

IN THE CASE OF: [REDACTED]

BOARD DATE: 29 February 2024

DOCKET NUMBER: AR20230006226

APPLICANT REQUESTS:

- receipt of her late husband's Reserve Component Survivor Benefit Plan (RCSBP) annuity
- a personal appearance hearing before the Board via video/telephone

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 Letter, 12 August 2022
- Marriage Certificate, [REDACTED] (duplicate copy)
- U.S. Army Reserve Personnel Center Memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter), 18 February 1994
- DD Form 1883 (SBP Election Certificate), 9 March 1995
- Honorable Discharge Certificate, 7 June 1996
- U.S. Army Human Resources Command (HRC) Form 249-2-E (Chronological Statement of Retirement Points), 27 July 2006
- Defense Finance and Accounting Service (DFAS)-Cleveland Form 7220 (Retiree Account Statement), effective 25 November 2011
- State Certification of Death, [REDACTED]
- Email Correspondence ((Applicant) Direct Deposit Information 26 March 2013), 26 March 2013
- Standard Form 1174 (Claim for Unpaid Compensation of Deceased Member of the Uniformed Services), 26 March 2013, with financial documents
- Self-authored Letter, 27 February 2019
- DD Form 2656-7 (Verification for Survivor Annuity), 27 February 2019
- DFAS Letter, 10 June 2019
- Congressional Representative Letter, 28 June 2019
- U.S. Army Financial Management Command Letter, 7 August 2019
- Claims Appeals Board Interlocutory Decision, 14 April 2020
- DFAS Voucher with Check, 20 April 2020

- Email Correspondence (Your Survivor Benefit Plan (SBP) Annuity Claim), 4 May 2020
- U.S. Uniformed Service Identification and Privilege Card
- Social Security Card

FACTS:

1. The applicant, the surviving spouse of a deceased retired service member (SM), states she has never received her entitled monthly SBP annuity. She has struggled for 9 years to receive the monthly SBP annuity as a result of being given false information and not having proper guidance over the years. She finally received a \$25,000 annuity check in 2020 but has never received a monthly allotment since then.
2. Following enlisted service in the Regular and Reserve Marine Corps and a break in service, the SM enlisted in the U.S. Army Reserve on 26 July 1978.
3. The SM was promoted to the rank/grade of staff sergeant/E-6 effective 23 January 1988.
4. The SM and the applicant married on 26 January 1991.
5. The U.S. Army Reserve Personnel Center memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 18 February 1994, notified the SM that he completed the required years of service 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 SURVIVOR BENEFIT PLAN ELECTION CERTIFICATE (DD FORM 1883). IF YOU DO NOT SUBMIT YOUR ELECTION WITHIN 90 CALENDAR DAYS, YOU WILL NOT BE ENTITLED TO SURVIVOR BENEFITS COVERAGE UNTIL YOU APPLY FOR RETIRED PAY AT AGE 60. IF YOU DO NOT ELECT COVERAGE AND SHOULD DIE BEFORE AGE 60, YOUR SURVIVORS 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.

6. The SM's DD Form 1883, 9 March 1995, shows he was married with no dependent children. He placed a checkmark in the "Spouse only" block for the type of coverage he desired and placed an "X" in the "Option C (Immediate Coverage)" block as his election status. The instructions for Option C state: "I elect to provide an immediate annuity

beginning on the day after date of my death, whether before or after age 60." He and his spouse signed the form on 9 March 1995.

7. The SM's Honorable Discharge Certificate shows he was honorably discharged from the U.S. Army on 7 June 1996.

8. The SM's HRC Form 249-2-E, 27 July 2006, shows he completed 22 years, 10 months, and 9 days of qualifying service for retirement purposes.

9. The SM's DFAS-Cleveland Form 7220 effective 25 November 2011 shows SBP premiums were deducted from his retired pay for "Spouse Only."

10. HRC Orders P-11-943928, 23 November 2011, retired him and placed him on the Army of the United States Retired List in the rank of staff sergeant effective 1 July 2011.

11. The SM's death certificate shows he died on 22 February 2013 at age 61.

12. The applicant provided:

a. email correspondence with an HRC Reserve pay technician ((Applicant) Direct Deposit Information 26 March 2013), 26 March 2013, regarding her claim for survivor benefits and annuities;

b. a Standard Form 1174, 26 March 2013, with financial documents, claiming unpaid compensation of the SM's wages;

c. a self-authored letter, 27 February 2019, with a U.S. Postal Service Certified Mail Receipt, noting she submitted the required forms in support of her claim for the SM's pension;

d. a DD Form 2656-7, 27 February 2019, verifying her eligibility for an annuity under the SM's SBP. She signed the form on 27 February 2019;

e. the DFAS letter, 10 June 2019, informing her that her claim for entitlement to the SBP annuity from her husband's military retired pay account was denied. The Retired and Annuitant Pay Contact Representative stated, in part:

The Barring Act, 31 U.S.C. § 3702 [Title 31, U.S. Code, section 3702], bars payment of any claim not received within 6 years from the date it accrues. SBP annuity claims accrue upon the death of the retired member.

We have researched [SM's] account and our records indicate that the first application for annuity you sent was received on March 8, 2019. You

presented a claim for an annuity which is more than six years after the claim accrued. Therefore, your claim is untimely. The entirety of your claim is barred from consideration by this office and must be denied.

Because your claim was not received within the statutory time limit, it may not be considered, unless that finding is reversed on appeal. You have the right to submit an appeal of this determination to the Defense Office of Hearings and Appeals (DOHA). In order to begin this appeal, you must file an appeal with DFAS within 30 days of the date of this letter. An appeal received after 30 days cannot be accepted. You may request one extension of up to 30 days for good cause shown. This request must be received by DFAS within 30 days of the date of this letter. Failure to timely submit your appeal or request an extension within 30 days will end your appeal process.

In addition to an appeal of this determination to DOHA, you also have the right to request a waiver of the time limitations established by 31 U.S.C. § 3702 [Title 31, U.S. Code, section 3702]. Waiver requests should be submitted in writing directly to the Secretary of the service under which the claim arose at the address listed below [Assistant Secretary of the Army (Financial Management and Comptroller)]. Waivers are limited to claims up to \$25,000. Waiver requests should be in writing and include your name, mailing address, telephone number, the basis of your claim, the amount you are seeking to have waived, a complete description of the claim, all relevant documentation, and state the specific reasons why you believe a waiver of the time limitations is warranted.

f. the letter from her Congressional representative, 28 June 2019, stating he received information from her inquiry regarding assistance with respect to her husband's SBP annuity;

g. the U.S. Army Financial Management Command letter from the Army Financial Services Director to her Congressional representative, 7 August 2019, informing him that DFAS stated no entitlement to the SM's SBP had been established; however, an appeal was pending with DOHA. DOHA would inform the command of its decision and if a waiver were applicable. If so, the applicant would receive filing instructions for a waiver of the statute of limitations;

h. the Claims Appeal Board Interlocutory Decision, 14 April 2020, showing the applicant requested a waiver of the statute of limitations to allow payment up to the maximum amount of \$25,000 allowed by the statute. The Assistant Secretary of the Army (Financial Management and Comptroller) recommended approval of the payment and DFAS submitted the payment;

- i. the DFAS voucher and check, 20 April 2020, showing she was paid \$25,000 for the SBP annuity payment as approved by the wavier;
  - j. email correspondence with the U.S. Army Financial Management Command (Your SBP Annuity Claim), 4 May 2020, providing instructions for applying to the Army Board for Correction of Military Records (ABCMR); and
  - k. her U.S. Uniformed Service Identification and Privilege Card and social security card.
13. The email correspondence from a DFAS pay technician (Reply: Army Review Boards Agency Assistance), 20 December 2023, states the SM is deceased and has no retired pay account on file. The DFAS database contains:
- a. the SM's DD Form 1883, 9 March 1995, showing he elected "Spouse Only" coverage and Option C, electing an immediate annuity beginning on the day after the date of his death, whether before or after age 60; and
  - b. the SM's DD Form 2656 (Data for Payment of Retired Personnel), 11 January 2011, showing he elected "Spouse Only" SBP coverage for the applicant, and he and a witness signed this form on the same date.

#### BOARD DISCUSSION:

After reviewing the application and all supporting documents, the Board determined relief was warranted. The applicant's contentions, the SM's military records, and regulatory guidance were carefully considered. Based upon the available documentation, the applicant's deceased husband (FSM) made clear that he intended to designate his surviving spouse Wanda (the applicant) as his sole SBP beneficiary. The FSM's intent is expressed in documents he signed and submitted in March 1995 (DA Form 1883) and in November 2011 (DD Form 2656). Moreover, SBP premiums were deducted from the FSM's retirement pay as early November – December 2011. The only reason the applicant is not currently receiving annuity payments is because she waited too long to submit to DFAS her DD Form 2656-7 (Verification for Survivor Annuity). The applicant waited more than 6 years to submit this form. Consequently, the Barring Act has prevented DFAS from paying the applicant the monthly SBP annuity payments. Based upon the lack of education on SBP terms and conditions to properly annotated beneficiaries, the Board concluded there was an injustice warranting a correction to the relevant SBP records associated with the FSM to reflect that the applicant submitted to DFAS her DD Form 2656-7 (Verification for Survivor Annuity) within the Barring Act's 6-year deadline.

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 Army records of the individual concerned be corrected by correcting the relevant SBP records associated with the FSM to reflect that the applicant submitted to DFAS her DD Form 2656-7 (Verification for Survivor Annuity) 1 March 2013.

5/20/2024

X

█

CHAIRPERSON

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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. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the ABCMR.

a. The ABCMR will decide cases on the evidence of record; it is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence. The ABCMR members will direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record.

b. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

2. 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. 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, it has been subjected to a number of substantial legislative changes.

3. Public Law 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP provided a way for Reserve Component members who qualified for Non-Regular (Reserve) retirement but were not yet age 60 and eligible to participate in the SBP, to provide an annuity for their survivors should they die before reaching age 60. Three options were available:

- Option A – elect to decline enrollment and choose at age 60 whether to start SBP participation
- Option B – elect that a beneficiary receive an annuity if the member dies before age 60, but delay payment until the date of the member's 60th birthday
- Option C – elect that a beneficiary receive an annuity immediately upon the member's death if before age 60

4. 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.

//NOTHING FOLLOWS//