

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2003-105

XXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

ULMER, Chair:

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The application was docketed on June 23, 2003, upon receipt of a completed application from the applicant's former spouse and the applicant's military records.

This final decision, dated March 25, 2004, is signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST

The applicant's former spouse filed this application asking for a correction to the applicant's military record. She asked that the applicant's record be corrected to show that she (former spouse) is entitled to 50% of the applicant's retired pay under the Survivor Benefits Plan (SBP), effective March 24, 2001. The applicant died on March 25, 2001. The applicant's death certificate indicates that he was divorced and does not name a surviving spouse. At the time the Board docketed this application, it was not aware that the applicant had divorced the former spouse.

APPLICANT ALLEGATIONS

The applicant's former spouse alleged that she "was never offered the survivor benefit program when [the applicant] retired and had no knowledge that she needed to be enrolled in SBP to continue collecting retirement benefits." The former spouse stated that she is only getting social security and is in need of increased income. She further stated that she did not discover the alleged error until August 31, 2001, after the

applicant's death.

Two of the applicant's children wrote a letter to a military pay supervisor on September 11, 2001, inquiring about their mother's claim that she was entitled to 50% of their deceased father's retired pay. They stated that their father had been diagnosed by the Department of Veterans Affairs (DVA) with schizophrenia and was in no position to have enrolled their mother in SBP prior to his death. They further stated that their father had frequent angry outbursts and periods of violent behavior and that their mother would have feared for her safety if she had submitted her divorce decree claiming her right to half of their father's retired pay.

SUMMARY OF RECORD

The applicant retired from the Coast Guard on May 31, 1973 with twenty years and ten months of active service. At retirement, he did not elect SBP coverage for his then wife or for his then minor children. He acknowledged the following warning, by signature, on the SBP election certificate: "The decision you make with respect to participation in this [SBP] is a permanent irrevocable decision. Please consider your decision and its effects carefully." At the time of the applicant's retirement, spousal consent was not required for SBP non-participation.

There have been three SBP open enrollment periods since the applicant's retirement on May 31, 1973. They were from October 1, 1981 to September 30, 1982, April 1, 1991 to March 31, 1993, and from March 1, 1999 to February 29, 2000. The applicant did not elect SBP coverage for his former spouse during any of the SBP open enrollment periods.

According to the applicant's former spouse, their children, and the applicant's death certificate, the applicant and his former spouse had divorced. On March 15, 1988, the Circuit Court of the State of Oregon entered a stipulated decree dividing the couple's marital property, ordering the custody of and child support payments for their minor children, and ordering alimony for the then spouse. The stipulated decree did not mandate that the applicant elect SBP coverage for his then spouse, nor did it mention the applicant's military retirement or retired pay. The decree directed the DVA to continue paying the former spouse "an apportionment" resulting from the applicant's DVA disability compensation.

VIEWS OF THE COAST GUARD

On November 7, 2003, the Judge Advocate General of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. TJAG stated the following:

Applicant's [former spouse] requested that the Board change her deceased ex-husband's record to indicate that he had elected her as the beneficiary under the [SBP] effective March 24, 01, the date of his death. The record indicates the [applicant] retired from active duty on 01 June 1973 with the rank of Subsistence Specialist First Class (SS1) after 20 years and 9 [months and 26 days] of active service. On 21 May 1973 [the applicant] completed DD Form 1883 entitled "Survivor Benefit Plan Election Certificate." On that form, he indicated that he had a spouse and dependent children, but that he did not want an annuity under SBP. That form clearly cautioned the reader: "The decision you make with respect to participation in this [SBP] is a permanent irrevocable decision. Please consider your decision and its effect very carefully." At the time of his retirement, there was no requirement for the [former spouse] to concur in her then husband's decision regarding SBP. The [former spouse] and [the applicant] divorced on 15 March 1988. The divorce decree does not address [the applicant's] retired pay or the issue of SBP election. [The applicant] never attempted to enroll in SBP during the open enrollment periods beginning in 1982 and 1992. [The former spouse] never sought a court order to force [the applicant] to enroll in SBP. Although [the former spouse] is a sympathetic figure, there is neither error for the Coast Guard to fix, nor injustice for the Board to right.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 1, 2003, the BCMR received the former spouse's response to the views of the Coast Guard. She stated that she did not know that she could have applied for SBP and that she did not have the funds to hire an attorney to obtain a court order forcing the applicant to elect SBP coverage for her. She stated that she was not aware that electing SBP coverage required the payment of premiums.

The former spouse stated that she is sixty-nine years of age and is taking care of a mentally ill son. She stated that she does not have life insurance and would like to leave her children some funds for her burial expenses. She stated that she only receives \$1,000 per month from Social Security.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has subject matter jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.

2. The former spouse has no standing to ask for correction of the applicant's military record. As a former spouse, she does not have standing to request a correction of the applicant's record unless she has an appointment as the applicant's legal representative. According to section 1552(b) of title 10 of the United States Code, "No correction may be made . . . unless the claimant or his heir or legal representative files a request for the correction. " The Board's rules at 33 CFR § 52.21(b) state that a family member or legal representative may sign the application in the case of a deceased member. A divorce severs the legal relationship between husband and wife. Therefore, the former spouse is not a legal member of the applicant's surviving family and she has not submitted any evidence showing that she has been appointed as the applicant's legal representative.

3. At the time the Board placed this application on the docket it was not aware of the applicant's divorce from his former spouse. The Board only became aware of the divorce on November 5, 2003, upon receipt of the Coast Guard's advisory opinion. This application should therefore be dismissed for lack of standing.

4. Moreover, even if the former spouse had standing to request a correction of the applicant's military record, such request would be denied because it was not timely. To be timely, an application for correction of a military record must be submitted within three years after the applicant discovered or should have discovered the alleged error or injustice. See 33 CFR 52.22. This application was submitted approximately 30 years after the applicant's retirement and 15 years after his divorce from his former spouse.

5. The Board may still consider an untimely application on the merits, however, if it finds it is in the interest of justice to do so. The interest of justice is determined by taking into consideration the reasons for and the length of the delay and the likelihood of success on the merits of the claim. See, Dickson v. Secretary of Defense, 68 F. 3d 1396 (D.D.C. 1995).

6. The applicant's former spouse claimed that she did not discover the alleged error until August 2001, after the applicant had died. The alleged error should have been discovered sooner. The applicant retired in 1973 and was married to the former spouse until 1988, giving her ample time to review documents related to his retirement and pay. In addition, the former spouse should have become aware at the time of her divorce that the applicant had not elected to cover her under SBP. She had the representation of an attorney during her 1988 divorce proceeding, which included a detailed division of their marital property.

7. With respect to the merits of the former spouse's claim for coverage under SBP, the Board finds that it is not likely that she would prevail on them. She has not

demonstrated that the Coast Guard committed an error or injustice in this case. The applicant elected not to cover his then spouse or his then minor children under the SBP when he retired in 1973, and there was no requirement at that time that the spouse had to agree with his non-election. Despite the applicant being diagnosed with schizophrenia after his retirement, no effort was made by the former spouse or their children to seek SBP coverage for the former spouse during any of the three SBP open enrollment periods, one such open enrollment occurring prior to the couple's divorce.

8. Moreover, Article 18.F.13.b. of the Personnel Manual provides that former spouse SBP elections are made in writing with the service member's knowledge and consent or by court order. In this case, the stipulated decree dividing the applicant's and former spouse's marital property does not direct the applicant to elect SBP coverage for the former spouse. She has not presented any evidence why the applicant was not ordered to make an SBP election for her in the stipulated decree. Nor has she presented persuasive evidence that it was the applicant's intent to elect SBP coverage for her after his retirement. Her mere allegation that she is entitled to 50% of the applicant's retired pay under SBP, after his death, is insufficient to establish that the Coast Guard committed an error or injustice in this case. Therefore, based on the length of the delay, the reasons (or lack thereof) for not filing an application sooner, and the lack of probable success on the merits of her claim, the Board finds that it would not be in the interest of justice to waive the statute of limitations in this case even if the applicant had standing to request a correction of the applicant's military record.

9. Accordingly, the application of the applicant's former spouse for correction of the applicant's military record should be dismissed with prejudice for lack of standing.

[ORDER AND SIGNATURES ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXX for the correction of the military record of XXXXXXXXXXXXXXXXXXXX, USCG (Ret.) (deceased) is dismissed, with prejudice, because she has not established that she has a legal right to request correction of the applicant's military record.

Philip B. Busch

Marc J. Weinberger

George A. Weller