

November 30, 2005

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In Re:

[Redacted]

Claimant

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Claims Case No. 05100302

**CLAIMS APPEALS BOARD**  
**RECONSIDERATION DECISION**

**DIGEST**

Pursuant to a divorce decree, a member was required to elect a spousal annuity for his former wife and ordered to provide her with survivor's benefits. His former wife timely requested a deemed election. The member's subsequent election of a reduced base amount of Survivor Benefit Plan (SBP) coverage and his former spouse's signature on a DD Form 2656-1 has no effect on his court-ordered obligation to provide her with full, unreduced SBP coverage.

**DECISION**

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Appeal Decision, DOHA Claim No. 05060603, dated September 1, 2005, which denied the member's claim for reduced Survivor Benefit Plan (SBP) base amount coverage.

**Background**

On June 11, 1971, the member married. On August 19, 1992, the member was divorced. The divorce decree included a Qualifying Domestic Relations Order (QDRO) which required the member to elect a spousal annuity for his former wife and ordered the member to provide his wife with survivor's benefits. On August 24, 1992, the member's former wife's attorney submitted the QDRO to the Defense Finance and Accounting Service (DFAS) and requested a deemed election on her behalf. On November 7, 1992, the member remarried.

On May 2, 2001, the member signed a DD Form 2656, Data for Payment of Retired Personnel. The member checked Block 27b electing coverage with a reduced base amount of \$509.00. DFAS established SBP coverage for the member's former wife with a base amount of \$509.00, effective August 1, 2001, the date of the member's retirement. On May 2, 2001, the Air Force mailed a letter to the member's former wife advising her that the Air Force required her written consent if her former husband chose less than maximum coverage for her. The letter then stated: "If you agree with your spouse's election, sign block 14a-14d." The member's former spouse signed the enclosed DD Form 2656-1, Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage on May 8, 2001. On August 27, 2001, the member's former wife advised DFAS in a letter that she did not concur with her former husband's election of minimum coverage and that she thought that her signature on the DD Form 2656-1 may have waived her entitlement to maximum coverage and that was not her intent. DFAS subsequently advised the member's former wife that it had reviewed the file and found that the court intended her to have maximum SBP coverage.

On July 1, 2002, the member was recalled to active duty. Payment of his retired pay and SBP deductions were suspended. The member returned to retired status on June 1, 2004. When his retired pay resumed, the member noticed that his SBP deduction had increased from \$15 per month to more than \$295 per month.

The member appealed DFAS's determination that his former wife was entitled to maximum coverage as evidenced by QDRO. In the Appeal Decision, the DOHA adjudicator found that the member's former wife was entitled to maximum

SBP coverage because the member's election of reduced base SBP coverage was an attempt to change the terms of a court-ordered former spouse coverage election. As required under 10 U.S.C. § 1450(f)(2), in order to make the change, a court order which modified the prior court order relating to the election had to be furnished to the Secretary concerned.

The member now requests, through counsel, reconsideration of his claim. First, he argues that the QDRO only requires that he elect SBP coverage but is silent on the amount; DFAS's assumption that the state court meant SBP coverage at the maximum level is a conclusion that is arbitrary, capricious or an abuse of discretion. Second, the DOHA adjudicator committed error when he applied the "plain meaning rule" to interpret the language in the QDRO, "a pension survivor benefit," to mean "a pension survivor benefit at the maximum benefit level." Third, the former wife effectively waived SBP coverage at the maximum level by signing the DD Form 2656-1, and her waiver was not a result of fraud on the member's part. The member directs our attention to 10 U.S.C. § 1450(f)(2)(B), which allows the non-military spouse to agree to a lesser election than set forth in the order. The member argues that even if the QDRO can be interpreted to require maximum benefit, the former wife waived election in May 2001 by signing the DD Form 2656-1, SBP Election. Therefore, DFAS is required to honor the election of lesser benefits under 10 U.S.C. § 1450(f)(2)(B), and DFAS's failure to do so is an illegal taking from the member, an illegal impairment of his contractual rights and denial of due process.

### **Discussion**

The Survivor Benefit Plan, 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; however, a member may elect coverage for a former spouse. *See* 10 U.S.C. § 1448(b)(2). Coverage of a former spouse precludes coverage for a current spouse. *See* 10 U.S.C.

§ 1448(b)(2)(B). Former spouse coverage may be required under the terms of the divorce decree. When a member elects former spouse coverage, he must provide the Secretary concerned with a written statement setting forth whether the election is being made pursuant to a court order or to an agreement voluntarily entered into and incorporated in, ratified, or approved by court order. *See* 10 U.S.C. § 1448(b)(5). However, in certain circumstances, former spouse coverage can be established without the member's active participation. For instance, the former spouse may request a deemed election by providing the Secretary concerned with a written request and a copy of the court order requiring the election. *See* 10 U.S.C. § 1450(f)(3)(A).<sup>(1)</sup> The former spouse's deemed election request must be received by DFAS within one year of the date of the court order. *See* 10 U.S.C. § 1450(f)(3)(C). Pursuant to the deemed election, once the former spouse is designated the beneficiary under the SBP, a subsequent change can only be made following submission of a modifying court order to the Secretary concerned which permits such a change of election. *See* 10 U.S.C. § 1450(f)(2)(A) and B-248353, Sept. 10, 1992.

In the case before us, the member was obligated by the terms of his divorce decree to elect his former spouse as beneficiary under the SBP program. The QDRO included these pertinent paragraphs:

"11. Respondent will elect a spousal annuity or pension survivor benefits for Petitioner when he retires or at any other time when he must make this election. . . .

"14. Petitioner, the former spouse, is entitled to receive survivor benefits or a survivor's annuity. Respondent is directed and ordered to provide to Petitioner a survivor's spouse annuity or survivor benefits.

"15. An election by Respondent to provide additional survivor benefits to any other person shall have no effect to the extent it

causes reduction in the survivor annuity or survivor benefits awarded to Petitioner pursuant to the order."

The member is correct that there is nothing in the court order stating the level of coverage. However, there is no language concerning election of coverage at less than the maximum level. In addition, paragraph 15 specifically states that a subsequent election to provide survivor benefits to another person will have no effect on reducing the survivor benefits provided to the member's former wife. Although the member could not have elected additional SBP for another person, this language clearly reflects the court's intent to award full, unreduced SBP coverage to the member's former spouse. Therefore, looking at the plain meaning of the QDRO, plus the relevant portions of the statute, DFAS was

correct in its interpretation of the state court order. <sup>(2)</sup>

When the member's former spouse requested a deemed election pursuant to the divorce decree, DFAS properly informed her that upon her husband's retirement, she would be designated as the former spouse SBP beneficiary. When the member elected former spouse SBP coverage at a reduced base amount, his election failed to comply with the QDRO. <sup>(3)</sup> Therefore, under 10 U.S.C. § 1450(f)(3)(A), the former spouse's timely submitted request for a deemed election protected her entitlement to SBP coverage as dictated by the QDRO. Under the statute, the only way to change the level of coverage where the election is dictated by a court order, is for the member to provide a certified copy of a court order which modifies the provisions of the prior order relating to the election. *See* 10 U.S.C. 1450(f)(2)(A). <sup>(4)</sup> As stated in the Appeal Decision, no such order was obtained. <sup>(5)</sup>

Finally, for argument sake only, there is nothing in the record that shows that the former

spouse knew she was waiving her right to full coverage when she signed the DD Form 2656-1. It is not clear whether she received a copy of DD Form 2656. In addition, even if she were able to affect a change by signing the DD Form 2656-1, there would be no reason for her to have chosen the lesser amount of coverage. *See* 51 Comp. Gen. 298 (1971), and B-163946, June 21, 1968, in which the assumption was made that an individual would prefer to be paid the greater benefit or be reimbursed for the larger amount.

### Conclusion

For the reasons stated, the request for reconsideration is denied, and the appeal decision is sustained. In accordance with 32 C.F.R. Part 282, Appendix E, paragraph o(2), this is the final Department of Defense action in this matter.

\_\_\_\_\_/s/\_\_\_\_\_

Michael D. Hipple

Chairman, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_

Jean E. Smallin

Member, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_

Catherine M. Engstrom

Member, Claims Appeals Board

1. Congress accepted the fact that entitlement to an SBP annuity might be a basis for negotiation in a property settlement. If a member agrees to provide an SBP annuity to his former spouse, she ought to be able to rely on his agreement and ought to be able to request a deemed election if the member fails or refuses to make an election for her. *See* 66 Comp. Gen. 687, 691 (1987).

2. Under the definition section, 10 U.S.C. § 1447, standard annuity is defined as meaning an annuity provided by virtue of eligibility under section 1448(a)(1)(A). The term base amount means the full amount under the standard annuity.

3. When the member filled out DD Form 2656, and checked 26e, stating that he elected coverage for his former spouse, his election was based on the final divorce decree. He was required to attach a certified photocopy of the final decree that discussed SBP for former spouse coverage. Coverage was already established by the language of the QDRO. Therefore, his attempt to elect less than base amount of coverage in 27b, had no effect.

4. We note that in his request for reconsideration, the member argues that 10 U.S.C.

§ 1450(f)(2)(B) applies. However, this subparagraph only applies in the absence of a court order.

5. We note that the member was advised by the Office of the General Counsel, DFAS, that he could seek clarification order from the court stating that the court intended to give the member discretion on election the level of SBP for his former spouse.