

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03291

XXXXXXXXXX

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 was divorced after he retired from the Air National Guard. He just became aware he and his former spouse should have filed DD Form 2656-10, *Survivor Benefit Plan (SBP) Former Spouse Request for Deemed Election*, to establish his former spouse would be receiving SBP benefits upon his death. It is now 18 years after the divorce and his former spouse wants to be listed as the SBP beneficiary. He will be held in contempt of court unless he is able to name his former spouse as his SBP beneficiary.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air National Guard master sergeant (E-7).

On 10 Oct 00, ARPC/DPTT sent the applicant the standard Notification of Eligibility for retired pay (20-year letter) informing him that he has 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 30 days.

On 24 Oct 00, according to PS Form 3811, *Domestic Return Receipt*, an RCSBP package was delivered to the applicant's address and was signed.

On 2 Jan 03, according to Reserve Order **Work-Product**, dated 27 Dec 02, the applicant was assigned to the Retired Reserve Section and placed on the Air Force Reserve Retired List.

On 17 Sep 04, according to a divorce decree provided by the applicant, he was required to provide SBP coverage for his former spouse. As of 16 Sep 05 [one year after divorce], the applicant had not filed a change to his SBP 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 14 Apr 20, according to DD Form 2656, *Data for Payment of Retired Personnel*, the applicant elected Option B, *Previously elected coverage to begin at age 60*.

On 27 Oct 20, according to Reserve Order **Work-Product** dated 18 May 20, the applicant was authorized retired pay and placed on the United States Air Force Retired List.

On 23 Mar 22, 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 21 Dec 22, 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.

AIR FORCE EVALUATION

ARPC/DPTT (Transitions) recommends denying the application. All Reserve Component Service members who are eligible to participate in RCSBP but who fail to make an election in the prescribed time will by law automatically have full immediate RCSBP coverage for their dependent spouse and/or children, based upon dependents in the member's record in the Military Personnel Data System (MilPDS). The prescribed time limit for RCSBP election is before the end of the 90th day after the Service member receives notification of having completed the years of service to be eligible for non-regular retirement in accordance with 10 U.S.C. § 12731.

On 15 Jun 00, the applicant completed 20 satisfactory years of service; however, the RCSBP Notification of Eligibility takes approximately 120 days for members to receive as there is a delay in the Point Credit Summary to reflect the 20 satisfactory years in the record. The applicant's spouse signed PS Form 3811, on 24 Oct 00, confirming their household's receipt of the Notification of Eligibility. The applicant did not submit any RCSBP election form within the required 90-day timeframe. Effective 22 Jan 01, MilPDS updated the applicant's automatic election to Option C, *Immediate annuity upon death regardless of age for spouse only*.

The applicant and his spouse divorced on 17 Sep 04. On the court order, dividing military retirement, paragraph 14, the former spouse is named beneficiary to the SBP. In accordance with Department of Defense Instruction 1332.42, *Survivor Benefit Plan*, paragraph 5.2.a.1: "A member who elected spouse coverage upon becoming eligible to participate in SBP or RCSBP, and later divorces, may elect to cover that former spouse (who was not the applicant's former spouse at the time the applicant became eligible to participate) within one year after the date of decree of divorce, dissolution, or annulment. The 17 Sep 04 court order stated the former spouse is entitled to the SBP annuity; however, there was no election change forms submitted on behalf of the former spouse nor the applicant.

In preparation for commencement of retired pay the applicant completed DD Form 2656, in conjunction with his retirement application. He selected he was under Option B, *Previously elected coverage to begin at age 60*, for RCSBP. The Air Reserve Personnel Center, Casualty Office contacted the Defense Finance and Accounting Service on 9 Mar 23 to explain the member's election on his DD Form 2656, should have reflected Option C, *Immediate annuity upon death regardless of age*, for spouse only.

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 7 Jul 23, 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 ARPC/DPTT against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. In this respect, the Board took notice of the divorce decree awarding the applicant's former spouse SBP. Furthermore, the applicant's current spouse was fully advised of her right to SBP 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 would 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, in the interest of justice, 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 17 Sep 04, he submitted a timely and effective election for former spouse coverage under the Reserve Component Survivor Benefit Plan, naming FORMER SPOUSE as the eligible beneficiary.
- b. On 14 Apr 20, he submitted a timely and effective election for former spouse coverage under the Survivor Benefit Plan, based on full retired pay, naming FORMER SPOUSE as the eligible beneficiary.
- c. Approval should be contingent upon recovery of SBP premiums owed since his 27 Oct 20 retirement.

CERTIFICATION

The following quorum of the Board, as defined in Department of the Air Force Instruction (DAFI) 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2021-03291 in Executive Session on 17 Aug 23:

, 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 21 Dec 22.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.

Exhibit C: Advisory Opinion, ARPC/DPTT, dated 13 Jun 23.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 7 Jul 23.

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.

X

Board Operations Manager, AFBCMR