

## RECORD OF PROCEEDINGS

**IN THE MATTER OF:**

**DOCKET NUMBER:** BC-2022-00341

XXXXXXXX (MEMBER)

**COUNSEL:** NONE

XXXXXXXX (APPLICANT)

**HEARING REQUESTED:** YES

### 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

In 1996, the decedent and applicant gave the Air Force permission to withdraw funds from the decedent's pay in return for a monthly annuity distribution to be paid to the applicant upon the decedent's death. The decedent and applicant had an amicable divorce and remained friends. The decedent continued to pay annuity premiums for another 17 years, until his death. They were married for 20 years, and he intended that the applicant receive the SBP distribution upon his death. Neither remarried during the decedent's lifetime.

In 2017, the decedent told the applicant he was terminally ill and reminded her he had continued to pay for the SBP annuity with her listed as beneficiary. He provided the applicant a copy of his DD Form 214, *Certificate of Release or Discharge from Active Duty*, Retirement Account Statement, and instructions on how to file for the annuity. After his death, the applicant filed for the annuity; however, the Defense Finance and Accounting Service (DFAS) denied the claim because the decedent did not change her status from spouse to former spouse.

She does not know why the decedent did not change her status. He allowed DFAS to continue to withhold premiums after their divorce, until his death, with the intention the distribution would be paid to her. She believed he had taken care of everything, and he verbalized that the arrangements he made with DFAS would allow for a smooth transition of funds.

She has exhausted the appeals process with DFAS and Defense Office of Hearings and Appeals (DOHA). She does not agree with their decision to deny her simply because she was not labeled "former spouse" after the divorce. She does know the decedent continued to pay for the annuity after their divorce with the intent that she would receive the SBP annuity.

The applicant's complete submission is at Exhibit A.

### STATEMENT OF FACTS

The applicant is the former spouse of a deceased Air Force captain (O-3).

On 22 Jun 79, according to an Abstract of Marriage Record, provided by the applicant, she married the decedent.

On 16 Oct 95, according to DD Form 2656, *Data for Payment of Retired Personnel*, the decedent elected Option A, *Coverage for Spouse Only*, based on reduced retired pay and the applicant concurred with the decision.

On 1 Mar 96 according to Special Orders No. XXXXX, dated 29 Jan 96, the decedent retired from the Regular Air Force.

On 19 Sep 01, according to the Settlement Agreement, provided by the applicant, the decedent and the applicant divorced. As of 18 Sep 02 [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)).

On 14 Jun 17, according to a Certificate of Death, provided by the applicant, the decedent passed away.

On 17 Jul 17 and 1 Jun 19, according to AFPC/DPFFF advisory, the applicant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS-CL. Both requests were denied.

On 8 Dec 21, according to a DOHA letter, provided by the applicant, her claim for entitlement to the SBP annuity established by the decedent was disallowed.

On 15 Feb 22, the Board sent the applicant the following standard form: SBP Marital Status Affidavit (Former Spouse), 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.

On 14 Jun 22, the applicant returned the completed affidavit.

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, no evidence the decedent tried to elect former spouse coverage, and no basis in the law to grant the applicant's request. Eligibility to receive a spouse SBP annuity terminates upon divorce. 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 was married to the applicant at the time of his retirement and did elect spouse coverage, at a reduced amount, and his spouse concurred. The parties later entered into a settlement agreement and divorced with neither the settlement agreement nor divorce decree addressing SBP. The settlement agreement does state the applicant would release all claims to the decedent's military retirement benefits. The decedent did not notify DFAS-CL to change his election from spouse to former spouse, and no deemed election was submitted by the applicant, within the one-year anniversary of their divorce. The spouse coverage, at a reduced amount, remained and the decedent had not remarried.

The applicant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS-CL, on two occasions, 17 Jul 17 and 1 Jun 19, with both being denied as she was not entitled to an SBP annuity. She appealed the decision to DOHA, and was again denied, citing no request for former spouse coverage within one-year of the divorce.

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 4 Jan 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 not 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 does not substantiate the applicant's contentions. The decedent did not make an election for former spouse coverage within one year of their divorce, as required by law. Additionally, although SBP premiums were deducted from the decedent's retired pay, there is no evidence it was his intent to provide this coverage to his former spouse, particularly as the settlement agreement/divorce decree stated the applicant released her claim to any military retirement benefits. Therefore, the Board recommends against correcting the applicant's records.
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 Board recommends informing the applicant the evidence did not demonstrate material error or injustice, and the Board will reconsider the application only upon receipt of relevant evidence not already presented.

## 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-2022-00341 in Executive Session on 20 Apr 23:

, Panel Chair  
, Panel Member  
, Panel Member

All members voted against correcting the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 6 Jan 22.  
Exhibit B: Documentary Evidence, including relevant excerpts from official records.  
Exhibit C: Advisory, AFPC/DPFFF, dated 28 Dec 22.  
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 4 Jan 23.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings, as required by DAFI 36-2603, paragraph 4.121.9.

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Board Operations Manager, AFBCMR