

DATE: March 19, 2001

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In Re: [Redacted]

Claimant

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Claims Case No. 01010219

## CLAIMS APPEALS BOARD DECISION

### DIGEST

A retired member's former spouse requested a deemed election as beneficiary of his Survivor Benefit Plan (SBP) in accordance with a 1998 divorce decree. When the paperwork was processed in arch 2000, the retired member's debt was established for the costs of the SBP coverage between 1998 and 2000. Waiver is not appropriate for premium amounts because the member was responsible under the divorce decree to provide SBP coverage for his former spouse.

### DECISION

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) July 13, 2000, Settlement Certificate, DOHA Claim No. 00071101, which denied a former member's request for waiver of a debt to the government which arose when Survivor Benefit Plan (SBP) premiums were not deducted from his retired pay.

### Background

The record indicates that the retired member elected SBP coverage for his spouse when he retired from the Air Force in 1991. He was divorced in February 1998. In February 2000, he requested that his second wife receive SBP coverage. It was at this time that the retired member claims he learned that his first wife was eligible for former spouse coverage under SBP.

The February 11, 1998, divorce decree ordered the retired member to immediately designate his former spouse as the beneficiary under SBP and ordered that he would not modify, amend, withdraw, or in any other manner alter the election to name his former spouse as beneficiary under SBP. The retired member failed to designate his former spouse; however, in April 1998, his former spouse submitted appropriate paperwork for a deemed election. Due to administrative error, the Defense Finance and Accounting Service (DFAS) did not process the former spouse's deemed election until March 2000.

In July 1998, the retired member was issued a refund for SBP premiums withheld from his retired pay in March, April,

May, and June 1998 as a result of his divorce. In March 2000, when the former spouse's deemed election was processed, the retired member's debt was established in the amount of \$1,602.66, for the SBP costs during the period of March 1, 1998, through February 29, 2000. It was determined that the retired member's former spouse had been overpaid her portion of his retired pay and he had been underpaid for the period of April 1, 1998, through February 29, 2000. As a result, his debt was reduced to \$880.49.

DFAS determined that the retired member should have expected to pay the premiums for the SBP coverage for his former spouse as a result of the divorce decree. For not questioning the discontinuation of the SBP coverage for his former spouse after his divorce, he was not without fault and waiver was not considered appropriate. The Settlement Certificate upheld DFAS' denial of the waiver stating that the retired member was aware that he was supposed to elect his former spouse as beneficiary under the SBP program. With this obligation, our Office determined that collection of the premiums would not be against equity and good conscience, nor would it be contrary to the best interests of the United States.

On appeal, the retired member argues that he should not be the one held accountable for the debt. He questions the statement in the Settlement Certificate that he should have looked at his pay statements to determine that no SBP election was shown and that money was no longer being deducted for SBP after his divorce. He contends that the government must prove to him that he was aware of the court order to elect his former spouse as beneficiary under SBP. Additionally, he suggests that he at no time agreed to a term of his divorce being that his former spouse would receive SBP. He states that if the debt is not waived, he has contacted an attorney about having the divorce decree overturned.

### Discussion

Under 10 U.S.C. § 2774, we may waive collection of erroneous overpayments of pay and allowances to a member or former member of the uniformed services if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. Waiver is not appropriate if the member knew or should have known that he was receiving overpayments. *See* DOHA Claims Case No. 97092914 (November 26, 1997).

The SBP, 10 U.S.C. §§ 1447-1460b, is an income maintenance program for the survivors of members of the uniformed services. Spousal coverage ends upon divorce; if a member divorces and wishes to provide SBP coverage for his former spouse, he must notify DFAS in writing of the divorce and his intention to provide coverage for his former spouse, even if the former spouse was the spousal beneficiary immediately before the divorce. *See* 10 U.S.C. § 1448(b)(3)(A); and *Colonel Robert F. Schultz, USAF (Retired)*, B-249740, June 4, 1993. Former spouse coverage must be established within one year of the member's divorce. *See* 10 U.S.C. § 1448 (b)(3)(A); and *Constance L. Posner*, 71 Comp. Gen. 478 (1992). If the member is required under the terms of the divorce decree to provide SBP coverage to his former spouse and he fails or refuses to do so, the former spouse has one year from the date of the divorce to request a deemed election. *See* 10 U.S.C. § 1450(f)(3); *Nawanna Driggers*, 71 Comp. Gen. 475 (1992); and *Posner*, 71 Comp. Gen. 478, *supra*.

The retired member argues that a retiree should not be expected to look at pay statements provided by the government nor should he be expected to be aware of the deposits made to his account for retired pay. We note that it is a rule of long standing that if a member is provided information which if reviewed would indicate an error, waiver of a resulting overpayment is precluded because the member is at least partially at fault in the accrual of the debt. *See* DOHA Claims Case No. 97032501 (June 9, 1997) and cases cited therein; and *John P. Rieder*, B-259199, Feb. 22, 1995. The rule

applies to members of all ranks and military duties. Additionally, the Comptroller General and this Office have held that a reasonable person would be aware of his correct bank balance and would therefore be aware of unexplained payments. When the member or former member does not question such unexplained payments, he is considered partially at fault in the matter and waiver is precluded. See DOHA Claims Case No. 98020428 (March 12, 1998) and *Petty Officer First Class Patrick K. Reedy, USN (Retired)*, B-257862, Jan. 17, 1995.

The retired member was obligated by the terms of his divorce decree to elect his former spouse as beneficiary under the SBP program. When he did not do so, under 10 U.S.C. § 1450(f)(3) and (4), the retired member's former spouse appropriately deemed the election of SBP within one year of the date of divorce. It appears that the retired member's contention is that he was unaware of the terms of the 1998 divorce decree until after he remarried in 2000. Even if the retired member chose not to read or follow the orders of his divorce decree, he remains legally responsible for upholding the terms of the decree. If a divorcee disagrees with the terms of a decree, his remedy is through the courts. In the present case, the retired member's contention that he did not agree to his former spouse's entitlement to an SBP annuity as a term of the divorce is an issue for the courts to settle at his request. We do not have any evidence that the 1998 divorce decree has been terminated. Therefore, the former spouse appropriately deemed election of SBP, and the retired member is liable for the premiums. It is unfortunate that administrative error caused a two-year delay in the processing of her election, however, that has no impact on the retired members' obligations under the terms of the decree to pay for SBP for his former spouse.

### Conclusion

We affirm the Settlement Certificate.

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Michael D. Hipple

Chairman, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_  
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Christine M. Kopocis

Member, Claims Appeals Board

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Jean E. Smallin

Member, Claims Appeals Board