

RECORD OF PROCEEDINGS
AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

IN THE MATTER OF:

DOCKET NUMBER: BC-2012-01230
COUNSEL:
HEARING DESIRED: NO

APPLICANT REQUESTS THAT:

She be entitled to an annuity under the Survivor Benefit Plan (SBP).

APPLICANT CONTENDS THAT:

1. She is a 93 year old widow and did not understand the SBP at the time of her spouse's death. She was denied the SBP annuity because she failed to make a claim for the benefits within the six-year period prescribed by statute.

2. After her spouse's funeral, she moved out of state to live with one of her sons. Her mail was being held until she returned several months later. While going through some of her papers, her son discovered she had received mail from the Defense Finance and Accounting Service (DFAS) that dated back to 2002.

3. On 28 September 2002, she sent a letter to DFAS which met the statutory requirement for a claim. DFAS cannot claim they were confused by what she was attempting to communicate when she wrote the letter. Nothing in her letter, would have led DFAS to conclude she was not seeking benefits provided by her deceased spouse.

4. She was the spouse of a military retiree; had little experience in dealing with DFAS and should not be penalized for not specifically mentioning survivor benefits. DFAS on the other hand, had all the information they needed to process her SBP benefits.

5. On 3 November 2011, DFAS rejected her request for benefits. They stated there was no completed "Verification for Survivor Annuity (DD Form 2656-7) on file prior to the expiration of the six year statute of limitations." The reason for rejecting her application for benefits is faulty for two reasons:

a) The statute cited does not require any particular format for a claim to be valid.

b) The DD Form 2656-7 is entitled "Verification for Survivor Annuity" and has a stated purpose of being used by a surviving

spouse to verify eligibility for an annuity. Also, it states that disclosure is voluntary and cautions that "failure to provide identifying information may delay the verification process and any subsequent payment." Nothing on the form indicates that it is a form for filing a "claim" or that the failure to use the form will be treated as a basis for denying benefits. Her letter provided all the essential information the form was designed to elicit.

6. Her deceased spouse served his country faithfully and honorably. He authorized the deduction of premiums from his retirement pay and went to his grave believing he had done everything required to ensure she was provided for after his death.

The applicant's complete submission, with attachments, is at Exhibit A.

STATEMENT OF FACTS:

The relevant facts pertaining to this application are contained in the letter prepared by the appropriate office of the Air Force, which is attached at Exhibit B.

AIR FORCE EVALUATION:

DFAS-JBJE/CL recommends denial. DFAS states that based on Claims, Against the Government, Title 31 United States Code Section 3702(b) (31 USC § 3702(b)), The Barring Act, the applicant was required to submit a claim for the SBP annuity within six years from her deceased spouse's date of death.

In order to constitute a claim, in addition to providing the requisite information in 31 USC § 3702(B), the annuitant must also indicate in some fashion they believe the United States Government owes them funds. A person's notification of a member's death, even in writing, does not constitute a claim for payment. The applicant's claim for annuity, filed in 2011, 9 years after the member passed away was denied because she had not made a claim for benefits within the 6 years prescribed by statute.

The complete DFAS evaluation is at Exhibit B.

APPLICANT'S REVIEW OF THE AIR FORCE EVALUATION:

The applicant's counsel states there is no statute or regulation that states DD Form 2656-7 and only this form, is the only means for requesting SBP benefits. The letter sent by the applicant contained all the pertinent information this form requests, just in a different format.

Counsel states the title of the form is misleading. No one reading this form would reasonably conclude this is a "claims" form. The title leads one to believe it is a form used simply to verify beneficiary information. The cited purposes on the form itself indicate it is used to verify eligibility for an annuity. The interested party is not advised that the failure to use this precise form will be deemed to be a failure to "file a claim."

Being told to fill out a form to receive the unpaid retirement benefits at the time of death is well within the ability of the lay person to understand. The SBP program; however, is quite complicated and not easily understood by many military spouses. A lay person, particularly an elderly lay person, will not be familiar with the nuances of that particular program.

It is inappropriate for DFAS to simply say "we sent her the papers, our job is done." DFAS knows it is often dealing with elderly widows, none of whom would knowingly forgo receiving a lifetime annuity paid for out of their deceased spouse's retirement check.

Counsel states DFAS should not be allowed to simply remain silent and let these elderly widows unknowingly forfeit a benefit which is specifically designed to provide for them after their spouse's pass away.

The applicant provided all the verification data this form requests in her letter. She identified herself as the service member's wife, gave her address and social security number. DFAS knew the service member had elected and paid for the SBP annuity for his wife who was 84 years old at the time of his death. To recite the fact the applicant missed the window to apply for the benefits her deceased spouse bought for her, ignores the facts of the case, is unjust to the applicant and unjustly enriches the government for its inaction, all at the expense of a deceased retired service member who trusted he had "taken care" of his spouse after his death.

Counsel's complete submission, with attachment, is at Exhibit D.

THE BOARD CONCLUDES THAT:

1. The applicant has exhausted all remedies provided by existing law or regulations.

2. The application was not timely filed; however, it is in the interest of justice to excuse the failure to timely file.

3. Sufficient relevant evidence has been presented to demonstrate the existence of an injustice. After thoroughly reviewing the documentation submitted in support of this appeal, we believe that relief is warranted. In this respect, we note that at the time of his eligibility for reserve retired pay in 1975, he elected spouse coverage under the SBP, based on full retired pay, and paid the associated premiums to ensure the applicant would receive an annuity upon his death. In order to establish the annuity, the applicant was required to complete and return to DFAS a DD Form 2656-7, *Verification for Survivor Annuity*. However, she did not submit this form until 2011. As a result, DFAS has refused to pay her an annuity and recommends denial of her instant application, stating that it is untimely, as she did not file a valid claim within the 6 years prescribed by 31 USC § 3702(b). The evidence before us indicates that although the applicant failed to submit the requisite form to claim the annuity, she did submit a letter to DFAS, dated 28 September 2002, in which she provided all of the relevant information she believed was necessary to affect her receipt of the annuity. In addition, on 13 November 2002, she forwarded DFAS a completed SF Form 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services* and provided a copy of the former member's death certificate. In view of this, we believe that in 2002, the applicant believed that she completed all of the necessary paperwork in order to receive the annuity and in effect, had timely placed DFAS on notice of her claim for said annuity. Considering the age of the applicant at the time, it appears that she may not have understood the steps necessary to request the SBP annuity; however, she clearly demonstrated her intent to establish a timely annuity claim. Moreover, we do not find it reasonable that she would have knowingly elected not to pursue this important benefit, which the former member had paid premiums for over 26 years. Accordingly, in view of the above and based on the substantial evidence before us, we believe the interest of justice can best be served by correcting the former member's records to the extent indicated below.

THE BOARD RECOMMENDS THAT:

The pertinent military records of the Department of the Air Force relating to the deceased service member be corrected to show that on 14 July 2002, the applicant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, requesting payment of the Survivor Benefit Plan annuity.

The following members of the Board considered AFBCMR Docket Number BC-2012-01230 in Executive Session on 19 Dec 12, under the provisions of AFI 36-2603:

Panel Chair
Member
Member

All members voted to correct the records as recommended. The following documentary evidence pertaining to AFBCMR Docket number BC-2012-01230 was considered:

- Exhibit A. DD Form 149, dated 28 Feb 12, w/atchs.
- Exhibit B. Letter, DFAS-JBJE/CL, dated 21 Jun 12.
- Exhibit C. Letter, SAF/MRBR, Letter, dated 27 Jun 12, w/atch.
- Exhibit D. Letter, Applicant, dated 12 Jul 12, w/atch.

Panel Chair