
RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-01710

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: YES

APPLICANT'S REQUEST

His participation in the Survivor Benefit Program (SBP) be terminated, and he be refunded the premiums paid.

APPLICANT'S CONTENTIONS

SBP premiums are unjustly being deducted from his retirement pay due to an error (a representative inadvertently enrolled him in the SBP) made in his records.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air National Guard colonel (O-6).

On 29 Sep 01, ARPC/DPPRB sent the applicant the standard Notification of Eligibility (NOE) 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 Reserve Component Survivor Benefit Program (RCSBP) and should receive detailed RCSBP information by certified mail within 30 days. The RCSBP information included instructions to reply within 90 days of receipt.

On 13 Nov 01, according to PS Form 3811, *Domestic Return Receipt*, an RCSBP package was delivered to the applicant's address and was signed.

On 14 Dec 21, according to Reserve Order X-XXXXXX, dated 13 Jan 22, the applicant was honorably discharged from the Air National Guard and transferred to the United States Air Force Reserve and assigned to Head Quarters Air Reserve Personnel Center (HQ ARPC).

On 4 Jan 22, according to documentation provided by the applicant, he submitted a DD Form 2656, *Data for Payment of Retired Personnel*, reflecting he elected Option C, *Previously elected or defaulted to immediate RCSBP Coverage*.

On 16 Mar 22, according to documentation submitted by the applicant, after speaking to an HQ ARPC staff member, he submitted a notarized DD Form 2656, updating block 33 to reflect Option A, *Previously declined to make an election until eligible to receive retired pay*; block 34 to reflect Item g, *I Elect not to Participate in SBP*, with concurrence of his spouse.

On 2 Apr 22, according to Reserve Order XX-XXXX dated 2 May 22, the applicant was authorized retired pay and placed on the United States Air Force Retired List.

On 2 May 22, according to documentation submitted by the applicant, he re-accomplished page 4 of the DD Form 2656 by signing the form before a Notary Public with a witness other than his wife.

On 9 May 22, according to documentation submitted by the applicant, his Retiree Account Statement reflected a deduction of \$279.83 for SBP Costs.

For more information, see the excerpts 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, 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."

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 5408. "The Government does not subsidize the cost of providing RCSBP coverage under the immediate or deferred annuity option, but the members and beneficiaries who potentially will benefit from the coverage share the cost. The cost to the retiree, known as the Reserve Component Premium, is in the form of an additional deduction from his or her retired pay beyond the Standard Premium. The RCSBP, unlike SBP, requires a reduction in the survivor annuity. That reduction, known as the Survivor's Annuity Premium Deduction, begins when the survivor begins to receive an annuity. The Reserve Component Premium and the Survivor's Annuity Premium Deduction increase at the same time and by the same percentage that retired pay increases by cost-of-living adjustments."

Fiscal Year 2023 National Defense Authorization Act (FY23 NDAA). Congress provided for a Survivor Benefit Plan (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 are currently NOT enrolled in SBP or the Reserve Component Survivor Benefit Plan (RCSBP) 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 are currently enrolled in either SBP or RCSBP 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 FY23 NDAA SBP Open Season law and processes. Refer to 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 SBP is administered pursuant to 10 U.S.C., Subchapter II, Chapter 73. SBP pays a monthly benefit to designated survivors of an eligible Service member or retiree. RCSBP extends eligibility of the SBP to Reserve Component members, who would otherwise be eligible to receive retired pay, except they have not yet reached retirement age. RCSBP allows members to provide an annuity based on their retired pay, to qualified survivors, upon the death of a member. 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 19 Mar 01, the applicant completed 20 satisfactory years of service; however, the RCSBP NOE 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 record. On 13 Nov 07 [¹sic], the applicant signed PS Form 3811 confirming he received the RCSBP NOE. However, he did not return the documentation with the desired election within the 90-day timeframe prescribed by law and was automatically enrolled based on his eligible beneficiaries, which resulted in Option C, *provide an immediate survivor annuity beginning on the day after death for spouse*, effective 11 Feb 02. Per 10 U.S.C., Subsection 1448(a)(5)(B), a member can only change their original election, despite the fact if the election was automatic, 12 months following a life changing event, i.e. child birth, divorce, remarriage, or death of a spouse.

On 16 Mar 22, in preparation for commencement of his retired pay, the applicant completed DD Form 2656, electing to decline SBP with spousal concurrence. The DD Form 2656 cannot be used to make and/or change an SBP election.

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 26 Jul 22, for comment (Exhibit D), but has received no response.

¹ The applicant signed PS Form 3811 on 13 Nov 01.

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. Specifically, as prescribed by law, the applicant failed to make an election within the 90-day timeframe following NOE, resulting in automatically having full, immediate RCSBP coverage for his dependent spouse and/or children, based upon dependents in the applicant's MilPDS record. However, 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.
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-2022-01710 in Executive Session on 16 Mar 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 7 Jun 22.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory, ARPC/DPTT, dated 18 Jul 22.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 26 Jul 22.

Taken together with all Exhibits, this document constitutes the true and complete Record of Proceedings pertaining to Docket Number BC-2022-01710, as required by DAFI 36-2603, paragraph 4.12.9.

X

Board Operations Manager, AFBCMR