

RECORD OF PROCEEDINGS  
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: 96-03174

[REDACTED] (Deceased)

COUNSEL: None (Counsel listed  
on DD 149 is **no longer**  
retained by applicant)

HEARING DESIRED: Yes

OCT 28 1997

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APPLICANT REQUESTS THAT:

Her late husband's records be corrected to reflect that he elected spouse coverage under the Survivor Benefit Plan (SBP).

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APPLICANT CONTENDS THAT:

Her rights were violated because her spousal concurrence in the decedent's SBP election was never obtained. The Air Force never informed her of the change after they had made the initial election on her behalf. At the time her late husband retired, they were experiencing domestic difficulties and had separated. There was never a divorce or legal separation. Later they reconciled and lived as husband and wife until his death. She assumed she was covered by the initial Air Force decision. Apparently her late husband never realized she was not covered because he always assured her she was. In 1991, he suffered a stroke with consequent memory loss and, even if he had been aware of it, was unable to correct the situation. She is in desperate need of this benefit.

In support of her request, applicant submits, in part, her late husband's Retired Pay Account Statement (AFAFC Form 0-457), for 31 October 1972, and a 7 October 1972 letter and fact sheet from the Air Force Accounting and Finance Center (AFAFC) to her husband pertaining to the newly implemented SBP.

Applicant's complete submission is attached at Exhibit A.

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STATEMENT OF FACTS:

Public Law (PL) 92-425, which authorized implementation of the SBP on 21 September 1972, required the spouse of a married member to be notified if, before retirement, the member elected not to participate in the Plan at the maximum level. If a member made no election before retirement, the law required maximum coverage to be established for the spouse and children. Section 1455 of

the law permitted members who retired within 180 days of implementation of the SBP to elect not to participate within 180 days of their retirement, but did not require the spouse to be notified if the member opted after retirement to terminate the spouse coverage established in the absence of a pre-retirement election. The US Court of Claims has ruled that widows of members who retired after SBP's implementation who are not given notice of a sponsor's election are entitled to full SBP coverage (Barber v. US, Dean v. US, Kelly v. US). The spouse's written concurrence in elections for less than full coverage is required for members retiring after 28 February 1986 (PL 99-145).

Applicant and the decedent and were married on 26 June 1955. He retired effective 1 October 1972 but did not make an SBP election prior to that time. An AFAFC letter to the decedent, dated 7 October 1972, explained that SBP coverage had been established on his spouse's behalf in compliance with the provision of the law that required establishment of maximum spouse and child coverage if a member, such as the applicant, made no election before retirement. The letter also provided guidance for changing the election. On 25 October 1972, the applicant indicated on the SBP Election Change, DD Form 1882, that he elected child-only coverage based on full retired pay for his five children. He also marked the block that indicated he was not married. According to HQ AFPC/DPPTTR, his retired pay records contain no evidence the applicant was notified of the decedent's post-retirement election. Premiums for child-only coverage were deducted from the decedent's retired pay until July 1994, when his youngest child attained age 22 and lost eligibility. The decedent died on 18 February 1996.

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AIR STAFF EVALUATION:

The Chief, Retiree Activities Branch, HQ AFPC/DPPTTR, reviewed this application and states many members who retired very shortly after the SBP's implementation had no opportunity to complete an SBP election before retirement. In the absence of an election, maximum spouse and child coverage was automatically established. However, there were no legal or regulatory requirements to notify the spouse of a member who changed an election during that period. Furthermore, had the Services been required to notify the spouse of a member's post-retirement election to decline spouse coverage, the spouse would have had no right to effect a change to the election. The provision giving a spouse veto rights in a member's election by non-concurring in the election became effective 1 March 1986 and applied only to members retiring on or after that date. The notice provision in the implementing legislation required spousal notice only if the member elected not to participate before retirement. In this case, the member retired only nine days after SBP's implementation and he did not decline coverage before retiring. The AFAFC acted in compliance with the statute by establishing the member's SBP election for

child-only coverage, and neither statutory nor regulatory guidance required the applicant be notified.

The author clarifies these points to refute the applicant's contention that her rights were violated and she was unfairly denied benefits. Even if she had been notified of the decedent's post-retirement election and registered an objection, the law made no provision for changing the election to provide coverage for her. This case differs from those cases referred to as Barber cases in that the member did not decline coverage before his retirement; in Barber, et al, the members declined coverage before retiring and the Air Force could produce no evidence showing the spouses had been notified as required by law.

While the applicant's counsel contends the decedent did not realize the applicant was not entitled to SBP benefits, it is clear he knew because he ceased paying premiums two years before his death. The decedent was provided open enrollment information in 1981 and 1992, offering him a second and third opportunity to cover the applicant; however, he failed to act.

Denial is recommended. A method for correcting the records is provided if the Board should decide to grant relief. However, approval should be contingent upon the applicant's providing proof that she and the decedent were married on the date he retired and recovery of premiums the decedent would have paid had he made the election.

A complete copy of the evaluation, with attachments, is provided at Exhibit B.

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APPLICANT'S REVIEW OF AIR FORCE EVALUATION:

Applicant reviewed the Air Force evaluation and states she was married to the decedent when he retired, as evidenced by the Certificate of Appreciation she received when he retired. She does not know why he checked the block that indicated he was unmarried. They were never divorced. Her husband suffered a stroke in 1991, which caused memory lost among other health problems. When the premiums stopped being paid in July 1994 after their youngest child turned 22, she did not realize that she was to be without any benefits. She relied on her husband's word that she would be provided for. She does not believe her husband realized the error in checking the wrong box on a military form 20 years ago. She cites Barber, Dean and Kelly, and contends that, since she was never given the required statutory notification of her husband's retirement election, she is entitled to full SBP coverage.

She provides 13 packets of additional documentation such as affidavits; employment and retirement information on herself and

her husband; financial documents such as **tax** returns, insurance, retired pay accounts, etc.; birth/marriage/death certificates; and pictures of her family.

Applicant's complete response, with attachments, is provided at Exhibit D.

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THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.
2. The application was timely filed.
3. Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. After a thorough and careful review of the evidence of record and applicant's submission, we are not persuaded that her late husband's records should be corrected to reflect that he elected spouse coverage under the SBP. Public Law 92-425, which implemented the SBP on 21 September 1972, required the spouse of a married member to be notified if, before retirement, the member elected not to participate in the Plan at the maximum level. If a member made no election before retirement, the law required maximum coverage be established automatically for the spouse and children. However, Section 1455 of the law permitted members who retired within 180 days of the implementation of the SBP to elect not to participate within 180 days of their retirement. At this time, the law did not require the spouse to be notified if the member opted--after retirement--to terminate the spouse coverage that had been established in the absence of a pre-retirement election. Spousal written concurrence in elections for less than full coverage applied only to those members who retired after 28 February 1986. The provision giving a spouse veto rights in a member's election or non-election did not become effective until 1 March 1986. We note that the decedent retired on 1 October 1972 and, since he made no SBP election before he retired, SBP coverage was automatically established in behalf of the applicant and their children in compliance with the law. When the decedent decided on 25 October 1972 to change the coverage to child-only, statute did not require that the applicant be notified. At that time, she was only required to be notified, if her late husband had declined coverage before he retired. Therefore, applicant's reliance on Barber v. US is misapplied. Further, assuming *in arguendo* that she was required to have been notified of her husband's change in election after his retirement, which she was not, she would not have had the option at that time to nonconcur with his election. Finally, even if the decedent's stroke in 1991 impaired his ability to elect coverage during the 1992 open season as the applicant contends, we note he could have obtained coverage for her in the 1981 open season but did not do so. In view of the foregoing, we conclude that the applicant has failed

to sustain her burden that she has suffered either an error or an injustice. We therefore find no compelling basis to recommend granting the relief sought.

4. The documentation provided with this case was sufficient to give the Board a clear understanding of the issues involved and a personal appearance, with or without legal counsel, would not have materially added to that understanding. Therefore, the request for a hearing is not favorably considered.

**THE BOARD DETERMINES THAT:**

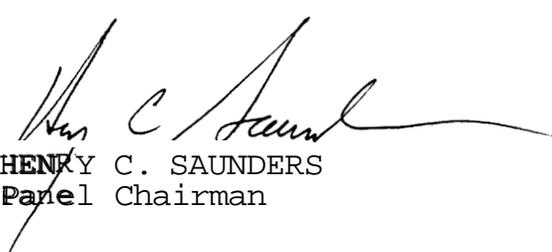
The applicant be notified that the evidence presented did not demonstrate the existence of probable material error or injustice; that the application was denied without a personal appearance; and that the application will only be reconsidered upon the submission of newly discovered relevant evidence not considered with this application.

The following members of the Board considered this application in Executive Session on 9 September 1997, under the provisions of AFI 36-2603:

Mr. Henry C. Saunders, Panel Chairman  
Ms. Kathy L. Boockholdt, Member  
Mrs. Barbara A. Westgate, Member  
Ms. D. E. Hankey, Examiner (without vote)

The following documentary evidence was considered:

Exhibit A. DD Form 149, dated 23 Sep 96, w/atchs.  
Exhibit B. Letter, HQ AFPC/DPPTR, dated 13 Dec 96, w/atch.  
Exhibit C. Letter, AFBCMR, dated 30 Dec 96.  
Exhibit D. Applicant's Response, dated 18 Feb 97, w/atchs.



HENRY C. SAUNDERS  
Panel Chairman



DEPARTMENT OF THE AIR FORCE  
HEADQUARTERS AIR FORCE PERSONNEL CENTER  
RANDOLPH AIR FORCE BASE TEXAS

U.S. AIR FORCE



MEMORANDUM FOR AFBCMR

FROM: HQ AFPC/DPPTR  
550 C Street West Ste 11  
Randolph AFB TX 78150-4713

13 DEC 1996

SUBJECT: Application for Correction of Military Records

Reference: [REDACTED]

Requested Correction: Applicant, widow of the above-named retired member, is requesting corrective action that would entitle her to a Survivor Benefit Plan (SBP) annuity.

Basis for Request: Applicant claims her rights were violated because her written concurrence in the decedent's SBP election was not obtained.

Background:

a. Public Law (PL) 92425, which authorized implementation of the SBP on 21 Sep 72, required the spouse of a married member to be notified if, before retirement, the member elected not to participate in the Plan at the maximum level. If a member made no election before retirement, the law required maximum coverage to be established for the spouse and children. Section 1455 of the law permitted members who retired within 180 days of implementation to elect not to participate within 180 days of their retirement, but did not require the spouse to be notified if the member opted after retirement to terminate the spouse coverage established in the absence of a preretirement election.

b. The U.S. Court of Claims has ruled that widows (of members who retired after SBPs implementation) who are not given notice of sponsor's election are entitled to full SBP coverage—Barber v. U.S., 676 F.2d 651 (Cl. Ct. 1982); Dean v. U.S., 10 Cl. Ct. 563 (1986); and Kelly v. U.S., 826 F.2d 1049 (Fed Cir. 1987). The spouse's written concurrence in elections for less than full coverage is required for members retiring after 28 Feb 86 (PL 99-145).

Facts: Documents provided by the applicant and from the decedent's military record show they were married 26 Jun 55. The member retired effective 1 Oct 72, but did not make an election prior to that time. Documents provided by the applicant include a copy of a 7 Oct 72 letter to the decedent from the Air Force Accounting and Finance Center (AFAFC) which explained SBP coverage had been established on his spouse's behalf to comply with the provision of the law that requires maximum spouse and child coverage to be established if a member made no election before retirement. The letter also provided guidance for changing the election. Subsequently, the decedent elected child only SBP coverage based on full retired pay and marked the block that indicated he was unmarried. The decedent's retired pay records contain no evidence the applicant was notified of the member's post-retirement election. Premiums for child only coverage were deducted from the member's retired pay until Jul 94 when his youngest child attained age 22 and lost eligibility. The member died 18 Feb 96.

REACT FILE

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Discussion:

a. Many members who retired very **shortly** after the **SBP's** implementation had no opportunity to complete an **SBP election** before retiring. In the absence of an election, maximum spouse and child coverage was automatically established. However, there were no legal or regulatory requirement to notify the spouse of a member who changed an election during that period. Furthermore, had the Services been required to notify the spouse of a member's post-retirement election to **decline** spouse coverage, the spouse would have had no right to effect a change to the election. The provision giving a spouse veto rights in a member's election by non-concurring in the election became effective 1 Mar 86 and applied only to members retiring on or after that date.

b. The notice provision in the implementing legislation required spousal notice only if the member elected not to participate before retirement. In this case, the member retired only nine days after **SBPs** implementation and he did not decline coverage before retiring. The AFAC acted in compliance with the statute by establishing the member's SBP election for child only coverage, and neither statutory nor regulatory guidance required the petitioner to be notified.

c. We clarify these points to refute petitioner's contention that her rights were violated and she was unfairly denied benefits. Even if she had been notified of the decedent's post-retirement election and registered an objection, the law made no provision for changing the election to provide coverage for her. This case differs from those cases referred to as Barber cases, in that the member did not decline coverage before his retirement; in Barber et al, the members declined coverage before retiring and the Air Force could produce no evidence showing the spouses had been notified as required by law.

d. **Petitioner's** counsel states the decedent did not realize the petitioner was not entitled to survivor benefits. However, it is **clear** the decedent knew the petitioner was not covered by SBP because he ceased paying premiums **two** years before his death. He **was** provided open enrollment information in 1981 and 1992, offering him a second and third opportunity to cover the petitioner, however, he failed to act.

Recommendation: There is no evidence of **error** or injustice and we recommend the request be denied. However, if the Board's decision is to grant relief, the decedent's military record should be corrected to show on 30 Sep 72 he elected SBP coverage for his spouse and children based on full retired pay. Approval should be contingent upon (1) the applicant's providing proof that she and the decedent **were married** on the date he retired and (2) recovery of premiums the decedent would have paid had he made this election.

*Mary S. Holter*

MARY S. HOLTER, DAFC  
Chief, Retiree Services Branch  
Directorate of Pers Program Mgt

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