

This decision was affirmed by the DoD Deputy General Counsel (Fiscal) on March 8, 2002.

July 21, 2000

In Re:

[Redacted]

Claimant

Claims Case No. 99102801

CLAIMS APPEALS BOARD DECISION

DIGEST

A member elected Survivor Benefit Plan (SBP) coverage for his spouse at retirement. Although the member states that he attempted to elect former spouse SBP coverage immediately after his subsequent divorce, the Defense Finance and Accounting Service did not receive notification of the divorce until more than three years after it occurred. Since the member did not elect former spouse SBP coverage within one year of his divorce and his former spouse did not request a deemed election within that year, the member's claim for coverage for her must be denied. The member elected SBP coverage for his current spouse after he remarried, and she remains his SBP beneficiary in the absence of a court order modifying the divorce decree in such a way as to give the member's former spouse a right to an SBP annuity which she did not have in the original decree.

DECISION

We have been asked to render a decision regarding the claim of a retired Army member for Survivor Benefit Plan (SBP) coverage for his former spouse.

Background

The member elected SBP coverage for his spouse when he retired from the Army in 1987. He was divorced on September 6, 1989. Prior to the issuance of the court order which terminated their marriage, the parties reached a separation agreement which, among other issues, divided the parties' financial interests. That agreement, which was written in long-hand and dated August 1, 1989, included the statement that the wife would receive "100 % of the

survivor benefits of his military benefits" and that the husband would complete the paperwork necessary to accomplish that. In its order the court stated that it approved the parties' separation agreement and incorporated by reference certain provisions of the agreement into the court's order.⁽¹⁾ The member states that in September 1989 he submitted to the Defense Finance and Accounting Service (DFAS) copies of the court order and the parties' separation agreement in order to comply with his agreement to provide SBP coverage for his former spouse. He also states that he called DFAS on several occasions to verify that DFAS had received the documents and made the proper changes, but did not receive a definitive answer. DFAS has no record of that submission or the member's calls. Because DFAS was unaware of the member's divorce, premiums continued to be deducted from his retired pay for spousal coverage.⁽²⁾ The member remarried in January 1993, and DFAS became aware of his 1989 divorce when he contacted them to obtain SBP coverage for his new spouse, who became his SBP beneficiary one year after their marriage. In the absence of action to cover his first wife as a former spouse, the member had no SBP beneficiary from the time of his divorce until his second wife became eligible. DFAS therefore refunded to him the SBP premiums deducted from his retired pay during that period. When his first wife became aware that he had not elected former spouse SBP coverage for her, she sought to compel him to provide coverage. The member has asked DFAS to transfer the SBP coverage from his current spouse to his former spouse, and his current spouse has agreed to that transfer. DFAS has informed the member that he had one year after his divorce to elect coverage for his former spouse and that his former spouse had the same one year to request a deemed election. DFAS states that since neither the member nor his former spouse acted within one year of their divorce, DFAS is precluded from establishing coverage for her. Since in DFAS' view the 1989 court order did not grant SBP coverage to the member's first wife,⁽³⁾ DFAS indicates that it would transfer SBP coverage to her if the appropriate West Virginia court issued a modified or amended order granting coverage to her. We note that in November 1994 the member petitioned the Army Board for Correction of Military Records (Army Board) to correct his military records to designate his first wife as his SBP beneficiary, but the Army Board declined to make the correction.

Discussion

We note at the outset that this decision addresses only the member's claim for SBP coverage for his former spouse. The Claims Appeals Board must base its decision on the written record submitted to us by DFAS and any evidence submitted by the claimant. The Board has no authority to investigate the claim independently or subpoena witnesses. *See* 4 C.F.R. § 31.7 (1996). We also note that the Claims Appeals Board has no jurisdiction over the Army Board.⁽⁴⁾

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*, 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.⁽⁵⁾ *See* 10 U.S.C. § 1450(f)(3); *Nawanna Driggers*, 71 Comp. Gen. 475 (1992); and *Posner*, 71 Comp. Gen. 478, *supra*. After that year has elapsed, a change to former spouse coverage based on the original divorce decree cannot be made. If the court later modifies the divorce decree to give the former spouse rights to SBP coverage which she did not have under the original decree, a new one-year period arises during which the former spouse can become the member's beneficiary.⁽⁶⁾ *Id.*

In the case before us, the member states that he sent copies of his divorce decree and the separation agreement which accompanied it to DFAS shortly after his divorce, but DFAS indicates that it did not receive the documents until after the member remarried in 1993. Because the burden of proof is on the member, this Office must accept as fact DFAS's

statement that it did not receive notification of the member's divorce until 1993 unless the member can provide clear and convincing evidence that he submitted the documents in 1989. He has provided no such evidence. Since the member did not elect former spouse coverage within one year of his divorce and his spouse did not obtain a deemed election within that year, former spouse coverage is not available for her.

DFAS properly refunded the SBP premiums which the member paid from the date of his divorce until his second wife became an eligible beneficiary. Under 10 U.S.C. § 1452(a)(3), no premiums were payable while there was no eligible beneficiary. As discussed above, a former spouse cannot be an SBP beneficiary unless the member affirmatively elects her as a former spouse, even if she was his spouse beneficiary immediately before their divorce. *See Schultz*, B-249740, *supra*. We agree with the member's assertion that he did not request that refund. DFAS had collected premiums from the member in the belief that he was still married to his first wife. DFAS was required to refund the payments without the member's request when it learned that the member had had no eligible SBP beneficiary for over three years.

The fact that the member's current spouse is willing to relinquish her SBP coverage does not allow coverage to be established for his former spouse. SBP elections must be made according to law. In the absence of a modified court order described below, the member's election of his current spouse is generally irrevocable. Moreover, in the absence of such an order, his former spouse is not currently eligible for SBP coverage, because neither an election nor a deemed election on her behalf was made within one year of the divorce. *See Posner*, 71 Comp. Gen. 478, *supra*. Even if the member's current spouse declined benefits, the former spouse would remain ineligible in the absence of a modified court order.

As stated above, DFAS has no record of the member's attempted former spouse election in 1989 and did not receive a copy of his divorce decree and separation agreement until 1993. DFAS indicates that since the 1989 divorce decree does not entitle the member's spouse to SBP coverage, [\(7\)](#) a modified court order which granted the member's former spouse a right to an SBP annuity would give rise to a new one-year period during which she could request a deemed election. *See Driggers*, 71 Comp. Gen. 475, *supra*; and *Posner*, 71 Comp. Gen. 478, *supra*. *See also aster Sergeant George M. McClain, USAF (Retired) (Deceased)*, B-248017, Sept. 16, 1992; and *Peggy Wimberly Minier*, B-232319, Mar. 23, 1990. The fourth of those decisions is the only one in which a court's action subsequent to the divorce decree gave rise to a new opportunity for a deemed election. In the other three the court's action did not give the former spouse a right to an SBP annuity which she did not already have under the earlier court order.

Conclusion

The member's claim is disallowed.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. The provisions incorporated by reference were those dealing with "custody, support, visitation, exclusive use and possession, and the payment of alimony." SBP was not included in that list.
2. As discussed below, SBP coverage of a retired member's spouse ends at divorce unless either the member elects former spouse coverage within one year of their divorce or the former spouse obtains a deemed election within the same time period.
3. See Footnote 1.
4. If the Army Board corrected the member's record to indicate that he elected SBP coverage for his former spouse within the prescribed one-year period, that decision would be binding on all government officers including the Claims Appeals Board.
5. In 66 Comp. Gen. 687 (1987), the Comptroller General explained the purpose of a deemed election. Congress accepted the fact that entitlement to an SBP annuity might be a basis for negotiation in a property settlement. If a member voluntarily agrees to provide an SBP annuity to his former spouse, she ought to be able to rely on his agreement to do so and therefore ought to be able to request a deemed election if the member fails or refuses to make the election for her. As stated above, the former spouse has only one year to make the request.
6. Under 10 U.S.C. § 1448 (b)(3), the member's spouse must be notified of his election of his former spouse, since the spouse would lose coverage upon the new election.
7. See Footnote 1.