

KEYWORDS: Waiver of Indebtedness

DIGEST: The member elected to decline participation in the Survivor Benefit Plan (SBP). The member retired on September 30, 1993. The Defense Finance and Accounting Service (DFAS) later determined that the member's election to decline SBP coverage was invalid because the member's underage daughter signed the form as a witness. As a result, SBP coverage was effective October 1, 1993. Therefore, SBP premiums should have been deducted from his retired pay from October 1, 1993, through May 31, 2011. If the member had died during the period when premiums were not being deducted, his wife would have become eligible for an SBP annuity. Since the member received the benefit of SBP coverage, waiver is not appropriate.

CASENO: 2012-WV-072701.2

DATE: 10/18/2012

DATE: October 18, 2012

	)	
In Re:	)	
[REDACTED]	)	
	)	Claims Case No. 2012-WV-072701.2
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The member elected to decline participation in the Survivor Benefit Plan (SBP). The member retired on September 30, 1993. The Defense Finance and Accounting Service (DFAS) later determined that the member's election to decline SBP coverage was invalid because the member's underage daughter signed the form as a witness. As a result, SBP coverage was effective October 1, 1993. Therefore, SBP premiums should have been deducted from his retired pay from October 1, 1993, through May 31, 2011. If the member had died during the period

when premiums were not being deducted, his wife would have become eligible for an SBP annuity. Since the member received the benefit of SBP coverage, waiver is not appropriate.

## **DECISION**

A retired member of the U.S. Navy, through his wife, requests reconsideration of the August 30, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-072701. In that decision, DOHA upheld DFAS's denial of waiver of the member's indebtedness to the government in the amount of \$27,136.56.

### **Background**

On August 25, 1993, the member completed NAVCOMPT Form 2272, *Navy Retired / Retainer Pay Data Form*, and elected to decline participation in SBP. The member's wife signed the Form 2272, acknowledging that she concurred with the member's election to decline SBP coverage. The member's daughter also signed the Form 2272 as a witness. The member retired from the Navy on September 30, 1993.

In 2005 the member was injured. At that time, his wife obtained power of attorney. In 2008 the member's wife contacted DFAS about his retired pay. She was told that her husband had elected to decline SBP coverage, and that she had concurred with his decision by signing the Form 2272, with her 15-year-old daughter signing as a witness. In 2011 the member's wife contacted her congressman about the matter. In response to the congressman's inquiry, DFAS discovered that the member's election to decline SBP coverage was invalid. The record reflects that DFAS made this determination based on its regulations concerning SBP election data requirements. DFAS determined that (1) a signature of a witness is required when a retired member's spouse concurs with the member's election to decline SBP coverage; and (2) the witness must be of the age of majority in the state in which the retired member resides, and must be a disinterested party. DFAS found that the member's daughter was a minor at the time she signed the Form 2272, and was not a disinterested party. Upon this discovery, DFAS adjusted the member's retired pay account to reflect automatic SBP coverage for his spouse with an effective date of October 1, 1993. DFAS began deduction of SBP premiums from the member's retired pay effective July 1, 2011. Since the member did not pay SBP premiums for the period October 1, 1993, through May 31, 2011, DFAS established a debt in the amount of \$27,136.56 on the member's retired pay account. The member's wife requested waiver of the indebtedness.

In the appeal decision, our office upheld DFAS's denial of the member's request for waiver. The DOHA adjudicator explained that under the waiver statute, 10 U.S.C. § 2774, a debt resulting from the non-deduction of SBP premiums may not be waived if the member received the benefit of the coverage. If the member had died during the period when premiums were not being deducted, his wife would have become eligible for an SBP annuity.

In the member's reconsideration request, his wife asserts that if her husband had died during the period when premiums were not being deducted, she would not have been informed of the invalidity of the Form 2272.<sup>1</sup> She further contends that if the discovery had been made, DFAS would have fought hard to not disperse an SBP annuity to her based on the fact that he had declined coverage. She also takes issue with the following language in the appeal decision: "We have consistently held that the United States is not liable for the erroneous or negligent acts of its officers, agents, or employees." She states that she was under the impression that the government stood behind its officers, agents and employees, just as officers, agents and employees stand behind our government. She questions why DFAS "instated" she and her husband for SBP, and not "reinstated" them.

### Discussion

We have the authority under 10 U.S.C. § 2774 to waive claims of the United States against members or former members of the uniformed services if collection would be against equity and good conscience and not in the best interests of the United States, and if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member, or any other person having an interest in obtaining a waiver of the claim. In applying for waiver, an applicant is not disputing their legal obligation to pay an indebtedness, but is arguing that as a matter of equity it would be inappropriate for the government to pursue collection in the circumstances of the case. The fact that a debt occurred as a result of administrative error does not by itself entitle the member to waiver. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.3. Waiver of a debt which arises due to non-deduction of insurance or SBP premiums is not appropriate if the member received the benefit of the coverage. *See* DOHA Claims Case No. 07022009 (February 28, 2007) and DOHA Claims Case No. 02120406 (December 19, 2002).

The SBP, 10 U.S.C. §§ 1447-1460b, is an income maintenance program for survivors of deceased members of the uniformed services. A married member is eligible to participate in SBP when he becomes entitled to retired pay, unless he elects with his spouse's concurrence not to participate before the first day for which he is eligible for that pay. *See* 10 U.S.C. § 1448. The SBP election data requirements are set forth under Chapter 43 of Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Survivor Benefit Plan — Elections and Election Changes. Notably, under paragraph 430303, two impartial persons must witness an election made by the member and spousal concurrence is required when the member elects to decline coverage or provide the spouse with less than the maximum SBP coverage available.

In this case, DFAS examined the Form 2272 executed by the member on August 25,

---

<sup>1</sup>We note that in her prior submissions, she stated that she was surprised that her husband elected to decline SBP coverage, and therefore, continued to pursue the matter. In fact, she stated that she did not recall signing her concurrence and had to obtain a copy of the Form 2272 from DFAS.

1993, and found that the member's election to decline SBP coverage was invalid because certain election data requirements were not met under their regulations. As a result, DFAS instated SBP coverage effective October 1, 1993, and established a debt in the amount of \$27,136.56 on the member's retired pay account for the unpaid premiums. If the member had died during the period the premiums were not being deducted, his wife would have become eligible for an SBP annuity, although DFAS would have deducted the outstanding premiums from the annuity. Since the member received the benefit of the SBP coverage during this period, waiver of the unpaid premiums is not appropriate. *See* DOHA Claims Case No. 07022009, *supra*, and DOHA Claims Case No. 02120406, *supra*.

We interpret the member's wife's argument concerning DFAS "instating" the SBP coverage and not "reinstating" it, as her contention that SBP coverage should not have become effective October 1, 1993, but at a latter date since the error in the election was not discovered until 2011. However, as discussed above, DFAS determined that the member's election was invalid. Therefore, under law, the SBP coverage was effective October 1, 1993.

Finally, in response to the member's wife's statement that DFAS admitted that it was their error in failing to recognize the invalidity of the member's election to decline SBP coverage, the adjudicator cited to a long-standing principle that the government is not liable for the erroneous or negligent acts of its officers, agents or employees, even if committed in performance of their official duties. *See* 56 Comp. Gen. 943 (1977) and B-191813, July 6, 1978. We have consistently held that when a member is in receipt of the benefit of SBP coverage, he incurs a legal obligation to pay for it. As stated above, although the government erred, the fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis, in and of itself, for granting waiver. Waiver is an equitable remedy. In this case, it is not against equity and good conscience to require a member who receives a benefit of coverage to pay for it. *See* DOHA Claims Case No. 08012801 (February 4, 2008).

### **Conclusion**

The member's request for relief is denied, and we affirm the August 30, 2012, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

---

Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

---

Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

---

Natalie Lewis Bley  
Member, Claims Appeals Board