

DATE: July 12, 2024

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2022-CL-051701.2

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

A member retired from military service and elected spouse only Survivor Benefit Plan (SBP) coverage. The member subsequently divorced, remarried, and divorced again. Neither divorce decree required the member to elect former spouse SBP coverage for either of his former spouses, and the record reflects that the member did not make a former spouse SBP election for either former spouse. Therefore, under the law, when the member married again, his third spouse became his SBP beneficiary one year after their marriage.

**DECISION**

The claimant, the surviving spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-051701, dated October 3, 2022. In that decision, DOHA sustained the Defense Finance and Accounting Service's denial of the claim for the spouse Survivor Benefit Plan (SBP) annuity of the deceased member.

**Background**

On July 24, 1956, the member married. On December 1, 1972, the member retired from the Air Force and elected spouse only SBP coverage. On March 22, 1973, the member divorced. The divorce decree was silent on the issue of SBP. However, at that time of the member's divorce there were no provisions in the SBP law that allowed a member to establish SBP coverage for a former spouse. On April 10, 1980, the member married again, but divorced on

March 3, 1992. The divorce decree incorporated a prior settlement agreement, but both documents were silent on the issue of the SBP.

In 1991, the Defense Finance and Accounting Service (DFAS) was created, consolidating the financially-related services for military members, including the administration of the SBP program. In an undated letter to DFAS received on April 3, 1992, the member advised DFAS of his divorce on March 3, 1992, and sent them a copy of his divorce decree. He also wrote the following:

I need some information. I hope you can help. I have plans to remarry my former spouse at a later date. Would like to know if I can pick up Survivor Benefit Plan at that time? I would also like to put my former spouse as my beneficiarie [sic]. Please provide as soon as possible.

There is no information in the record that the member ever remarried his former spouse, nor does it reflect any subsequent attempt by the member to provide either of his former spouses with SBP coverage.

On January 4, 1994, the member married the claimant. On March 6, 1999, the member executed an AF Form 114, *Arrears of Retired Pay Designation and/or Annuity Beneficiary Changes*. On that form, the member requested that his arrears of retired pay be paid (the retired pay due at the time of his death) according to the order of precedence under 10 U.S.C. § 2771. In addition, under the section entitled “Part II – Survivor Benefit Plan (SBP) and/or Retired Serviceman’s Family Protection Plan (RSFPP) Changes,” the member listed his marriage date as January 4, 1994, and that his two prior marriages had ended on March 22, 1973, and March 3, 1992.

The member’s first former spouse passed away on June 13, 1999. On November 1, 2009, the member reached paid-up status, and SBP premiums were no longer deducted from his retired pay. On November 18, 2010, the member wrote to DFAS requesting DFAS discontinue SBP coverage for his former spouse and establish spouse coverage for his current spouse. DFAS reported that they were advised of the member’s former spouse’s death and received her death certificate on November 19, 2010. Despite DFAS’s receipt of this information, the member’s Retiree Account Statements (RAS) from December 3, 2019, and December 15, 2019, reflected former spouse SBP coverage for the member’s deceased former spouse.

Under the National Defense Authorization Act for Fiscal Year 2016 (NDAA for FY 2016), Public Law 114-92, 129 Stat. 726, Section 641, Congress amended 10 U.S.C. § 1448(b) by adding subsection (7) to allow a member who had made an election to provide former spouse SBP coverage, the ability to cover a subsequent spouse if the former spouse dies. That section established a one-year open season during which a member who had an SBP former spouse beneficiary who died before November 25, 2015, to establish SBP coverage for a subsequent spouse who was married to the member as of that date. DFAS advised by mail those members who were in that situation, and who were also in paid-up status, of the opportunity to establish SBP spouse coverage for a subsequent spouse during the open season. That mailing included the form for applying for that coverage. However, DFAS advised DOHA that such a mailing was

not dispatched to the member, in this case, because their records erroneously showed that his former spouse was still alive. DFAS did not receive an open season election from the member.

On January 23, 2021, the member passed away. On February 16, 2021, the claimant filed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the spouse of the member. DFAS originally denied the claim on April 8, 2021, on the basis that the member had not been married to the claimant at his retirement and that he had not elected SBP spouse coverage for the claimant within one year of their marriage, as is required for a member who was unmarried at the time of retirement to establish SBP coverage for a spouse that the member married after retirement.

The claimant did not receive DFAS's denial letter dated April 8, 2021. The claimant telephoned DFAS to inquire about the commencement of the SBP annuity payments and was advised of the denial by telephone. The claimant wrote to DFAS on June 8, 2021, and June 15, 2021. The claimant wrote that DFAS advised her by telephone that the member had paid into the SBP program, but he had not chosen a beneficiary. She stated that the member told her that he had named her as his SBP beneficiary, and after their marriage in 1994, the member enrolled her into the Defense Enrollment Eligibility Reporting System (DEERS) and had obtained a military identification card for her. The claimant again wrote to DFAS on July 16, 2021, after finally receiving DFAS's original denial letter dated April 8, 2021, resulting from the intervention of a military family support center. The claimant pointed out that DFAS had erroneously stated that the member was not married at the time of his retirement. She also reported that in December 2020, the member realized his RAS did not identify her as his SBP beneficiary and that he and the claimant telephoned DFAS and asked them to change their records to show that she was the beneficiary.

On July 16, 2021, DFAS reconsidered the SBP annuity claim. DFAS stated that: the member had established SBP spouse coverage upon his retirement; that his spouse lost her SBP spouse coverage upon their divorce after his retirement; that the member and his former spouse entered into a court-approved agreement for him to provide her with SBP former spouse coverage; that the former spouse later requested an SBP former spouse deemed election based on that agreement; and that her request had been granted. Therefore, DFAS concluded that the member's former spouse was his SBP beneficiary.

On July 23, 2021, DFAS wrote to the claimant again, denying her claim on the additional grounds that the member had not established SBP spouse coverage for the claimant during the open season that started on November 25, 2015, which allowed a member with a deceased SBP former spouse beneficiary, to elect spouse SBP coverage for a living subsequent spouse. DFAS acknowledged that the member had not been advised by mail, of that open season, due to their records that erroneously showed that the member's former spouse was still alive.

The claimant again appealed DFAS's denial of her claim through the assistance of her Senator. DFAS reconsidered her claim in an administrative report dated March 21, 2022. It is unclear from that administrative report what was the actual basis used by DFAS to sustain its prior denial of the claim. DFAS wrote out a timeline of events, listed various sections of the SBP law, most not applicable to the facts in the case, and concluded:

After considering the claimant's arguments, DFAS concludes that it properly followed the applicable laws, regulations, and instructions. The recommendation is that this claim should be denied.

DFAS forwarded the appeal package to DOHA by letter dated May 11, 2022. The DOHA adjudicator upheld DFAS's denial of the claim on October 3, 2022. In that decision, the adjudicator noted that at the time of the member's divorce from his first spouse, there was no provision in the SBP law to establish SBP coverage for a former spouse. He explained that there were two open seasons during which SBP former spouse coverage might have been established. However, he found no documentary evidence in the record to support a finding that the member had established former spouse coverage during these open seasons.<sup>1</sup> Despite this lack of evidence, the adjudicator gave deference to DFAS, stating the following:

By one of the aforementioned means, SBP former spouse coverage for [REDACTED] was established and it terminated the default SBP spouse coverage established at [the member's] retirement.

The adjudicator then found that under the NDAA for FY 2016, the member could have established spouse SBP coverage for the claimant, but he did not do so, possibly because he never received notice of the ability to do so from DFAS. The adjudicator further advised the claimant that although DOHA did not have the authority to allow the SBP annuity claim, she may find other avenues of relief through the Air Force Board for Correction of Military Records (AFBCMR).

In the claimant's reconsideration request, through her attorney, she states that there are errors of material and relevant fact in the case as pointed out in the DOHA appeal decision. First, she states that the record is unclear whether former spouse SBP coverage was ever established. Second, she states that it appears SBP premiums continued to be collected after the member reached a paid-up status. Third, the member was not provided written notice from DFAS that he could have established spouse SBP coverage for the claimant because DFAS's records erroneously reflected that his former spouse was still alive. She states that she has filed a request for correction of military record with the AFBCMR. She attaches the petition and the AFBCMR's acknowledgement of its receipt. She states that DOHA's decision may be premature based on the outcome of the AFBCMR petition.

## Discussion

The SBP, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the dependents of deceased members of the uniformed services. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation is automatic for members who are married or have

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<sup>1</sup>The adjudicator made numerous attempts to develop the file further with DFAS. He sent multiple emails to DFAS requesting information on the establishment of former spouse coverage on the member's account, but received no response to his specific questions.

dependent children. Under the original legislation, there was no authority for SBP coverage of a former spouse, and upon a divorce, a member's former spouse generally lost coverage. The SBP law only provided a monthly annuity to be paid to the eligible widow or widower, the surviving dependent children, or the natural person designated with an insurable interest in the member. *See* Public Law No. 92-425, 86 Stat. 706, 708, September 21, 1975, codified at 10 U.S.C. § 1450. Since 1972, that provision has been modified a number of times. Of significance, in 1983, Congress amended the law to allow a member to change an existing election of spouse coverage to provide coverage for a former spouse. *See* Public Law No. 98-94, 92 Stat. 652, September 24, 1984. Therefore, under current law, if a member divorces and wishes to provide SBP coverage for a former spouse, the member must notify the Secretary concerned, in writing, of the divorce and the member's intention to provide coverage for the former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. Former spouse coverage must be established by the member within one year after the date of the decree of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(3)(A).

After Public Law 98-94 was enacted in 1983, it was found that an agreement to provide an annuity to a former spouse could not be enforced even if the member was eligible to elect SBP coverage, since it was up to the member to make a voluntary election on behalf of the former spouse. Congress found that a former spouse should be entitled to rely on a written agreement to provide coverage. As a result, Congress passed Public Law No. 98-525, 98 Stat. 2492, 2548, October 19, 1984. Under current law, if a member is required under the terms of a court order in the proceedings of a divorce, dissolution, or annulment, to provide SBP coverage to the former spouse, and that member fails to do so, the former spouse may request that the election be deemed to have been made. *See* 10 U.S.C. § 1450(f)(3)(A). In order to effectuate such an election, the former spouse must submit a written request for a deemed election and a copy of a court order requiring former spouse coverage, within one year of the date of the court order. *See* 10 U.S.C. § 1450(f)(3).

Once a member is a participant in SBP, the member continues to be considered a participant, even during a period when the member has no eligible spouse beneficiary. If a member ceases to have an eligible spouse beneficiary and later remarries, the member may decline coverage for the subsequent spouse if the member does so within the first year of marriage. *See* 10 U.S.C. § 1448(a)(6). When the member remarries the new spouse becomes a beneficiary unless the member formally declines coverage within the first year of marriage. *See* DOHA Claims Case No. 2022-CL-030901.2 (August 30, 2022); DOHA Claims Case No. 2016-CL-111002.2 (October 31, 2017); and DOHA Claims Case No. 02120406 (December 19, 2002).

In this case, the member established spouse SBP coverage for his first spouse when he retired from the Air Force on December 1, 1972. That coverage ended with their divorce on March 22, 1973. The divorce decree was silent on SBP, and at that time, there was no mechanism in the law for the member to establish former spouse SBP coverage. When the member married again on April 10, 1980, that spouse became the member's eligible spouse SBP beneficiary when he took no action to decline coverage for her. That coverage ended with the member's divorce on March 3, 1992. The divorce decree, which incorporated a prior settlement agreement, was silent on SBP. There is no record evidence of the member making a voluntary

former spouse SBP election for the second former spouse, only an inquiry he sent to DFAS on April 3, 1992, about remarrying his former spouse.

There is no record evidence of the member or either of his former spouses doing anything to effectuate former spouse SBP coverage. DOHA has again verified with DFAS and the Air Force that there was no basis for the establishment of former spouse SBP coverage on the member's account. Therefore, since there was no former spouse SBP coverage in effect, the claimant became the member's eligible spouse SBP beneficiary under 10 U.S.C. § 1448(a)(6), when he took no action to decline coverage for her. *See* DOHA Claims Case No. 2022-CL-052501.2 (May 17, 2023). Under the circumstances, DFAS shall establish the SBP annuity for the claimant as the member's surviving spouse.

Finally, as for any SBP premiums that may have been improperly deducted from the member's retired pay after he reached paid-up status, any refund for overpaid premiums would be payable as arrears of retired pay to the member's beneficiary under 10 U.S.C. § 2771.

### **Conclusion**

The claimant's request for relief is granted. In accordance with Department of Defense Instruction 1340.21 ¶ E7.11, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom  
Administrative Judge  
Chair, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr.

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Richard C. Ourand, Jr.  
Administrative Judge  
Member, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Administrative Judge  
Member, Claims Appeals Board