

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2021-03572

XXXXXXXXXXXX (DECEASED MEMBER)

COUNSEL: XXXXXXXXXXXX

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

Counsel, on behalf of the applicant, contends that recognizing this is not an uncommon request for the Board, three things clearly distinguish this case, removing it from the general rule. First, the service member's widow, who is the nominal entitlee, has under oath declared her willingness to transfer the SBP benefit to the applicant. Second, there is good reason to believe the ex-spouse designation form was in fact sent to the Defense Finance and Accounting Service (DFAS), given that DFAS was clearly on notice of the divorce and had the dissolution property settlement agreement as it began deducting the applicant's portion from the service member's retired pay. Under those circumstances, DFAS should have stopped taking SBP premiums. Further, after notification in 2007 that the applicant was an ex-spouse, DFAS continued to deduct SBP premiums from his retired pay and the applicant's share of that retired pay, showing the applicant as the SBP beneficiary for 14 years thereafter. As a result, the decedent and applicant had no reason to think documentation was lacking. Because of DFAS action, it was impossible for them to know of an alleged omission, much less correct it. In fact, the decedent's Retired Monthly Statement showed the applicant as the SBP recipient as well as the ex-spouse. Even after the service member's death, DFAS continued to tell his widow [current spouse] she was not the beneficiary, and telling the applicant she was the beneficiary and advising her to submit her application for benefits. It was only after the applicant submitted the application that DFAS claimed not to have the proper form to elect former spouse. Third, given DFAS actions, the most likely explanation is the form that accompanied the divorce decree sent to DFAS was mislaid. In support, a narrative summary with detailed timeline is provided.

As a general rule, the law places the burden for compliance on the service member. DFAS does not notify the service member of error or deficiencies. Inasmuch as both principles are undergirded by the assumption of administrative regularity, this reasoning should not apply when DFAS takes all actions consistent with timely receipt of the documentation designating the applicant as the ex-spouse beneficiary. DFAS error is inescapable. Either DFAS received the correct documentation but misplaced it, or DFAS did not receive the correct documentation yet took all actions as though they had, leading the decedent and applicant to assume they had complied with all requirements. If DFAS had not received the correct designation, the SBP premiums would have stopped, and they would have known within a month that more was required and taken action to correct it. Under either error scenario, the applicant should not be held to the one-year limitation under the principle of equitable tolling.

Notwithstanding strict compliance contained in 10 U.S.C. § 1448(b)(3)(A)(i) (SBP election for former spouse) and 10 U.S.C. § 1450(f)(3)(A) (deemed election), the courts have left room for a limited exception of substantial compliance. *Bonewell v. United States*, 111 Fed. Cl. 129, 139 (Ct. Fed. Cl. 2013); *Bailey v. Bailey*, 2014 U.S. Dist. LEXIS 136619, at p. 29 (N.D. Miss. 2014).

Substantial compliance has particular applicability, whereas here equity favors the applicant, and there is no competing claim. *Id.*, at 137. *Holt v. United States*, 64 Fed. Cl. 215, 218 (2005), cited in *Holmes v. United States*, 98 Fed. Cl. 767, 777-78 (Ct. Fed. Cl. 2011). *Bonewell v. United States*, supra, is in many respects similar to this - but differs in three crucial respects - all of which augur in favor of relief. First, the widow waived her entitlement. Second, insistence on strict compliance overlooks DFAS error. Finally, the decedent and applicant paid full premiums for SBP up until the service member's death. Caselaw and precedent before this Board clearly establish that equity plays a decisive role where there is not a competing claim for the same fund.

This Board has the authority to correct a record where there is error or injustice. Both are present here. In fact, the error is proximately the cause of the injustice. Had DFAS not behaved as though they had the proper ex-spouse designation, the decedent and applicant would have known of it within a month or two, made contact, and ascertained what was necessary to correct it. Precedent, common sense, and simple justice lead to no other conclusion but to grant the relief requested.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the former spouse of a retired Air Force lieutenant colonel (O-5).

On 18 Jul 02 according to DD Form 2656, *Data for Payment of Retired Personnel*, the decedent elected Option B, *Coverage for Spouse and Child[ren]*, based on reduced retired pay and his spouse [applicant] concurred with the decision.

On 30 Sep 02, the decedent was furnished an honorable discharge, with Narrative Reason for Separation: Sufficient Service for Retirement, and credited with 22 years, 4 months, and 3 days active service.

On 26 Oct 07, the decedent and the applicant divorced. The divorce decree required the service member to provide SBP coverage for his former spouse [applicant]. As of 25 Oct 08 [one year after divorce], 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 his former spouse [applicant] filed a deemed election under 10 U.S.C. § 1450(f)(3)(C).

On 25 Sep 20, according to a Certificate of Death, provided by the applicant, the service member passed away.

On 13 Apr 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 Release of Benefits Affidavit.

On 20 Apr 22, the applicant returned the completed affidavits. The applicant indicated she had not remarried, but the service member had remarried. The decedent's widow indicated she would relinquish any competing interest she may have in the SBP benefits in favor of the decedent's former spouse.

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 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 files an election change with DFAS-CL by completing a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, or (2) the former spouse requests the retiree be deemed to have made such a change on his or her behalf by completing a DD Form 2656-10, *SBP Former Spouse Request for Deemed Election*. Both actions must include a copy of the official divorce decree that shows SBP has been awarded to the former spouse. 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-CL 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 decedent and applicant were married with dependent children and elected Spouse and Children coverage prior to the decedent’s retirement. The Defense Enrollment Eligibility Reporting System reflects the parties divorced on 26 Oct 07, and the divorce decree required the decedent to elect SBP coverage for his former spouse. There is no evidence either party submitted a valid election to convert spouse coverage to former spouse coverage within the required timeline. DFAS records continued to reflect spouse coverage until the service member’s death. On 16 Oct 10, the service member remarried and remained married until his death on 25 Sep 20. His spouse, at that time, became the SBP beneficiary, is now in receipt of the monthly annuity, and submitted an affidavit releasing the annuity to the applicant if the corrective actions require her to do so. Finally, the law is clear in cases of divorce to adhere to the one-year timeline to change coverage, which was not done. The applicant sought corrective action via DFAS and Defense Office of Hearing and Appeals, with both resulting in denials.

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 29 Sep 22, for comment (Exhibit D), and the applicant replied on 6 Oct 22. In response, counsel, on behalf of the applicant, contends it is difficult to believe the advisory author read the entire package as the advisory simply rehearses the law and decides that since DFAS had no record of the former spouse designation within the statutory one-year time frame, there is no evidence of error or

injustice, and the application should be denied. One cannot reconcile this categorical statement with the evidence contained in the application.

Counsel reiterated contentions from the original application. There is good reason to believe DFAS was given appropriate notification of the divorce and former spouse election. It is indisputable that DFAS was notified of the divorce in 2007 yet continued to deduct SBP premiums for 14 years thereafter from the applicant's share of the decedent's retired pay. The decedent's widow confirmed in her affidavit that his Retirement Monthly Statement reflected the applicant's birthday for the SBP recipient and shows her as the former spouse. If DFAS did not receive notification of the former spouse election, their continued deduction of SBP premiums would be an error in itself. DFAS cannot have it both ways, because under either scenario there was an error.

That the decedent's widow waived her right to SBP as the decedent intended, and the court order required the applicant be the recipient, for which she paid premiums, and the retired pay was earned while the applicant was married to the decedent conclusively establishes there was an injustice. Additionally, the advisory completely misstates the widow's affidavit saying the widow is willing to relinquish the benefit "only if" ordered to do so by the Board. Counsel restated the widow's position from the affidavit and contends the only condition was that the benefit go to the applicant and not be relinquished altogether. Most worrisome about the advisory is the twisting of the widow's waiver to completely change its meaning. Nowhere in the record can the "only if" language be found. It is all the more disturbing when the applicant was invited to bring her case to the Board by the same Air Force that now seriously misrepresents her application in its official advisory.

It is hard to conceive of a clearer case for relief. Where the rightful and clearly intended recipient, who paid the premiums for 14 years, and was married to the service member for nearly all of his career, asks the Board to act, and the statutory recipient agrees to relinquish her entitlement, there is no reason not to grant the application. The Treasury is out nothing; a court order is satisfied; all parties are made whole; and the Board acts within its authority to fix an injustice.

The applicant's complete response is at Exhibit F.

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. While the Board heeded the recommendation of AFPC/DPFFF 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 SBP, the decedent's willingness to accept a reduction in his retired pay for over 13 years, and the records that continued to show the applicant as the eligible beneficiary, albeit as spouse instead of former spouse, and determined these factors are indicative of the decedent's intent to maintain SBP coverage on the applicant's behalf. Furthermore, there is no evidence of competing interest as the decedent's widow expressly waived her entitlement to SBP premiums in favor of the applicant. Therefore, in the interest of justice, the Board recommends correcting the decedent's records as indicated below.

RECOMMENDATION

The pertinent military records of the Department of the Air Force relating to MEMBER be corrected to show that:

a. On 25 Oct 08, he submitted a timely and effective election for former spouse coverage under the Survivor Benefit Plan, based on a reduced base amount of \$2,988.00, naming APPLICANT as the eligible beneficiary.

b. On 2 Nov 20, APPLICANT submitted a timely and effective claim for survivor benefit annuity.

c. Approval should be contingent upon recovery of Survivor Benefit Plan 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 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-2021-03572 in Executive Session on 18 May 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 20 Oct 21.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory, AFPC/DPFFF, dated 28 Sep 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 29 Sep 22.
Exhibit E: Applicant's Response, dated 6 Oct 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.

X

Board Operations Manager, AFBCMR