



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Evelyn M. Fleming - Survivor Benefit Plan - Former Spouse Election

File: B-258310

Date: December 28, 1994

DIGEST

Former spouse election under Survivor Benefit Plan (SBP) is valid even though request for election was filed on Open Season election form (DD Form 2618) rather than forms for SBP Election Change and Election Statement for Former Spouse Coverage because submitted form contained all information required by 10 U.S.C. § 1448 (b).

DECISION

Evelyn M. Fleming requests our Office to review the Army's determination denying her claim to be named the Survivor Benefit Plan (SBP) beneficiary of her former husband, Staff Sergeant (SSG) Michael J. Fleming, USA, Retired. For the reasons stated below, we believe she is the beneficiary of his SBP.

On August 6, 1985, SSG Fleming elected SBP coverage for spouse and children. On May 8, 1992, SSG and Mrs. Fleming divorced and the divorce decree stated that SSG Fleming had voluntarily agreed to name Mrs. Fleming as the beneficiary of his SBP and to take such action as necessary, i.e. completing the required forms, to make such election effective and that such election was to continue during SSG Fleming's lifetime. On the date of the divorce, May 8, 1992, SSG Fleming completed DD Form 2618, Survivor Benefit Plan Open Enrollment Election, electing former spouse coverage for his former wife. This form was forwarded to the Defense Finance and Accounting Service (DFAS), Indianapolis, Indiana, on June 24, 1992.

On May 7, 1992, the day before the divorce proceeding, Mrs. Fleming's attorney had contacted the U.S. Army Community and Family Support Center and advised the Army's representative that SSG Fleming had waived SBP at the time of his retirement and requested the proper forms for electing former spouse coverage pursuant to the divorce. Since the Army's representative was incorrectly advised that there was no SBP coverage then in effect (SSG Fleming had elected coverage in 1985), Mrs. Fleming's attorney was advised to complete the open season SBP form, DD Form 2618.

Since the SBP open season (April 1, 1992 to March 31, 1993) was applicable in part to retired members who did not have SBP coverage, when DFAS received the June 24,

1992, letter enclosing the DD Form 2618, it advised SSG Fleming and Mrs. Fleming, by separate letters dated July 23, 1992, that the election was invalid. The letter to SSG Fleming instructed him to complete USAFAC Forms 20-237 (Survivor Benefit Plan Election Statement for Former Spouse Coverage) and 20-238 (Survivor Benefit Plan Election Change). The letter to Mrs. Fleming stated that she could request a deemed election within 1 year of the date of the divorce.

Mrs. Fleming states that she never received the July 23, 1992, letter. On October 12, 1993, Mrs. Fleming wrote to DFAS and advised that her divorce was final and enclosed the final decree. DFAS advised Mrs. Fleming that her ex-husband's completion of DD Form 2618 did not constitute a valid election and that the 1 year period for requesting a deemed election had elapsed.

Mrs. Fleming then applied to the SBP Board of Corrections seeking to be named the SBP beneficiary. She claimed that an administrative error was made when her attorney had been told to have the open season SBP forms completed. The Board denied the request for correction because it found no error was committed by the U.S. Army since incorrect information (that SSG Fleming had previously waived SBP coverage) was given to the Army's representative.

Mrs. Fleming now asks our Office to review the Army's determination that she is not a beneficiary notwithstanding the fact that the wrong election form was submitted a month after the divorce.

We agree with DFAS that Mrs. Fleming is not eligible to request a deemed election pursuant to 10 U.S.C. § 1450 (f)(3)(A) and (B), since the request for such an election was not made within 1 year of the divorce.

However, we find that the information submitted in June 1992, albeit on the wrong form, contained sufficient information and conformed to the law so as to constitute a valid election for former spouse coverage.

An election for former spouse coverage is permitted by 10 U.S.C. § 1448(b) and subsection (b)(5) lists the requirements for making such an election. These include a written statement signed by the member and the former spouse setting forth whether the election is being made pursuant to the requirements of a court order or there is a voluntary written agreement as part of or incident to a divorce proceeding and whether such voluntary agreement has been incorporated in, or ratified or approved by, a court order.

The DD Form 2618, completed and signed by both SSG Fleming and Mrs. Fleming, contained all of the above information including that the election was made pursuant to a voluntary written agreement which had been incorporated into the court order. While the subsection states that this information should be provided on a form prescribed by the

Secretary, we find that the use of one service-generated form instead of another, where both contain the same information should not be a bar to a valid election.

In this regard, we have held that where the requirements of a statute are met the use of the wrong form under certain circumstances does not affect the propriety of the action taken. See 65 Comp. Gen. 806, 809 (1986). The only difference in the DD Form 2618 and USAFAC Forms 20-237 and 238 is that the reverse of 238 states that a copy of the court order be furnished. We note that there is no requirement contained in 10 U.S.C. § 1448 (b) for such a submission and that if the order is submitted subsequently and fails to justify the former spouse election, the election can be canceled.

Accordingly, it is our view that the form signed by both SSG and Mrs. Fleming and submitted on June 24, 1992, should be accepted as a valid former spouse election under the SBP.

/s/ Seymour Efros
for Robert P. Murphy
General Counsel