

RECORD OF PROCEEDINGS

IN THE MATTER OF:

DOCKET NUMBER: BC-2024-04275

XXXXXXXXXX (DECEASED)

COUNSEL: NONE

XXXXXXXXXX (APPLICANT)

HEARING REQUESTED: NO

APPLICANT'S REQUEST

The deceased service member's record be changed to show he:

- a. Submitted a valid application for retired pay.
- b. Made a timely election for spouse coverage under the Survivor Benefit Plan (SBP).

APPLICANT'S CONTENTIONS

Due to an error in guidance from the Air Reserve Personnel Center (ARPC), the service member completed an application for retired pay with the help of his Power of Attorney (POA). The Defense Finance and Accounting Service (DFAS) rejected the application and stated the service member should not have applied with a POA. This was not determined until after the service member's death due to the lengthy application review time; therefore, there was no recourse for the service member to correct his application.

According to the applicant, the service member was disadvantaged due to incorrect or erroneous guidance when he needed help applying for his retired benefits. Processing the application took so long the service member passed away in the meanwhile and was denied the opportunity to correct his application. Due to the error, the service member, and now his widow, were denied the retirement benefits the service member earned and deserved after his decades of exemplary service. As the guidance provided on his application was incorrect, the applicant requests the Board overrule the DFAS rejection of the service member's application for retired pay.

Per the applicant, while this is not directly related to Post-Traumatic Stress Disorder (PTSD), as noted on the DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552*, Block 14, the applicant suffered from many mental health issues, including PTSD, in his later years, which is why he needed a POA to help with his [retired pay] application.

The applicant's complete submission is at Exhibit A.

STATEMENT OF FACTS

The applicant is the surviving spouse of a retired Air Force Reserve master sergeant (E-7).

On 10 Oct 87, according to a *Certificate of Marriage*, provided by the applicant, she married the service member.

On 20 Oct 01, ARPC/DPPR sent the service member the standard Notification of Eligibility (NOE) for Retired Pay (20-year letter) informing him that he had completed the required years under the provisions of Title 10 United States Code, Section 12731 (10 USC § 12731) and was entitled to retired pay upon application prior to age 60. In addition, he was eligible to participate in the Reserve Component Survivor Benefit Plan (RCSBP).

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

On 27 Jan 11, according to Reserve Order XXXX, dated 16 Nov 10, the service member was assigned to the Retired Reserve Section and placed on the USAF Reserve Retired List.

On 15 Jun 17, according to Reserve Order XXXX, dated 26 Sep 23, the service member was authorized retired pay and was placed on the USAF Retired List, Retired Reserve Section ZB.

On 26 May 23, according to DD Form 2656, *Data for Payment of Retired Personnel*, the service member, via POA, elected Option C, *Previously elected or defaulted to immediate RCSBP Coverage*, for spouse only, based on full retired pay.

On 26 Aug 23, according to a *Certificate of Death*, provided by the applicant, the service member passed away.

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

APPLICABLE AUTHORITY

10 USC § 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."

Department of Defense (DoD) 7000.14-R, *Financial Management Regulation*, Volume 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 1 Jan 01, 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 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."

10 USC § 1448(a)(3)(B). "A married person who is eligible to provide a Reserve-component annuity may not without the concurrence of the person's spouse elect (i) not to participate in the Plan; (ii) to designate under subsection (e)(2) the effective date for commencement of annuity payments under the Plan in the event that the member dies before becoming 60 years of age to be the 60th anniversary of the member's birth (rather than the day after the date of the member's death); (iii) to provide an annuity for the person's spouse at less than the maximum level; or (iv) to provide an annuity for a dependent child but not for the person's spouse."

AIR FORCE EVALUATION

ARPC/DPTS (Reserve Personnel Law) recommends granting the applicant's request to honor the service member's application for retired pay. The service member was automatically enrolled in the RCSBP for full spouse coverage when he failed to make an election after receiving his 20-year letter in Jun 01¹. The service member became eligible for retired pay on his 60th birthday but did not apply for retired pay. The service member and applicant were legally separated but never divorced. On the date of the service member's death on 26 Aug 23, the applicant was the service member's spouse.

On 31 Oct 22, a [State] judge of the Circuit Court, Family Court Branch, issued an Order Appointing Guardian ad Litem or Attorney appointing an attorney to represent the service member with the specific purpose of assisting him to apply for non-regular retired pay. On or about 28 Dec 22, the attorney contacted ARPC/JA seeking to apply for retired pay on behalf of the service member. The attorney provided a POA, signed by the service member on 22 Dec 22, and the attorney was instructed to complete and submit a DD Form 2656 to apply for retired pay on the service member's behalf. On 26 May 23, the attorney submitted DD Form 2656 containing the service member's address, signed by the attorney "as P.O.A. for [service member]," applying to initiate the service member's retired pay. Upon receipt of DD Form 2656 and POA, they were forwarded to the ARPC Retirements Section advising them to process the application to be forwarded to DFAS. Unfortunately, though the court order clearly indicates the attorney was appointed by the court to represent the service member with the specific purpose of assisting him with initiating his retired pay, the POA only authorized the attorney to obtain documents, forms, and information, and did not address the authority to apply for retired pay. While the service member's packet was at DFAS for processing, he died on 26 Aug 23. In Sep 23, DFAS rejected the service member's application for retired pay, correctly citing the fact the POA provided by the attorney did not authorize him to apply for retired pay on the service member's behalf. The applicant contends that had ARPC/JA properly identified the POA submitted by the service member did not authorize him to apply for retired pay and not incorrectly told the attorney his POA was sufficient, the attorney could have obtained a suitable POA from the service member and applied for his retired pay prior to his death.

The following Air Force policies, regulatory requirements, or applicable laws were in effect at the time of the alleged error or injustice:

Per 10 USC § 12731, a member who has completed 20 years of satisfactory service and attained the required age, usually 60, must apply to receive non-regular retired pay. *See also*, DoD 700.14-R, *Financial Management Regulation*, Volume 7B, Chapter 1, paragraph 3.8.1; Department of the Air Force Instruction (DAFI) 36-3203, *Military Retirements*, paragraph 3.1.2.

Unlike other retirement benefits such as SBP elections, a claim for retired pay can be made by the claimant or an authorized agent or attorney and must contain the signature and address of the claimant or an authorized agent or attorney. See 31 USC § 3702(b)(1) and Department of Defense Instruction (DoDI) 1340.21, *Procedures for Settling Personnel and General Claims and Processing Advance Decision Requests*, paragraphs E5.3 and E5.4. A claim submitted by the claimant's agent or attorney must include or have attached a duly executed power of attorney or other documentary evidence of the agent's or attorney's right to act for the claimant. DoDI 1340.21 paragraph E5.4. A power of attorney is only valid during the life of the principal. *See* Restat 3d of Agency, § 3.07 (3rd 2006).

¹ According to an HQ ARPC/DPPR memorandum, Subject: Notification of Eligibility for Retired Pay at Age 60 and Audit of Retirement Points, dated 20 Oct 01, the applicant accumulated 2381 points for retired pay as of 5 Jun 01.

The applicant correctly points out that had the attorney not been erroneously told the POA and DD Form 2656 he submitted were sufficient to apply for the service member's retired pay, the attorney could have obtained a POA with language specifically addressing the authority to apply for the service member's retired pay prior to his death. This would have been consistent with the court's purpose for appointing the attorney to represent the service member and every other contact the attorney had with the Air Force regarding the service member. This also would have addressed DFAS's objection to the attorney's application for retired pay.

The complete advisory opinion is at Exhibit C.

AIR FORCE EVALUATION

ARPC/DPTT (Transition Division) recommends granting the applicant's request for coverage under SBP. There is an error or injustice due to miscommunication as the service member, and his attorney, could have been advised on the language required to request retired pay prior to the service member's death. This would have been consistent with the court's purpose for appointing the attorney to represent the service member and every other contact the attorney had with the Air Force regarding the service member. This also would have addressed DFAS's objection to the attorney's application for retired pay. Additionally, based on the service member's enrollment into RCSBP, he would have been automatically enrolled into SBP once his retirement pay was initiated.

A review of the service member's military personnel record shows the NOE was sent to him on 13 Nov 01² and he was automatically enrolled in RCSBP coverage as no election was indicated.

Per DoDI 1332.42, *Survivor Benefit Plan*: Section 3.d.(1) The following RC service members are covered under RCSBP, and subsequently SBP, unless they choose to reduce, defer, or decline coverage, with spousal concurrence, in exchange for a reduction in retired pay, as discussed in Section 8.

Section 3.d.(3)(b) On or after 1 Jan 01, are participants with maximum RCSBP coverage (and subsequently SBP coverage), in accordance with the full base amount defined in paragraph 8.2. The exception to this requirement is if the member, with spousal consent if married elects for, in accordance with Section 4 and Section 9 (see Section 5 for exceptions related to former spouse or former spouse and child coverage that do not require spousal concurrence):

1. Less-than-maximum spouse coverage for an immediate annuity;
2. Child-only coverage;
3. A delayed annuity that, regardless of the date of death, begins no earlier than the date that the member would have attained age 60; or
4. Not to participate in SBP or RCSBP.

Section 3.d.(4) A service member or retiree may not revoke their decision to participate in RCSBP if not revoked before the date which is 90 days after receipt of NOE. Automatic coverage established in paragraph 3.1.d.(3)(b) is also irrevocable.

The complete advisory opinion is at Exhibit D.

APPLICANT'S REVIEW OF AIR FORCE EVALUATION

The Board sent copies of the advisory opinions to the applicant on 11 Sep 25 for comment (Exhibit E) but received no response.

² According to a PS Form 3811, *Domestic Return Receipt*, the RCSBP package was delivered to the service member's address on 13 Nov 01.

FINDINGS AND CONCLUSION

1. The application was timely filed.
2. The applicant exhausted all other available administrative remedies 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 rationales and recommendations of ARPC/DPTS and ARPC/DPTT and finds a preponderance of the evidence substantiates the applicant's contentions. The service member had a court-appointed attorney with a legal POA; however, upon the attorney's attempt to exercise that POA and apply for retired pay on the service member's behalf, the attorney was misinformed by the ARPC representative. This misinformation resulted in DFAS's rejection of the service member's application for retired pay. Due to the lengthy processing time associated with the application for retired pay, the service member was not afforded the opportunity to amend his application prior to his death. Additionally, due to the service member's automatic enrollment in RCSBP, had the service member's DD Form 2656 been accepted, his election of spouse coverage, based on full gross pay, would have taken effect in accordance with 10 USC § 1448. Therefore, the Board recommends correcting the decedent'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 26 May 23, he submitted a valid DD Form 2656 and applied for non-regular retirement pay, effective 15 Jun 17.
- b. On this same date, he submitted a timely and effective election for spouse coverage under the SBP, based on full retired pay, naming APPLICANT as the eligible beneficiary.
- c. Approval is contingent upon recovery of applicable SBP premiums.

CERTIFICATION

The following quorum of the Board, as defined in DAFI 36-2603, *Air Force Board for Correction of Military Records (AFBCMR)*, paragraph 2.1, considered Docket Number BC-2024-04275 in Executive Session on 6 Nov 25:

, 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 26 Nov 24.
- Exhibit B: Documentary Evidence, including relevant excerpts from official records.
- Exhibit C: Advisory, ARPC/DPTS, w/atchs, dated 13 Aug 25.
- Exhibit D: Advisory, ARPC/DPTT, w/atchs, dated 8 Sep 25.
- Exhibit E: Notification of Advisory, SAF/MRBC to Applicant, dated 11 Sep 25.

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