (VA) awarding him dependency and indemnity compensation (DIC) benefits. On 25 Jul 05, he notified DFAS he remarried on 2 Jul 05. Since he remarried prior to age 55, his spouse SBP annuity payments were suspended. He divorced on 18 Sep 19 and requested his SBP annuity be reinstated, which it was.

On 4 Aug 20, he submitted a complete DD Form 2656-7, *Verification for Survivor Annuity*, on behalf of their daughter. Since the deceased service member elected spouse and child SBP coverage, their daughter would have been entitled to a child annuity when his spouse SBP annuity was suspended due to remarriage. However, since the claim for the annuity was submitted more than six years from the date his spouse SBP annuity was suspended, DFAS mailed a denial letter on 4 Aug 20. The Barring Act, 31 U.S.C. § 3702(b), provides a six-year statute of limitation for filing claims against the Government. Due to the application of the Barring Act, DFAS denied the annuity claim submitted on behalf of the daughter. On 15 Aug 20, he submitted an appeal, which was also denied. The approximate amount of unpaid child annuity for the period of 1 Jul 05 through 30 Sep 19 is \$346,683.00.

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

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. The Board notes DFAS does not make a recommendation stating they do not have the authority to waive the Barring Statute; however, states the applicant would have been entitled to the SBP annuity for the period of 1 Jul 05 through 30 Sep 19, if the SBP claim, in her behalf, was submitted in a timely manner. In this respect, the Board finds it reasonable to conclude the applicant's father was not made aware of his daughter's entitlement to the SBP annuity upon his remarriage before age 55 and would have submitted a timely claim in her behalf had he been properly counseled. Further, the Board does not find it in the interest of justice to deny the applicant her entitlement to the SBP benefit earned through her mother's service. Therefore, 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 MEMBER be corrected to show that on 3 Jul 05, a timely and effective claim for child annuity under the Survivor Benefit Plan, based on the previous full level of retired pay was made, naming APPLICANT as the eligible beneficiary.

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-2021-02933 in Executive Session on 21 Jul 22 and 29 Jul 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 26 Jul 21.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory, DFAS/CL, w/atch, dated 28 Jun 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 28 Jun 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.