

DATE: April 29, 2015

In Re:

[REDACTED]

Claimant

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Claims Case No. 2014-WV-072908.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The member's spouse became his Survivor Benefit Plan (SBP) beneficiary one year after they married, because the member did not decline SBP coverage within that year. If the member had died before the Defense Finance and Accounting Service (DFAS) began deducting SBP premiums from his retired pay, she would have been eligible for a SBP annuity, although DFAS would have collected the outstanding SBP premiums from her annuity. Because the member has received the benefit of the coverage, waiver is not appropriate.

DECISION

A retired Navy member requests reconsideration from the appeal decision dated March 24, 2015, of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-072908. In that case, this Office declined to waive the overpayment of \$36,608.41 in SBP premiums and one retroactive payment.

Background

The member retired from the United States Navy (USN) effective April 12, 1968, and elected Retired Serviceman's Family Protection Plan (RSFPP) coverage for his spouse and children. At that time the proper deductions were withheld from his military retired pay. On November 8, 1972, the member cancelled his RSFPP coverage and elected Survivor Benefit Plan (SBP) coverage for his spouse, and the proper deductions were again withheld from his military retired pay.

In October 1978, the member and his spouse divorced, and his divorce decree required him to retain life insurance policies wherein his former spouse would remain the beneficiary.

The divorce decree permitted him to dispose of his SBP as he so chose. On October 24, 1978, the member married his current spouse, and on October 25, 1978, he requested DFAS terminate SBP coverage for his former spouse. Since he also notified them of his remarriage, on December 5, 1978, the USN notified the member that his SBP coverage for his former spouse had been terminated, and that his new spouse would be eligible for SBP coverage on October 1, 1979. He was notified that he needed to decline coverage for his new spouse within one year after the date of his remarriage or he would be automatically enrolled in SBP, with his first premium due on November 1, 1979. However, due to an administrative error, his retired pay records were not timely updated, and as a result, no SBP premiums were deducted from his retired pay from November 1, 1979, through September 30, 2008, causing him to be overpaid \$28,886.19.

A further error occurred when DFAS updated the member's records to reflect that his SBP account was in a paid-up status.¹ If the member had paid his SBP premiums during the period November 1, 1979, through September 30, 2008, he would have been in a paid-up status. When DFAS updated his account to reflect this in August 2013, this update caused the member to erroneously receive a \$7,722.22 retired military payment on August 1, 2013, which represented the SBP payments he would have paid from October 1, 2008, through August 1, 2013, had they been deducted from his military retired pay. Thus the member's indebtedness increased to \$36,608.41 (\$28,886.19 + \$7,722.22).

In his request for reconsideration, the member insists that he was not informed of the above enrollment or disenrollment requirement. He states that after retiring from the USN, he received a license to master vessels on the high seas, and for twenty-five years he traveled the world. He sent copies of several of his passports to show travel to Viet Nam, Singapore, Indonesia, Borneo, Dubai, Saudi Arabia, Kuwait, Nigeria, Camaroon, Brazil, Mexico, Thailand, Spain, Thailand, Ghana, etc. His family moved among several of these countries. He states that receiving mail was difficult and he often had temporary addresses. The member also alleges that when he spoke with DFAS and attempted to enroll his new spouse, he was told that the time for eligibility had passed.

Discussion

Section 2774 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to or on behalf of members or former members of the uniformed services, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that the claim arose from an administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or any other person having an interest in obtaining the waiver.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. If a married member does not decline SBP coverage for his spouse upon retirement, coverage for the spouse is initiated. If the member no longer has an eligible spouse beneficiary and later remarries, he may decline coverage for the

¹ Per Public Law 105-261, October 17, 1998, a member attains paid-up SBP status after the 360 months of retired pay reduction for SBP premiums, and he/she reaches 70 years of age.

subsequent spouse if he does so within the first year of marriage. In this case, the member's first spouse agreed that the member could choose at his will what to do with SBP because the divorce decree required that he provide private life insurance for her. Comptroller General decisions indicate that a debt which arises due to non-deduction of SBP premiums may not be waived if the member received the benefit of coverage. See Comptroller General decisions B-254265, Dec. 20, 1993; and B-252123, Aug. 4, 1993.

The record in this case indicates that the USN sent the member a letter regarding his SBP entitlement for his new spouse, and there is no correspondence which reflects that the member declined the coverage. While the member states that he was told it was too late to apply for his new spouse, this Office has consistently held that the member's version of the events must be corroborated by the written record. There is no documentation in the record that corroborates the member's contention. Additionally, while this Office appreciates that mail delivery may have been difficult for the member, it clearly was not impossible as there are numerous examples of the member replying to correspondence from the Navy Finance Center and DFAS.

Regardless of those points, the main point of this issue is that the member's current spouse became his SBP beneficiary one year after they married because the member did not decline SBP coverage within that year. If the member had died before DFAS began deducting the SBP premiums from his retired pay, she would have been eligible for a SBP annuity, although DFAS would have collected the outstanding SBP premiums from her annuity. In his request for reconsideration, the member asks that his current spouse receive the annuity but requests that we waive the debt. The member cannot expect that his spouse will receive the benefit of an annuity without paying for it. His spouse is covered, and she will receive the annuity if he predeceases her. Because the member has received the benefit of the coverage, we must deny waiver of the premiums in the amount of \$28,886.19.

Regarding the overpayment of \$7,722.22 which the member erroneously received in August 2013, this amount must also be denied for waiver as there is no indication that the member reasonably should have expected to receive such a large payment. Further, there is no indication in the file that the member questioned his entitlement to such a significant amount. Department of Defense Instruction 1340.23 (hereinafter Instruction), *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances*, ¶ E4.1.4 states that a waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government.

As to the contention of the member that repayment of the debt will cause financial hardship, Instruction ¶ E4.1.7 states that financial hardship is not a factor for consideration in determining whether a waiver is appropriate. The member should contact DFAS regarding a more favorable repayment plan.

Conclusion

The request for reconsideration is denied, and the appeal decision dated March 24, 2015, requiring payment of the debt to the Government in the amount of \$36,608.41 is affirmed. In accordance with the Instruction, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

William S. Fields
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board