

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01188

XXXXXXXXXX (DECEASED)

COUNSEL: NONE

XXXXXXXXXX (APPLICANT)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

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

APPLICANT'S CONTENTIONS

When she and the service member divorced, they agreed that she would not claim any of his retirement benefits, but she be listed as the recipient of his SBP entitlement. This agreement is documented in the divorce decree between her and her former spouse. When her former spouse passed away, she filed a claim to start receiving her SBP entitlement, but the claim was denied due to missing documentation that should have been provided by the service member. She was unaware of any missing documentation and Defense Finance and Accounting Service (DFAS) did not contact her to make her aware of this.

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 1 Jul 67, according to a Certificate of Marriage, provided by the applicant, she married the service member.

On 31 Jul 88, according to Special Order XX-XXXXXX, dated 6 Feb 88, the service member retired from the Regular Air Force.

On 6 Feb 96, the applicant and service member divorced. The divorce decree required the service member to provide SBP coverage for his former spouse. As of 6 Feb 97, one year after divorce, the service member 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 7 Feb 96, according to memorandum from the applicant's attorney to DFAS, the applicant filed a deemed election.

On 26 Oct 21, according to a Certificate of Death, provided by the applicant, the service member passed away.

On 28 Jun 22, the Board sent the applicant the following standard forms, 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 (Arrears of Pay).

On 1 Jul 22, the applicant returned the completed affidavits.

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

AIR FORCE EVALUATION

AFPC/DPFFF recommends granting the application. 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 may file an election change, or (2) the former spouse may request the retiree be deemed to have made such a change on his or her behalf. 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 Cleveland (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 service member and applicant were married at the time of his 1 Aug 88 retirement and elected spouse SBP coverage. The applicant and the service member divorced on 6 Feb 96, and the divorce decree reflects SBP was awarded to the former spouse. Although, there is no evidence the service member submitted a valid election to change spouse to former spouse SBP coverage, as agreed upon per the divorce decree within the first year following their divorce as the law requires; there is evidence the attorney, on behalf of the applicant did attempt to notify DFAS-CL via mail to deem the election. The SBP coverage and premiums were suspended as of 6 Feb 96. There is no evidence that either party ever remarried.

Although there is no evidence of Air Force error in this case, to preclude an injustice, it would be appropriate to correct the applicant's record to reflect that on 7 Feb 96, a deemed election for former spouse coverage was received by DFAS from the applicant, based on full retired pay of the service member. Approval of this request should be contingent upon recoupment of all applicable retroactive SBP premiums.

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 23 Aug 22, 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 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. Therefore, 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 the MEMBER be corrected to show that:

a. On 6 Feb 96, 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 APPLICANT as the eligible beneficiary.

b. On 26 Oct 21, APPLICANT submitted a timely and effective claim for survivor benefit annuity.

c. Approval should be contingent upon recovery of all retroactive 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-2022-01188 in Executive Session on 20 Apr 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 7 Apr 22.

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

Exhibit C: Advisory, AFPC/DPFFF, dated 19 Aug 22.

Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 23 Aug 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