

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 January 2024

DOCKET NUMBER: AR20230004490

APPLICANT REQUESTS: payment of her late husband's Reserve Component Survivor Benefit Plan (RCSBP) annuity retroactive to the date of his death.

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

- two DD Forms 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Self-authored Letter, 16 February 2023
- Certificate of Marriage and Marriage License, 1 June 1967
- DD Form 214 (Certificate of Release or Discharge from Active Duty) for the period ending 1 May 1991
- U.S. Army Reserve (USAR) Personnel Center Memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 7 November 1995
- DD Form 1883 (Survivor Benefit Plan Election Certificate), 24 August 1996
- Certificate of Death, 23 January 2006
- DD Form 2656-7 (Verification for Survivor Annuity), 23 July 2022
- Defense Finance Accounting Service (DFAS)-Cleveland Form 1059 (Direct Deposit Authorization), 23 July 2022
- Internal Revenue Service Form W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 23 July 2022
- DA Form 5016 (Chronological Statement of Retirement Points), 9 August 2022
- U.S. Army Human Resources Command Gray Area Retirements Branch Letter, 15 August 2022
- Letter to U.S. Army Human Resources Command Gray Area Retirements Branch, 21 September 2022
- Department of Defense Spouse Identification and Privilege Card, 21 September 2022

FACTS:

1. The applicant, the surviving spouse of a deceased Reserve Component service member (SM), states:

a. Her late husband was 59 years old upon his passing in 2006. Age 59 was the soonest he could submit his application for Reserve retired pay. He grew weak from chemotherapy due to his cancer diagnosis and prepared to file for retirement, but passed before he could submit the paperwork. Neither the Department of Veterans Affairs, Department of the Army, nor any other Government organization contacted her or assisted with his retirement paperwork upon his death. She did not know or understand survivor benefit requirements. Her husband's death is recorded with the Department of Veterans Affairs as service related due to his deployments to Vietnam and Saudi Arabia.

b. She was never advised about availability of survivor benefits or the survivor benefit annuity process for her husband. The only benefits mentioned were retaining basic privileges and TRICARE coverage. DFAS informed her there were no death benefits upon her husband's death. Furthermore, there was no assistance or follow-up in researching other benefits. As a civilian she was unaware of the Army's procedures and expected the Army would aid with survivor benefits information. She was informed by her son, who is currently serving in the Army, that she was entitled to survivor benefits after he recently received Army Casualty Assistance Officer training.

c. On 16 February 2023, she submitted an appeal for reconsideration to the Army Human Resources Command Gray Area Retirements Branch for her husband's survivor benefit annuity, which was denied via correspondence on 15 August 2022.

2. The SM and the applicant, L____ L____ E____, married on 10 June 1967.

3. The SM was ordered to active duty in support of Operations Desert Shield/Desert Storm effective 12 September 1990. He was honorably released from active duty on 1 May 1991 to the control of his USAR troop program unit.

4. The USAR Personnel Center memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 7 November 1995, notified the SM that he completed the required years of service and would be eligible for retired pay upon application at age 60. Paragraph 4 states:

You are entitled to participate in the Reserve Component Survivor Benefit Plan (RC-SBP) established by Public Law 95-397. This plan enables you to provide an annuity for your spouse, and other eligible beneficiaries. BY LAW, YOU HAVE ONLY 90 CALENDAR DAYS FROM THE DATE YOU RECEIVE THIS LETTER TO SUBMIT YOUR SBP ELECTION CERTIFICATE (DD FORM 1883). IF YOU DO NOT SUBMIT YOUR ELECTION WITHIN 90 CALENDAR DAYS, YOU WILL NOT BE ENTITLED TO SURVIVOR BENEFIT COVERAGE UNTIL YOU APPLY FOR RETIRED PAY AT AGE 60. IF YOU DO NOT ELECT COVERAGE AND SHOULD DIE BEFORE AGE 60, YOUR SPOUSE WILL NOT BE ENTITLED TO

BENEFITS. More detailed information concerning participation in the Reserve Component Survivor Benefit Plan (RC-SBP) and blank DD Form 1883 are enclosed.

5. There is no evidence indicating the SM submitted a DD Form 1883 within 90 days following receipt of his 20-year letter.

6. The SM's DD Form 1883, 24 August 1996, shows in:

a. Section II (Marital, Dependency, and Election Status):

- item 6 (Are you married) – he placed an "X" in the "Yes" block
- item 7 (Do you have dependent children) – he placed an "X" in the "No" block
- item 8 (Check one of the following to indicate the type of coverage you desire) – he placed an "X" in the "Spouse Only" option
- item 9a (If You Checked 8a, b, or c, do you elect to provide an annuity based on the full amount of retired pay or on a reduced portion of retired pay?) – he placed an "X" in the "FULL" box
- item 9c – he placed an "X" in the "Option C (Immediate coverage) box, indicating he elected to provide an immediate annuity beginning on the day after the date of his death, whether before or after age 60, and he and his spouse signed the form on 24 August 1996

b. Section III (Family Information):

- item 10 (Name of Spouse) – he listed L____ L. E____ with a marriage date of 10 June 1967
- item 15 (I have the following unmarried dependent children under age 22) – he did not list any dependent children

c. Section V (Additional Information), block 18 (Is this the only election of coverage you have submitted under the new Survivor Benefit Plan?), he placed an "X" in the "Yes" box; and

d. Section VI (Signatures), he signed the form on 24 August 1996 and his signature was witnessed the same date.

7. Headquarters, 81st Regional Support Command, Orders 077-77, 18 March 1998, released the SM from assignment to the 320th Military Police Company and assigned him to the USAR Control Group (Reinforcement) effective 17 April 1998.

8. The SM's death certificate shows he died on 23 January 2006 at age 58. The applicant is listed as his surviving spouse.

9. The SM's records contain a DD Form 1300 (Report of Casualty), 23 February 2009, showing he died on 6 January 2023. The circumstances and duty status entries are blank.

10. On 23 July 2022, the applicant completed a DD Form 2656-7 as the deceased SM's surviving spouse. She stated she was legally married to him at the time of his death and there are no dependent children.

11. The SM's DA Form 5016, 9 August 2022, shows his status was changed to "Retired" effective 26 January 1999, the date of his death.

12. The applicant provided:

a. copies of her DFAS-Cleveland Form 1059, 23 July 2022, and Internal Revenue Service Form W-4P, 23 July 2022, in support of her claim for annuity pay;

b. the U.S. Army Human Resources Command Gray Area Retirements Branch letter, 15 August 2022, denying her request for the survivor benefit annuity based on the military service of her late spouse because the statute of limitations for her claim was reached on 23 January 2012;

c. her letter to the U.S. Army Human Resources Command Gray Area Retirements Branch, 21 September 2022, requesting reconsideration for receipt of her late spouse's survivor benefit annuity; and

d. a copy of her Department of Defense Spouse Identification and Privilege Card issued 21 September 2022.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the SM's military records, the Board found that relief was not warranted. The Board carefully considered the applicant's contentions, the Service Member's military records, and regulatory guidance. Documentation available for review reveals a properly completed and signed election for full SPB with the applicant named as the beneficiary. However, there is no evidence it was submitted timely and the date signed reflects a date approximately nine months after the retirement notice. After due consideration of the applicant's request, the Board determined the evidence presented insufficient to warrant a recommendation for relief.

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 Board determined 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 for correction of the records of the individual concerned and payment of her payment of her late husband's Reserve Component Survivor Benefit Plan (RCSBP) annuity retroactive to the date of his death is not warranted.

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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 Survivor Benefit Plan (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.
2. Public Law 95-397, the RCSBP, enacted 30 September 1978, provided a way for those who qualified for Reserve retirement but were not yet age 60 to provide an annuity for their survivors should they die before reaching age 60. Three options are available: (A) elect to decline enrollment and choose at age 60 whether to start SBP participation, (B) elect that a beneficiary receive an annuity if they die before age 60 but delay payment until the date of the member's 60th birthday, and (C) elect that a beneficiary receive an annuity immediately upon their death if before age 60. If death occurs before age 60, the RCSBP costs for Options B and C are deducted from the annuity (costs for Option C being the more expensive). By law, a member must have made the election within 90 days of receiving the notification of eligibility for retired pay at age 60 or else wait until he/she applied for retired pay and elect to participate in the standard SBP.
3. Title 31, U.S. Code, section 3702, is the 6-year barring statute for payment of claims by the Government. In essence, if an individual brings a claim against the Government for monetary relief, the barring statute states the Government is only obligated to pay the individual 6 years in arrears from the date of approval of the claim. Attacks to the barring statute have resulted in litigation in the U.S. Court of Federal Claims. In the case of *Pride versus the United States*, the court held that the Board for Correction of Military Records is not bound by the barring act. The Board for Correction of Military Records decision creates a new entitlement to payment and the 6-year statute begins again. Payment is automatic and not discretionary when a Board for Correction of Military Records decision creates an entitlement.
4. The DFAS website defines "gray area" retirees as Reserve Component members who served in the National Guard or Reserve, are qualified for retired pay, and have "retired" from their service (stopped drilling), but are not yet at the age where they can begin receiving retired pay. The time between their "retirement" from the service and the date when they are eligible to begin receiving retired pay is the "gray area." The "gray area" applies even if the member is assigned to the Retired Reserve.
5. The Retired Reserve consists of all Reserve officers and enlisted personnel who are otherwise eligible for retired pay but have not reached age 60, who have not elected discharge and are not voluntary members of the Ready or Standby Reserve, and other retired Reservists under certain conditions.

//NOTHING FOLLOWS//