

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-02676

XXXXXXXXXXXXXX (MEMBER)

COUNSEL: XXXXXXXXXXX

XXXXXXXXXXXXXX (APPLICANT)

HEARING REQUESTED: NO

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

Counsel, on behalf of the applicant, requested the Board consider all submitted evidence and past precedent, and in the interest of justice, award the applicant SBP coverage as the former spouse of the deceased service member.

The applicant has exhausted all known non-judicial relief prior to applying to the Board, as reflected in the final denial from the Defense Finance and Accounting Service (DFAS). It would be a manifest injustice to not correct the record to reflect the service member made a timely election for former spouse coverage under SBP. It was an error that following their divorce, in which the court awarded the applicant SBP, the service member failed to file proper documents with DFAS naming the applicant as the former spouse. The applicant was not aware at the time of the divorce of the requirement to file paperwork with DFAS, or the allowance for her, as the former spouse, to file the required paperwork. The applicant currently survives on social security and was depending on SBP payments to further provide for her financial security as was guaranteed in the divorce decree if she survived the service member; however, no payments were made upon his death.

DFAS recognized it was the service member's responsibility to notify them when beneficiary status changes. In this case, the applicant is being punished for the service member's inaction. The divorce decree directed the service member to do so, and his Retiree Account Statements reflect payments were made until his death. At no point was the applicant aware that DFAS was to be informed. Additionally, the service member never remarried after their divorce.

The applicant is specifically named in the DFAS system as the beneficiary, and there was no follow up, or check, by DFAS to confirm or deny any benefit during the period payments were made by the service member. The annotation on the Retiree Account Statement did not change from the date of the divorce until the date of the service member's death. Thus, there is a presumption that DFAS recognizes the applicant as the beneficiary. To say otherwise would be an injustice.

The service member never remarried and intended for the applicant to receive the SBP payments upon his death. He willingly accepted a reduction in his retired pay for over twenty years, even though, according to DFAS, he had no eligible beneficiary.

In the interest of justice and equity, the applicant requests the Board make findings in her favor and correct the record accordingly awarding SBP payments to her immediately from the date of the service member's death.

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 19 Mar 82, according to a Certificate of Marriage, provided by the applicant, she married the service member.

On 13 Nov 02, the service member and the applicant divorced. The divorce decree required the service member to provide SBP coverage for his former spouse. As of 12 Nov 03, [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)), nor had his former spouse filed a deemed election under 10 U.S.C. § 1450(f)(3)(C).

On 4 Sep 20, according to a Certificate of Death, provided by the applicant, the service member passed away.

On 15 Nov 21, according to Defense Office of Hearings and Appeals letter, provided by the applicant, her claim for SBP was disallowed.

On 21 Oct 22, the Board sent the applicant the following standard forms, 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: SBP Marital Status Affidavit (Former Spouse); SBP Release of Benefits Affidavit (Arrears of Pay).

On 27 Oct 22, the applicant returned the completed affidavits. The service member's son signed an affidavit stating he understood the service member's intention to comply with a court order naming the applicant as the SBP beneficiary. Further, the service member's son indicated he would relinquish any competing interest he may have in the Arrears of Pay in favor of the service member's former spouse.

For more information, see 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 (SBP Program Manager) 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 of the divorce and continues to pay SBP premiums afterwards, the former spouse is not eligible for annuity payments upon the member's death. Additionally, any over payment of premiums will be paid to the member's named beneficiary for unpaid compensation and any arrears of pay owed to the member. If there is no named beneficiary, it is designated as by law. By law is as follows spouse, children, parents, sister/brother, and so forth.

Department of Defense Person search reflects the service member and applicant were married prior to the service member's retirement, and later divorced on 13 Nov 02. The divorce decree awarded the applicant SBP coverage for former spouse; however, neither party contacted DFAS to change coverage from spouse to former spouse within the one year required by law. Although premiums continued to be deducted from the service member's retired pay, there is no evidence that justifies providing an additional opportunity outside of the law to change SBP coverage. Additionally, there is a competing claimant who is the legal recipient of the overpaid premiums, which are included in the arrears of pay and unpaid compensation. The competing interest has provided an affidavit relinquishing his claim to the overpaid SBP premiums.

There is no evidence of an Air Force error; however, with the competing interest relinquishing claim to overpaid SBP premiums, approval is recommended.

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 11 Apr 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 the victim of an injustice. The Board concurs with the rationale and recommendation of AFPC/DPFFF and finds a preponderance of the evidence substantiates the applicant's contentions. The divorce decree directed the service member to elect his former spouse as SBP beneficiary and while the service member's son is a competing interest, he has signed a release of benefits for arrears of pay. Therefore, in the interest of justice, 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 MEMBER be corrected to show that:

- a. On 14 Nov 02, 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 5 Sep 20, APPLICANT submitted a timely and effective claim for survivor benefit annuity.

c. Approval should be contingent upon recovery of 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-2022-02676 in Executive Session on 20 Jul 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 18 Oct 22.
Exhibit B: Letter, SAF/MRBC Request for Affidavits, atchs, 21 Oct 22.
Exhibit C: Advisory, AFPC/DPFFF, dated 13 Mar 23.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Apr 23.

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