

**DEPARTMENT OF HOMELAND SECURITY  
BOARD FOR CORRECTION OF MILITARY RECORDS**

---

Application for the Correction of  
the Coast Guard Record of:

**BCMR Docket No. 2015-093**



---

**FINAL DECISION**

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the application upon receipt of the completed application and military records on May 1, 2015, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated March 11, 2016, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

**APPLICANT'S REQUEST AND ALLEGATIONS**

The applicant is a former spouse of the deceased lieutenant commander (LCDR) named in the caption above. She asked the Board to correct the LCDR's record so that she will receive survivor benefits through the Survivor Benefit Plan (SBP). She stated that the LCDR completed the paperwork for SBP and she received his election certificate while they were married in 1973. They were divorced in July 1998, and in August 1998, she was advised by the Coast Guard that her SBP coverage had terminated due to the divorce and that the LCDR had not elected to continue SBP coverage for her as his former spouse. The Coast Guard sent her forms to complete to apply for "deemed elected status"; she submitted this paperwork in November 1998; and she was awarded "deemed elected status" effective as of the date of their divorce. The applicant alleged that this continues to be her status.

On September 20, 2010, the applicant alleged, the Coast Guard informed her that it had received a notarized letter from the LCDR changing the beneficiary of his SBP coverage to his then current spouse before he died on September 13, 2010. The applicant alleged that this change was unjust and that the LCDR's signature was "improperly obtained." The applicant stated that since receiving this letter, she has tried to get a copy of it to no avail, and the Coast Guard will not pay her survivor benefits.

In addition, the applicant stated that in their divorce proceedings, the LCDR had the option of providing her with his insurance policy or SBP, and he chose to keep the insurance

policy and give her SBP. Since that time, he tried at least four times through the courts to have her alimony reduced and her SBP coverage terminated, and “[e]xcept for the last time, all the judges would not even address SBP BECAUSE of its Federal coverage.”

The applicant alleged that she discovered the error and injustice when she received a letter dated September 20, 2010, informing her that her SBP coverage had been terminated. She argued that it is in the interest of justice for the Board to consider her request because she has been persistently attempting to get her benefits restored since she learned of the error.

In support of her allegations, the applicant submitted copies of the numerous documents, which are included in the Summary of the Record below. She also submitted a letter from one of her sons with the LCDR addressed to the Chair of the BCMR and so presumably written in 2015, although it is not dated. The son wrote that the LCDR’s notarized letter changing beneficiaries “could not have been signed by my Father, nor could he have [had] the mental capacity at the time to know what he may be signing.” The son explained that during the last weeks of August 2010, his father was taking morphine three times a day, a hydrocodone cough syrup, and Vicodin. In addition, “[h]is only liquid nourishment at this time was Jack Daniels.” He noted that when his father was released from the hospital to hospice, he was able to hold the pen but could not sign the release form, so he had to sign it for his father. Nor was his father able to sign his name on several other occasions during those weeks. The son stated that on the day the notarized letter was allegedly signed (not mentioning the date), the son was with the LCDR from 7:00 a.m. till about 10:00 p.m., and no lawyer or notary visited the house. Nor was his father able to leave the house, hold a pen, or sign anything because “[h]e was semi-comatose, with only very short periods of minimal clarity.”

### **SUMMARY OF THE RECORD**

The LCDR retired from the Coast Guard on July 1, 1973, at age 40. At the time, he was married to the applicant. The record before the Board includes his personal data record and the following documents regarding SBP:

- An SBP Election Certificate shows that the LCDR retired from the Coast Guard on July 1, 1973; that he was married to the applicant and had a son; and that he elected a survivor annuity.
- An SBP publication issued in October 1972, which states that a “widow or widower who is receiving SBP payments can remarry at age 60 or later and continue to receive those payments” and that once a member elects coverage to participate in the plan to protect a spouse or child, the member cannot withdraw from the plan. However, it notes that a member who elects to participate may switch beneficiaries to protect a new spouse or child.
- An undated letter signed by the Coast Guard’s Military Pay Supervisor advises the applicant that her SBP coverage ended on August 1, 1998, because of her divorce and that the LCDR had not elected to continue her SBP coverage as his former spouse.
- A letter from the applicant to the Coast Guard dated September 17, 1998, forwarding a copy of the divorce decree and drawing attention to paragraph 3.

- In a letter dated November 19, 1998, the applicant requested reinstatement of her coverage (“deemed election”) pursuant to her divorce decree, and she attached a copy of the decree. Paragraphs 2 and 3 of the court’s order states the following:
  2. PERMANENT ALIMONY: The Husband shall pay permanent alimony to the Wife in the monthly amount of \$1,350.00 per month until the Wife remarries or either party dies ... These payments shall be made in the manner and method as delineated on Schedule A, attached.
  3. LIFE INSURANCE POLICY: The Husband shall maintain the Life Insurance Policy with New York Life on his life in the amount of \$25,000.00 naming the Wife as beneficiary for so long as he is under an obligation to pay permanent alimony as delineated above or until such time as he furnishes documentation to counsel for the Wife confirming the existence of a survivor annuity in favor of the Wife from the Husband’s military pension.

• • •

SCHEDULE “A”

The Husband, [LCDR], shall pay to the Wife, [applicant], the sum of \$1,350.00 as permanent alimony.

These alimony payments shall continue until the occurrence of any of the following:

- a. Death of the Wife.
  - b. Death of the Husband.
  - c. Remarriage of the Wife.
  - d. Until modified by subsequent court order.
- A letter from the Coast Guard to the applicant dated March 24, 1999, returning her request to her with an explanation that she could only be “deemed elected” if the court order required the LCDR to make the election, the LCDR refused to do so, and the former spouse filed a request with a copy of the court’s order within a year of the issuance of the order. The Coast Guard stated that her request did not meet these requirements because the court’s order offered the alternative of maintaining the \$25,000.00 life insurance policy with her as beneficiary. The Coast Guard advised her to submit additional court documents or getting the LCDR to agree to elect coverage for her.
  - An SBP election form signed by the LCDR on May 9, 1999, in which the LCDR elected “former spouse only” SBP coverage.
  - An undated letter signed by the same Military Pay Supervisor advises the applicant that she had been “deemed elected” as the LCDR’s SBP former spouse beneficiary as of July 1, 1999, and that if the LCDR predeceased her, her monthly annuity would be \$794.00, which was subject to future cost-of-living adjustments.
  - A letter from the applicant to the Coast Guard, dated January 30, 2006, names the attorney she had retained to represent her regarding the LCDR’s attempt to change his SBP beneficiary.
  - A letter from the Coast Guard to the applicant, dated February 2, 2006, responds to her letter dated January 30, 2006, and forwards to her a copy of a former spouse election the LCDR made on May 9, 1999. The Coast Guard recommended that she safeguard it “as evidence of this election.”
  - On March 23, 2006, the court issued an order granting the LCDR’s motion to lower his alimony payments to the applicant. The court noted that the applicant had been awarded

the marital home in the divorce and that she had refinanced the property and included another man with whom she had been living since 1999 as a co-owner of the property. Therefore, and in light of other indicia, such as their reciprocal wills and powers of attorney and shared living expenses, the court reduced the LCDR's monthly alimony obligation to \$850.00. The court denied the LCDR's request to terminate the applicant's survivor benefits "without prejudice."

- In a fax from the applicant to the Coast Guard on April 19, 2006, she submitted a copy of a court order and asked for information about what changes would occur if she remarried. She noted that she was over 55 years old. She stated that she had discussed the matter with a legal officer and had been assured her SBP would continue and requested confirmation that "the amended court order confirms that my SBP would not change if I remarry."
- An email from the Coast Guard to the applicant dated April 26, 2006, thanks her for providing a copy of the court order dated April 5, 2006, and noted that her "SBP coverage remains in place as a result of this decree." The email also states that the "SBP coverage for a former spouse is not impacted by the former spouse's remarriage if such remarriage occurs after the former spouse reaches age 55 years" and attached a copy of 10 U.S.C. 1450.
- In a letter dated October 10, 2006, the applicant advised the Coast Guard that she had remarried on October 1, 2006, at the age of 72, and so was no longer receiving alimony. She stated that she believed she was still entitled to SBP coverage. She forwarded a copy of her marriage license and certificate.
- A Coast Guard memorandum dated October 30, 2006, showing that the applicant's alimony was no longer to be deducted from the LCDR's retired pay.
- A retiree newsletter states that under the National Defense Authorization Act of 1998, a member may not elect to discontinue participation in SBP without the written consent of his spouse.
- In a petition for modification of the divorce decree, dated November 23, 2009, the LCDR asked the court to terminate his obligation to maintain the applicant as the beneficiary of his SBP because he no longer paid her alimony since she had remarried.
- A letter from the court to the parties' attorneys, dated August 16, 2010, states that his findings were that the LCDR's obligation to maintain SBP coverage for the applicant terminated because she remarried. The judge noted that the court "does not have the jurisdiction to determine or designate the beneficiary of the survivor annuity of the former husband's military pension. Beneficiary designation is governed by Federal Statute." The court asked the attorneys to draft proposed orders.
- A letter from the LCDR's attorney to the judge dated August 31, 2010, notes that the LCDR was in hospice care and not expected to live more than a few days. The attorney asked to be able to pick up the judge's order the same day.
- A court order dated August 31, 2010, granting the applicant's petition to end his obligation to provide her with SBP coverage. The order states that the LCDR, his attorney, the applicant, and her attorney had been present at a hearing on August 13,

2010. The court stated that the applicant had remarried and that therefore, paragraph 3 of the divorce decree “is no longer applicable. The former husband’s obligation to pay the former wife permanent periodic alimony ended when the former wife remarried. As there is no longer any alimony to be paid, there is no longer any alimony to secure. The former husband’s obligation to maintain the former wife as beneficiary of the Survivor Annuity of his Military Pension should be terminated. ... This Court does not have jurisdiction to determine or designate the beneficiary of the survivor annuity of the former husband’s military pension as said beneficiary designation discovered [sic] by Federal Statute.” Therefore, the court ordered that the LCDR’s “obligation to maintain the former wife as beneficiary of his survivor annuity of his military pension is hereby terminated. The former husband is free to designate a new beneficiary of the survivor annuity of his military pension.”

- A notarized letter dated August 31, 2010, from the LCDR to the Defense Finance and Accounting Service (DFAS) forwarding a certified copy of a court order authorizing him to end SBP coverage for his former spouse, the applicant, and requesting that his SBP beneficiary be changed to his current spouse.
- A letter from the Coast Guard to the applicant, dated September 20, 2010, informed her that her SBP coverage had ended on August 31, 2010. The letter states that her court-ordered coverage was irrevocable unless the LCDR sought to change his coverage to a new spouse or child and a “court of competent jurisdiction issues a new order terminating the original award,” citing 10 U.S.C. 1450(f)(1)-(2). The Coast Guard stated that it had received a notarized letter from the applicant requesting to change his SBP coverage to his current spouse and enclosing a court order filed on August 31, 2010, that terminated the original July 1998 former spouse SBP award. The Coast Guard concluded that the applicant’s “former spouse SBP coverage ended by operation of law on August 31, 2010.”
- A letter from the Coast Guard responding to a U.S. Senator’s letter dated October 18, 2010, stating that the LCDR’s notarized letter was protected under the Privacy Act and would not be released absent the consent of the LCDR’s widow or an order signed by a Federal judge. The Coast Guard also noted that only a judge could determine whether the LCDR was competent to make an SBP election two weeks before he died.
- In a letter dated January 12, 2011, the applicant stated that she believed that the Coast Guard did not consider all the facts when it terminated her SBP coverage. She stated that she and the LCDR were married for more than forty years and had two sons. The applicant stated that she was “deemed elected” in 1998, and “this election has not been changed” and was irrevocable. She alleged that she “would have to concur in any change” and that she had not concurred. She stated that the SBP election the LCDR made on May 9, 1999, had no impact on her “deemed elected” status. She noted the LCDR’s prior attempts to change his election and stated that in late August and early September of 2010, she, her son, and her attorney had had several discussions with Coast Guard staff concerning the LCDR’s deteriorating health and an overheard conversation about his SBP. She stated that one or both of her sons was with the LCDR almost continuously from August 16, 2010, until the last few days before he died; that the LCDR was “helpless and had to be assisted in everything he did” during this period; and that “they never saw him sign anything, especially a notarized statement with witnesses.” She

stated that she doubted the authenticity of the LCDR's notarized request to change beneficiaries and she alleged that he could not have signed such a request before the court's order was issued on August 31, 2010, by which time he was "helpless."

- In a letter dated January 24, 2011, the Coast Guard replied, stating that the Coast Guard had "no discretion in this matter" and that it had "carefully considered all relevant facts before acting in full accordance with the law," citing 10 U.S.C. 1450(f)(1)-(2). The Coast Guard stated that the Privacy Act prohibited it from providing the applicant with a copy of the LCDR's notarized letter requesting the change in SBP coverage.
- A form the applicant submitted requesting a copy of the LCDR's notarized letter.
- In a letter from the applicant to the judge who issued the order dated August 31, 2010, she complained that she "was not permitted to speak on my behalf at the hearing on August 13, 2010," and did not hear the information her attorney presented but that her "rights under the Former Spouse Protection Act have not been preserved." She wrote, "Shortly after the hearing, approximately August 16, 2010, my former spouse was hospitalized more than once and became bed ridden at home o/a August 20, 2010, and had to be attended 24/7 mostly by our two sons and hospice." She stated that her sons had told her that they "both have serious concerns how a notarized letter could be signed on August 31, 2010 without their knowledge." She concluded that "[a]ltogether I had the SBP coverage for more than thirty-five years and may have been denied some protection provided by the Former Spouse Protection Act due to the overzealous actions" of the LCDR's attorney.
- A letter from the applicant to the Coast Guard dated April 8, 2013, in which she requested a formal review of her entitlement to SBP.
- A letter from the Coast Guard to the applicant dated June 13, 2013, stating that the Coast Guard had already conducted multiple reviews of her case and that in accordance with law and regulation, they could not change its decisions without a valid court order.
- Letter from the applicant to the Coast Guard dated July 13, 2013, and October 2, 2013, in which she complained that that the Coast Guard was refusing to recognize her "deemed elected" SBP status and the irrevocable nature of her "former spouse" coverage. In the first, she enclosed an SBP publication which states that a former spouse will lose coverage if remarried before age 55 and that "[f]ormer spouse SBP coverage is generally irrevocable. However, if a retired member remarries, they may change the coverage from a former spouse to a current spouse with the former spouse's consent." She also submitted an Air Force Fact Sheet about SBP coverage, which notes how former spouses can get "deemed election" if the retired member refuses to submit a former spouse SBP election request. It also states that a "divorce decree which specifies that former-spouse coverage can be terminated if the former spouse remarries at any age is not enforceable. The SBP is a federal law (Title 10, U.S. Code, Chapter 73), not a state law. A state court can incorporate anything it or the parties desire into a divorce decree; however, federal law dictates the conditions of eligibility for SBP and does not allow termination of former spouse coverage based solely on the former spouse's remarriage at any age."
- A letter from the applicant to a U.S. Senator, dated May 21, 2014, in which she sought his help in verifying that she was "deemed elected" and entitled to SBP.

### VIEWS OF THE COAST GUARD

On August 17, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief in this case.

The JAG stated that after the LCDR elected former spouse coverage for the applicant on May 9, 1999, her deemed election was approved. The applicant remarried on October 1, 2006, and because she was over the age of 55, her remarriage did not impact her former spouse coverage. However, on August 31, 2010, the LCDR obtained the court order modifying his divorce decree and terminating his obligation to maintain the applicant as his beneficiary “and permitted him to change coverage to his spouse.” The LCDR provided a certified copy of this order to the Coast Guard and requested to change his beneficiary to his current spouse. The Coast Guard’s Personnel and Pay Center (PPC) approved this request, and began paying his widow SBP benefits upon the LCDR’s death on September 13, 2010.

The JAG stated that the application is not timely and should be denied because the applicant was informed that her SBP coverage had ended on September 20, 2010.

Regarding the applicant’s claims, the JAG stated that under 10 U.S.C. 1450(f)(2), SBP elections are normally irrevocable, but an exception exists “if the member furnishes a certified copy of a court order, regular on its face, which modifies the provisions of a previous court order relating to the former spouse election.” The JAG stated that the LCDR met this requirement and argued that the Coast Guard “was (and is) bound by federal law to honor the August 31, 2010, ... Order Granting Supplemental Petition for Modification.” The JAG also cited Article 18.F.13.c. of the Personnel Manual in effect in April 2010 and DODFMR Volume 7B, section 4300702 B, June 2008.

The JAG noted that the applicant and her son have repeatedly claimed that the LCDR was not physically or mentally competent to make the requested change on August 31, 2010, but the LCDR submitted a notarized copy of his request. The JAG alleged that the notarized request “was dated the same date that a court hearing was conducted in ... [the judge’s] chambers, and in which both parties were represented by counsel.” (The Board notes, however, that the hearing was conducted on August 13, 2010, and the notarized letter and court order are both dated August 31, 2010.) The JAG stated that the applicant’s legal recourse in this matter would have been to timely appeal the judge’s decision dated August 31, 2010, in accordance with State law. The JAG stated that federal law

very clearly provides for this type of SBP beneficiary change, even when made late in life. As with nearly all other areas of family law, federal law relies on state courts to make the kind of frequently difficult beneficiary decision involved in this case. Subchapter II sets the parameters upon which the state court decision must be made (e.g., regular on its face) but, once made, the Coast Guard and the Department of Defense are bound by law to follow the state’s decision. Although [the LCDR] was terminally ill at the time, his actions were lawfully proper, overseen and supported by the court, and he was represented by counsel.

The JAG stated that since September 2010, PPC, the Coast Guard Headquarters Compensation Division, the Personnel Service Center, and the Congressional Liaison Office “have conducted numerous reviews of the matter” at the request of the applicant and her son. However, the applicant “does not appear to understand that, although she was in fact originally properly designated (deemed) as [the LCDR’s] SBP former spouse beneficiary, the law allows this ordinarily non-revocable designation to be changed under the limited conditions found in 10 U.S.C. 1450(f)(2).

Regarding the applicant’s equitable argument that she should receive SBP benefits because she was the LCDR’s beneficiary for many years, the JAG argued that the consideration of such equities “is better left to the state court.” The JAG stated that the divorce decree shows that the applicant’s SBP coverage was linked to her entitlement to alimony and that “SBP coverage was intended to replace alimony in the event that [the LCDR] died.” Because the alimony ended when the applicant remarried, “the need for an alimony-like payment in the event of [the LCDR’s] death ceased. Based on the original reason for SBP former spouse coverage, no injustice occurred.”

The JAG also stated that the SBP premiums were paid out of the LCDR’s retired pay and did not affect the applicant’s alimony payments, which were also deducted from his retired pay. The JAG stated that once the applicant remarried on October 1, 2006, the LCDR was entitled to seek to change his SBP coverage. Although he waited until 2010 to do so, the LCDR acted in compliance with the law to change his beneficiary. The JAG argued that the applicant has not suffered an injustice because he did so.

#### **APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD**

On September 18, 2015, the applicant responded to the views of the Coast Guard. She claimed that “deemed election” status was granted to her before the LCDR signed the election on May 9, 1999. She asked whether and how his voluntary election could have replaced her “deemed election” and why she was not told if it had. She argued that her deemed election should have been irrevocable, in which case it could only have been changed with her agreement. If her “deemed election” was replaced with the LCDR’s voluntary election, she should have been told.

The applicant complained that the LCDR’s May 9, 1999, election form indicates that it was not made pursuant to a divorce decree, but it was. She stated that she is entitled to SBP benefits because of her “deemed election” status. Her complaint indicates that she believes her rights and the irrevocability of a former spouse election depend upon whether the election is considered “deemed,” court-ordered, or voluntary on the LCDR’s part. In addition, she argued that the court order dated August 31, 2010, cannot have any effect on an election not made in accordance with the terms of her divorce.

The applicant stated that the LCDR’s signature on the notarized letter dated August 31, 2010, is not the same as his signature on other forms in the record.



Regarding the Coast Guard's claim that her application is untimely, the applicant stated that the Coast Guard never advised her of her right to file an application with the Board.

The applicant submitted with her response various documents already contained in the record and other publications about SBP.

### APPLICABLE LAW

Title 10 U.S.C. 1448(b)(3)(A) provides that a retiree participating in SBP may elect to provide coverage to a former spouse if the person making the election does so within one year of the date of the divorce decree. Subparagraph 1448(b)(3)(C) states, "An election under this paragraph may not be revoked except in accordance with section 1450(f) of this title.

Title 10 U.S.C. § 1450 states the following regarding SBP in pertinent part:

a) In general.--Effective as of the first day after the death of a person to whom section 1448 of this title applies ..., a monthly annuity under section 1451 of this title shall be paid to the person's beneficiaries under the Plan, as follows:

(1) Surviving spouse or former spouse.--The eligible surviving spouse or the eligible former spouse. ...

(b) Termination of annuity for death, remarriage before age 55, etc.--

(1) General rule.--An annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost.

(2) Termination of spouse annuity upon death or remarriage before age 55.--An annuity for a surviving spouse or former spouse shall be paid to the surviving spouse or former spouse while the surviving spouse or former spouse is living or, if the surviving spouse or former spouse remarries before reaching age 55, until the surviving spouse or former spouse remarries.

• • •

(f) Change in election of insurable interest or former spouse beneficiary.--

(1) Authorized changes.--

(A) Election in favor of spouse or child.--A person who elects to provide an annuity to a person designated by him under section 1448(b) of this title may, subject to paragraph (2), change that election and provide an annuity to his spouse or dependent child.

(B) Notice.--The Secretary concerned shall notify the former spouse or other natural person previously designated under section 1448(b) of this title of any change of election under subparagraph (A).

(C) Procedures, effective date, etc.--Any such change of election is subject to the same rules with respect to execution, revocation, and effectiveness as are set forth in section 1448(a)(5) of this title (without regard to the eligibility of the person making the change of election to make such an election under that section). Notwithstanding the preceding sentence, a change of election under this subsection to provide an annuity to a spouse instead of a former spouse may (subject to paragraph (2)) be made at any time after the person providing the annuity remarries without regard to the time limitation in section 1448(a)(5)(B) of this title.

(2) Limitation on change in beneficiary when former spouse coverage in effect.--A person who, incident to a proceeding of divorce, dissolution, or annulment, is required by a court order to elect under section 1448(b) of this title to provide an annuity to a former spouse (or to both a former spouse and child), or who enters into a written agreement (whether voluntary or required by a court order) to make such an election, and who makes an election pursuant to such order or

agreement, may not change that election under paragraph (1) unless, of the following requirements, whichever are applicable in a particular case are satisfied:

(A) In a case in which the election is required by a court order, or in which an agreement to make the election has been incorporated in or ratified or approved by a court order, the person--

(i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and which modifies the provisions of all previous court orders relating to such election, or the agreement to make such election, so as to permit the person to change the election; and

(ii) certifies to the Secretary concerned that the court order is valid and in effect.

(B) In a case of a written agreement that has not been incorporated in or ratified or approved by a court order, the person--

(i) furnishes to the Secretary concerned a statement, in such form as the Secretary concerned may prescribe, signed by the former spouse and evidencing the former spouse's agreement to a change in the election under paragraph (1); and

(ii) certifies to the Secretary concerned that the statement is current and in effect.

(3) Required former spouse election to be deemed to have been made.--

(A) Deemed election upon request by former spouse.--If a person described in paragraph (2) or (3) of section 1448(b) of this title is required (as described in subparagraph (B)) to elect under section 1448(b) of this title to provide an annuity to a former spouse and such person then fails or refuses to make such an election, such person shall be deemed to have made such an election if the Secretary concerned receives the following:

(i) Request from former spouse.--A written request, in such manner as the Secretary shall prescribe, from the former spouse concerned requesting that such an election be deemed to have been made.

(ii) Copy of court order or other official statement.--Either--

(I) a copy of the court order, regular on its face, which requires such election or incorporates, ratifies, or approves the written agreement of such person; or

(II) a statement from the clerk of the court (or other appropriate official) that such agreement has been filed with the court in accordance with applicable State law.

(B) Persons required to make election.--A person shall be considered for purposes of subparagraph (A) to be required to elect under section 1448(b) of this title to provide an annuity to a former spouse if--

(i) the person enters, incident to a proceeding of divorce, dissolution, or annulment, into a written agreement to make such an election and the agreement (I) has been incorporated in or ratified or approved by a court order, or (II) has been filed with the court of appropriate jurisdiction in accordance with applicable State law; or

(ii) the person is required by a court order to make such an election.

(C) Time limit for request by former spouse.--An election may not be deemed to have been made under subparagraph (A) in the case of any person 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.

(D) Effective date of deemed election.--An election deemed to have been made under subparagraph (A) shall become effective on the day referred to in section 1448(b)(3)(E)(ii) of this title.

(4) Former spouse coverage may be required by court order.--A court order may require a person to elect (or to enter into an agreement to elect) under section 1448(b) of this title to provide an annuity to a former spouse (or to both a former spouse and child).

(g) Limitation on changing or revoking elections.--

(1) In general.--An election under this section may not be changed or revoked.

(2) Exceptions.--Paragraph (1) does not apply to--

(A) a revocation of an election under section 1449(b) of this title; or

(B) a change in an election under subsection (f).

Article 18.F.13. of the Personnel Manual in effect in 2010 stated the following regarding SBP for former spouses:

#### 18.F.13.a. Discussion

Public Law 97-252 permitted members retiring on or after 08 September 1982 to voluntarily elect SBP coverage on behalf of a former spouse. Previously, members who were unmarried or had no dependent child(ren) on retirement could elect coverage for a former spouse as an insurable interest person if it could be shown that the former spouse had a financial interest in the continuance of the life of the member. Public Law 99-145 placed former spouse coverage under spouse coverage at the same costs and benefits effective 01 March 1986. Public Law 101-189, 29 November 1989, gave courts the authority to mandate that military members provide SBP coverage to a former spouse in the case of divorce, dissolution, or annulment.

#### 18.F.13.b. Elections

There are five types of former spouse elections that may be made.

1. A voluntary election made by the member without entering into an agreement with the former spouse. If the member is married, his/her current spouse shall be notified that the member has made a former spouse election and that such election precludes the current spouse from being covered under SBP.

2. A voluntary election made pursuant to a written agreement between the member and former spouse, and such agreement has been incorporated in a court order.

3. A voluntary election made pursuant to a written agreement between the member and former spouse, and such agreement has not been incorporated in a court order.

4. A deemed election in which a member entered into a voluntary agreement, which has been incorporated or ratified or approved by a court order, and the member fails or refuses to make the election.

5. A deemed election in which the member did not enter into a written agreement with the former spouse, but the court order mandates that the member provide SBP coverage for the former spouse.

#### 18.F.13.c. Special Provisions

1. In some cases, former spouse/child(ren) coverage may be changed to coverage for a spouse/child(ren) acquired after retirement. If the former spouse election was made pursuant to a written agreement or court order between the member and former spouse, the member must provide appropriate evidence of the former spouse's consent or court order to the change. The consent of the former spouse is not required if the member voluntarily elected former spouse coverage without a written agreement.

2. A former spouse shall be notified by PSC when a member changes from former spouse coverage to coverage for a spouse/child(ren).

## FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. 1552.<sup>1</sup>
2. The applicant requested an oral hearing before the Board. The Chair, acting pursuant to 33 C.F.R. § 52.51, denied the request and recommended disposition of the case without a hearing. The Board concurs in that recommendation.<sup>2</sup>
3. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.<sup>3</sup> The applicant admitted that she discovered the alleged error in September 2010. Therefore, her application should have been filed by September 2013 and is untimely.
4. The Board may excuse the untimeliness of an application if it is in the interest of justice to do so.<sup>4</sup> In *Allen v. Card*, 799 F. Supp. 158 (D.D.C. 1992), the court stated that the Board should not deny an application for untimeliness without “analyz[ing] both the reasons for the delay and the potential merits of the claim based on a cursory review”<sup>5</sup> to determine whether the interest of justice supports a waiver of the statute of limitations. The court noted that “the longer the delay has been and the weaker the reasons are for the delay, the more compelling the merits would need to be to justify a full review.”<sup>6</sup>
5. The record shows that, as the applicant alleged, she has persistently challenged the Coast Guard’s denial of former spouse SBP coverage since September 2010. The record also shows that in its numerous responses to the applicant’s numerous letters regarding her SBP coverage, the Coast Guard never mentioned the applicant’s right to challenge its determination through the BCMR. In light of the Coast Guard’s long silence on the availability of a possible administrative remedy through the BCMR and the quantity of evidence that the applicant has submitted, the Board finds that it is in the interest of justice to excuse the untimeliness of her application and consider her claims on the merits.
6. The applicant alleged that the Coast Guard’s decision to change the LCDR’s SBP election in his military record from former spouse to spouse is erroneous and unjust. In considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the applicant’s military record is correct as it appears in his record, and the applicant bears the burden of proving by a preponderance of the evidence that the disputed

---

<sup>1</sup> 10 U.S.C. 1552(g) states regarding the BCMR’s authority to correct military records, “the term ‘military record’ means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, *or a dependent or current or former spouse of any such person*. Such term does not include records pertaining to civilian employment matters . . . “ (Emphasis added.)

<sup>2</sup> *Armstrong v. United States*, 205 Ct. Cl. 754, 764 (1974) (stating that a hearing is not required because BCMR proceedings are non-adversarial and 10 U.S.C. § 1552 does not require them).

<sup>3</sup> 10 U.S.C. § 1552(b) and 33 C.F.R. § 52.22.

<sup>4</sup> 10 U.S.C. § 1552(b).

<sup>5</sup> *Allen v. Card*, 799 F. Supp. 158, 164 (D.D.C. 1992).

<sup>6</sup> *Id.* at 164, 165; *see also Dickson v. Secretary of Defense*, 68 F.3d 1396, 1405 n14, 1407 n19 (D.C. Cir. 1995).

information is erroneous or unjust.<sup>7</sup> Absent evidence to the contrary, the Board presumes that Coast Guard officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”<sup>8</sup>

7. The record shows that upon his retirement in 1973, the LCDR elected coverage for his spouse under the SBP. When the applicant and the LCDR divorced in 1998, he submitted an election to provide former spouse SBP coverage for her on May 9, 1999, within a year of the date of the divorce decree, as required by 10 U.S.C. § 1448(b)(3)(A). In the meantime, the applicant had requested that his election be “deemed,” pursuant to 10 U.S.C. § 1450(f)(3). The Coast Guard initially responded on March 24, 1999, stating that her request did not meet the requirements because of the options provided in paragraph 3 of the divorce decree. The Coast Guard recommended that she get a different court order or get the LCDR to submit a request to change his election to former spouse coverage. There is no evidence that the applicant obtained a different court order, but the LCDR did submit his request on May 9, 1999. Nevertheless, in an undated letter, the Coast Guard advised the applicant that her request for a deemed election had been granted.

8. The record shows that the applicant believes that she has “deemed election status” that is legally irrevocable. She is incorrect, and while an election may be “deemed,” there is no such legal status for a beneficiary. Title 10 U.S.C. § 1448(b) provides that a retiree may elect former spouse SBP coverage, and § 1450(f)(3) states that a retiree may be deemed to have elected former spouse SBP coverage under § 1448(b) if the retiree fails to obey a court order requiring such an election. Because the LCDR’s original divorce decree allowed an alternative to SBP coverage (the insurance policy) and because the LCDR did in fact submit a request to elect former spouse SBP coverage within a year of the divorce decree, the Coast Guard appears to have erred by sending the applicant a letter stating that the election was “deemed.” Regardless of whether the LCDR’s election in this case is considered deemed or not, however, the rules regarding the revocability of former spouse SBP coverage are the same under the law. Whether the election was made under § 1448(b) or is legally deemed to have been made under § 1448(b), § 1448(b)(3)(C) applies, and it states that “[a]n election under this paragraph may not be revoked except in accordance with section 1450(f) of this title.” The rules for revocation under § 1450(f) do not distinguish between deemed and regular elections for former spouse SBP coverage under § 1448(b).

9. Under paragraph 3 of the applicant’s original divorce decree, the LCDR had the option of maintaining a life insurance policy for her, instead of electing former spouse SBP coverage for her. The record shows that he fulfilled the requirement of paragraph 3 by electing former spouse SBP coverage for her, and the court refused to relieve him of this obligation in subsequent court proceedings until August 2010. Therefore, the Board finds that from the date of the LCDR’s election on May 9, 1999, until August 31, 2010, providing former spouse SBP

---

<sup>7</sup> 33 C.F.R. § 52.24(b); *see* Docket No. 2000-194, at 35-40 (DOT BCMR, Apr. 25, 2002, approved by the Deputy General Counsel, May 29, 2002) (rejecting the “clear and convincing” evidence standard recommended by the Coast Guard and adopting the “preponderance of the evidence” standard for all cases prior to the promulgation of the latter standard in 2003 in 33 C.F.R. § 52.24(b)).

<sup>8</sup> *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

coverage was required of the LCDR by court order, even though the LCDR could have fulfilled the requirement in paragraph 3 of the original divorce decree by maintaining the life insurance policy instead.

10. Under 10 U.S.C. § 1450(f)(2)(A), a person who is required by court order to elect former spouse SBP coverage may not change that election unless the person submits a “certified copy of a court order which is regular on its face and which modifies the provisions of all previous court orders relating to such election ... so as to permit the person to change the election.” The applicant argued that her consent to the change in the LCDR’s election was required, but § 1450(f)(2)(B) states that the former spouse’s consent is required when there is no court order but, instead, “a written agreement that has not been incorporated in or ratified or approved by a court order.” In this case, the LCDR had a court order, and so § 1450(f)(2)(A) applied instead of § 1450(f)(2)(B). Therefore, with the certified copy of the court order dated August 31, 2010, the LCDR could legally change his election without the applicant’s consent. This statute is reflected in Article 18.F.13.c. of the Personnel Manual in effect in 2010, which states that “[i]f the former spouse election was made pursuant to a written agreement or court order between the member and former spouse, the member must provide appropriate evidence of the former spouse’s consent or court order to the change.” The record shows that the LCDR, through his attorney, timely submitted a certified copy of the court order ending his prior legal obligation to provide former spouse SBP coverage for the applicant.

11. The applicant argued that her former spouse SBP coverage could not legally be terminated due to her remarriage because she remarried after age 55. Title 10 U.S.C. § 1450(b) states that “[a]n annuity for a surviving spouse or former spouse shall be paid to the surviving spouse or former spouse while the surviving spouse or former spouse is living or, if the surviving spouse or former spouse remarries before reaching age 55, until the surviving spouse or former spouse remarries.” Therefore, if a former spouse is actually receiving annuity payments after the retiree’s death, those payments stop upon the former spouse’s death or upon her remarriage if she remarries before age 55. Because the applicant never received and was never entitled to receive annuity payments, § 1450(b) is inapplicable. Section 1450(b) does *not* prevent a living retiree from changing his SBP election from former spouse to spouse. The applicant’s remarriage therefore affected the LCDR’s legal obligation to provide former spouse SBP coverage only because of the terms in paragraphs 2 and 3 of the divorce decree.

12. The record shows that on August 31, 2010, the LCDR submitted to the Coast Guard a certified copy of the August 31, 2010, court order and a notarized letter requesting to change his SBP election to cover his current spouse, instead of his former spouse. The applicant and her son alleged that on August 31, 2010, the LCDR was too ill to sign such a letter and that the LCDR did not visit and was not visited by a notary public on the day in question. The applicant pointed out that the LCDR’s signature on the August 31, 2010, letter is not identical to his signature on documents he signed in 1973. The record shows, however, that the applicant was well enough to attend a court hearing on August 13, 2010. In addition, the change requested in the letter was apparently a long-standing desire on the part of the LCDR because, as the applicant stated, he had sought to relieve himself of the obligation of providing former spouse SBP coverage in prior court proceedings. Thus, the record shows that the LCDR strongly desired to change his SBP beneficiary and so the fact that he succeeded, with the help of his

attorney, cannot be considered surprising. Nor does the Board find the son's 2015 letter about whether a notary could have visited his father's and stepmother's house and obtained his father's signature without the son's knowledge on August 31, 2010, to be persuasive. Therefore, and because the LCDR's letter was notarized by a notary public, the Board finds that the statements of the applicant and her son regarding the LCDR's inability and lack of opportunity to sign a document on August 31, 2010, do not persuade the Board that the letter was forged, that the LCDR did not knowingly sign it, or that the content of the letter was contrary to the LCDR's desire and intent on August 31, 2010. In light of the August 31, 2010, court order and notarized letter from the LCDR requesting to change his election, the Board finds that the applicant has not proven by a preponderance of the evidence that the Coast Guard erred by finding that the LCDR had properly changed his SBP election from former spouse to spouse before he died.

13. The applicant has not proven by a preponderance of the evidence that the election for spouse, rather than former spouse, SBP coverage in the LCDR's record is erroneous. Nor has she proven by a preponderance of the evidence that it is unjust.<sup>9</sup> As the JAG pointed out, under paragraph 2 of the original divorce decree, the applicant was entitled to alimony until she remarried, which she did in 2006. Under paragraph 3, her entitlement to former spouse SBP coverage or life insurance was tied to her entitlement to alimony, so that if she was still receiving alimony when the LCDR died, that income would be replaced by SBP or life insurance payments. When the applicant remarried, her entitlement to alimony ended as did the applicant's legal obligation to provide her with former spouse SBP coverage, as the court found in August 2010. Under 10 U.S.C. § 1450(f), therefore, the LCDR was entitled to change his election, which he did. Under these circumstances, the Board finds that the LCDR's change of beneficiary does not constitute an injustice in the record.

14. The applicant has not proven by a preponderance of the evidence that the LCDR's military record is erroneous or unjust in showing that on August 31, 2010, he changed his election to make his then current spouse his SBP beneficiary. Therefore, the applicant's request should be denied.

**(ORDER AND SIGNATURES ON NEXT PAGE)**

---

<sup>9</sup> *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976); *but see* 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907 (finding that "[t]he words 'error' and 'injustice' as used in this section do not have a limited or technical meaning and, to be made the basis for remedial action, the 'error' or 'injustice' need not have been caused by the service involved."). The Board has authority to determine whether an injustice exists on a "case-by-case basis." Final Decision, BCMR Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

**ORDER**

The application for correction of the military record of [REDACTED] USCG (deceased), submitted by his former spouse, [REDACTED] denied.

March 11, 2016

