



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

WJH
Docket: 12037-09
19 Oct 2010

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: [REDACTED]
REVIEW OF NAVAL RECORD

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 w/attachments
(2) NPC letter 5420 PERS OOJ1/142 of 9 Sep 2010
(3) BCNR Administrative Record

1. Pursuant to the provisions of reference (a) Subject's widow, [REDACTED], hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, that the applicable naval record be corrected to show that she submitted a timely application for annuity benefits under the Survivor Benefit Plan (SBP) after her husband's death in 2001.

2. The Board, consisting of Messrs. Pfeiffer, Zsalman, and George reviewed Petitioner's allegations of error and injustice on 4 October 2010 and, pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Subject [REDACTED] and Petitioner [REDACTED] were married in 1975.

c. Subject [REDACTED] retired from active duty in 1994. Prior to his retirement, he completed a NAVCOMPT Form 2272 (Navy Retired/Retainer Pay Data Form) memorializing his SBP election.¹ He elected to decline participation in the SBP. Petitioner's name was also entered on the NAVCOMPT Form 2272. Based on the NAVCOMPT Form 2272 as completed and submitted², Subject was not enrolled in the SBP and no costs (or "premiums") were deducted from his retired pay.

d. Subject [REDACTED] died on 15 February 2001. He was still married to Petitioner [REDACTED] at the time of his death.

e. In December 2007, Petitioner [REDACTED] made application to this Board seeking a change to her deceased husband's naval record that would entitle her to SBP. She averred in her application that she never signed a form declining participation in the SBP.

f. The assertion made by Petitioner [REDACTED] in her application was reviewed by the Naval Personnel Command (NPC) and the Defense Finance and Accounting Service (DFAS). After inspecting the NAVCOMPT Form 2272, they noticed that Petitioner's signature was dated before Subject's signature and Petitioner's signature was entered on 2 Nov 1993 but witnessed on 3 November 1993. In order for an SBP declination to be valid, the member's spouse must concur in the declination of SBP after the member declines the SBP. Since it was apparent from the form that Petitioner [REDACTED] signed the form before the Subject [REDACTED] signed the form declining SBP, DFAS determined that the SBP determination was invalid. DFAS then automatically enrolled Subject [REDACTED] in the SBP in the spouse category of coverage retroactively to the date of his retirement. That action, in turn, triggered the

¹ The Uniformed Services Survivor Benefit Plan (SBP) was created by Congress in 1972 to allow a means by which survivors can continue to receive a portion of military retired pay after the death of the retiree. Without it, retired pay stops completely on the date of death of the retiree and the survivors can be left with no means of support.

If, in conjunction with retirement from active service, military members elect to participate, they will receive a reduction in their retired pay for their lifetime, so as to continue (up to) 55 percent of their retired pay to their survivors following their death. The dollar amount of retired pay that may be selected to base participation on may be any amount between \$300 per month and full retired pay. Premiums continue as long as there is an eligible beneficiary that survives the retiree.

² Petitioner would later claim that she did not sign the NAVCOMPT Form 2272 and the form would later be found to be invalid by the Defense Finance and Accounting Service because of the manner in which the form was executed.

payment of SBP annuity benefits to Petitioner [REDACTED] retroactive to the date of Subject's death (15 February 2001). The costs (premiums)³ that would have been deducted from Subject's retired pay were deducted from the retroactive SBP annuity award before being paid to Petitioner [REDACTED].

g. Thereafter, DFAS audited the account and discovered that they had inadvertently overlooked that the first claim made by Petitioner [REDACTED] for the SBP annuity benefits was not received by the United States until more than six years after her husband's death.

h. Under the Barring Act (31 U.S.C. § 3702) a claim against the United States is generally barred unless such claim is received within six years after the date such claim first accrued.⁴

i. After noting that the Barring Act should have applied to bar payment of the SBP annuity to Petitioner [REDACTED], DFAS suspended further annuity payments and referred the matter back to this Board for a determination as to whether any change should be made to the record to show that Petitioner [REDACTED] submitted a timely application for annuity benefits under the Survivor Benefit Plan (SBP) after her husband's death in 2001.

j. In correspondence attached as enclosure (2), the Staff Judge Advocate for NPC has commented to the effect that the request warrants favorable action.

CONCLUSION

Upon review and consideration of all the evidence of record, and especially in light of the contents of enclosure (2), the Board finds the existence of an injustice warranting the following corrective action.

RECOMMENDATION:

³ The SBP is a voluntary contributory program which requires participants to pay a monthly premium in order to provide a monthly annuity to an eligible beneficiary after the retiree dies.

⁴ The primary purpose of the Barring Act is to limit the burden on the government of adjudication and computing entitlements after a substantial period of time has elapsed. The United States is not expected to be able to adjudicate and compute entitlements in perpetuity.

That Subject's naval record be corrected, where appropriate, to show that:

a. Petitioner [REDACTED], made a timely written request for Survivor Benefit Plan annuity benefits. The request was received by the Defense Finance and Accounting Service on 16 February 2001, the day after the death of her husband [REDACTED].

Note: Petitioner [REDACTED], has already received some retroactive SBP annuity benefits. She is also receiving Dependents Indemnity Compensation from the United States Department of Veterans Affairs.

b. That a copy of this Report of Proceedings be filed in Subject's naval record.


4. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6 (c) it is certified that quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder


WILLIAM J. HESS, III
Acting Recorder

5. Pursuant to the delegation of authority set out in Section 6(e) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(e)) and having assured compliance with its provisions, it is hereby announced that the foregoing corrective action, taken under the authority of reference (a), has been approved by the Board on behalf of the Secretary of the Navy.

19 Oct 2010


FOR W. DEAN PFEIFFER
Executive Director