

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2015-162



FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 425. The Chair docketed the application upon receipt of the completed application and military records on July 21, 2015, and assigned it to staff member [REDACTED] to prepare the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated May 27, 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 the former spouse of the deceased Captain (CAPT) named in the caption above. She asked the Board to correct the CAPT's record so that she will receive survivor benefits through the Survivor Benefit Plan (SBP). She specifically requested that the Board correct the CAPT's record to reflect her title as the CAPT's "former spouse" so that she may receive the SBP coverage as specified by the couple's Final Decree of Divorce.

The applicant married the CAPT in 1972 while he was active duty in the Coast Guard. The CAPT retired from the Coast Guard on November 1, 1977, after 27 years of service. Upon retiring, the CAPT completed the necessary Survivor Benefit Plan (SBP) paperwork and named the applicant as his primary beneficiary and spouse on the application. The CAPT continued to pay SBP premium costs until 2007 when his SBP premiums were fully paid up. On March 15, 2011, the applicant and the CAPT divorced. After the divorce, the CAPT had one year to change his SBP coverage from "spouse" to "former spouse" in order to continue the applicant as his beneficiary under the program. However, the CAPT failed to notify the Coast Guard of the divorce and did not change his elected coverage from "spouse" to "former spouse." Further, by submitting a copy of their divorce decree, the applicant could have requested a "deemed election" within one year of the divorce to ensure that she remained his beneficiary herself. However, the applicant stated that she was unaware of the need to do so and did not request it. Because of their divorce on March 15, 2011, her status as his "spouse" beneficiary was suspended on April 1, 2011, without either party's knowledge. The CAPT died in December

2015, at age 90, and the applicant alleged that she should be entitled to the benefits from the SBP program.

In support of her request, the applicant submitted her Final Decree of Divorce, initialed by her and the CAPT. Paragraph 7 of the Final Decree, dated March 15, 2011, states that “The husband will not take any action to revoke the wife from being designated as the surviving beneficiary of his military retirement.” The applicant alleged that she was unaware that the CAPT had one year from the date of divorce to notify the Coast Guard that he wanted to keep her on as his SBP beneficiary by updating his coverage to “former spouse.” The applicant believed that the Final Decree was sufficient on its own to keep her as his SBP beneficiary. The applicant was represented by an attorney during her divorce and was not advised by her attorney that the CAPT would need to take action. Further, she was not advised that she also had the ability to ensure a “deemed election.” Upon learning of the one-year requirement in May 2015, the applicant took immediate action to rectify the matter.

The applicant stated that the CAPT never remarried after they were divorced and that there are no other beneficiaries eligible to receive the SBP benefits, making her the only possibly beneficiary of the benefits. Further, the applicant alleged that the Final Decree was written with the intent to leave the applicant as the CAPT’s SBP beneficiary, even though the wording of the decree had the opposite effect. Finally, the applicant alleged that since the CAPT was making monthly payments toward the SBP plan and was aware that these payments were being deducted, his failure to remove her as his beneficiary further indicates his intent for her to receive the benefits.

VIEWS OF THE COAST GUARD

On November 9, 2015, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief in this case.

The JAG stated that the Coast Guard acted in compliance with law and regulation and committed no errors in the maintenance of the CAPT’s SBP account. Further, the Coast Guard committed no error in suspending the applicant’s SBP coverage upon learning of the divorce. The JAG argued that it is the member’s responsibility to notify the Pay & Personnel Center (PPC) about changes in life circumstances, and the CAPT never notified the PPC of his divorce. Further, the applicant never submitted a request for SBP deemed election.

The JAG acknowledged that although there were no procedural errors committed by the Coast Guard, the BCMR has the authority to decide whether an injustice has occurred on a case-by-case basis. Paragraph 7 of the Final Decree states that “[t]he husband will not take any action to revoke the wife from being designated as the surviving beneficiary of his military retirement.” The JAG stated that, although the language is poorly drafted, had the PPC received a timely filed request for SBP deemed election, it would have interpreted the Final Decree as requiring SBP former spouse coverage and would have approved the request.

The JAG concluded that the divorce degree, combined with the fact that the CAPT continued to make alimony payments throughout his lifetime, evidenced the court’s intent that

the CAPT continue to provide for the applicant if he predeceased her. The JAG further concluded that the CAPT intended to comply with the Final Decree.¹ His failure to notify the PPC about his divorce may have simply been from his lack of knowledge about notification requirements.

Although the CAPT and the applicant failed to notify the Coast Guard of their divorce and so did not change his coverage from spouse to former spouse as required by law, the JAG recommended that the Board grant relief to make the applicant the CAPT's beneficiary. The JAG concluded that despite the applicant's and the CAPT's failure to meet legal requirements, the Board should determine that an injustice occurred as the CAPT paid all premiums required by the program and the applicant is the only person who may claim the benefits. The JAG recommended that the Board correct the CAPT's record to reflect that he selected former spouse SBP coverage on March 15, 2011, the date of divorce.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On December 2, 2015, the applicant responded to the views of the Coast Guard. She stated that she had no objections to the Coast Guard's views and requested that the Board take the matter under consideration.

APPLICABLE LAW

The SBP is authorized under 10 U.S.C. §§ 1447 *et seq.* Section 1448, "Application of Plan," states the following in pertinent part:

(a) General rules for participation in the Plan.--

(1) Name of Plan; eligible participants.--The program established by this subchapter shall be known as the Survivor Benefit Plan. The following persons are eligible to participate in the Plan:

(A) Persons entitled to retired pay.

(B) Persons who would be eligible for reserve-component retired pay but for the fact that they are under 60 years of age.

(2) Participants in the Plan.--The Plan applies to the following persons, who shall be participants in the Plan:

(A) Standard annuity participants.--A person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he becomes entitled to retired pay, unless he elects (with his spouse's concurrence, if required under paragraph (3)) not to participate in the Plan before the first day for which he is eligible for that pay.

¹ The JAG also stated that the CAPT notified the Defense Enrollment Eligibility Reporting Systems (DEERS) about his divorce, which resulted in the applicant being removed from DEERS eligibility because there was insufficient marriage overlap between the marriage and the CAPT's military service. This demonstrates his intent to keep proper records. Therefore, his inaction in notifying the PPC was probably due to lack of knowledge.

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 Final 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.

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

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(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).

Article 2.D. of the Coast Guard's Civil Affairs Manual, COMDTINST M1700.1, explains SBP coverage for former spouses as follows:

2.D.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.

2.D.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.

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(a) and (h).²

² 10 U.S.C. § 1552(h) 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.)

2. An application to the Board must be filed within three years after the applicant discovers the alleged error or injustice.³ The record supports the applicant's claim that she did not discover the lack of SBP coverage until 2015. Therefore, her application is timely.

3. The applicant alleged that her ineligibility to receive the SBP benefits is erroneous and unjust because her Final Decree required the CAPT to maintain her as his beneficiary. The CAPT made monthly payments to the SBP and never removed her as his beneficiary, and the applicant is the only person possibly eligible to receive the benefits. When 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 information is erroneous or unjust.⁴ 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."⁵

4. The Coast Guard argued that the Board should grant relief in this case in the interest of justice. Under 10 U.S.C. § 1552, the Board is authorized to remove injustices, as well as errors, from any Coast Guard military record. For the purposes of the BCMR, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."⁶ The Board has authority to determine whether an injustice exists on a "case-by-case basis."⁷ Indeed, "when a correction board fails to correct an injustice clearly presented in the record before it, it is acting in violation of its mandate,"⁸ and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."⁹ In addition, the Board may correct errors and injustices in military records even if the military service did not cause the prejudicial error [or injustice].¹⁰ Therefore, it is within the Board's authority to grant relief and remove the injustice.

5. The Board notes that there is no indication in the record that the CAPT remarried after his divorce from the applicant, and his obituary does not mention a widow. The preponderance of the evidence shows that there is no widow currently eligible for spouse SBP coverage or otherwise contending to be considered the CAPT's SBP beneficiary. Therefore, adjudication of the applicant's claim in this non-adversarial forum is appropriate.

³ 10 U.S.C. § 1552(b); 33 C.F.R. § 52.22.

⁴ 33 C.F.R. § 52.24(b).

⁵ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁶ *Reale v. United States*, 208 Ct. Cl. 1010, 1011 (1976).

⁷ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

⁸ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

⁹ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

¹⁰ 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.").

6. The Board agrees with the Coast Guard that the applicant has proven by a preponderance of the evidence that her ineligibility for SBP annuity payments constitutes an injustice. As the applicant and the Coast Guard stated, the Final Decree shows that the court intended for the CAPT to maintain the applicant as his SBP beneficiary, although it was poorly worded. The Final Decree technically required the CAPT to “not take any action to remove the [applicant] from being designated as the surviving beneficiary.” This language seemingly mandates inaction on the part of the CAPT to make sure that he did not remove the applicant as his SBP beneficiary. However, in order to make sure that the applicant remained his SBP beneficiary, the CAPT would have had to take action. It was through his inaction that the applicant’s status as his beneficiary was lost. Based on the wording in the Final Decree, it appears that the parties, their attorneys, and the court were unaware that action needed to be taken to ensure that the applicant remained the SBP beneficiary even as a former spouse, or the Final Decree would have been worded differently. Therefore, given that the SBP premiums were fully paid and there is no other contender for the benefits, the Board finds that the CAPT’s record should be corrected to show that he elected former spouse SBP coverage within one year of his divorce from the applicant.

7. To effect appropriate relief in this case, the Coast Guard should correct the CAPT’s record to show that he changed his SBP beneficiary from “spouse” to “former spouse” within one year of his divorce from the applicant as required under the Final Decree. If she is so entitled, the Coast Guard should then pay the applicant any amount due in SBP annuity payments owed to her.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application for correction of the military record of [REDACTED] [REDACTED] [REDACTED] USCG (deceased), submitted by his former spouse, [REDACTED] [REDACTED] is granted as follows:

- The Coast Guard shall correct the Captain's record to show that he changed his SBP beneficiary/coverage from "spouse" to "former spouse" within one year of his divorce.
- The Coast Guard shall pay the Captain's former spouse any amount owed to her as a result of this correction.

May 27, 2016

