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## UNITED STATES AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

### RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2022-03218

Work-Product

COUNSEL: Work-Product

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HEARING REQUESTED: YES

### APPLICANT'S REQUEST

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

### APPLICANT'S CONTENTIONS

Counsel, on behalf of the applicant, contended but for the lack of an election from the service member to provide SBP coverage to the applicant upon the death of his former spouse beneficiary, the applicant would have become the beneficiary when the service member passed away. However, there are numerous compelling equitable reasons for the Air Force Board for Correction of Military Records (AFBCMR) to correct the service member's record to reflect he made the appropriate election to timely elect the applicant as the new spouse beneficiary.

As of Aug 14, the SBP statute provided that a current spouse of the SBP participant would become the designated beneficiary by operation of law upon the death of a former spouse beneficiary. However, effective 25 Nov 15, the *National Defense Authorization Act for the Fiscal Year 2016* (NDAA FY16) amended the SBP statutory scheme to include a provision that terminated participation in the plan when a former spouse beneficiary died and required the participant to affirmatively elect to resume participation for a new spouse to whom they were married on the date of the former spouse's death. The Department of Defense (DoD) had an "open season" from 15 Nov 15 through 14 Nov 16 for affected participants to elect SBP coverage for their current spouses who, under the previous statutory rules, would have been covered under operation of law.

On 1 Aug 81, the service member retired from the Air Force and elected spouse and child SBP coverage. He and his [then] spouse divorced on 14 Dec 90, with the judgment filed on 6 Mar 91. The service member then married the applicant on 5 Jul 91. On 5 Feb 92, pursuant to the terms of the divorce judgment, the service member subsequently elected former spouse SBP coverage. He further informed the Defense Finance and Accounting Service (DFAS) of his marriage to the applicant on the same form. As of 7 Dec 00, SBP documentation indicated the former spouse beneficiary and further reflected the service member's "elected order of precedence" for SBP benefits was the applicant as the "relationship spouse." The service member's former spouse passed away on or about 19 Aug 14, at which point, under pre-NDAA FY16 SBP coverage, the applicant was automatically designated as the beneficiary.

On 25 Nov 15, the NDAA FY16's new SBP rules took effect, terminating the service member's participation in SBP and requiring that he elect to provide coverage to the applicant during the

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open season period. In her attempts to resolve this matter with DFAS, the applicant stated she had a good faith belief the service member filed the necessary paperwork to ensure she would receive the SBP annuity, and that the service member repeatedly assured her the necessary paperwork was filed after the former spouse's death. She did not have any documentation reflecting any SBP action the service member may have taken and asked DFAS to assist in providing any records that might illuminate the issue. Ultimately, the Defense Office of Hearing and Appeals (DOHA) appeal decision indicated DFAS did research the matter and did not find any evidence the service member made an NDAA FY16 open season election to designate the applicant as beneficiary.

After a prolonged battle with Parkinson's disease, the service member passed away on 8 Jun 18. On 15 Feb 21, after DFAS denied the applicant's initial claim for SBP benefits and compiled an administrative report, she rebutted matters to DOHA, clarifying material facts stated in the DFAS administrative report. She described the applicable statutory and regulatory framework for SBP benefits and argued she should have been designated as beneficiary as a matter of law. On 2 Aug 22, DOHA denied the applicant's appeal on the grounds that although there were strong equitable reasons for the applicant to be designated as SBP beneficiary, ultimately, the service member had not affirmatively elected to renew his participation in SBP and designate her as beneficiary during the NDAA FY16 open season period. DOHA noted there were several reasons denying her claim was unfair, but they could not grant equitable relief. As such, DOHA appeared to have expressed support for the applicant's request, opining that two theories might yet allow her claim, a petition to the AFBCMR under Title 10, United States Code, Section 1454 (10 USC § 1454) and/or 10 USC § 1552.

There is no indication the service member intended to cease participation in SBP, and all competent evidence indicates he clearly wanted the applicant to receive SBP benefits. There is no evidence either the service member or the applicant was notified of the open season, or that they were otherwise aware the applicant may have become ineligible. According to the rationale discussed in case law (1993 U.S. Comp. Gen. LEXIS 633, 4 Jun 93), which DOHA agreed was sound, the applicant actually was the lawful beneficiary when the former spouse passed away. Without notice or an awareness of NDAA FY16 open season, it is entirely reasonable the service member and applicant believed there were no issues with her eligibility. The service member's health likely contributed to any failure to effectuate an open season election. During the open season period, the service member's health was in serious decline due to Parkinson's disease. The DOHA decision supports granting relief. A reasonable interpretation of the DOHA decision is that but for the inability to grant equitable relief, DOHA would have granted the applicant's request.

The applicant's complete submission is at Exhibit A.

## STATEMENT OF FACTS

The applicant is the surviving spouse of a retired Air Force colonel (O-6).

On 1 Aug 81, according to Special Order Number **Work-Product** dated 6 Mar 81, the service member retired from the Regular Air Force.

According to DOHA Appeal Decision, dated 2 Aug 22, provided by the applicant, the service member elected SBP spouse and child[ren] coverage upon his retirement.

On 14 Dec 90, according to DOHA Appeal Decision, dated 2 Aug 22, provided by the applicant, the service member divorced his wife, who then became his former spouse.

On 5 Jul 91 according to a Certificate of Marriage, provided by the applicant, she married the service member.

On 5 Feb 92, according to *Former Spouse Election Statement*, provided by the applicant, the service member elected former spouse and child coverage under SBP.

As of 7 Dec 00, the service member's Retiree Account Statement, provided by the applicant, reflects the service member's SBP Coverage Type: Former Spouse, with his former spouse listed under Former Spouse Protection Act. The Beneficiary Information reflects "You have elected order of precedence. The following beneficiaries are on record:" [applicant], Relationship: spouse.

On 19 Aug 14, according to DOHA Appeal Decision, dated 2 Aug 22, provided by the applicant, the service member's former spouse passed away and the applicant became the SBP beneficiary by operation of law.

On 25 Nov 15, Public Law 114-92 [NDAA FY16], was enacted, amending 10 USC § 1448(b).

According to AFPC/DPFFF [SBP Program Manager] advisory, dated 3 Aug 23, the NDAA FY16 included provisions in the form of an [SBP] Open Season period from Nov 15 to Nov 16 to accommodate [service] members whose covered former spouse beneficiaries were already deceased prior to 25 Nov 15.

On 8 Jun 18, according to a Certificate of Death, provided by the applicant, the service member passed away, and the applicant became his widow.

On 20 Apr 23, 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 (Deceased Retiree).

On 28 Apr 23, the applicant returned the completed affidavit.

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

## **APPLICABLE AUTHORITY**

Public Law (PL) 114-92, Section 641, *Death of Former Spouse Beneficiaries and Subsequent Remarriages under the Survivor Benefit Plan*. (Excerpted for relevance)

(a) IN GENERAL. Section 1448(b) of title 10, United States Code, is amended by adding at the end the following new paragraph:

(7) EFFECT OF DEATH OF FORMER SPOUSE BENEFICIARY.

(A) TERMINATION OF PARTICIPATION IN PLAN. A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) and whose former spouse subsequently dies is no longer a participant in the Plan, effective on the date of death of the former spouse.

(B) AUTHORITY FOR ELECTION OF NEW SPOUSE BENEFICIARY.

If a person's participation in the Plan is discontinued by reason of the death of a former spouse beneficiary, the person may elect to resume participation in the Plan and to elect a new spouse beneficiary as follows:

(i) **MARRIED ON THE DATE OF DEATH OF FORMER SPOUSE.** A person who is married at the time of the death of the former spouse beneficiary may elect to provide coverage to that person's spouse. Such an election must be received by the Secretary concerned within one year after the date of death of the former spouse beneficiary.

(b) **EFFECTIVE DATE.** Paragraph (7) of section 1448(b) of title 10, United States Code, as added by subsection (a), shall apply with respect to any person whose former spouse beneficiary dies on or after the date of the enactment of this Act.

(c) **APPLICABILITY TO FORMER SPOUSE DEATHS BEFORE ENACTMENT.**

(1) **IN GENERAL.** A person:

(A) who before the date of the enactment of this Act had a former spouse beneficiary under the Survivor Benefit Plan who died before that date; and

(B) who on the date of the enactment of this Act is married, may elect to provide spouse coverage for such spouse under the Plan, regardless of whether the person married such spouse before or after the death of the former spouse beneficiary. Any such election may only be made during the one-year period beginning on the date of the enactment of this Act.

(2) **EFFECTIVE DATE OF ELECTION IF MARRIED AT LEAST A YEAR AT DEATH FORMER SPOUSE.** If the person providing the annuity was married to the spouse beneficiary for at least one year at the time of the death of the former spouse beneficiary, the effective date of such election shall be the first day of the first month after the death of the former spouse beneficiary.

## **AIR FORCE EVALUATION**

AFPC/DPFFF recommends denying the application. There is no evidence of an Air Force error or injustice and no basis in law to approve the request. PL 114-92 § 641 (NDAA FY16) amended the SBP statute to provide a member who had made an election of SBP or Reserve Component SBP (RCSBP) coverage for a former spouse the ability to cover a subsequent spouse if the former spouse dies. The enactment of this legislation included provisions in the form of an open season period from Nov 15 to Nov 16 to accommodate members whose covered former spouse beneficiaries were already deceased prior to 25 Nov 15. A retiree who elects coverage in this open season is only allowed to choose a coverage amount which is equal to the amount, after adjustments for COLAs [cost of living adjustments], of the earlier former spouse election. The open season was publicized by DFAS on the website, social media, notification letters to certain identified members with deceased former spouses with former spouse coverage, Air Force retiree services website, *Afterburner*, and *Military Times*. The members who failed to contact DFAS within the allowable open season to change the elections beyond 24 Nov 16 under the law cannot change the category of coverage to spouse coverage.

DoD Person Search reflects the service member retired on 1 Aug 81 and elected spouse and child SBP coverage. He later divorced on 14 Dec 90 and former spouse coverage was awarded per the divorce decree. The service member changed his SBP coverage to former spouse and child. On 5 Jul 91, the service member and applicant were married. In Dec 00, the service member updated his Arrears in Pay beneficiary, naming the applicant as the designated recipient. On 19 Aug 14, the service member's former spouse passed away. There is no evidence the service member provided any documentation or written request to change the former spouse coverage to spouse coverage after enactment of the NDAA FY16. The open season 2015 to 2016 provided the opportunity for the change; however, no action was taken by the service member to provide SBP for the applicant. The service member passed away on 8 Jun 18.

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 Aug 23 for comment (Exhibit D), and the applicant replied on 21 Aug 23. In his response, counsel contended the AFPC opinion's assertion that there is no basis in the law to approve the request is incorrect insofar as it is referring to the AFBCMR's authority to grant relief. The AFBCMR clearly has authority to correct the service member's records under 10 USC § 1552(a), which authorizes the Board to correct any military record to correct an error or to remove an injustice, and contrary to the AFPC opinion's recommendation, the Board has a compelling reason to grant relief.

The AFPC opinion's recommendation hinges on the lack of evidence that the service member elected to change his SBP coverage during the open season period 2015 to 2016 to cover the applicant after his former spouse passed away. To be clear, the AFBCMR Memorandum [counsel's application brief] does not contest that DFAS was unable to find evidence the service member made an open season election. Nonetheless, the memorandum propounds several arguments that it is an injustice the applicant was not established as the SBP beneficiary. The memorandum asserts: (a) the evidence demonstrates the service member intended the applicant to be the SBP beneficiary; (b) neither the service member nor the applicant was notified of the open season; (c) the service member's Parkinson's disease likely contributed to any failure to make an open-season election; and (d) DOHA favorably endorsed seeking equitable relief from the AFBCMR.

DOHA effectively acknowledged that DFAS's denial of the applicant's claim was unfair but stated that DOHA could not grant the equitable relief necessary to provide a remedy. DOHA expressed support for the applicant's efforts, offering two legal avenues that could potentially result in equitable relief DOHA could not provide, including a petition to the AFBCMR under 10 USC § 1552.

The AFPC opinion addresses none of these crux equitable points and consequently offers little utility in aiding the AFBCMR's duty to carry out its "abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and to take steps to grant thorough and fitting relief. *Yee v. United States*, 512 F.2d 1383, 1387–88 (Ct. Cl. 1975). Indeed, "when a [military records] correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its [statutory] mandate [under 10 USC § 1552]. And such a violation, contrary to the evidence, is arbitrary and capricious." *Haselwander v. McHugh*, 774 F. 3d 990, 996 (D.C. Cir. 2014) (quoting *Yee*, 512 F.2d 1383 at 1387 (Ct. Cl. 1975)).

Clearly, the AFBCMR has compelling reason, and the authority, to grant the requested relief to remove a clear injustice.

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, to include the applicant's rebuttal, the Board concludes the applicant is the victim of an injustice. While the Board notes the recommendation of AFPC/DPFFF against correcting the record, the Board finds a preponderance of the evidence substantiates the applicant's contentions. The Board found the applicant was identified as the SBP beneficiary "by order of precedence" upon the death of the service member's former spouse. Prior to the NDAA 16, the United States Comptroller General, in 1993 U.S. Comp. Gen. LEXIS 633, 4 Jun 93, found in favor of another service member similarly situated. Upon enactment of NDAA 16, and when changing the applicant's legal status as an SBP beneficiary, it was incumbent upon DFAS to take affirmative action to ensure the service member was aware of the change and the options available to him. While an open season was declared to address those effected by the statutory change, there is no evidence the service member or applicant was notified of either her change in status as a beneficiary or the steps required to ensure the service member's continued participation in the SBP. Therefore, the Board recommends correcting the applicant'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 MEMBER be corrected to show that:

a. On 25 Nov 15, during the 2015 to 2016 SBP Open Season, he submitted a timely and effective election for spouse coverage under SBP, based on the previous full level of retired pay, naming APPLICANT as the eligible beneficiary.

b. Approval is contingent upon recovery of SBP 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-2022-03218 in Executive Session on 25 Jan 24:

**Work-Product**, Panel Chair

**Work-Product**, Panel Member

**Work-Product**, Panel Member

All members voted to correct the record. The panel considered the following:

Exhibit A: Application, DD Form 149, w/atchs, dated 15 Sep 22.

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

Exhibit C: Advisory, AFPC/DPFFF, dated 3 Aug 23.

Exhibit D: Notification of Advisory, SAF/MRBC to Counsel, dated 4 Aug 23.

Exhibit E: Counsel's Response, dated 21 Aug 23.

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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.

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