

RECORD OF PROCEEDINGS

IN THE MATTER OF:

XXXXXXXXXXXXXX

DOCKET NUMBER: BC-2022-01661

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

Her election of benefits under the Survivor Benefit Plan (SBP) be changed. Specifically, to decline participation in the SBP.

APPLICANT'S CONTENTIONS

On her DD Form 2656, *Data for Payment of Retired Personnel*, application for retirement, signed 10 Nov 21, she elected to not participate in the SBP. Her spouse concurred with the declination and signed with a notary witness. They never stated they wanted SBP coverage and were surprised when the payment was deducted from her retirement check. She made several phone calls and eventually was told she would need to apply for a correction to her military record. The correction should be made because she and her spouse never requested to participate in SBP and have alternative arrangements.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force Reserve lieutenant colonel (O-5) receiving retired pay.

On 24 Aug 09, ARPC/DPPR sent the applicant the standard Notification of Eligibility for retired pay (20-year letter) informing her that she 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, she was eligible to participate in the Reserve Component Survivor Benefit Plan (RCSBP).

According to PS Form 3811, *Domestic Return Receipt*, an RCSBP package [dated Aug 09] was delivered to the applicant's address and was signed.

On 31 May 16, according to Reserve Order XXXXX, dated 25 Aug 16, the applicant was assigned to the Retired Reserve Section and placed on the Air Force Reserve Retired List.

On 8 Sep 16, according to Reserve Order XXXXX, Reserve Order XXXXX, dated 25 Aug 16, was amended to read: Date Assigned to Retired Reserve – 31 May 17.

On 10 Nov 21, according to DD Form 2656, the applicant elected to not participate in SBP and her spouse concurred with her election.

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

APPLICABLE AUTHORITY

10 U.S.C. § 1448(a)(2)(B). “Participants in the plan. The Plan applies to the following persons, who shall be participants in the Plan: ... Reserve-component annuity participants. A person who (i) is eligible to participate in the Plan under paragraph (1)(B), and (ii) is married or has a dependent child when he is notified under section 12731(d) of this title that he has completed the years of service required for eligibility for reserve component retired pay, unless the person elects (with his spouse's concurrence, if required under paragraph (3)) not to participate in the Plan before the end of the 90-day period beginning on the date on which he receives that notification.”

DoD 7000.14-R, *Financial Management Regulation*, Vol 7B, Chapter 540401. “Any member who is notified of his or her completion of the years of service required for retired pay eligibility for non-regular retirement may elect to participate in RCSBP before the end of the 90-day period. A member who is married or has a dependent child, and who receives notice of eligibility for retired pay, after January 1, 2001, is automatically an immediate participant in RCSBP unless the member elects (with spousal concurrence, if required) not to participate or to defer the decision or delay coverage before the end of the 90-day period.”

DoD 7000.14-R, Volume 7B, paragraph 540701. “Elections filed during the 90-day period referred to in paragraph 540401 are generally irrevocable unless revoked before the expiration of the 90-day period.”

10 U.S.C. § 1448(a)(3)(B). “A married person who is eligible to provide a reserve-component annuity may not without the concurrence of the person's spouse elect (i) not to participate in the Plan; (ii) to designate under subsection (e)(2) the effective date for commencement of annuity payments under the Plan in the event that the member dies before becoming 60 years of age to be the 60th anniversary of the member's birth (rather than the day after the date of the member's death); (iii) to provide an annuity for the person's spouse at less than the maximum level; or (iv) to provide an annuity for a dependent child but not for the person's spouse.”

Fiscal Year 2023 National Defense Authorization Act (FY23 NDAA). Congress provided for an SBP Open Season in the FY23 NDAA. The SBP Open Season began on 23 Dec 22 and ends on 1 Jan 24. The SBP Open Season allows for retirees receiving retired pay, eligible members, or former members awaiting retired pay who were not enrolled in SBP or RCSBP (Reserve Component Survivor Benefit Plan) as of 22 Dec 22 to enroll. For a member who enrolls during the SBP Open Season, the law generally requires that the member will be responsible to pay retroactive SBP premium costs that would have been paid if the member had enrolled at retirement (or enrolled at another earlier date, depending on the member's family circumstances).

The SBP Open Season also allows eligible members and former members who were enrolled in SBP or RCSBP as of 22 Dec 22 to permanently discontinue their SBP coverage. The law generally requires the covered beneficiaries to concur in writing with the election to discontinue. Previously paid premiums will not be refunded.

There are special forms to enroll or discontinue in accordance with the NDAA 2023 SBP Open Season law and processes. See the following website for additional information.

<https://www.dfas.mil/RetiredMilitary/provide/sbp/SBP-Open-Season-NDAA2023/>

AIR FORCE EVALUATION

ARPC/DPTT recommends denying the application. The applicant did not make an election within the 90-day timeframe following Notification of Eligibility prescribed by law and is ineligible to change her election outside of the eligible timeframe.

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.

The applicant completed 20 satisfactory years of service on 12 May 09; however, the RCSBP Notification of Eligibility takes approximately 120 days for receipt due to a delay in the Point Credit Summary to reflect 20 years of service. The applicant's spouse signed the PS Form 3811, *Domestic Mail Return Receipt*, in Aug 09 to confirm their household's receipt. The applicant did not return the documentation with her desired election within the 90-day timeframe prescribed by law and was automatically enrolled based on her eligible beneficiaries, which resulted in Option C – *provide an immediate survivor annuity beginning on the day after death for spouse and child(ren)*, effective 17 Dec 09.

On 10 Nov 21, in preparation for commencement of retired pay, the applicant completed DD Form 2656 in conjunction with her retirement application, electing to decline SBP, with spousal concurrence; however, Reserve and Air National Guard members that have a previous RCSBP election of Option C cannot make a new election on the DD Form 2656 as it is not a change of election form due to a life-changing event.

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 5 Aug 22 for comment (Exhibit D), and the applicant replied on 25 Oct 22. In her response, the applicant contended she is being charged for SBP in her recently started Air Force pension. She and her spouse do not want to participate in SBP, and they both signed the DD Form 2656 in Nov 21 prior to beginning her retirement pay indicating they did not want to participate. She received a letter informing her the DD Form 2656 cannot be used to make a new election; however, is it a new election if they never wanted SBP in the first place? While it is true someone signed the PS Form 3811 over 13 years ago, she does not recall ever seeing it and should be able to correct the record and reverse the decision made unknown to her over 13 years ago. She questions why she has to pay for the rest of her life for something she does not want. She asks the Board to correct the record so she can stop paying several hundred dollars per month for a benefit she and her spouse do not want. The applicant's complete response is at Exhibit E.

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 ARPC/DPTT and finds

a preponderance of the evidence does not substantiate the applicant's contentions. The applicant completed 20 satisfactory years on 12 May 09, and the notification of RCSBP eligibility and election materials (PS Form 3811) were signed in Aug 09. However, she did not return the documentation with her desired election within the 90-day time frame prescribed by law. Therefore, she was automatically enrolled in the RCSBP based on her eligible beneficiaries, which resulted in Option C - *provide an immediate survivor annuity beginning on the day after death for spouse and child(ren)*, effective 17 Dec 09. Nonetheless, the Board notes, the FY23 NDAA provides an SBP Open Season, which began on 23 Dec 22 and ends on 1 Jan 24, allowing eligible members and former members who are currently enrolled in either SBP or RCSBP to permanently discontinue their SBP coverage. However, previously paid premiums will not be refunded. The applicant has the opportunity to permanently discontinue SBP coverage during this Open Season. Therefore, the Board recommends against correcting the applicant's records.

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-2022-01661 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 15 Jun 22.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory, ARPC/DPTT, w/atch, dated 28 Jul 22.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 5 Aug 22.
- Exhibit E: Applicant's Response, dated 25 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