

KEYWORDS: waiver of indebtedness; SBP

DIGEST: The member elected Survivor Benefit Plan (SBP) coverage for his spouse and retired. The member divorced and subsequently remarried. He did not decline SBP coverage. Under the law, his new spouse became his SBP beneficiary one year after their marriage. SBP premiums should have been deducted from his retired pay, but they were not. He then divorced his second spouse and remarried another. He subsequently notified the appropriate officials about his remarriage and requested coverage for his third spouse. Once that spouse became his SBP beneficiary, the Defense Finance and Accounting Service (DFAS) failed to deduct SBP premiums for a month, causing an overpayment. If the member had died during the periods when premiums were not being deducted, his spouse who was his SBP beneficiary would have become eligible for an SBP annuity. Since the member received the benefit of SBP coverage, waiver is not appropriate.

CASENO: 08110601

DATE: 11/18/2008

DATE: November 18, 2008

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In Re: )  
          ) [REDACTED] ) Claims Case No. 08110601  
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Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The member elected Survivor Benefit Plan (SBP) coverage for his spouse and retired. The member divorced and subsequently remarried. He did not decline SBP coverage. Under the law, his new spouse became his SBP beneficiary one year after their marriage. SBP premiums should have been deducted from his retired pay, but they were not. He then divorced his second

spouse and remarried another. He subsequently notified the appropriate officials about his remarriage and requested coverage for his third spouse. Once that spouse became his SBP beneficiary, the Defense Finance and Accounting Service (DFAS) failed to deduct SBP premiums for a month, causing an overpayment. If the member had died during the periods when premiums were not being deducted, his spouse who was his SBP beneficiary 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 United States Air Force requests reconsideration of the September 17, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08080101. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS) denial of waiver of the member's indebtedness to the government in the amount of \$3,795.00.

### **Background**

On April 17, 1995, the member elected Survivor Benefit Plan (SBP) coverage for his spouse. On August 1, 1995, the member retired from the United States Air Force. On May 15, 2001, the member was divorced. On May 17, 2001, he requested that his SBP coverage be suspended. On July 25, 2001, the member remarried. Because he did not decline SBP coverage for his new spouse, she became an eligible beneficiary effective one year from the date of their marriage. SBP premiums should have been withheld from the member's retired pay effective August 1, 2002. However, SBP premiums failed to be deducted from his retired pay during the period August 1, 2002, through August 31, 2006, causing an overpayment of \$3,712.28. On August 22, 2006, the member divorced. On September 8, 2006, he remarried. On April 20, 2007, he notified the appropriate officials and requested SBP coverage for his third spouse. SBP premiums should have been withheld from the member's retired pay effective October 1, 2007. However, SBP premiums failed to be deducted from his retired pay during the month of October 2007, causing an overpayment of \$82.72. As a result, the member was overpaid a total of \$3,795.00

Our Office determined that it would not be against equity and good conscience to collect the overpayment from the member since the member's spouse (second or third) would have been covered under SBP had he died during the period when no SBP premiums were deducted from his retired pay.

In his reconsideration request, the member states that when he married his second wife, he asked DFAS about her benefits and was told that she could be enrolled only after a year of marriage and that he could elect not to include her in SBP coverage, in part by not making any benefit payments for her. He states that his wife left him the day after their marriage and he had no way to obtain her consent to exclude her from SBP coverage. He states he consulted his local judge advocate (JAG) attorney and was told to file new forms showing his new spouse and

showing that he had not elected survivor benefits for her. He states that he did this. He argues that under the DoD Financial Management Regulation (DoDFMR), there is no prescribed form required to exclude a spouse from receiving SBP. He argues that DFAS's failure to reduce his retired pay reinforced his belief that he had done all that was necessary to exclude his spouse. He also cites paragraph 430767 of the DoDFMR, as allowing the Secretary to correct an election when necessary to correct an administrative error. He states that the error occurred through no fault on his part and that the debt therefore should be waived.

### **Discussion**

Under 10 U.S.C. § 2774, we have the authority to waive claims of the United States against members (including retired members) of the Uniformed Services if collection would be against equity and good conscience and not in the best interest of the United States. Waiver may not be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. The fact that an erroneous payment is solely a result of administrative error or mistake on the part of the government is not a sufficient basis in and of itself for granting waiver. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.3, and DOHA Claims Case No. 08032002 (March 21, 2008).

The SBP, 10 U.S.C. §§ 1447-1460b, is an income maintenance program for survivors of deceased members of the Uniformed Services. If a member ceases to have an eligible spouse beneficiary and later remarries, he may decline coverage for the subsequent spouse if he does so within the first year of marriage. *See* 10 U.S.C. § 1448(a)(6). Waiver of a debt resulting from the non-deduction of SBP premiums is not proper if the member received the benefit of the coverage. *See* DOHA Claims Case No. 08032002, *supra*; DOHA Claims Case No. 07030508 (March 13, 2007); DOHA Claims Case No. 02120406 (December 19, 2002); and DOHA Claims Case No. 98060410 (September 30, 1998).

In this case, when the member retired, his wife was covered under SBP. Her coverage ceased upon their divorce. When the member remarried in July 2001, his wife automatically became his SBP beneficiary one year after their marriage since he did not decline coverage for her. Her coverage ceased upon their divorce. When the member remarried in September 2006, he requested SBP coverage for his new wife. She became his SBP beneficiary one year after their marriage. If the member had died during the periods the premiums erroneously were not being deducted, August 1, 2002, through August 31, 2006, and the month of October 2007, his spouse would have been entitled to an SBP annuity, although DFAS would have collected the outstanding SBP premiums from the annuity.

Although the member states that he was told that he could elect not to provide SBP coverage for his new wife, in part by not making any benefit payments for her, under applicable law the member's spouse became his SBP beneficiary one year after they married, because DFAS has no record that the member declined SBP coverage within one year after his marriage. The member states he was advised by the JAG office to file new forms showing he did not elect

coverage for his new spouse, which he states he did do. However, the member has not provided documentation showing he submitted this paperwork to DFAS, and the record contains no evidence of it. In circumstances such as this, we accept the agency's statement of facts absent clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 03082101 (August 29, 2003).

Finally, the member refers to a paragraph in the DoDFMR allowing the Secretary to correct an election when necessary to correct an administrative error. We note that paragraph 430707 of the DoDFMR states that the Secretary of the Military Department concerned (or designee) may correct any election when the Secretary considers it necessary to correct an administrative error. However, our Office has no authority over correction of an election. Our authority in this matter is limited to a consideration of whether the member's debt may be waived under 10 U.S.C. § 2774. The member's debt arose from the failure to deduct SBP premiums from his retired pay. As stated above, we have consistently held in such a situation that since the member received the benefit of the coverage, waiver of repayment of the unpaid premiums is not appropriate.

### **Conclusion**

The member's request for relief is denied, and we affirm the September 17, 2008, 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: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board