

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02554

XXXXXXXXXXXXXXXXX (DECEASED)

COUNSEL: NONE

XXXXXXXXXXXXXXXXX (APPLICANT)

HEARING REQUESTED: YES

APPLICANT'S REQUEST

Her eligibility under the Survivor Benefit Plan (SBP) be reinstated.

APPLICANT'S CONTENTIONS

The unfair deceptive acts and practices of the Defense Finance and Accounting Service (DFAS) have caused her tremendous financial and emotional harm. After the death of her husband, DFAS questioned their marriage and stopped her annuity payments. They requested she provide a declaratory judgement to validate their marriage; however, she was advised that no court exists to issue such a judgement. She exhausted her savings hiring attorneys to assist her and was forced to move to a state with a lower cost of living. Although the error occurred more than three years ago, she requests consideration for extenuating circumstances. She experienced multiple health issues over the past six years, causing hospitalization and rehabilitation.

In support of her request, the applicant provided a copy of the divorce decree for the decedent and his former spouse, as well as legal documents attempting to satisfy DFAS' request to validate the divorce. In addition, the applicant provided the decedent's Retiree Account Statement, dated 10 January 2002, reflecting deductions for spouse only coverage. The statement also reflects the applicant's date of birth under "Spouse DOB," and she is named as the arrears of pay beneficiary.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the surviving spouse of a deceased retired Air Force major (O-4).

On 1 November 1963, according to Special Order XX-XXXX, dated 19 July 1963, the service member retired from the Regular Air Force.

Based on documentation provided by the applicant and analysis of the facts, the following information is provided:

On 12 November 1976, according to a Decree of Divorce, the service member divorced his former spouse while he was temporarily residing in the [REDACTED]. The decree indicates the former spouse was summoned but did not appear for the proceedings and is silent on SBP.

On 18 November 1976, according to a Certificate of Marriage, the service member and applicant were married in [State].

On 8 March 2009, according to a Certificate of Death, the service member passed away.

On 18 March 2009, DFAS acknowledged the service member's passing and provided the applicant SF 1174, *Claim for Unpaid Compensation*, to request unpaid retired pay. On 25 March 2009, DFAS notified the applicant they received all documentation needed to establish her SBP annuity.

Her first payment was computed at 55 percent of the SBP annuity base amount at \$1,359.91. On 6 July 2009, DFAS informed the applicant the decedent paid a total of \$61,289.25 into SBP.

In February 2010, DFAS terminated the applicant's SBP annuity payments.

On 27 June 2013, Counsel, on behalf of the applicant, appealed to DFAS. He stated that on 12 November 1976 while living in the [REDACTED] and flying for a commercial airline, the service member divorced his former spouse, and the divorce was authenticated by the United States Embassy. The service member and applicant provided their divorce decrees to the [State] Clerk of Court, the validity of the divorce decrees was accepted by the Court, the couple was issued a marriage license, and subsequently married. In 2005, the service member's former spouse passed away. Following the service member's death in 2009, the applicant applied for and received SBP. In a letter to the applicant dated 3 February 2010, nearly 34 years after marriage, DFAS questioned the validity of her marriage to the decedent and terminated her SBP annuity. Counsel claimed that despite confusing assertions made by DFAS, there could be no conflicting claims since the decedent's former spouse predeceased him in 2005. He noted the power to regulate marriages is vested in individual states and in the absence of irrefutable proof of improper conduct by the Court, DFAS was bound by the Court's determination to issue the marriage license. Finally, he noted the applicant was recognized as the decedent's widow by the Department of Veterans Affairs, Social Security Administration, Internal Revenue Service, and the Air Force. The decedent specifically designated the applicant as his SBP beneficiary and DFAS withheld premiums based on that designation. It was incongruous that the marriage is recognized by four Federal agencies only to be denied by the one agency the decedent "hired" to care for his wife. Counsel concluded that DFAS should honor the marriage and grant SBP benefits.

On 27 May 2015, a presiding [State] judge certified the marriage certificate issued to the decedent and applicant was in due form and made by the proper officer.

In a letter dated 26 July 2022, DFAS informed the applicant's congressman they established her SBP annuity account in 2009 and issued monthly payments until February 2010, when they questioned her entitlement after receiving correspondence from the Department of Veterans Affairs regarding her Dependency Indemnity Compensation award. They sent the applicant a letter dated 3 February 2010, explaining her SBP annuity had been terminated due to issues related to the validity of the decedent's divorce from his former spouse. Because the applicant could not provide documentation verifying the divorce, they suspended her SBP annuity account and established a debt of \$17,392.98 for overpayment. As of the date of the letter, they had not received a declaratory decree establishing her marital status and until such information was received, their denial remained. In a letter dated 18 December 2013, DFAS informed the applicant the reason her appeal was denied and advised her of her right to appeal to the Defense Office of Hearings and Appeals within 30 days. An extension was granted until 12 May 2014; however, an appeal was not received by the required date. The applicant's only recourse is to petition the AFBCMR.

On 5 September 2023, an official from the Air Force Personnel Center Records and Sustainment Office confirmed the Defense Enrollment Eligibility Reporting System (DEERS) reflects the applicant's eligibility as an un-remarried widow, effective 8 March 2009, with a date of marriage of 18 November 1976.

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/JA (Disability and Casualty Law) recommends granting the application, indicating there is evidence of an error or injustice. According to Title 1 United States Code, Section 7 (1 U.S.C. § 7), *Marriage*, for the purpose of any Federal law, rule, or regulation in which marital status is a factor, an individual shall be considered married if that individual's marriage is between two individuals and is valid in the state in which the marriage was entered. [State] Statute 10-502 states that while lawfully married to a living person, a person may not enter a marriage ceremony with another. Finally, according to *Wolff v. Wolff*, 40 [redacted] App. 168, 389 A.2d 413 ([redacted] Ct. Spec. App. 1978), holding "a decree of divorce granted in one country by a court having jurisdiction to do so will be given full force and effect in another country by comity, not only as a decree determining status, but also with respect to an award of alimony and child support. The principle of comity, however, has several important exceptions and qualifications. A decree of divorce will not be recognized by comity where it was obtained by a procedure which denies due process of law in the real sense of the term, or was obtained by fraud, or where the divorce offends the public policy of the state in which recognition is sought, or where the foreign court lacked jurisdiction. 24 Am. Jur.2d, Divorce and Separation, § 964."

It appears DFAS, on its own, raised questions about the validity of the decedent's prior divorce and subsequent marriage. It does not appear DFAS' decision to discontinue SBP payments was based on a bona fide challenge by a former spouse asserting a right to some benefit. The applicant, who is reflected as the qualifying widow in DEERS, provided a copy of the divorce decree from the Dominican Republic effective 12 November 1976, along with a [State] marriage license issued on 18 November 1976. The application for this marriage license identified the decedent's marital status as "Divorced 1976 – [redacted]."

On 27 May 2015, a [State] judge certified the marriage license was in proper order and signed by an authorized clerk of court. They understand DFAS' concern regarding unusual aspects of the divorce, including the facts the decedent's former spouse was not present for the divorce proceedings (though the divorce decree states she was notified of the proceedings and given an opportunity to appear), and the marriage to the applicant was so close in time to the finalized divorce. Nonetheless, at the time the marriage license was issued, a [State] official evaluated the evidence of the validity of the divorce and was satisfied of the decedent's legal ability to remarry.

DFAS requested a court of competent jurisdiction determine the validity of the divorce decree. However, the State had already done so when the marriage license was issued, and again when the validity of the license was attested in 2015. It is the State's purview and authority to determine whether the decedent and applicant were properly married. If there were any challenges to the validity of the marriage, it should be raised in [State] courts and the burden would be on the challenger to prove the marriage was invalid, not on the surviving spouse to prove it was valid.

Given the evidence of a valid marriage license, and in light of 1 U.S.C. § 7, and barring any additional relevant information not provided, they disagree with DFAS' decision to terminate SBP payments to the applicant. As the decedent was lawfully married, according to the State, and he paid into SBP in consideration for annuity payments to his surviving beneficiary (applicant), they recommend the Board find the applicant eligible to receive such proper SBP payments.

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 October 2023 for comment (Exhibit D), but has received no response.

FINDINGS AND CONCLUSION

1. The application was not timely filed, but it is in the interest of justice to excuse the delay.
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 applicant contends she and the decedent were legally married in November 1976 and remained married until his passing in March 2009. After his death, DFAS acknowledged and accepted her claim for SBP annuity and made monthly payments for almost one year. Then, DFAS raised questions regarding the validity of their marriage, terminated her annuity, and demanded she provide irrefutable proof the marriage was valid. In May 2015, she attempted to satisfy the unreasonable requests from DFAS and provided legal documentation in which a [State] judge attested to the validity of the marriage license issued to her and the decedent. The decedent specifically designated her as his SBP beneficiary, DFAS withheld premiums based on that designation, and her annuity should be reinstated. The Board concurs with the rationale and recommendation of AFPC/JA and finds a preponderance of the evidence substantiates the applicant's contentions. In this regard, the Board notes there is sufficient evidence at the time the decedent's and applicant's marriage license was issued, the [State] Court acted properly and within its judicial authority when it evaluated the validity of the decedent's divorce and determined the couple satisfied legal requirements to remarry. For over 30 years the Department of Defense recognized the marriage as valid and extended the applicant spousal benefits and entitlements for which her husband served and earned. In addition, the decedent paid SBP premiums with the intent and understanding his named beneficiary (applicant) would receive annuity payments after his passing. The decedent's former spouse passed away in 2005 prior to his 2009 death and there is no competing claimant. Therefore, the Board recommends correcting the deceased service member's records as indicated below.
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 pertinent military records of the Department of the Air Force relating to FORMER MEMBER be corrected to show that:

On 9 March 2009, APPLICANT submitted a timely and effective claim for Survivor Benefit Plan annuity, and her claim was approved by a competent authority.

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-2022-02554 in Executive Session on 14 December 2023:

- , 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 15 August 2022.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory, AFPC/JA, dated 15 September 2023.
- Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 4 October 2023.

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