

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2016-201

Submitted by [REDACTED] (deceased)
[REDACTED] (former spouse)

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 August 13, 2016, and prepared the decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated June 16, 2017, 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 [REDACTED] [REDACTED] named in the caption above. She asked the Board to correct the [REDACTED]'s record so that she will receive survivor benefits through the Survivor Benefit Plan (SBP). She specifically asked the Board to correct the [REDACTED]'s record to reflect his election of "former spouse" coverage so that she may receive the SBP annuity as required by their divorce decree.

The records show that the applicant married the [REDACTED] in 1975 while he was on active duty in the Coast Guard. The [REDACTED] retired from the Coast Guard on August 1, 1993, after 28 years of service. Upon retiring, the [REDACTED] completed the Survivor Benefit Plan (SBP) paperwork and elected "spouse and children" coverage, which defaulted to "spouse" coverage when his youngest child was no longer eligible. The [REDACTED] also named the applicant as his primary beneficiary in 1993. He divorced the applicant in March 2003 and remarried in June 2003. The Coast Guard has no record of receiving any documentation of the divorce or request to change the [REDACTED]'s "spouse" coverage to "former spouse" coverage within a year of the divorce. The [REDACTED] continued to pay SBP premium costs out of his retired pay until he died on March 22, 2016.

The applicant stated that in 1994, a year after his retirement, the [REDACTED] was diagnosed with Non-Hodgkin's Lymphoma. The applicant stated that she took care of the [REDACTED] for eight years while he fought the lymphoma with chemotherapy, radiation treatments, surgeries, and a

stem cell transplant. The applicant stated that shortly after he received a clean bill of health in 2002, the [REDACTED] left their home in Alaska with no explanation except a note on the counter thanking her for everything she had done for him and saying that he needed to find a new purpose in life. The applicant stated that she believes he left because she had been his caregiver for eight years and he associated her with his illness and mortality. The applicant stated that she next heard from the [REDACTED] in the fall of 2002, when he sent her divorce papers from Oregon. She had to hire an attorney in Oregon to represent her during the divorce. Their divorce was finalized in March 2003 and the decree specified that she would remain his SBP beneficiary and receive alimony.

The applicant stated that in May 2003, the [REDACTED] called to let her know that he was remarrying. The [REDACTED] told her that his new wife would receive medical insurance coverage under the Defense Enrollment Eligibility Reporting System (DEERS) because she had health problems but that the applicant would continue to be his SBP beneficiary. The [REDACTED] gave her a Coast Guard telephone number to call, and when she called it she was told that she was the [REDACTED]'s named SBP beneficiary. She was never told that to remain the beneficiary, she would have to submit documentation to change the applicant's SBP coverage from "spouse" to "former spouse."

The applicant stated that the [REDACTED] continued to pay her alimony as required by the divorce decree until his death in March 2016. When her son called the Coast Guard about her SBP coverage on her behalf, he was told that she was still the beneficiary. However, later they were told that there was no copy of their marriage certificate, the divorce decree, or forms changing the [REDACTED]'s spouse coverage to former spouse coverage in his records. She was told that she was no longer eligible for the [REDACTED]'s survivor benefits even though the [REDACTED] had continued to pay the premiums. She was told that the [REDACTED] or she herself should have filed the divorce decree and paperwork within a year of the divorce to change the [REDACTED] coverage type, but no one had told her so at the time and she had been reassured over the phone after the divorce that she was still the beneficiary.

The applicant argued that she should receive the SBP annuity because her continuing coverage was required by their divorce decree and because she supported the [REDACTED] throughout his Coast Guard career and eight-year battle with lymphoma. In support of her request, the applicant submitted the following documents:

- A marriage certificate shows that the applicant and the [REDACTED] married on September 24, 1975.
- A divorce decree, titled "Stipulated Judgment and Decree of Dissolution of Marriage," and dated March 11, 2003, states, "The Petitioner [the [REDACTED] shall continue the Respondent [the applicant] as the survivor beneficiary on his US Coast Guard and Veterans' Administration retirement accounts."
- An Oregon death certificate dated March 22, 2016, states that at the time of his death the [REDACTED] marital status was "legal separation," and it names the woman he married in 2003 as his spouse.

- In a letter dated May 24, 2016, the Coast Guard informed the applicant that although her divorce decree stipulated that she would continue to be the [REDACTED] SBP beneficiary, neither the [REDACTED] nor the applicant had informed the Coast Guard of the divorce and need to change the coverage from spouse to former spouse within a year of the divorce, as required by law. The Coast Guard further stated that because the [REDACTED] had remarried, his new spouse was entitled to his SBP benefits automatically by law if they were still married when he died because of his continuing spouse coverage. The Coast Guard noted that it was seeking to confirm the [REDACTED] marital status at the time of his death. The Coast Guard stated that if the problem were not resolved, some of the [REDACTED] SBP premiums would be refunded to her as the named beneficiary.
- A notarized statement signed by the [REDACTED] spouse (widow) at the time of his death, states the following:

I, [name of widow] am fully aware that the beneficiary of [the [REDACTED] name and social security number] Survivor Benefit plan is [the applicant, former spouse]. [The applicant] was the spouse at that time of [the BMC's] retirement in 1993 and was named beneficiary as per the terms of their divorce in 2003. I was fully aware of this at the time of our marriage and at the time of his death on March 22, 2016.

As his current spouse, I will not be applying for these benefits as assigned in his divorce, but will apply for his VA disability benefits.

VIEWES OF THE COAST GUARD

On December 21, 2016, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board grant relief in this case.

The JAG confirmed that the applicant was the named beneficiary on the [REDACTED] SBP enrollment form, on which he elected full spouse and children coverage upon his retirement in 1993, and that he had continued to pay the premiums until his death.

The JAG agreed that the divorce decree stipulates that the applicant would continue as the [REDACTED] SBP beneficiary but claimed that neither the [REDACTED] nor the applicant had notified the Coast Guard about the divorce or the need to change the [REDACTED] spouse coverage to former spouse coverage. The JAG noted that when the [REDACTED] remarried on June 7, 2003, he informed the Department of Veterans' Affairs and the DEERS office so that his new wife would have medical insurance.

The JAG stated that after the [REDACTED] death, the [REDACTED] spouse (widow) never contacted the Coast Guard regarding any benefits. Although the Coast Guard made repeated attempts to contact her, she did not return telephone calls and messages, and a letter addressed to her was returned as undeliverable. However, the JAG noted, the applicant has submitted "a notarized statement from [the spouse] that she was aware that the applicant was to receive the SBP annuity and that she ([the spouse]) would not be applying for it."

The JAG argued that the Board should grant relief in this case in the interest of justice. The JAG stated that although a spouse's eligibility under spouse coverage is suspended upon

divorce, 10 U.S.C. §§ 1448(b)(3) and 1450(f)(3) provide ways to change spouse coverage to former spouse coverage. Within a year of the divorce, the retiree may submit an election change requesting former spouse coverage, or the former spouse may submit a copy of the divorce decree with an application for a “deemed election.” The JAG noted that, although the language in the divorce decree is poorly drafted, had the Coast Guard received a timely filed request for a deemed election, it would have interpreted the divorce decree as requiring SBP former spouse coverage and would have approved the request. The JAG noted that under the law, if neither the retiree nor the former spouse requests the change in coverage within a year of the divorce, the coverage is suspended “subject to other laws and regulations governing the SBP.” The JAG stated that pursuant to 10 U.S.C. § 1448(a)(6), “if the retiree divorces and does not select former spouse coverage and later remarries, his (new) spouse is automatically covered on the one year anniversary of the marriage unless the retiree opts out of SBP coverage.”

The JAG stated that retirees are responsible for notifying the Coast Guard of their changed circumstances, and the Coast Guard reminds retirees in newsletters and on its website of their responsibilities. The JAG stated that although the Coast Guard committed no errors in this case, the Board should grant relief in the interest of justice based on the requirement in the divorce decree and the new spouse’s notarized affidavit stating that she will not file for the ██████ SBP annuity. The JAG noted that the BCMR does not ordinarily rule on disputes between two claimants when only one can receive the benefit but argued that because the spouse has signed a notarized statement indicating that she is not entitled to the SBP annuity and will not apply, “the Coast Guard does not object to the Board determining that the applicant is the proper recipient.”

APPLICANT’S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 10, 2017, the Chair mailed the applicant a copy of the views of the Coast Guard and invited her to respond within thirty days. No written response was received.

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.

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. ...

• • •

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

• • •

(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).¹ The record supports the applicant's claim that she did not discover her lack of SBP coverage until after the ██████ death in 2016. Therefore, her application is timely.

2. The applicant alleged that her ineligibility to receive SBP benefits is erroneous and unjust because her divorce decree required the ██████ to maintain her as his beneficiary; the ██████ intended that she remain his beneficiary after their divorce; and the ██████ continued to

¹ 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.)

pay SBP premiums until his death. When considering allegations of error and injustice, the Board begins its analysis by presuming that the disputed information in the member'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.² 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."³

3. The Board is a non-adversarial forum and does not adjudicate SBP cases in which two claimants are vying for the annuity, which can only be paid to one. However, the preponderance of the evidence shows that the applicant and the [REDACTED] widow have agreed to a division of the [REDACTED] SBP and VA benefits, which had previously been awarded to the applicant by a State court order pursuant to her divorce. The record shows that in a notarized affidavit, the widow has relinquished her claim to the SBP annuity in exchange for the applicant's relinquishment of any claim to the VA benefits. In addition, the widow stated that she would not apply for SBP benefits in the affidavit. Therefore, the Board finds that the adjudication of the applicant's claim in this non-adversarial forum is appropriate.

4. The Coast Guard argued that it has committed no errors in this case but that the Board should find that justice requires the Board to award the applicant the SBP annuity by correcting the [REDACTED] coverage to former spouse. The Board notes that payment of the SBP annuity to the widow would not be a legal error under 10 U.S.C. § 1450 because neither the [REDACTED] nor the applicant filed the necessary documentation to change his spouse coverage to former spouse coverage within a year of their divorce as the statute requires. As a Coast Guard retiree, however, the [REDACTED] was still a member of the Coast Guard, and his actions with regards to his military records are arguably attributable to the Coast Guard. Under their divorce decree, the [REDACTED] was required to maintain the applicant as his SBP beneficiary in his military records, and he failed to comply with that order. The [REDACTED] failure to obey the State court's order in his divorce decree was an error, albeit not a federal one, committed by a member of the Coast Guard. Even if the [REDACTED] error were not attributable to the Coast Guard, however, the Board could correct it because the Board may correct errors in military records that are not caused by the Coast Guard.⁴ The Attorney General has ruled that "[t]he words 'error' and 'injustice' as used in this section [the BCMR statute] 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."⁵ Therefore, the Board finds that the [REDACTED] error in failing to correct his SBP coverage from spouse to former spouse within a year of his divorce from the applicant—whether attributable to the Coast Guard or not—is an error that the Board is authorized to correct under 10 U.S.C. § 1552.

5. Since the [REDACTED] widow will not request the SBP annuity, in accordance with her notarized affidavit, if the Board denies relief in this case, no one will receive the annuity, and

² 33 C.F.R. § 52.24(b).

³ *Arens v. United States*, 969 F.2d 1034, 1037 (Fed. Cir. 1992); *Sanders v. United States*, 594 F.2d 804, 813 (Ct. Cl. 1979).

⁴ 41 Op. Att'y Gen. 94 (1952), 1952 WL 2907.

⁵ *Id.*

only a tiny portion of the [REDACTED] premiums will be returned to the applicant.⁶ Therefore, and given the widow's relinquishment of the SBP annuity, the [REDACTED] continued payment of the SBP premiums, the rights of the applicant under the divorce decree, and the [REDACTED] failure to comply with that decree, the Board agrees with the Coast Guard that it is in the interest of justice to correct the [REDACTED] record to show that he changed his spouse coverage to former spouse coverage at the time of his divorce from the applicant.

6. To effect appropriate relief in this case, the Coast Guard should correct the [REDACTED] record to show that he changed his SBP coverage from "spouse" to "former spouse" within one year of his divorce from the applicant on March 11, 2003. The Coast Guard should then pay the applicant any amount due in SBP annuity payments owed to her.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁶ According to the Coast Guard, the applicant would be entitled to receive the premiums that were paid between the date of her divorce in March 2003, when coverage was suspended, and the one year wedding anniversary of the [REDACTED] and the widow in June 2004, when coverage would automatically resume by law.

ORDER

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

- The Coast Guard shall correct [REDACTED] [REDACTED] record to show that he changed his SBP beneficiary/coverage from “spouse” to “former spouse” within one year of his divorce on March 11, 2003.
- The Coast Guard shall pay the applicant any amount owed to her as a result of this correction.

