

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2023-01805

XXXXXXXXXXXXXXXXXX

COUNSEL: NONE

HEARING REQUESTED: NO

APPLICANT'S REQUEST

His record be changed to show he made a timely election for former spouse coverage under the Survivor Benefit Plan (SBP).

APPLICANT'S CONTENTIONS

In January XXXX, he and his wife divorced, and she was awarded SBP former spouse coverage; however, he was unaware of the requirement to submit an election to change his SBP coverage from spouse to former spouse. Neither his attorney, his former spouse's attorney, or the Defense Finance and Accounting Service (DFAS) informed them additional forms were required. He believed his former spouse was covered because DFAS continued to deduct SBP premiums from his retired pay. He became aware of the requirement in March 2021 when DFAS stopped SBP deductions due to the proper election not being submitted within one year of divorce. Since then, he has done his best to have SBP reinstated.

In support of his request, he provides copies of the divorce decree, the subsequent order awarding SBP former spouse coverage, and multiple letters from DFAS and the Defense Office of Hearing and Appeals (DOHA) denying his request to establish coverage for his former spouse.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is a retired Air Force captain (O-3).

On XX July XXXX, according to DOHA letter, dated 8 May 2023, provided by the applicant, the applicant married his former spouse. Prior to retirement, he elected SBP coverage for spouse and child[ren], based on reduced retired pay. In addition, the applicant obtained paid up SBP status, effective 1 October 2017.

On 1 September 1987, according to Special Order XX-XXXXXX, dated 9 October 1986, the applicant retired from the Regular Air Force.

On XX January XXXX, the applicant and his former spouse divorced, and the divorce decree was silent on SBP. On XX February XXXX, the district court issued an Order Dividing Disposable Retirement Pay awarding SBP former spouse coverage based on full gross pay. As of XX March XXXX, one year after the judgement, the applicant 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 12 October 2023, 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 Marital Status Affidavit (Retiree).

On 5 January 2024, the applicant returned the completed affidavits stating neither he nor his former spouse remarried, indicating there is no competing claimant.

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

APPLICABLE AUTHORITY

Department of Defense Instruction (DoDI) 1332.42, *Survivor Benefit Plan*.

Paragraph 5.2, Changing from Spouse Coverage to Former Spouse Coverage after Retirement or NOE (Notification of Eligibility).

a. Divorce After First Becoming Eligible to Participate.

(1) A member who elected spouse coverage upon becoming eligible to participate in SBP or RCSBP, and later divorces, may elect to cover that former spouse (who was not the member's former spouse at the time the member became eligible to participate) within one year after the date of decree of divorce, dissolution, or annulment.

(2) Former spouse coverage is not automatic upon divorce, dissolution, or annulment. A court order alone does not create coverage.

(3) There is no option to change the level of coverage (i.e. base amount) for an election under this paragraph.

Paragraph 5.3, Notification of Electing Former Spouse Coverage.

b. Deemed Former Spouse Election.

(3) For a former spouse deemed election made after the member has first become eligible to participate (i.e., when the member initially elected spouse coverage), the base amount must be the same base amount that was previously established as described in paragraph 5.2a(2).

AIR FORCE EVALUATION

AFPC/DPFC (SBP Management) 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 using DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, and DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, or (2) The former may submit DD Form 2656-10, *Survivor Benefit Plan (SBP) Former Spouse Request for Deemed Election*, requesting the retiree be deemed to have made such a change on their 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.

Prior to retirement on 1 September 1987, the applicant elected to participate in SBP with spouse and child[ren] coverage based on a reduced amount of \$300 and premiums were deducted from his retired pay. The Defense Enrollment Eligibility Reporting System reflects the applicant and his spouse divorced on XX January XXXX. The applicant did not notify DFAS to change the election from spouse to former spouse coverage and no deemed election was submitted as the original divorce decree did not include award of SBP. However, in March XXXX the court amended the divorce decree and SBP was awarded. According to DFAS records, neither the

applicant nor the former spouse submitted the proper forms to change SBP coverage from spouse to former spouse. Nevertheless, records revealed the former spouse submitted a written statement dated X April XXXX, deeming the election and her attorney provided a signed affidavit confirming this action. The original spouse and child[ren] election was established at a reduced coverage base amount of \$300. If the applicant is requesting maximum SBP former spouse coverage, there will be a recalculation of premiums owed as he will incur charges for coverage based on full gross pay effective on the date of retirement, in accordance with the law. Additionally, the applicant has not remarried and there is no other possible beneficiary at this time.

There is no evidence of an Air Force error; however, there is an injustice. On X April XXXX, the former spouse submitted a timely statement to DFAS deeming her awarded SBP, and her attorney signed an affidavit confirming the action. As such, they recommend granting the applicant's request. Coverage is contingent on receipt of all retroactive premiums.

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 8 February 2024 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 Board concurs with the rationale and recommendation of AFPC/DPFC and finds a preponderance of the evidence substantiates the applicant's contentions. Prior to retirement, the applicant elected spouse and child[ren] coverage based on a reduced amount of \$300. In January XXXX, the couple divorced, and the divorce decree was silent on SBP. In March XXXX, the agreement was amended to award SBP former spouse coverage at the full base amount, and the former spouse submitted a deemed election within one year of the divorce/amended agreement. For unknown reasons, the request was not processed at DFAS. While the amended divorce agreement orders coverage at the full base amount, DoDI 1332.42 states a change of SBP election for former spouse coverage made after the member has first become eligible to participate in the Plan (i.e., when the member initially elected spouse coverage), the base amount must be the same base amount that was previously established. Therefore, 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 APPLICANT be corrected to show that:

- a. On XX April XXXX, he submitted a timely and effective election for former spouse coverage under the Survivor Benefit Plan, based on the previous reduced level of retired pay, naming FORMER SPOUSE as the eligible beneficiary.
- b. Approval is 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-2023-01805 in Executive Session on 24 October 2024:

, 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 28 May 2023.
Exhibit B: Documentary Evidence, including relevant excerpts from official records.
Exhibit C: Advisory, AFPC/DPFC, dated 2 February 2024.
Exhibit D: Notification of Advisory, SAF/MRBC to Applicant, dated 8 February 2024.

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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Board Operations Manager, AFBCMR