

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 September 2024

DOCKET NUMBER: AR20230006593

APPLICANT REQUESTS: correction of his records to show he declined to participate in the Reserve Component Survivor Benefit Plan (RCSBP) with spousal concurrence.

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)
- Email to U.S. Army Human Resources Command (HRC) (Survivor Benefit Plan (SBP) – (Applicant)), 21 March 2022
- HRC Email to Applicant (Forward: SBP – (Applicant)), 22 March 2022

FACTS:

1. The applicant states he previously tried to cancel this coverage but it was incorrect due to delays. When he retired, Washington State was locked down due to the coronavirus disease pandemic and he was unable to get unit support. Since it takes the Defense Finance and Accounting Service (DFAS) at least 30 days to review forms for accuracy, it was past the deadline by the time DFAS reviewed his documents and DFAS automatically enrolled him for maximum SBP coverage. He does not receive retired pay; he receives Department of Veterans Affairs disability compensation. He realized the error about 2 months after the fact. He tried to correct his records multiple times but due to his parents' failed health and his own mental health, he stopped fighting the issue for about 8 months between June 2022 and February 2023. He and his wife have been going through a divorce and she supported his declination of SBP coverage in 2021.

2. He enlisted in the Regular Army on 1 June 2000. He was honorably released from active duty on 31 May 2004.

3. He subsequently enlisted in the [REDACTED] Army National Guard on 3 May 2008.

4. The DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 6 October 2021, shows a PEB found him physically unfit and recommended a disability rating of 60 percent and permanent disability retirement. The PEB found the disability

disposition was not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war. His disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code, section 104, or Title 10, U.S. Code, section 10216.

5. He did not complete 20 years of qualifying service for retired pay at age 60 and he did not receive a Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter).

6. Headquarters, U.S. Army Physical Disability Agency, Orders D 286-08, 13 October 2021, retired him and placed him on the Retired List in the grade of sergeant first class effective 12 November 2021.

7. The Headquarters, U.S. Army Physical Disability Agency, memorandum (Permanent Physical Disability Retirement), 13 October 2021, advised him to immediately contact the nearest military installation Retirement Services Officer for assistance with retirement and SBP counseling, as well as completing the DD Form 2656 (Data for Payment of Retired Personnel) to activate his retired pay account.

8. He completed a DD Form 2656 (Data for Payment of Retired Personnel) on 17 November 2021 after the effective date of his retirement, showing the following entries:

a. Section I (Pay Identification):

- block 4 (Retirement/Transfer Date) – 12 November 2021
- block 7 (Member or Former Member of the) – Reserve Component
- block 8 (Participant in the Following Retirement Plan) – Disability

b. Section IV (Veterans Affairs (VA) Disability Compensation Information):

- block 15a (VA Disability Compensation) (In the event I am awarded disability compensation by the VA, I will notify DFAS of the amount of any award, as it may impact my retired pay benefit) – Agree
- block 15b (Have you applied for or are you receiving VA compensation for disability?) – Yes

c. Section VI (Federal Income Tax Withholding Information), block 17 (Marital Status), he marked Married;

d. Section X (SBP Election):

- block 33 (Reserve Component Only – This section refers to the decision you previously made on the DD Form 2656-5 when you were notified of eligibility to retire, in most cases you do not have the right to make a new election on this form.) – he marked Option C (Previously elected or defaulted to immediate RC-SBP Coverage) and (Marital status has changed since your initial election to participate in RC-SBP) – No
- block 34b (I Elect Coverage for Spouse and Child(ren)) – he checked this block

e. Section XI (Certification), block 39 (Member), he signed and dated the form on 17 November 2021;

f. Section XI, block 40 (Witness), a witness signed and dated the form at the Joint Force Headquarters on 17 November 2021; and

g. Part V (Spouse SBP Concurrence) (Required ONLY when the 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):

(1) Section XII (SBP Spouse Certification), block 41 (Spouse), is blank; and

(2) Section XII, block 42 (Notary Witness), is blank.

9. He completed a second DD Form 2656 on 25 January 2022, showing the following entries:

- Section VII (Dependency Information), block 29 (Spouse) – [REDACTED] with a marriage date in [REDACTED]
- Block 32 (Dependent Children) – one son with a birthdate in [REDACTED]
- block 33 (Reserve Component Only) – Option A – Previously declined to make an election until eligible to receive retired pay
- block 34 (SBP Beneficiary Categories) – I Elect Not to Participate in SBP
- block 39 (Member) – he signed the form on 25 January 2022
- block 41 (Spouse) – his spouse concurred with his election – the notary public seal obscures the date
- block 42 (Notary Witness) – the notary public signed the form – the notary public seal obscures the date

10. His email to HRC Customer Service (SBP – (Applicant)), 21 March 2022, states:

a. I have a problem, I medically retired on November 17 2021. I tried to complete the SBP forms prior to retirement and was told it was invalid and must be completed after retirement. I waited for a copy of my orders which were completed and backdated to Nov[ember] 17, 2021 since the [Army National Guard] does not like to release too many people at the same time. In December, I called DFAS to follow up on my forms because I received a bill for 189 [dollars] per month. The wife and I are completing a divorce and the SBP does not benefit either of us.

b. When I first tried to fill out the forms, it was a little strange since I am being medically discharged but I am not eligible to collect a retirement even after age 67 because I am missing 3 years of service. Because of the error on my forms and not receiving the retirement, I resubmitted the form to [DFAS] again but still did not get a call back. There was no office and currently is not an office for me to bring the forms to in order to have it inspected for accuracy and therefore I am forced to wait 30 days between documents before I can even contact someone for update. At no point has [DFAS] called to help me through this process and there does not seem to be a check and balance process to make sure the service member is contacted when a discrepancy exist[s].

c. In Feb[ruary], I resubmitted the documents after getting a notary to sign the forms for me however, now in March (today), I learned the form is still not correct. Apparently the notary did not date or sign the way [DFAS] experts expect, and therefore the form is "invalid" according to your office. I wish to file a complaint, not only do I believe there should be a department to help support individuals through this process, but certainly we should receive some communication if they are choosing to decline this and help resolving the problem. I have tried twice to resolve this issue and will continue to push this issue as long as [DFAS] is trying to garnish my disability check. Even now, I'm still fighting with the [Army National Guard] unit, BN [battalion], and BDE [brigade] to get back pay for language money (4 months) the [Army National Guard] owed me when I left but because the orders were late. I just want this hassle to be over. Please help me to determine why my rejection of the SBP is not valid, how do we resolve this?

11. On 22 March 2022, an HRC Customer Service representative responded, notifying him that HRC had no control over the SBP Program.

12. He completed a DD Form 2656-8 (SBP Automatic Coverage Fact Sheet) on 16 March 2023, showing the previously mentioned dependency information and date of marriage.

13. Email correspondence from the DFAS Supervisory Military Pay Specialist, 21 March 2024, states the applicant is currently enrolled in the SBP with spouse and child(ren) coverage.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, the Board found that relief was not warranted. The applicant's contentions, his military records, and regulatory guidance were carefully considered. The evidence shows the applicant did not complete 20 years of qualifying service for retired pay at age 60 and did not receive a Notification of Eligibility for Retired Pay at Age 60 (20-year letter). He was medically retired effective 12 November 2021. He completed a DD Form 2656 after the effective date of retirement and elected Option C, full SBP coverage for spouse and his child. On 25 January 2022, applicant completed a second DD Form 2656 seeking to not participate in SBP. There is no visible date showing when either the notary public or applicant's spouse signed the document. Public Law 105-85 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. It appears from the record that applicant: (1) did not wait until the second anniversary of the date on which his retired pay started to withdraw from the SBP as required; (2) did not have proper spousal concurrence due to the lack of dates for both his spouse and the notary. Although the applicant states he is going through divorce proceedings with his spouse, the fact remains that he sought to terminate SBP participation on an ineligible date with defective spousal consent. Therefore, the Board determined no error or injustice exist.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	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 for correction of the records of the individual concerned.

9/9/2024

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. 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. The ABCMR considers individual applications that are properly brought before it. 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 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 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP 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 of it 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. Once a member elects either Option B or C in any category of coverage, that election is irrevocable. Option B and C participants do not make a new SBP election at age 60. They cannot cancel SBP participation or change options they had in the RCSBP. RCSBP coverage automatically converts to SBP coverage upon retirement.
3. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elects not to participate in the SBP. The statute also provides 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.
4. 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.
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 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 two 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.

c. A service member who has been ruled severely disabled by the VA and whose VA compensation exceeds the member's retired pay doesn't receive retired pay from DFAS. As a result, DFAS cannot automatically deduct SBP premiums from the member's monthly retired pay. In this case, the best way to pay for SBP coverage is to have payments deducted from the member's VA compensation and forwarded to DFAS Retired and Annuitant Pay by the VA.

//NOTHING FOLLOWS//