

KEYWORDS: Waiver of Indebtedness

DIGEST: A member’s Survivor Benefit Plan (SBP) election at retirement is irrevocable. He has the option of electing a reduced rate, but he must do so on or before the first date for which he becomes eligible for retired pay. After a member’s retirement, the base amount is set and cannot be reduced.

CASENO: 2015-WV-061602.2

DATE: 07/21/2016

DATE: July 21, 2016

In Re:)	
REDACTED)	Claims Case No. 2015-WV-061602.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member’s Survivor Benefit Plan (SBP) election at retirement is irrevocable. He has the option of electing a reduced rate, but he must do so on or before the first date for which he becomes eligible for retired pay. After a member’s retirement, the base amount is set and cannot be reduced.

DECISION

A retired Air Force member requests reconsideration of the May 31, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-061602. In that decision, this Office declined to waive overpayments of SBP premiums in the amount of \$2,620.22.

Background

The member was divorced on June 29, 2006. On April 30, 2007, a Military Qualifying Court Order (MQCO) was issued awarding the member's former spouse fifty per cent of his disposable retired pay. In addition, the member was required to provide his former spouse with the maximum possible Survivor Benefit Plan (SBP) protection. On April 25, 2011, the member completed DD Form 2656, *Data for Payment of Retired Personnel*, and elected child(ren) only coverage. The member retired on November 1, 2011. The member remarried on August 25, 2012.

The member petitioned the Air Force Board for Correction of Military Records (AFBCMR) requesting that his record be corrected to reflect that he elected former spouse coverage under SBP. On March 8, 2013, the AFBCMR granted his request to reflect that he elected former spouse and child coverage based on full retired pay effective November 1, 2011. The member's former spouse remarried on August 6, 2012, prior to obtaining the age of 55. The Defense Finance and Accounting Service (DFAS) therefore suspended the former spouse's coverage. On April 14, 2014, the member submitted a DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S.C. Code Section 1552*, to the Air Force. In that application, the member requested that his new spouse be covered under SBP, but he requested that she be covered under the minimum coverage, not the full coverage he was required to have for his former spouse by reason of the MQCO contained in their Final Judgment of Divorce. The Air Force responded to his request that corrective action was not necessary and DFAS could take the action requested. By letter dated August 26, 2014, DFAS, Retired and Annuitant Pay, advised the member that an adjustment had been made from child coverage to spouse and child coverage with an effective date of August 12, 2013. DFAS stated that the change was retroactive, and he was undercharged for SBP in the amount of \$2,620.22 (\$251.80 per month).

The member was charged at the full coverage rate for his new spouse. On August 27, 2014, the member wrote to DFAS and explained that he understood under normal circumstances that once full SBP coverage is elected, a member is not permitted to decrease coverage. However, he argued in his case that he had not elected the full coverage in the first instance, but rather it was mandated by the court for his former spouse. On October 1, 2014, the member and his current spouse completed a DD Form 2656-2, *Survivor Benefit Plan (SBP) Termination Request*. On October 7, 2014, DFAS advised the member that no further payments would be required after he paid the debt of \$2,620.22. The member contends that had the AFBCMR done what he had asked them to do on his second submission, this indebtedness would never have occurred. The member has requested reconsideration and believes that he has fully justified his case. He contends that he should never have been penalized in the first place. He argues that this was through no fault of his own, and he hopes this injustice can be remedied.

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 persons having an interest in obtaining the waiver.

As the statutory language indicates, whether to grant waiver under 10 U.S.C. § 2774, is not simply a matter of right whenever a member receives pay to which he is not entitled, but is to be decided on the principles of equity and fairness under the circumstances presented in each case. The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of deceased members of the uniformed services. In this regard, pursuant to a court order, the member was required to provide maximum SBP coverage for his former spouse. When the member's former spouse remarried, full former spouse SBP coverage was suspended, and his former spouse ceased being an eligible beneficiary under SBP. *See* 10 U.S.C. § 1450(b). However, the member also remarried in August 2012. Under the law, the member's new spouse became his SBP beneficiary at the maximum coverage level when he did not decline SBP coverage within one year after his marriage. Although the member may have been originally advised that he had to petition the AFBCMR for coverage for his new spouse as she was not otherwise eligible, this erroneous advice had no effect on the ultimate outcome.

The member argues that because the first election of SBP coverage was court mandated, he was not actually electing the level of coverage at the time of his retirement and should be allowed to elect a lower level of coverage for his current spouse. This Board notes that the member was represented by counsel in his divorce proceedings and Article XI regarding Independent Legal Advice indicates that "It is mutually agreed by and between Husband and Wife that this Agreement is made voluntarily by both parties, each having the advice or his or her counsel . . ." Therefore, it would seem that with benefit of counsel the member did voluntarily elect to provide his former spouse with SBP at the maximum coverage level. Once a level is elected at retirement, it is irrevocable. *See* 10 U.S.C. § 1448(a)(4). The fact that his election was made part of their divorce agreement is not relevant. In fact, the member failed to perform this task outlined in the divorce agreement and had to petition the AFBCMR. This Board notes that the action of a Correction Board is implemented to correct an error or remove an injustice, and is final and conclusive on all officers of the United States.

More importantly, this Board has consistently held that waiver is not appropriate for uncollected SBP premiums, whether or not the member knew he was being overpaid, because it is not inequitable for a member who receives the benefit of the coverage to pay for it. *See* DOHA Claims Case No. 2012-WV-072701.2 (October 18, 2012); DOHA Claims Case No. 08012801 (February 4, 2008); and DOHA Claims Case No. 00100332 (December 28, 2000). If the member had died during the period the premiums were not being deducted, his spouse would have become eligible for an SBP annuity at the maximum level, although DFAS would have deducted the outstanding premiums from the annuity.

Conclusion

The member's request for reconsideration is denied, and the May 31, 2016 appeal decision is affirmed. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

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Gregg A. Cervi
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Natalie Lewis Bley
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