

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 September 2023

DOCKET NUMBER: AR20220009408

APPLICANT REQUESTS: in effect, reconsideration of her previous request for payment of the Survivor Benefit Plan (SBP) annuity based on the death of her former husband, a former service member (FSM).

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Congressional Letter
- Privacy Act Statement

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20180013558, on 4 June 2019.

2. The applicant states, in effect, her former husband elected spouse SBP at time of retirement in 2014. They were divorced in November 2016. Their divorce decree did not address the SBP. The FSM died on 4 October 2017. She was denied an SBP annuity. This Board also denied her an SBP annuity based on the death of her former husband. She adds she is requesting that the Board consider that she gave up her successful career as a Paramedic for Columbus Consolidated Government to follow the FSM and multifacetedly support him in his pursuit of his physician assistant degree and military career. She did so for so long that she could have retired from said CCG by the time her disability struck. She has multiple sclerosis, and she is 100% disabled. She feels that the stress of deployments greatly contributed to the worsening of her condition which was diagnosed in 2005. She is now living solely on disability, and she is on food stamps and Medicaid. She firmly believes that her service to the Army through her service to her former spouse demands that she should not have to live in poverty. She served him for 18 years, 15 of which while he was active duty in the Army. Had they stayed in Columbus, GA, so that she could follow her career path instead of his, she would have had her own retirement to live on. She chose to support her husband and now she is paying for it. She feels that this is a gross miscarriage of justice on behalf of the United States Army.

3. Review of the FSM's service records shows:

a. The FSM and Sta\_\_\_, the applicant, were married on 28 December 1998. With prior service, the FSM entered active duty on 17 January 2003. He served in a variety of assignments and attained the rank of major (MAJ).

b. On 11 December 2013, in preparation for his upcoming retirement, the FSM completed a DD Form 2656 (Data for Payment of Retired Personnel). He indicated he was married to Sta\_\_\_, the applicant, and they had no pendent children.

- He elected spouse SBP coverage based on the full gross pay under REDUX. He understood that this represents a reduced base amount that requires spouse concurrence.
- The FSM's spouse, Sta\_\_\_ (Applicant) concurred with his election; she signed the form, and her signature was notarized

c. The FSM was honorably retired from the service on 31 January 2014 and he was placed on the retired list in his retired grade of major on 1 February 2014. His December 2014 Retiree Account Statement shows he had spouse SBP coverage and the premium amount/monthly cost.

d. The FSM and applicant were divorced on 29 November 2016. The divorce decree is silent regarding the SBP.

e. The FSM died on 4 October 2017. His death certificate shows his marital status "divorced" and the informant's name is that of his mother.

f. The applicant, through her attorney, sought a judgement Nunc Pro Tunc [changing back to an earlier date of an order, judgment or filing of a document] on 25 January 2018. Within that document, the judgment was for the applicant to receive the SBP.

g. On 20 December 2017, the applicant completed a DD Form 2656-7, Verification for Survivor Annuity. She claimed the:

- Type of Benefit: "Reserve Component Survivor Benefit Plan"
- Relationship to Decedent: Former Spouse
- She was not legally married the member on date of death

h. DFAS denied the applicant's request and sent her a letter, dated February 24, 2018, explaining their denial and providing her with information for appealing their decision to the Defense Office of Hearings and Appeals (DOHA). She had 30 days from the date of the letter to lodge an appeal. DFAS did not receive an appeal to that denial.

i. On 3 April 2018, the applicant's counsel wrote a letter to the Office of the General Counsel of Defense Finance and Accounting Service (DFAS). He stated:

(1) An annuity is deemed community property if acquired during a marriage in the State of Texas. If a party to a divorce fails to disclose such property, the property still exists it becomes property owned jointly with right of survivorship. The FSM did not disclose the existence of the SBP annuity and the SBP could not have been considered by the Presiding Judge for division at the time of the divorce on 29 November 2016. The court did take into account the FSM's retirement pay, which was divided by the FSM and the applicant. Counsel was able to provide the FSM's retiree account statements from 25 July 2016 through 1 February 2017. The deductions for SBP were taken prior to his death and the applicant was noted as the beneficiary.

(2) The applicant was not provided information to make a request in writing or to deem an election to her benefit. The court has made an effort to include the SBP annuity by issuing its Judgment Nunc Pro Tunc to the final decree of divorce. This judgement is proper and is "boot-strapped" to the final divorce decree. This judgment does not violate constitutional rights of due process of law. Since the FSM did not disclose to the applicant or the Court the existence of the SBP annuity, it is not equitable to deny the benefits of SBP to the applicant.

j. The applicant also previously wrote to a Member of Congress regarding her DFAS SBP claim. She stated that the FSM retired on 1 February 2014 and elected SBP for his then spouse, the applicant. He died on 4 October 2017. Upon his death DFAS was notified that she and the FSM were divorced on 29 November 2016. As a result of the late notification, the FSM paid premiums for SBP until his death. A former spouse does not automatically become eligible for SBP upon divorce. The FSM could have elected for former spouse coverage and the voluntary election must be made before 1 year of the divorce. The FSM did not voluntarily elect former spouse for the SBP. The law allows the former spouse to deem an election for SBP. It must specifically be identified in the divorce decree that the former spouse is entitled to the SBP. The divorce decree dated 29 November 2016 did not indicate entitlement to the SBP. A second divorce decree dated 25 January 2018 shows the Court awarded SBP to the applicant. The court proceedings did not begin while the FSM was alive. DFAS will not accept the second divorce decree

k. DFAS responded to the applicant, through her Member of Congress stating that the law allows a former spouse to deem an election for the SBP; however, the divorce decree must specifically indicate the former spouse is entitled to the coverage. The records further show that the divorce decree dated November 29, 2016, did not indicate entitlement to the SBP. A second divorce decree dated January 25, 2018, shows that the court awarded the SBP to [Applicant]. Regretfully, the court proceedings did not

begin while [FSM] was alive, as a result; DFAS is unable to accept the second divorce decree.

I. On 4 June 2019, the Board carefully considered the applicant's request, supporting documents and the evidence in the records. The Board discussed the Soldier's SBP election (spouse only) at the time of retirement, the subsequent divorce and no evidence of a former spouse election within one year of the divorce. The Board noted that the initial divorce decree did not include language directing former spouse SBP coverage and that the subsequent court proceeding included such language was initiated after the Soldier's death and per DoD financial management regulations would not be honored for SBP purposes. The Board determined, by preponderance of evidence, that there was no error or injustice in this case. After reviewing the application and all supporting documents, the Board found the relief was not warranted.

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The Board carefully considered the applicant's contentions, the military record, and regulatory guidance. The Board found insufficient evidence that upon his retirement and divorce, he timely elected his former spouse as his SPB beneficiary. The Board agreed that the initial divorce decree did not reflect language directing former spouse coverage. Further, the Board noted that as the subsequent court proceedings included language specific to the SPB initiated after his death, DFAS did not accept the second divorce decree. Based on the preponderance of the documentation available for review, the Board determined there was insufficient evidence of an error or injustice which would warrant a correction to the record.

BOARD VOTE:

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
█	█	█	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20180013558, on 4 June 2019.

 Revoked certificate

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I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Public Law 92-425, the SBP, enacted 21 September 1972, provided that military members on active duty could elect to have their retired pay reduced to provide for an annuity after death to surviving dependents. However, surviving children are only entitled to SBP payments until reaching age 22 in certain cases. Changes in SBP options are not authorized except in specific instances, or authorized by law.
2. Public Law 97-252, the Uniformed Services Former Spouses Protection Act (USFSPA), dated 8 September 1982, established SBP for former military spouses. This law also decreed that state courts could treat military retired pay as community property

in divorce cases if they so choose. It established procedures by which a former spouse could receive all or a portion of that court settlement as a direct payment from the service finance center. The USFSPA contains strict jurisdictional requirements. The State court must have personal jurisdiction over the FSM by virtue of the FSM's residence in the state (other than pursuant to military orders), domicile in the State, or consent.

3. Title 10, U.S. Code § 1448(b)(3)(A) authorizes persons already participating in SBP voluntarily to elect coverage for a former spouse, stating as follows:

"(3) Former Spouse Coverage by Persons Already Participating in Plan: "(A) Election of Coverage –

"(i) Authority for Election: - A person - "(I) who is a participant in the Plan and is providing coverage for a spouse or a spouse and child ( even though there is no beneficiary currently eligible for such coverage), and "(II) who has a former spouse who was not that person's former spouse when that person became eligible to participate in the Plan, may (subject to subparagraph (B)) elect to provide an annuity to that former spouse.

"(ii) Termination of Previous Coverage - Any such election terminates any previous coverage under the Plan.

"(iii) Manner and Time of Election. - Any such election must be written, signed by the person making the election, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment."

4. Title 10, U.S. Code, § 1450(f)(3)(A) (2006), if a person described in Title 10, U.S. Code § 1448(b)(3) is required by a court order to elect to provide an annuity to a former spouse, and such person then fails or refuses to make such an election, such person shall be deemed to have made such an election if the Secretary concerned receives a written request from the former spouse concerned requesting that such an election be deemed to have been made and receives a copy of the court order, regular ort its face , which requires such election.

5. Title 10, U.S. Code, § 1450(f)(3)(A), Required Former Spouse Election to be Deemed to Have Been Made. "(A) Deemed Election Upon Request by Former Spouse. - If a person described in paragraph (2) or (3) of section 1448(b) of this title is required (as described in subparagraph (B)) to elect under section 1448(b) of this title to provide an annuity to a former spouse and such person then fails or refuses to make such an election, such person shall be deemed to have made such an election if the Secretary concerned receives the following:

a. "(i) Request from Former Spouse. - A written request, in such manner as the Secretary shall prescribe, from the former spouse concerned requesting that such an election be deemed to have been made.

b. "(ii) Copy of Court Order or Other Official Statement.-Either- "(I) a copy of the court order, regular on its face, which requires such election or incorporates, ratifies, or approves the written agreement of such person; or "(II) a statement from the clerk of the court ( or other appropriate official) that such agreement has been filed with the court in accordance with applicable State law."

6. Title 10, U.S. Code § 1450(f)(3)(C) (2006) , an election may not be deemed to have been made in the case of any person unless the Secretary concerned receives a request from the former spouse of the person within one year of the date of the court order or filing involved.

7. DOD Financial Management Regulation (FMR) 7000.14-r, volume 7b, chapter 43, section 4.4.3.4. discusses deemed elections by former spouses. If the request to direct a former spouse SBP election via court order was initiated after the member's death, the order will not be honored for SBP purposes.

//NOTHING FOLLOWS//