

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 December 2023

DOCKET NUMBER: AR20230003268

APPLICANT REQUESTS:

- termination of his Survivor Benefit Plan (SBP) coverage
- reimbursement of SBP premiums already paid

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

- DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Self-authored Statement, 20 February 2023
- DD Form 2656 (Data for Payment of Retired Personnel), 25 November 2019
- Defense Finance and Accounting Service (DFAS) U.S. Military Retired Pay Letter, undated, with enclosures –
 - SBP Withdrawal Fact Sheet
 - DFAS-Cleveland Form 1077 (SBP Withdrawal Consent), 11 April 2020
- Department of Veterans Affairs (VA) Letter, 11 April 2020
- DD Form 2656-2 (SBP Termination Request), 21 April 2021
- DD Form 2656-6 (SBP Election Change Certificate), 21 April 2021

FACTS:

1. The applicant states he wishes to terminate his SBP coverage because he and his wife did not want to enroll in the Plan. He requested termination on numerous occasions with DFAS but was told his paperwork contained incorrect dates or had incorrect information in it (see attachment).
2. He enlisted in the Regular Army on 6 June 2003.
3. His records contain a marriage certificate showing he and [REDACTED] married on 23 September 2006.
4. He was promoted to the rank/grade of staff sergeant/E-6 effective 1 November 2016.

5. The DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 6 November 2019, shows a PEB convened at Joint Base San Antonio, TX, on 17 October 2019 to determine his medical fitness for continued service in the Army. The PEB determined he was physically unfit and recommended a disability rating of 60 percent and his placement on the Temporary Disability Retired List with reexamination in July 2020.

6. His DD Form 2656, 25 November 2019, shows in:

a. Part I (Retired Pay Information), Section I (Pay Identification), block 4 (Retirement/Transfer Date), he entered 4 February 2020;

b. Part III (SBP), Section IX (Dependency Information), block 29 (Spouse), he listed [REDACTED] with a marriage date of 23 September 2006;

c. Part III (SBP), Section IX (Dependency Information), block 32 (Dependent Children), he listed [REDACTED] (daughter) and [REDACTED] (son) with birthdates in 2007 and 2009, respectively;

d. Part III, Section X (SBP Election), block 34 (SBP Beneficiary Categories), he placed an "X" in the box by the statement: "I elect not to participate in SBP" and placed an "X" in the "Yes" box by the statement: "I have eligible dependents under the plan";

e. Part IV (Certification), Section XI (Certification), block 39 (Member), he signed the form on 25 November 2019 and his signature was witnessed by an SBP Counselor at Fort Benning, GA, on the same date; and

f. Part V (Spouse SBP Concurrence) (Required ONLY when member is married and elects either: (a) child only SBP coverage, (b) does not elect full spouse SBP coverage; or (c) declines SBP coverage. The date of the spouse's signature in Block 41c MUST NOT be before the date of the member's signature in Block 39c, or on or after the date of retirement listed in Part I, Section I, Block 4. The spouse's signature MUST be notarized.), Section XII (SBP Spouse Concurrence), no entries.

7. He retired on 3 February 2020 in the rank/grade of staff sergeant/E-6 by reason of temporary disability (enhanced). His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 16 years, 7 months, and 28 days of net active service during this period.

8. The undated statement signed by him and his wife requested withdrawal from the SBP due to the fact that he would be receiving VA disability pay in lieu of retired pay.

9. The undated DFAS U.S. Military Retired Pay letter with a fact sheet and applicable form informed him of the process for withdrawing from the SBP due to a qualifying VA disability. It further noted the following criteria to be eligible to withdraw from SBP: (a) the retiree has had a service-connected disability rated by the VA as totally disabled for a continuous period of 10 or more years; or (b) the retiree has had a total disability rating from the VA for at least 5 continuous years immediately following the last date of active duty.
10. The VA letter, 11 April 2020, summarizes his VA benefits and shows he has been evaluated as 100-percent service-connected disabled.
11. The DFAS-Cleveland Form 1077, 11 April 2020, shows he and his wife requested withdrawal from the SBP and both signed the form on 11 April 2020.
12. He provided:
- a. his DD Form 2656-2, 21 April 2021, showing he and his spouse requested termination of participation in the SBP on 21 April 2021. He and his spouse both signed and dated the form that was witnessed by a notary public in Colorado Springs, CO, on the same date. Section I (Instructions) of this form states: "In accordance with Section 1448a of Title 10, U.S. Code, a participant in SBP may elect to discontinue participation during the 25th through the 36 month after commencement of payment of retired pay";
 - b. his DD Form 2656-6, 21 April 2021, showing in:
 - (1) Section II (Current Coverage), block 7 (My Current Coverage is), he checked "Spouse and Child";
 - (2) Section IV (Requested Change to Coverage), block 9 (Place an X in the Appropriate Box to Indicate Your Election), he checked "Suspend Coverage";
 - (3) Section VI (Spouse and Child(ren) Information), block 11a (Spouse's Name), he listed [REDACTED] with a marriage date of 23 September 2006, and block 13 (Dependent Children), he listed [REDACTED] (daughter) and [REDACTED] (son) with birthdates in 2007 and 2009, respectively; and
 - (4) Section VII (Member Signature), he signed the form on 21 April 2021 and his signature was witnessed and notarized in [REDACTED], on the same date.
13. The DA Form 199, 16 June 2021, shows he was reexamined at Joint Base San Antonio, TX, on 8 June 2021 for his medical conditions of post-traumatic stress disorder, right knee degenerative arthritis and chondromalacia, and left knee

degenerative arthritis and chondromalacia. The PEB determined his condition continued to be unfitting and recommended a 60-percent disability rating and his placement on the Permanent Disability Retired List.

14. U.S. Army Physical Disability Agency Order D168-04, 17 June 2021, removed him from the Temporary Disability Retired List and placed him on the Permanent Disability Retired List effective 17 June 2021.

15. The email correspondence from a DFAS pay technician (Reply: Army Review Boards Agency Assistance), 1 December 2023, notes the applicant has SBP spouse and child coverage. The DFAS pay technician further noted the DFAS database contains the following documents:

a. the applicant's original DD Form 2656, 25 November 2019, showing he elected "not to participate in SBP"; however, he did not procure his spouse's concurrence as required;

b. the DFAS letter to the applicant's spouse, 25 November 2019, notifying her that he declined SBP coverage. DFAS noted the law requires the spouses of Soldiers who at retirement elected less than Spouse SBP coverage based on the Soldiers' full retired pay to concur with the election or the Soldiers will receive automatic Spouse SBP coverage based on the Soldiers' full retired pay. A Spouse SBP Concurrence Statement was attached to garner her concurrence or nonconcurrence;

c. the Army Retirement Services Officer (RSO) SBP Retiring Soldier Counseling Statement, 25 November 2019, showing the applicant was counseled by a RSO at Fort Benning, GA, explaining the SBP and its requirements. The applicant signed this form along with the RSO on the same date;

d. the Spouse SBP Election Concurrence Statement explaining the applicant's declination election of SBP to his spouse and seeking her concurrence or nonconcurrence with that decision. She initialed the statement: "I **NON-CONCUR** with my spouse's SBP election, **DECLINE** SBP coverage. I understand that my non-concurrence will result in my spouse receiving an automatic Spouse SBP election based on full retired pay." She signed the form on 13 December 2019, which was notarized and witnessed on 13 November 2019 (should read 13 December 2019);

e. the undated DFAS U.S. Military Retired Pay letter informing the applicant of the process for withdrawing from the SBP due to a qualifying VA disability;

f. the DFAS-Cleveland Form 1077, 11 April 2020, showing the applicant and his wife requested withdrawal from the SBP and both signed this form on 11 April 2020;

g. the VA letter, 11 April 2020, summarizing the applicant's VA benefits and showing he has been evaluated as 100-percent service-connected disabled; and

h. the Army Board for Correction of Military Records letter, 26 October 2021, with the applicant's DD Form 149, 5 June 2020, and auxiliary documents, noting his application requesting termination of his SBP. This letter informed him of the requirements for discontinuing participation in the SBP and that he needed to first contact DFAS due to requirements in law.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found partial relief is warranted.

2. The Board noted the applicant clearly indicated his election not to participate in the SBP when he retired. His spouse did not concur with the election, and as a result the election defaulted to spouse and children SBP coverage as required by law. He later submitted an SBP termination request that included his spouse's concurrence, but it was not submitted within his SBP termination window (i.e., between the 25th and 36th month after his retirement). Because his spouse has concurred with his decision to terminate SBP, the Board determined it would be appropriate to correct the record to show his SBP coverage was terminated in the 25th month after his retirement and any SBP premiums he as paid subsequent to that month should be returned to him.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

■ ■ ■ GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined the evidence presented is sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing he submitted a request to terminate SBP in the 25th month after his retirement. As a result of this correction, any SBP premiums he paid after the 25th month of retirement should be returned to him.

2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to any relief in excess of that described above.

2/27/2024

X

CHAIRPERSON

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, enacted 21 September 1972, established the SBP. The SBP 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. An election, once made, was irrevocable except in certain circumstances. The election must be made before the effective date of retirement or coverage defaults to automatic spouse coverage. Since its creation, it has been subjected to a number of substantial legislative changes.

2. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elected not to participate in the SBP. The statute also provided for automatic enrollment for spouse coverage at the full base amount unless a member affirmatively declined to participate in the SBP prior to receiving retired pay.

3. Public Law 99-145, enacted 8 November 1985 but effective 1 March 1986, required written concurrence by the spouse in a member's decision to decline the SBP or elect spouse coverage at less than the full base amount.

4. Public Law 96-402, enacted 9 October 1990, provided that any person who has elected to participate in the SBP and who is suffering from a service-connected disability rated by the VA as totally disabling, and has suffered from such disability while so rated for a continuous period of 10 or more years (or, if so rated for a lesser period, has suffered from such disability while so rated for a continuous period of not less than 5 years from the date of such person's last discharge or release from active duty), may discontinue participation in the SBP by submitting a request to discontinue participation in the Plan to the Secretary concerned. Any such person's participation in the Plan shall be discontinued effective the first day of the first month following the month in which a request is received by the Secretary concerned.

5. Public Law 105-85, enacted 18 November 1997, established the option to terminate SBP participation. Retirees have a 1-year period beginning on the second anniversary of the date on which their retired pay started to withdraw from the SBP. The spouse's concurrence is required. No premiums will be refunded to those who opt to disenroll. The effective date of termination is the first day of the first calendar month following the month in which the election is received by the Secretary concerned.

6. Department of Defense Instruction 1332.42 (Survivor Annuity Program Administration) states a member may elect to discontinue participation by submitting a DD Form 2656-2 during the period that is more than 2 years but less than 3 years after the first date of entitlement to receive retired pay. The member must submit the request no earlier than the 1st day of the 25th month, and no later than the last day of the 36th month from the date of entitlement to retired pay, with spousal concurrence if applicable. A member electing to terminate coverage is not eligible for continuation in the Program; however, the member has 30 days after submitting a request to discontinue participation to revoke the request.

7. In accordance with the DFAS website, retirees discontinuing (withdrawing from) SBP coverage due to a qualifying VA disability who meet one of the following criteria are eligible to discontinue participation in the SBP:

a. the retiree has had a service-connected disability rated by the VA as totally disabling for a continuous period of 10 or more years; or

b. the retiree has had a total disability rating from the VA for at least 5 continuous years immediately following the last date of discharge or release from active duty.

8. The National Defense Authorization Act for Fiscal Year 2023 includes an SBP open season. The SBP open season began on 23 December 2022 and ends on 1 January 2024.

a. The SBP open season allows for retirees receiving retired pay, eligible members, or former members awaiting retired pay who are currently not enrolled in the SBP or RCSBP to enroll. For a member who enrolls during the SBP open season, the law generally requires that the member will be responsible to pay retroactive SBP premium costs that would have been paid if the member had enrolled at retirement (or enrolled at another earlier date, depending on the member's family circumstances). For retirees receiving pay, enrollment requires paying the premiums plus interest for the period since the date they were first eligible to enroll, as well as the monthly premiums moving forward.

b. The SBP open season also allows eligible members and former members who are currently enrolled in either the SBP or RCSBP to permanently discontinue their SBP coverage. The law generally requires the covered beneficiaries to concur in writing with the election to discontinue. Previously paid premiums will not be refunded.

//NOTHING FOLLOWS//