

IN THE CASE OF: [REDACTED]

BOARD DATE: 7 December 2024

DOCKET NUMBER: AR20230006088

APPLICANT REQUESTS: through counsel, correction of his records to show he elected Survivor Benefit Plan (SBP) coverage for his current spouse within 1 year of marriage.

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)
- Counsel's Letter, 30 January 2023, with enclosures –
  - Enclosure 1 – Power of Attorney, 2 February 2022
  - Enclosure 2 – Defense Finance and Accounting Service (DFAS) Letter, 12 January 2022
  - Enclosure 3 – DD Form 2656-6 (Survivor Benefit Plan Election Change Certificate), 29 December 2021
  - Enclosure 4 – DFAS Letter, 5 November 2021
  - Enclosure 5 – DFAS Letter, undated
  - Enclosure 6 – Applicant's Statement, 28 September 2022
  - Enclosure 7 – Certified Copy of Record of Marriage, [REDACTED]

FACTS:

1. The applicant states he wishes to enroll his wife in his SBP as his beneficiary. He and his wife were informed they had 1 year from the date of enrollment in the Defense Enrollment Eligibility Reporting System (DEERS) to submit a request for SBP coverage. Once they decided to enroll, they were told the information they received was inaccurate and they had 1 year from the date of their marriage to enroll in the SBP.

2. Counsel states he was retained to represent the applicant regarding his request to enroll his current spouse as the beneficiary of his SBP. The applicant and his spouse were informed by a DFAS agent that they had 1 year from the date of her enrollment in DEERS to submit a request for SBP coverage. Subsequently, they found this information to be false. While attempting to work with DFAS, DFAS submitted appeals to the Defense Office of Hearings and Appeals (DOHA) without his approval while also failing to provide the material facts. DFAS and DOHA rejected his submissions for

enrollment in the SBP and informed him that his only recourse is through this Board. The applicant is requesting to enroll his spouse in the SBP. This is his first attempt at petitioning this Board and he has exhausted all administrative remedies. Additionally, the National Defense Authorization Act for Fiscal Year 2023 directs an open season from December 2023 through 1 January 2024 to allow changes in SBP elections. Counsel argues the following points:

- a. Under the Agency Theory, a principal is bound by the promise and actions of its agent. The DFAS agent provided false information at the time the applicant wanted to enroll in the SBP.
  - b. Under the Doctrine of Equitable Estoppel, the applicant must receive the same benefits he would have received had the Agent's misrepresentation been true.
  - c. The applicant's spouse never concurred to not be the beneficiary of his SBP. By statutory and regulatory guidance, when a service member does not enroll a spouse in the SBP, the spouse must be notified of such and concur with that decision.
  - d. DFAS committed an administrative error in the case of the applicant seeking SBP enrollment.
  - e. The time limit to enroll in the SBP is waivable. The Secretary of Defense, upon a request to the Secretary concerned, may waive the time limitations.
3. He was appointed as a Reserve commissioned officer of the Army and executed his oath of office on 28 August 1998. He was promoted to the rank/grade of major/O-4 effective 1 February 2008.
  4. The Washington Superior Court Decree of Dissolution of Marriage shows he and ██████████ were granted a divorce on 2 January 2013. Paragraph 3.2 (Property to Be Awarded the Husband) states: "The husband is awarded as his separate property the following property (list real estate, furniture, vehicles, pensions, insurance, bank accounts, etc.): 2009 Subaru Forrester; 100% Military retirement, and Engagement ring/wedding (will be turned over in exchange for title to Subaru)."
  5. The New Mexico marriage license and certificate of marriage show he married ██████████ on 3 March 2014.
  6. The DA Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings), 28 July 2016, shows a PEB was convened at the National Capital Region on 26 July 2016 for his medical conditions of post-traumatic stress disorder and unspecified depressive disorder, and diabetes mellitus type II. The PEB found him physically unfit and recommended a disability rating of 60 percent and his placement of the Temporary

Disability Retired List with a reexamination in March 2017. He concurred with the proceedings on 28 July 2016 and the Secretary of the Army approved the findings on 12 September 2016

7. He retired on 29 December 2016 in the rank/grade of major/O-4 by reason of temporary disability (enhanced). His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 18 years, 3 months, and 29 days of net active service during this period.

8. His military records do not contain and he did not provide any retirement or SBP documentation showing his SBP coverage election at the time of his placement on the Temporary Disability Retired List.

9. The DA Form 199 (Informal PEB Proceedings), 17 May 2018, shows he was reexamined at Joint Base Lewis-McChord, WA, on 7 May 2018 for his medical conditions. The PEB determined his conditions continued to be unfitting and recommended a 60 percent disability rating and his placement on the Permanent Disability Retired List.

10. U.S. Army Physical Disability Agency Order D136-30, 16 May 2018, removed him from the Temporary Disability Retired List and placed him on the Permanent Disability Retired List effective 17 May 2018 in the rank of major.

11. His military records do not contain and he did not provide a divorce decree from his marriage to [REDACTED].

12. He provided a Massachusetts Certificate of Marriage showing he and [REDACTED] married on [REDACTED].

13. The DFAS letter, 5 November 2021, responded to his request to enroll in the SBP for "Spouse Coverage" and informed him that his request was denied. DFAS noted their records reflected the following:

On December 30, 2016, you were retired and placed on the Temporary Disability Retired List. Prior to retirement, you completed a DD Form 2656 and elected not to participate in the SBP program. At that time, you reported you were unmarried and had no dependent children.

On May 16, 2018, you were transferred to the Permanent Disability Retired List. On July 6, 2019, you married [REDACTED].

On August 25, 2020, DFAS received via facsimile your DD Form 2656-6 requesting to change your SBP election to spouse only coverage for [REDACTED].

Accompanying this form was a letter wherein you indicated you were given erroneous advice as to where you could elect SBP coverage for your spouse.

Pursuant to 10 U.S.C. § 1448(a)(5) [Title 10, U.S. Code, section 1448(a)(5)], a person who is not married and has no child upon becoming eligible to participate in the Plan but who later marries or acquires a dependent child may elect to participate in the Plan. Such an election must be written, signed by the person making an election, and received by the Secretary concerned within one year after the date on which that person marries or acquires a dependent child.

14. His DD Form 2656-6, 29 December 2021, shows in:

a. Section II (Current Coverage), block 7 (My Current Coverage is), he checked "No Coverage";

b. Section III (Conditions that Trigger Eligibility to Change Coverage), block 8 (I am requesting a change in coverage based on), he checked "Acquiring a Dependent Child. A member who does not have a dependent child at the time of initial eligibility for SBP may elect coverage for a dependent child within the one-year period after acquiring the first dependent child";

c. Section IV (Requested Change to Coverage), block 9 (Place an X in the Appropriate Box to Indicate Your Election), he checked "Spouse and Child(ren)";

d. Section V (Level of Coverage), he checked "Full Retired Pay";

e. Section VI (Spouse and Child(ren) Information), block 11 (Spouse's Name), he listed [REDACTED]; and in block 13 (Dependent Children), he entered [REDACTED], a son with a birthdate in 2021; and

f. Section VII (Member Signature), he signed the form on 29 December 2021 and his signature was witnessed and notarized in Norwood, MA, on the same date;

15. The DFAS letter, 12 January 2022, responded to his 20 December 2021 letter requesting enrollment in the SBP for "Spouse and Children" coverage. Paragraph 1 notes:

As explained in further detail below, the part of your request extending to the enrollment in spouse SBP coverage is denied. Retirees marrying after retirement who wish to enroll in spouse SBP coverage must submit an election prior to the one year anniversary of the marriage. However, the part of your request extending to the enrollment in child SBP coverage has been approved. Your request for child coverage was received within one year of the child's birth. This

denial letter extends only to the part of your December 30, 2021, request that pertains to spouse SBP coverage.

16. The DFAS letter, undated, noted his displeasure with the incorrect information he received concerning SBP coverage. His issue was referred to DOHA; however, he requested closure of the action. It further referred him to the Air Force Inspector General for assistance (see attachment for further details).

17. His statement, 28 September 2022, requests enrollment of his current spouse in his SBP and notes the lack of proper information he received regarding enrollment within 1 year of marriage.

18. The email correspondence from a DFAS pay technician (Reply: Army Review Boards Agency Assistance), 21 November 2023, notes the applicant currently has child(ren)-only SBP coverage. His spouse was not added due to receipt of the request after the 1-year anniversary date of their marriage. His child was added once DFAS was notified of the child's birth. The DFAS database contains:

a. the DD Form 2656 (Data for Payment of Retired Personnel), 18 October 2016, showing in:

(1) Section VI (Federal Income Tax Withholding Information), block 14 (Marital Status), he placed an "X" in the "Single" box;

(2) Section IX (SBP Election), block 26 (Beneficiary Category(ies)), he placed an "X" in the box by the statement: "I elect not to participate in SBP" and an "X" in the box by the statement: "I do not have eligible dependents under the plan";

(3) Section XI (Certification), block 30 (Member), he signed the form on 18 October 2016 and his signature was witnessed by an SBP Counselor at U.S. Army Garrison, Vicenza, Italy, on the same date;

b. the DD Form 2656-6, 25 August 2020, showing in:

(1) Section II (Current Coverage), block 7 (My Current Coverage is), he checked "Spouse Only";

(2) Section III (Conditions that Trigger Eligibility to Change Coverage), block 8 (I am requesting a change in coverage based on), he checked "Marriage. A member who does not have a spouse at the time of initial eligibility, may provide SBP for the first spouse acquired after retirement by electing coverage before the first anniversary of that marriage. Coverage and cost begin on the first anniversary of the marriage

(coverage begins immediately upon the birth of a child to the member and spouse beneficiary)";

(3) Section IV (Requested Change to Coverage), block 9 (Place an X in the Appropriate Box to Indicate Your Election), he checked "Spouse Only";

(4) Section V (Level of Coverage), he checked "Full Retired Pay";

(5) Section VI (Spouse and Child(ren) Information), block 11 (Spouse's Name), he listed [REDACTED] with a marriage date of 6 July 2019; and

(6) Section VII (Member Signature), he signed the form on 25 August 2020 and his signature was witnessed and notarized in [REDACTED], on the same date;

c. an undated letter wherein the applicant explained the rationale for not filing his request within 1 year of his current marriage, requested SBP coverage for his current spouse, and requested an exception to policy;

d. the applicant's certificate of marriage to [REDACTED], 6 July 2019, and his current spouse's U.S. Uniformed Services Identification and Privilege Card;

e. the DFAS letter, 5 November 2021, described above; and

f. his DD Form 2656-6, 29 December 2021, described above.

#### BOARD DISCUSSION:

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

2. A majority of the Board considered the applicant's claim to have received misinformation that led to his inability to elect his spouse as an SBP beneficiary and found the evidence supports that claim. A majority of the Board determined the applicant's record should be corrected to show he elected spouse SBP coverage within one year of their marriage on 6 July 2019.

3. The member in the minority found no evidence of error or injustice in this case, noting that information on how to add or change an SBP beneficiary and the time limits on doing so is readily available.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

█	:	█	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	█	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board determined the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing he elected spouse SBP coverage within one year of his marriage on 6 July 2019.

2/12/2024

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 provides 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. Elections are made by category, not by name. The election must be made before the effective date of retirement or coverage defaults to automatic spouse coverage. Since its creation, the SBP has been subjected to a number of substantial legislative changes.
2. Title 10, U.S. Code, section 1448, required 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, permitted a previously participating retiree upon remarriage to elect not to resume spouse coverage or to increase reduced coverage for the latter spouse (requiring a payback with interest of SBP premiums prior to first anniversary of remarriage). Changes must be made prior to the first anniversary of remarriage, or the previously suspended coverage resumes by default on the first day of the month following the first anniversary of the remarriage, with costs owed from that date.

4. Title 10, U.S. Code, section 1448(a)(5) (Participation by Person Marrying after Retirement, etc.), provides that a person who is not married and who has no dependent child upon becoming eligible to participate in the Plan, but who later marries or acquires a dependent child, may elect to participate in the Plan. Such an election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date on which that person marries or acquires that dependent child.

5. 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 Reserve Component SBP 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 Reserve Component SBP 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.

6. Title 10, U.S. Code, section 1454 (Correction of Administrative Errors), states the Secretary concerned may, under regulations prescribed under section 1455 of this title, correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error.



7. DEERS is a computerized database of military sponsors and eligible family members who are entitled to benefits under the law, such as medical care, post exchange privileges, and commissary privileges, among other benefits. Informing sponsors about SBP updates is not the responsibility of DEERS registration duties.

//NOTHING FOLLOWS//