

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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2020-116

██████████ ██████████ (deceased)
Submitted by ██████████ ██████████ (former spouse)

FINAL DECISION

This proceeding was conducted according to the provisions of 10 U.S.C. § 1552 and 14 U.S.C. § 2507. The Chair docketed the case after receiving the completed application on June 3, 2020, and assigned the case to the Deputy Chair to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated June 4, 2021, 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).

The applicant, through counsel, stated that she married the CAPT in 1968, and they were married for more than fifty years. The applicant stated that towards the end of their marriage, the CAPT suffered from severe mental illness and became increasingly unstable. To support her application, the applicant provided a copy of the CAPT's discharge paperwork from a hospital that shows that he was diagnosed with bipolar disorder in February 2017. The applicant also provided a copy of an Ex Parte Order for Involuntary Examination of the CAPT dated February 3, 2017. A county court judge ordered that the CAPT be involuntarily examined because he was acting erratically, was verbally abusive towards family members, was hardly sleeping, was refusing to take his medication, and was determined to be a danger to himself and others. Then, in 2018, the applicant stated, she divorced the CAPT as a means of protection. The following year, on October 24, 2019, the CAPT died as a result of suicide.

The applicant argued that the Board should reinstate her as the CAPT's SBP beneficiary to prevent a gross miscarriage of justice. First, the applicant stated that she was never notified that her SBP spouse coverage had been terminated. Specifically, she stated that she never received

documentation showing that the CAPT had elected to terminate the coverage. The applicant stated that it was only after the CAPT's death that she learned that she had not been maintained as the survivor beneficiary. Although the applicant acknowledged that her Marital Settlement Agreement does not address SBP coverage, she anticipated that this benefit would remain in place since she was the beneficiary at the time of their divorce. Second, the applicant argued that the terminated coverage was likely due to the CAPT's mental health issues. She argued that their divorce was fairly amicable and that it is highly unlikely that the CAPT would have knowingly decided to terminate coverage. She argued that if the CAPT terminated the coverage or if he failed to take action that resulted in the termination of coverage, it was likely due to his mental health issues.

The applicant concluded by arguing that it would be unjust to allow the loss of benefits after the CAPT continuously paid the premiums for SBP coverage for twenty-eight years. While the applicant was married to the CAPT, she was a supportive wife and stay-at-home mother to their children. She is now seventy-five years old and is reliant on her benefits to subsist.

SUMMARY OF THE RECORD

On August 27, 1965, the CAPT was appointed as a cadet and attended Aviation Cadet School. On March 8, 1968, the CAPT was commissioned as an ensign in the Coast Guard Reserves. A few months later, on June 28, 1968, the applicant and the CAPT were married. Four years later, on November 13, 1972, the applicant was commissioned as an officer in the regular Coast Guard.

On June 19, 1991, the CAPT signed a "Survivor Benefit Plan Election Certificate." On the form, the CAPT elected "spouse and children" coverage and noted that he was married to the applicant and that he had one dependent child who was born in 1973. He elected full coverage, instead of reduced coverage.

On September 1, 1991, the applicant retired from the Coast Guard after more than twenty-six years of service.

On September 4, 2018, the applicant and the CAPT divorced. Their Marital Settlement Agreement does not discuss SBP coverage.

On September 13, 2018, the applicant submitted an application for division of retired pay pursuant to the Uniformed Services Former Spouses' Protection Act (FSPA) to the Pay and Personnel Center. As part of the FSPA processing, the CAPT's retirement account was updated to reflect that he was no longer married and his SBP account was suspended. In November 2018, the CAPT's monthly SBP premium payment of \$402.85 was no longer subtracted from his retired pay as shown on his statement of monthly income.

VIEWS OF THE COAST GUARD

On September 2, 2020, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which he recommended that the Board grant relief in this case.

The JAG argued that the applicant has not shown that the Coast Guard committed an error when it suspended the CAPT's SBP account. The JAG stated that a spouses' eligibility as an SBP beneficiary is suspended upon divorce. However, there are mechanisms by which a retiree can change the SBP beneficiary from spouse to former spouse. In this case, the CAPT could have changed spouse coverage to former spouse coverage by submitting an election change form within one year of the divorce. However, the CAPT failed to do so and the SBP coverage remained suspended. In fact, the JAG argued that there is no evidence to support a finding that the CAPT wanted SBP former spouse coverage for the applicant. The JAG noted that the matter of SBP coverage was not discussed in the divorce documents, and the CAPT's retired pay increased by \$402.85 due to the suspension of SBP payments.

The JAG argued that although the Coast Guard did not commit an error, the Board should grant the applicant's request in the interest of justice and order the Coast Guard to correct the CAPT's record to reflect timely designation of the applicant as his SBP former spouse beneficiary. The JAG cited three issues that contributed to the injustice. First, the JAG stated that the Coast Guard failed to send notification letters to the CAPT and the applicant regarding the suspended SBP account. The JAG stated that upon notification of a divorce, the Pay and Personnel Center Retiree and Annuitant Services Office usually sends an SBP suspension notification letter to the member and former spouse. The JAG stated that although the notification letters are not required by law, they provide valuable information to both the member and former spouse regarding the status of their SBP account. The JAG acknowledged that due to the government furlough that occurred in 2018, letters were not sent to the CAPT or the applicant. As such, the applicant was not notified that SBP spouse coverage was suspended. The JAG stated that had the applicant been notified of the suspension of the SBP account, she likely would have alerted her attorney who could have pursued a court order requiring SBP former spouse coverage. However, the JAG stated relief should not be granted to the applicant based on an error committed by the Coast Guard because it is speculation to surmise that she would have been successful in obtaining a new court order providing SBP former spouse coverage.

The JAG also argued that the CAPT's mental health and the applicant's unfamiliarity with the SBP program support granting the applicant's request in the interest of justice. The JAG stated that the applicant provided evidence to show that the CAPT suffered from significant mental health issues at the time of this death. Additionally, the JAG stated that the applicant's application reflects a misunderstanding of an essential fact that SBP spouse coverage was automatically suspended upon divorce. That JAG stated that in granting the applicant's request, she should be responsible for SBP monthly premium payments that would have been paid from the date that SBP coverage was suspended in November 2018 to the date of the CAPT's death in October 2019.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On October 5, 2020, the Chair sent the applicant a copy of the Coast Guard's views and invited her to respond within thirty days. In her response, the applicant had no objection to the JAG's advisory opinion.

APPLICABLE LAW AND POLICY

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. —

• • •

(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 an 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)(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.9.b. Termination Date

Annuities terminate on the first day of the month in which eligibility is lost. A widow(er) or former spouse shall receive the annuity so long as they live or until remarriage, if such remarriage occurs before the widow(er) or former spouse reaches age 55. If remarriage is terminated by death, annulment, or divorce, payment of the annuity will resume effective on the first day of the month of termination of the remarriage, provided the widow(er) is not entitled to an annuity under this Plan based upon the second marriage (to another military spouse). In such event, the widow(er) or former spouse may not receive both annuities under this Plan, but must notify PPC by signed letter which annuity is elected. In all cases, the widow(er) or former spouse must notify PPC by signed letter when remarriage occurs or is terminated.

• • •

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 based on the applicant’s military record and submissions, the Coast Guard’s submission and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to 10 U.S.C. § 1552.
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.¹
3. The application is timely because it was filed within three years of the applicant's discovery of the alleged error or injustice in the record, as required by 10 U.S.C. § 1552(b).
4. The applicant alleged that her ineligibility to receive her deceased ex-husband's SBP benefits is unjust. 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 the military 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
5. The JAG argued that the Board should grant relief in this case in the interest of justice. Although the preponderance of the evidence shows that the Coast Guard did not err by suspending the CAPT's SBP account in 2018, pursuant to 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 BCMRs, "injustice" is sometimes defined as "treatment by the military authorities that shocks the sense of justice but is not technically illegal."⁴ The Board has authority to determine whether an injustice exists on a "case-by-case basis,"⁵ and the injustice need not have been caused by the Coast Guard.⁶ 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,"⁷ and "[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious."⁸
6. 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.

¹ *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).

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 *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.").

⁵ Docket No. 2002-040 (DOT BCMR, Decision of the Deputy General Counsel, Dec. 4, 2002).

⁶ 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.").

⁷ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

⁸ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

7. 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. The record shows that the applicant and the CAPT married in 1968, three years after he joined the Coast Guard, and remained married throughout his Coast Guard career. Then, in September 2018, the applicant and the CAPT divorced because of a significant deterioration of the CAPT's mental health. The following month, the CAPT's SBP account was properly suspended. However, as the JAG acknowledged in the advisory opinion, the Pay and Personnel Center Retiree and Annuitant Services Office failed to send an SBP suspension notification letter to either the applicant or the CAPT. While the notification letter is not required by law, it is a courtesy letter that is usually provided to retirees and their ex-spouses. The failure of the Coast Guard to provide a notification letter to the applicant prevented her from learning valuable information, which is notable in this case given her lack of familiarity of the SBP program. Specifically, the applicant mistakenly claimed that her spouse coverage should have continued since she was the designated beneficiary at the time of the divorce. If the applicant had been notified that the SBP spouse coverage was suspended, she could have asked the CAPT to change his SBP election from spouse to former spouse or her attorney could have pursued a court order requiring SBP former spouse coverage. There is no evidence that SBP coverage was considered during the divorce proceedings and no evidence that the CAPT would have contested continuing coverage for her. Furthermore, the applicant has provided evidence of the CAPT's significantly diminished mental health around the time of their divorce. Since the couple's Marital Settlement Agreement did not specifically require former spouse coverage, the onus would have been on the CAPT to change his SBP election to former spouse coverage. However, given the CAPT's mental health issues, it is unlikely that he would have had the foresight to change his SBP election. Therefore, the Board finds that in light of the unusual circumstances of this case and in the interest of justice, 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.

8. 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. However, since the CAPT stopped paying his SBP monthly premium payments in November 2018, the applicant should be responsible for those payments until the CAPT's death on October 24, 2019. After accounting for those premium payments, the Coast Guard should then pay the applicant any amount in SBP annuity payments owed to her.

(ORDER AND SIGNATURES ON NEXT PAGE)

ORDER

The application for correction of the military record of retired CAPT [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 applicant shall be responsible for SBP monthly premium payments that would have been paid from the date that SBP coverage was suspended in November 2018 to the date of the CAPT’s death on October 24, 2019, if he had changed his SBP 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.

June 4, 2021

[REDACTED] _____

[REDACTED] [REDACTED] [REDACTED] Digitally signed by [REDACTED] [REDACTED]
Date: 2022.04.06 12:33:26 -04'00'

[REDACTED] [REDACTED] [REDACTED] Digitally signed by [REDACTED] [REDACTED]
Date: 2022.04.07 09:24:16 -04'00'