


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

Application for Correction of
the Coast Guard Record of:

BCMR Docket No. 2022-054


CWO3 (Retired)

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 July 13, 2022, and assigned the case to a staff attorney to prepare the decision pursuant to 33 C.F.R. § 52.61(c).

This final decision, dated December 1, 2023, 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, a Chief Warrant Officer (CWO3) who retired on October 1, 2013, asked the Board to correct his military record to show that his ex-wife is entitled to his survivor benefits through the Survivor Benefit Plan (SBP). The applicant explained that his marriage to his ex-wife lasted 34 years and spanned the entirety of his Coast Guard career. The applicant further explained that upon his retirement on October 1, 2013, he elected spousal coverage so that his then-wife would be his SBP beneficiary and, upon divorcing on December 22, 2017, the divorce decree ordered that she remain the beneficiary. However, it was later discovered that the DD-2656-1 Election for Former Spouse had not been submitted. The applicant stated that he received a notice that his SBP coverage had been cancelled, and the premiums he had been paid during the previous 4.5 years were returned to him. The applicant requested that this Board correct his record to show that he elected former spouse SBP coverage following his divorce from his ex-wife, as the divorce decree required. The applicant further stated that he submitted the DD-2656-1 as requested by the Coast Guard Pay Center.

The applicant submitted a copy of his divorce decree, which stated the following:

8. **Survivor Beneficiary.** Husband shall designate his Wife as the beneficiary of his Survivor Benefit Plan (SBP). This shall be completed within 30 days of the date of this judgment. Husband's SBP base amount shall be Husband's full pension amount. Husband shall be responsible to pay the SBP premiums. Wife's

interest shall not thereafter be reduced or changed without prior approval of this court. Husband must provide Wife all requested documents pertaining to the SBP in a timely manner. The Court retains jurisdiction to resolve all issues between the parties involving Husband's SBP.

SUMMARY OF THE RECORD

The applicant enlisted in the Coast Guard on January 10, 1983.

On April 18, 1983, the applicant married his now ex-wife.

On October 1, 2013, the applicant retired from the Coast Guard as a CWO3.

On October 20, 2017, the applicant was divorced from his ex-wife pursuant to a court decree requiring him to maintain her as his SBP beneficiary.

On May 12, 2022, the Coast Guard notified the applicant that it had suspended his ex-wife's coverage effective May 1, 2022. The notice informed the applicant that he had the right to elect SBP coverage for a former spouse. The notice stated that federal law required the applicant to make this election, in writing, but he failed to do so. The applicant was informed that his coverage was not terminated, only suspended.

VIEWS OF THE COAST GUARD

On December 21, 2022, a judge advocate (JAG) of the Coast Guard submitted an advisory opinion in which she recommended that the Board grant relief in this case and adopted the findings and analysis provided in a memorandum prepared by PSC.

The JAG explained that upon the applicant's divorce on December 22, 2017, neither the applicant nor his ex-wife notified the Coast Guard about their divorce or completed the required documents to elect former spouse coverage. The JAG stated that the applicant acknowledged that he never notified Coast Guard Personnel Pay Center (PPC) about the divorce or the need to change his SBP coverage. The JAG further stated that the applicant continued to pay monthly SBP premiums from the time of his divorce until PPC became aware of the divorce in May 2022. The JAG explained that as a result of the change, PPC refunded the applicant a total of \$16,103.51 in past premiums. The JAG argued that the Coast Guard acted in compliance with law and regulation and committed no errors in the maintenance of the applicant's SBP account. The JAG further argued that because neither the applicant nor the ex-wife notified PPC or submitted the necessary documentation within the one year required, PPC had no legal authority to award SBP former spouse coverage.

The JAG explained that it is the member's responsibility to notify PPC about a change in life circumstances, including divorce, that impacts a member's retired pay account. According to the JAG, PPC makes frequent attempts to remind retirees about the member's responsibility to notify PPC of any changes. However, the JAG argued that because the applicant continued to make the necessary SBP premiums, this Board can administratively conclude that the applicant intended to comply with the necessary requirements contained within his divorce decree. The JAG speculated that the applicant's failure to notify PPC after the completion of his divorce was likely

due to a lack of knowledge about the SBP notification requirements. The JAG explained that in this case, neither the applicant nor his ex-wife have remarried, and the parties are in agreement to make the ex-wife the SBP beneficiary. The JAG stated that if this request is not approved, the applicant's ex-wife will lose the SBP designation and the entitlement to possible future SBP annuity payments. The JAG argued that this Board may properly determine, in the interests of justice, that the applicant submitted an SBP election form for his ex-wife within one year of the divorce decree.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 17, 2023, the Chair sent the applicant a copy of the Coast Guard's views and invited him to respond within thirty days. As of the date of this decision, no response was received.

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 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.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 over this matter under 10 U.S.C. § 1552(a) because the applicant is requesting correction of an alleged error or injustice in his Coast Guard military record. The Board finds that the applicant has exhausted his administrative remedies, as required by 33 C.F.R. § 52.13(b), because there is no other currently available forum or procedure provided by the Coast Guard for correcting the alleged error or injustice that the applicant has not already pursued.

2. The application was 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).

3. The applicant alleged that Coast Guard's suspension of his SBP benefits and the removal of his ex-wife as a beneficiary was unjust. 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 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.¹ Absent evidence to the contrary, the Board presumes that Coast Guard

¹ 33 C.F.R. § 52.24(b).

officials and other Government employees have carried out their duties “correctly, lawfully, and in good faith.”²

4. 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 refusing to change the applicant’s SBP election for spousal coverage to former spouse coverage in May 2022, 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 BCMR, “injustice” is sometimes defined as “treatment by the military authorities that shocks the sense of justice but is not technically illegal.”³ As the JAG noted, the Board has authority to determine whether an injustice exists on a “case-by-case basis.”⁴ Moreover, the error or injustice to be corrected need not have been caused by the Coast Guard to warrant correction by the Board.⁵ Therefore, even an error or injustice caused by the applicant him or herself may warrant correction. 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,”⁶ and “[w]hen a board does not act to redress clear injustice, its decision is arbitrary and capricious.”⁷

5. The Board’s review of the record shows that the applicant was married to his ex-wife on April 18, 1983, just four months after he enlisted in the Coast Guard. The record further shows that the applicant and his ex-wife remained married throughout the entirety of his Coast Guard career and did not divorce until four years after the applicant retired. Finally, the record shows that the applicant continued to pay his SBP premiums until the suspension of his SBP coverage in May 2022. Upon the applicant’s divorce, the court issued a divorce decree that required the applicant to maintain his ex-wife as his SBP beneficiary. However, the applicant failed to notify PPC of the change in his marital status within one year of his divorce as required by law. Although the applicant was notified upon making his election before his retirement of the SBP notification requirements, it is not uncommon for retirees and their spouses to forget that a spouse is not a named SBP beneficiary *per se* but a beneficiary by virtue of being the spouse of a veteran with spouse coverage and therefore to fail to change the election to former spouse coverage following a divorce. Therefore, in light of the applicant’s continued payment of premiums and the Coast Guard’s recommendation to grant relief, the Board finds that the applicant’s SBP records should be corrected to show that, within the year following his divorce in December 2017, the applicant submitted form DD-2656-1 and changed his coverage from spouse coverage to former spouse coverage, along with a copy of their Final Decree of Divorce, in accordance with 10 U.S.C. § 1450(f)(3), and to show that his application was approved so that his SBP election will be changed from spouse coverage to former spouse coverage. This relief is consistent with several

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

³ *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.”).

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

⁵ 41 Op. Att’y Gen. 94 (1952), 1952 WL 2907 (see footnote 3, above).

⁶ *Roth v. United States*, 378 F.3d 1371, 1381 (Fed. Cir. 2004) (quoting *Yee v. United States*, 206 Ct. Cl. 388, 397 (1975)).

⁷ *Boyer v. United States*, 81 Fed. Cl. 188, 194 (2008).

prior BCMR decisions⁸ and should be granted upon the recoupment of all premiums that were returned to the applicant following the suspension of SBP his coverage.

(ORDER AND SIGNATURES ON NEXT PAGE)

⁸ *See, e.g.*, CGBCMR Docket Nos. 2019-139, 2018-197, 2017-046, 2015-162.

ORDER

The application of CWO3 [REDACTED] [REDACTED] [REDACTED] USCG (Retired), for the correction of his military record is granted as follows:

The Coast Guard shall recoup all SBP premiums that were returned to the applicant upon the suspension of his SBP coverage and shall correct his SBP records to show that within one year following his divorce on December 20, 2017, he submitted to the Coast Guard a completed application requesting a change to his SBP election from spouse coverage to former spouse coverage, in accordance with 10 U.S.C. § 1450(f)(3), along with a copy of his Final Decree of Divorce, which required him to maintain his ex-wife as his SBP beneficiary following their divorce. The Coast Guard shall further correct these records to show that the application was timely approved so that his ex-wife shall be the legal “former spouse” beneficiary of his SBP. The Coast Guard shall assist him in completing any paperwork required to implement this correction.

December 1, 2023

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