

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

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2009-186

**XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX**

FINAL DECISION

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 Chair docketed the application upon receipt of the applicant's completed application and military records June 29, 2009, and subsequently prepared the final decision for the Board as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 22, 2010, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant is the former spouse of CWO4 XXXXXX (CWO4 T) who is a deceased member of the Coast Guard Reserve. She asked the Board to correct CWO4 T's military record "to have [her] eligibility upheld as [he] originally designated" on the Reserve Component Survivor Plan (RCSBP) election certificate.

On July 8, 1992, the Coast Guard notified CWO4 T that he had completed twenty years of satisfactory service and would be eligible for retired pay upon reaching age 60. He was also advised that that he was eligible to participate in the RCSBP, which would permit him to provide an annuity for his surviving spouse, children, or persons with an insured interest upon his death.

On October 6, 1992, CWO4 T signed an SBP election certificate naming his then spouse, the applicant, as his beneficiary under the plan. CWO4 T elected an SBP option that would allow an annuity for his widow if he died before age 60, but the annuity would not actually begin until the date on which CWO4 T reached his 60th birthday. CWO4 T and the applicant were divorced on July 27, 1999. The divorce judgment was silent with regard to the applicant's RCSBP. Both parties were represented by counsel during the divorce proceedings.

On July 30, 2002, CWO4 T died. Apparently, sometime in the fall of 2007, the applicant wrote to Coast Guard claiming entitlement to an annuity as the beneficiary of CWO4 T's RCSBP

based upon the original 1992 election form. The Coast Guard responded by informing her that she was not eligible to receive the annuity payments.

In an October 30, 2007 letter, the applicant responded to the Coast Guard's letter denying her annuity benefits. She argued that the Coast Guard's guidance¹ (only a page of which was submitted) stated, "If you elect spouse coverage . . . and later divorce you have the following rights: You may suspend your RCSBP spouse coverage by providing a copy of your divorce decree. You may voluntarily elect to cover your former spouse under the RCSBP. Submit a written request with a copy of your divorce decree." The applicant argued that in her opinion the use of the word "may" instead of "must" in the guidance allowed the original beneficiary election to remain in effect. She also stated that she had CWO4 T's durable power of attorney "expressly giving her . . . the power to sell or encumber all real estate and retirement benefits, deposit and withdraw all monies and collect pay checks." She argued since the Power of attorney was never canceled, it appeared that she would be eligible to collect his retirement.

In a November 30, 2007 letter, the Coast Guard informed the applicant that she was not eligible to receive a retirement annuity for the following reasons:

First, Coast Guard members eligible to participate in RCSBP may provide coverage to either their spouse or former spouse. [Footnote omitted] Although you were named a spouse beneficiary in 1992, your eligibility to continue as a spouse beneficiary terminated by operation of law when you divorced in 1999. To be named a former spouse beneficiary, [CWO4 T] had to voluntarily name you as his former spouse beneficiary within one year of the date of your divorce decree, or if ordered by a court to name you, file an election form. In the alternative, if a court ordered [CWO4 T] to name you as former spouse beneficiary and he did not elect you, you could request to be deemed as his former spouse beneficiary within one year of the divorce decree.

There is nothing in the record at PSC to indicate that [CWO4 T] either elected you voluntarily or by court order. Likewise, there is nothing that shows you made a request to be deemed his former spouse beneficiary [²] within one year of a court order requiring that you be named. In fact, there is nothing in the record at

¹ Only one page was submitted from the guidance allegedly provided to CWO4 T and the applicant in 1992. However, article 18-F-7b. of the Personnel Manual then in effect stated that Upon retirement reservists are provided a comprehensive packet by Commandant (G-RSM) explaining RCSBP computations by points, election forms, work sheets, etc."

² Section 1450(f)(3) of title 10 of the United States Code states that a *former spouse* election is deemed to have been made if a member has entered into a written agreement, incident to a divorce, to provide an annuity to a former spouse and such person then fails or refuses to make such an election. Subsection (4) states that a person may be required to elect or to enter into an agreement to elect to provide an annuity to a former spouse by a court order. A deemed election is a method by which a former spouse may become the SBP beneficiary of a service member. A deemed election may occur in one of the following circumstances: (1) when a member refuses or fails to make the former spouse election after entering into a voluntary agreement to do so and the agreement has been incorporated, ratified, or approved by a court order; or (2) when the member did not enter into a written agreement with the former spouse, but the court order mandates that the member provide SPB coverage for the former spouse.

PSC to even suggest that a court order is on file directing that you be named a former spouse beneficiary. And you note in your letter too, that “retirement benefits were not addressed by either of [your] attorneys . . .” which demonstrates that there is no such court order.

Second, Florida law provides that unless otherwise ordered by a court of competent jurisdiction, a durable power of attorney terminates upon the principal’s death.

VIEWS OF THE COAST GUARD

On November 10, 2008, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny relief. The JAG adopted the comments and analysis provided by the Personnel Service Center (PSC) as the Coast Guard’s advisory opinion. PSC stated the following:

[SBP], 10 USC §§ 1447-1460b, is an income maintenance program for the survivor(s) of members of the uniformed services. Spousal coverage ends upon a divorce. If a member divorces and wishes to maintain SBP coverage for their former spouse, they must notify the Secretary within one year of the date of the divorce in writing of their intention to provide coverage for their former spouse, even if the former spouse was the spousal beneficiary immediately before the divorce was executed. See 10 USC § 1448(b)(3)(A). If the member is required under the terms of the divorce decree to provide SBP coverage to their former spouse and he or she fails or refuses to do so, the former spouse has one year from the date of the divorce to request a deemed election.

The one year period is statutory and not left open to interpretation. Further, [the applicant] has provided no reasons for her or her former spouse’s failure to comply with the one year statute of limitations requirement, if it was in fact CWO4 T’s intent that she be selected as his beneficiary for former spouse coverage. [The applicant’s] comments concerning her attorney’s failure to inform her about SBP procedures or address [CWO4 T’s] retirement benefits during the divorce is a separate matter beyond the scope of the investigation. The attorney’s potential negligence is not a basis for her being granted an SBP beneficiary.

[T]here is nothing in the record to suggest that [CWO4 T’s] intent was to designate his former spouse as his SBP beneficiary. [The applicant] points to [CWO4 T’s] removing her as a beneficiary on a life insurance [policy], [but] he did not change his pre-divorce SBP designation. On the contrary . . . CWO4 T was advised in 1992 that if he divorced he “may voluntarily elect to cover his former spouse under the RCSBP. Submit a written request, with a copy of your divorce decree.” This instruction is clear. Based on this guidance, [CWO4 T] was made aware that a divorce would end his spouse’s SBP coverage and that it would require an affirmative action to reconstitute a former spouse’s SBP coverage. [CWO4 T’s] failure to take such action is indicative of his intent not to

identify his former spouse. Regardless of intent, however, both parties failed to comply with the clearly stated statutory requirements indicated above if they desired to continue SBP coverage.

Contrary to [the applicant's] assertion, the RCSBP guidance used in 1992 is not confusing. In applicable section which mentions a later divorce, the second bullet clearly indicates what must occur for the service member voluntarily elect to cover, or to continue to cover, their former spouse.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On January 22, 2010, the Board received the applicant's response to the views of the Coast Guard expressing her disagreement with them. She argued that the Coast Guard has committed an injustice by refusing to recognize her as the beneficiary under CWO4 T's RCSBP. She contended that the Coast Guard is violating CWO4 T's rights by withholding SBP payments to her because he chose her as his beneficiary in 1992. She argued that he followed the guidance provided as a "reasonably prudent person" would have by not submitting the divorce decree, thereby in his mind maintaining his original RCSBP election. She stated that CWO4 T was not aware that any special form was required to maintain her as his beneficiary after their divorce.

The applicant argued that it was not clear in any of the guidance that she and CWO4 T reviewed in 1991 that spousal coverage ended upon divorce, but rather provided only the following:

"If you elect spouse coverage . . . and later divorce, you have the following rights:

- You may suspend your RCSBP spouse coverage by providing a copy of your divorce decree;
- You may voluntarily elect to cover your former spouse under the RCSBP. Submit a written request with a copy of your divorce decree."

The applicant further stated that the subject of divorce was not addressed on the original RCSBP election form that she and CWO4 T signed, but it is mentioned on the current election form. The current form contains the following: "A member with spouse coverage who divorces, and who does not elect former spouse coverage, is automatically in a 'suspended coverage' status. To elect former spouse coverage, submit DD Form 2651-1, 'Former spouse election certificate.'" She argued that similar guidance should have been on the original form that she and CWO4 T executed and because it was not, it is an injustice to hold them responsible for that level of knowledge.

With regard to the Coast Guard's comment that CWO4 T had one year to notify the Secretary of an election for a former spouse upon his divorce, the applicant stated this was not clear from the paperwork they received, as it speaks only to remarriage not to divorce. She also disagreed with the Coast Guard's contention that CWO4 T was made aware that a divorce would end SBP coverage for his spouse and that an affirmative act was required to select a former spouse as a beneficiary under RCSBP. She stated that this was not clear from the guidance they

were provided, and that they are not attorneys, but reasonably prudent people. She stated that she believes that CWO4 T thought he maintained her as his beneficiary.

The applicant submitted a copy of the divorce judgment dissolving the marriage between CWO4 T and herself. The court made an equitable distribution of their property, but it did not include any provision with respect to military retired pay, benefits, or SBP.

APPLICABLE REGULATION

Article 18.F.3.c. of the Personnel Manual defines widow(er) as “the surviving spouse of a deceased retiree who:

1. was married to the retiree when the retiree became eligible for retired pay; or 2. Married the retiree after retirement, and: a. was married to the retiree at least one year immediately before, and at the time of, his or her death; or b. was the parent of a natural child from the marriage. See also 10 U.S.C. §§ 1447(7) & (9).

Article 18.F.13.b. of the Personnel Manual states that there are five types of former elections that may be made under the law. They are as follows:

1. A voluntary election made by the member without entering into an agreement with the former spouse. If the member is married, his/her current spouse shall be notified that the member has made a former spouse election and that such election precludes the current spouse from being covered under SBP.
2. A voluntary election made pursuant to a written agreement between the member and former spouse, and such agreement has been incorporated in a court order.
3. A voluntary election made pursuant to a written agreement between the member and former spouse, and such agreement has not been incorporated in a court order.
4. A deemed election in which a member entered into a voluntary agreement, which has been incorporated or ratified or approved by a court order, and the member fails to or refuses to make the election.
5. A deemed election in which the member did not enter into a written agreement with the former spouse, but the court order mandates that the member provide SBP coverage for the former spouse.”

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 jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code.³ The application was timely.⁴

2. The standard of proof before the board is a preponderance of the evidence. The applicant bears the burden of proving by a preponderance of the evidence that the Coast Guard committed an error or injustice by denying her request for payments under CWO4 T's RCSBP.

3. The applicant was married to CWO4 T at the time he earned 20 years of satisfactory service for retired pay at age 60. One of the benefits of qualifying for retired pay is participation in the RCSBP. On October 6, 1992, CWO4 T elected to participate in RCSBP and elected "spouse only" coverage. On July 27, 1999, the applicant and CWO4 T were divorced but the judgment did not discuss or divide the parties' retirement benefits; nor did it discuss or direct CWO4 T to cover the applicant under his RCSBP. On July 30, 2002, CWO4 T died without having elected to cover the applicant as a former spouse beneficiary under his RCSBP.

4. Although CWO4 T did not elect the applicant as a former spouse beneficiary after their divorce, the applicant claims that she is entitled to RCSBP payments under CWO4 T's 1992 original election certificate for spousal coverage because the guidance provided to CWO4 T and her at the time of his election did not require him to take any further action to keep her as his beneficiary if they divorced. She further argued that neither the SBP guidance nor the election certificate stated that spousal coverage ended upon divorce. The applicant submitted only one sheet of the alleged RCSBP guidance provided to them before CWO4 T made his 1992 election. The remainder of the guidance, which according to the Personnel Manual then in effect consisted of a comprehensive packet, was not provided to the Board. Therefore, the Board cannot say what other guidance was provided to the applicant and CWO4 T regarding this matter at the time he made his 1992 election. The sheet of guidance the applicant submitted included the following paragraph:

If you elect spouse coverage . . . and later divorce, you have the following rights: You may suspend your RCSBP spouse coverage by providing a copy of your divorce decree. *You may voluntarily elect to cover your former spouse under the RCSBP. Submit a written request with copy of your divorce decree.* [Emphasis added.]

³ Section 1552(g) of title 10 of the United States Codes states the following: [T]he term 'military record' means a document or other record that pertains to (1) an individual member or former member of the armed forces, or (2) at the discretion of the Secretary of the military department concerned, any other military matter affecting a member or former member of the armed forces, an employee or former employee of that military department, *or a dependent or current or former spouse of any such person.* Such term does not include records pertaining to civilian employment matters . . . " (Emphasis added.)

⁴ Under CWO4 T's SBP election in 1992, he chose the option that allowed for survivor payments to begin upon his 60th birthday, which would have been July 23, 2007. The BCMR application was filed on June 19, 2009, within three years of what would have been CWO4 T's 60th birthday. The applicant indicated on her DD 149 that she did not discover the alleged error until October 30, 2007.

The applicant argued that the above guidance used the word “may,” a permissive term, to describe actions CWO4 T could take if they divorced. The applicant stated that a reasonable person would conclude, as she did upon reading the guidance that the original certificate remained in effect if no action was taken to change it after the divorce.

5. However, Article 18.F.2 of the Personnel Manual clearly states that the purpose of SBP is to provide career members who reach retirement eligibility the opportunity to leave a portion of their pay to their survivors at a reasonable cost. Once the applicant and CWO4 T divorced, the applicant was no longer a surviving spouse. Under Article 18.F. of the Personnel Manual, the applicant does not meet the definition of a widow which is defined as the surviving spouse of a deceased retiree who was married to the retiree when the retiree became eligible for retired pay or was married to the retiree after retirement for at least one year immediately before and at the time of the retiree’s death. Notwithstanding the fact that CWO4 T did not request suspension of his SBP or elect another SBP beneficiary after their divorce, the applicant was not married to CWO4 T at the time of his death because they were divorced in 1999. Therefore, she does not meet the statutory definition of a widow and is not entitled to RCSBP payments as his surviving spouse.

6. Nor is the applicant a former spouse beneficiary under CWO4 T’s RCSBP. For the applicant to be a former spouse beneficiary, CWO4 T was required under Article 18.F.13.b. of the Personnel Manual to do one of the following after divorcing the applicant:

Voluntarily elect the former spouse without entering into an agreement with her; Voluntary elect the former spouse pursuant to a written agreement between the member and former spouse with the agreement having been incorporated into a court order; or Voluntary elect the former spouse pursuant to a written agreement between the member and former spouse with the agreement not having been incorporated in a court order.

The applicant could have also become a former spouse beneficiary through the deemed election process by submitting a written request to the Commandant with a copy of the court order within one year of the divorce (1) if the member entered into a voluntary agreement with the former spouse, which has been incorporated or ratified or approved by a court order and the member fails to or refuses to make the election; or (2) if the member did not enter into a written agreement with the former spouse, but the court order mandates that the member provide SBP coverage for the former spouse. There was no court order mandating SBP coverage for the applicant. Therefore, since CWO4 T never voluntarily elected the applicant as a former spouse beneficiary after their divorce and since no court of law ever directed him to provide SBP coverage for her she is not a former spouse beneficiary of CWO4 T’s RCSBP under the SBP law.

7. In the case of *Flynn v. United States*, 46 Fed. Cl. 414 (2000),⁵ in an attempt to obtain SBP benefits, the plaintiff argued that she was a former spouse, even though she had earlier

⁵ The plaintiff was married to Capt. Flynn until 1975 when they divorced. Captain Flynn retired from the Navy on October 1, 1986 and did not elect anyone for SBP coverage. Approximately five years after he retired, Capt. Flynn and the plaintiff remarried on April 21, 1991, he did not notify DFAS of his election to provide survivor benefits for the plaintiff until February 20, 1993. The February 20, 1993 election could not be located, so Capt. Flynn elected to

divorced Captain Flynn but subsequently remarried him and was married to him at the time of his death. However, Captain Flynn never properly executed an election certificate naming her as his spouse beneficiary after their remarriage. In deciding that the plaintiff was not a former spouse, the court applied the statutory definitions of a “former spouse” and a “widow” to the situation and found that the plaintiff did not meet the definition of a former spouse. The court further stated that it considered not only the bare meaning of the word but also its placement and purpose in the statutory scheme. “The purpose of the SBP statute is to permit military retirees to establish annuities for surviving current or former spouses or other dependents through a reduction in retired pay . . . To this end, the statute sets forth eligibility requirements for various classes of beneficiaries . . . In order for former spouses . . . to be included in the SBP, the service member must make an affirmative election under the statute.” *Id.* at 419; *see also MacConnell v. United States*, 217 Ct. Cl. 33 (1978). In the instant case, the applicant, although a former spouse at the time of CWO4 T’s death, is attempting to gain SBP benefits as a surviving spouse, which she clearly was not. Nor is she a former spouse beneficiary under CWO4 T’s RCSBP because he never elected her as such. Accordingly, the Board finds no error with the Coast Guard’s refusal to pay SBP benefits to the applicant.

8. Nor is the Board persuaded that an injustice has occurred in this case. The circumstances of this case are different than those in Docket No. 2008-175, wherein the Board directed that that member’s record be corrected to show the former spouse as beneficiary under his SBP. In No. 2008-175, the service member died three days after being granted a divorce but before the equitable distribution portion of the case was decided because it had been severed from the divorce action. In the final equitable distribution judgment, the court ordered the deceased member to provide SBP coverage for the former spouse, to which the administrator of the deceased’s estate agreed. The Coast Guard denied the former spouse’s request to be deemed the member’s beneficiary on February 26, 2007, stating that such an election could not occur posthumously. However, the Board granted relief in No. 2008-175 finding the Coast Guard’s refusal to grant former spouse SBP status contravened, without good reason, the court order, and that the deceased service member intended by his actions to provide for his former spouse as he had always done. The Board noted that the deceased member continued to support the former spouse for years after their separation, that he paid the mortgage in full prior to their divorce, and that he waited until the former spouse was age 65 to file for divorce.

9. In contrast to BCMR No. 2008-175, there is no evidence that CWO4 T ever took any affirmative action to elect the applicant as a former spouse beneficiary under his SBP. There is no court order directing CWO4 T to cover her under his RCSBP. There is insufficient evidence that he intended to cover her under the plan as a former spouse. In this regard, the Board notes that he removed her as beneficiary on his life insurance policy and that the applicant has provided no evidence that he continued to support her after their divorce. The applicant argued

cover the plaintiff during an open enrollment period on March 4, 1993, which required a two year waiting period before coverage became effective. Captain Flynn died on April 23, 1993 and the plaintiff sought SBP benefits immediately thereafter, but DFAS denied benefits because Capt Flynn’s election was not effective because it was not made within one year of the 1991 remarriage. The Board for Naval Records denied her request for a correction to Captain Flynn’s record entitling her to SBP benefits. In appealing the BCNR decision to the Court of Federal Claims, the plaintiff realized that Captain Flynn had not made a timely election and therefore argued that she was also a former spouse.

that CWO4 T intended to keep her as his beneficiary under his SBP because did not make any change to his retirement benefits after their divorce. The argument is not persuasive as to intent because an equally strong argument can be made that because they were divorced there was no need to actually change the election certificate because her SBP spousal coverage terminated upon the divorce. CWO4 T did not need to act after the divorce to terminate spousal coverage, but he was required to act to add a former spouse beneficiary after their divorce, which he did not do. The fact that CWO4 T took no action with respect to his SBP is insufficient to overcome the law or to establish that CWO4 T intended that the applicant be a former spouse beneficiary under his RCSBP.

10. The applicant complained that it was not expressly stated in the guidance provided to them or on CWO4 T's election certificate that spousal coverage terminated upon divorce as is stated on the current election certificate. Again, since the Board does not have all of the information that was provided to CWO 4 T at the time, we cannot state whether the totality of the information that was provided would have led one to believe that spousal coverage was automatically converted to former spouse coverage if no action was taken to elect former spouse coverage after the divorce. The Board can say that based upon a reading of Chapter 18 of the Personnel Manual, it would not be reasonable for one to believe that once divorced a former spouse could collect SBP payments as a surviving spouse without the service member taking some affirmative duty to elect the former spouse as his beneficiary after a divorce. Further, on the sheet of guidance provided by the applicant, the Coast Guard makes very clear that upon divorce, CWOT 4 had two rights: (1) he could suspend his coverage; or (2) he could voluntarily elect the applicant as a former spouse. The guidance was clear that if CWO4 T wanted to cover his former spouse after their divorce, he was required to take affirmative action by submitting a written request to the Coast Guard with a copy of the divorce decree. There is no evidence in the record that he took such action.

11. The applicant has failed to prove by a preponderance of the evidence that the Coast Guard committed an error or injustice by denying her payments under CWO4 T's RCSBP coverage.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application for correction of the military record of XXXXXXXXXXXXXXXX, USCGR (deceased), by XXXXXXXXXXXXXXXX (former spouse) is denied.

Evan R. Franke

James E. McLeod

Adrian Sevier