

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 April 2024

DOCKET NUMBER: AR20230008222

APPLICANT REQUESTS: reconsideration of her previous request for correction of her deceased husband's records to show he elected Reserve Component Survivor Benefit Plan (RCSBP) coverage for his new 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)
- Joint Forces Headquarters, Maryland, Memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 5 October 2004
- Certificate of Marriage, [REDACTED]
- DD Form 2656-5 (RCSBP Election Certificate), 7 September 2012
- State Certificate of Death, [REDACTED]
- National Guard Bureau (NGB) Form 23C (Army National Guard Retirement Points History Statement – Application for Retirement Pay), 23 June 2016
- DD Form 2656-7 (Verification for Survivor Annuity), 23 June 2016
- Standard Form 1199A (Direct Deposit Sign-Up Form), 9 June 2023
- Internal Revenue Service Form W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 9 June 2023

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the Army Board for Correction of Military Records (ABCMR) in Docket Number AR20160014317 on 18 September 2018.

2. The applicant, the surviving spouse of a deceased Reserve Component (RC) service member (SM), states she is requesting, in effect, receipt of her husband's Survivor Benefit Plan (SBP) annuity. Her previous submission for relief contained a DD Form 2656-5, 8 March 2005, instead of the DD Form 2656-5, 7 September 2009, that was completed within 45 days of his retirement. Her husband completed his DD Form 2656-5 without her knowledge. He selected Option A (I decline to make an election until age 60) in Section IV (Coverage), block 12 (Options). She is clearly listed in Section II (Marital/Dependency) as his spouse. She did not counter-sign this

DD Form 2656-5 as required under Section IV, block 12, and Section IX (Spouse Concurrence), directions. Section IX, blocks 20a (Spouse Signature) and 20b (Date Signed), are blank. She did not concur with this election and requests receipt of her late husband's SBP annuity.

3. Following prior enlisted service in the Regular Army, the SM enlisted in [REDACTED] Army National Guard ([REDACTED] ARNG) on 2 December 1991 in the rank/grade of sergeant/E-5.

4. The Joint Forces Headquarters [REDACTED] memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 5 October 2004, notified the SM that he completed the required years of service for retired pay upon application at age 60. Paragraph 3 states:

Public Law 95-397, 30 September 1978, created the Reserve Components Survivor Benefit Plan (RCSBP), in which you are entitled to participate. RCSBP is your sole means of protecting your retired pay entitlement. NOTE: Public Law 106-398, 30 October 2000, requires that upon receipt of this Letter, a qualified Reserved Component member, who is married, will automatically be enrolled in the RCSBP under option C, Spouse and Child(ren) coverage based on Full Retired Pay, UNLESS different coverage is selected within 90 days of receipt of this letter. Notarized spousal concurrence is required in order to decline full and immediate coverage for annuitants. FAILURE TO MEET THIS REQUIREMENT WILL RESULT IN THE RETENTION OF FULL COVERAGE FOR YOUR SPOUSE AND CHILD(REN). If you elect to remain covered under the automatic provision of the Law you must provide this Command written correspondence (the enclosed DD Form 2656-5 (formally [formerly] DD Form 1883) is required) stating who you have designated as annuitant(s). The cost for this participation will commence upon your receipt of retired pay at age 60. Detailed information concerning RCSBP program and cost is enclosed. You must contact this Command for answers to specific individual questions.

5. His DD Form 2656-5, 8 March 2005, that shows in:

a. Section II (Marital/Dependency Status), block 7 (Are you married?), he placed an "X" in the "No" box

b. Section II, block 8 (Do you have any dependent children?), he placed an "X" in the "Yes" box;

c. Section III (Spouse/Dependent Child(ren) Information), block 11a (Dependent Children), he entered [REDACTED] a daughter, and [REDACTED] a son, with birthdates in 1989 and 1992, respectively;

d. Section IV (Coverage), block 12 (Options), he placed an "X" in the block "Option C (Immediate Annuity). I elect to provide an immediate annuity beginning on the day after date of my death, whether before or after age 60";

e. Section IV, block 13 (Type of Coverage), he placed an "X" in the "Child(ren) Only" box;

f. Section V (Level of Coverage), block 14, he placed an "X" in the "Full Retired Pay" box; and

g. Section IX (Member Signature), he signed the form on 8 March 2005 and his signature was witnessed on the same date by Staff Sergeant [REDACTED] in [REDACTED]

6. The SM and the applicant married on [REDACTED]

7. The SM was promoted to the rank/grade of master sergeant/E-8 effective 15 March 2010.

8. The applicant provided a DD Form 2656-5, 7 September 2012, that shows in:

a. Section II (Marital/Dependency Status), block 7 (Are you married?), he placed an "X" in the "Yes" box;

b. Section II, block 8 (Do you have any dependent children?), he placed an "X" in the "Yes" box;

c. Section III (Spouse/Dependent Child(ren) Information), block 9a (Spouse), he entered [REDACTED] with a marriage date in [REDACTED]

d. Section III, block 11a (Dependent Children), he entered [REDACTED] a son, with a birthdate in [REDACTED]

e. Section IV (Coverage), block 12 (Options), he placed an "X" in the block "Option A. I decline to make an election until age 60. (Note: Do not select type of coverage below);

f. Section IV, block 13 (Type of Coverage), he placed an "X" in the "Spouse and Child(ren)" box;

g. Section V (Level of Coverage), block 14, he placed an "X" in the "Full Retired Pay" box;

h. Section VIII (Member Signature), he signed the form on 7 September 2012 and his signature was witnessed on the same date by [REDACTED] and

i. Section IX (Spouse Concurrence) (Required when member is married and elects child(ren) only coverage, does not elect full spouse coverage, or declines coverage. The date of the spouse's signature in item 20.b. MUST NOT be before the date of the member's signature in item 18, above. The spouse's signature MUST be notarized). Spouse consent and signature are required for an RCSBP election that does not provide for an immediate spouse annuity (Option C) based on full retired pay. A NOTARY PUBLIC MUST WITNESS THE SPOUSE'S SIGNATURE. The witness must not be a beneficiary of the member. In the event that consent is required, but not provided, RCSBP coverage will be established for an immediate spouse annuity based on full retired pay. NOTE: If the member selects Option A (declining to make an election until age 60), and the spouse consents, no annuity will be payable if the member dies prior to reaching age 60. When the member reaches age 60, an SBP election for less than a full spouse annuity requires the member's spouse to consent. Electing Option B requires the beneficiary to wait until the member would have been age 60 before the annuity is payable, in the event the member dies prior to reaching age 60. (Note: This section is void of a spouse's signature and date, and a notary witness.)

9. The SM's NGB Form 22 (National Guard Report of Separation and Record of Service) shows he was honorably discharged from the [REDACTED] ARNG and transferred to the Retired Reserve on 31 October 2012. He completed 28 years, 1 month, and 25 days of total service for retired pay.

10. Headquarters, [REDACTED] ARNG, Orders 312-010, 7 November 2012, honorably discharged him from the Army National Guard and assigned him to the Retired Reserve effective 31 October 2012.

11. The SM's death certificate shows he passed away on [REDACTED] at age [REDACTED]. The death certificate further shows he was married to the applicant at the time of his death. He was not yet eligible to apply for retired pay.

12. It appears the applicant contacted the U.S. Army Human Resources Command (HRC) regarding her eligibility for her late husband's RCSBP. The letter from the Chief, RC Retirement Branch, HRC, 26 June 2016, states:

The Reserve Component Survivor Benefit (RCSBP) established by Public Law 95-397, was to provide an annuity for the spouse and other eligible beneficiaries for Reserve Soldiers or former soldiers who have completed 20 years of service for retired pay at age 60. By law, [SM] had 90 calendar days from the date he received his letter, to submit a Survivor Benefit Election Certificate (DD [F]orm 2656-5). If an election was not made within 90 calendar

days, he would not be entitled to Survivor Benefit coverage until he applied for retired pay at age 60. [SM] completed a DD Form 2656-5, which he signed March 8, 2005. [SM] had one year after he was married to make an election[;] he was married on [REDACTED]

You may apply to the Army Board for Correction of Military Records (ABCMR) to review your case. The Board was established for the express purpose of considering the existence of error or injustice, and to make appropriate recommendations for corrective action. You may complete the enclosed Application for Corrections [sic] of Military Record (DD Form 149) and return it to the address highlighted on the form with a copy of this letter.

13. The SM's records contain a DD Form 2790 (Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces), 27 June 2016, showing [REDACTED] verified he is the unmarried minor child of the deceased SM with a birthdate [REDACTED]. This form further shows the applicant is the stepmother and custodian of the minor child. She signed and dated the form on 27 June 2016.

14. On 18 September 2018 in Docket Number AR20160014317, the ABCMR denied the applicant's request to correct her deceased husband's records to show he elected spouse coverage under the RCSBP within 1 year of marriage.

15. The applicant additionally provided:

a. the SM's NGB Form 23C (Army National Guard Retirement Points History Statement – Application for Retirement Pay), 23 June 2016, showing the SM completed 28 years, 1 month, and 25 days of creditable service for retired pay; and

b. her DD Form 2565-7, 23 June 2016, verifying her eligibility for an annuity under the RCSBP as the surviving spouse. She also provided financial documents for establishment of financial payments to her.

16. On 22 March 2024, a Defense Finance and Accounting Service pay technician noted the DFAS database contained the following documents:

a. the SM's Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter), 5 October 2004, as described above;

b. the SM's DD Form 2656-5, 8 March 2005, as described above;

c. the certificate of live birth for the SM's son, [REDACTED] with his birthdate [REDACTED]. It further shows his mother listed as [REDACTED], who is not the applicant;

d. the SM's certificate of death, [REDACTED]

e. the SM's NGB Form 23C, 23 June 2016, as described above;

f. the DD Form 2656-7, 23 June 2016, verifying [REDACTED] the child of the deceased SM, eligibility for an annuity under the RCSBP. This form was signed by the applicant as the guardian on 23 June 2016;

g. the DD Form 2790, 27 June 2016, as described above;

h. an HRC RC Retirements Branch letter to [REDACTED] 28 June 2016, stating:

Your application for Survivor Benefits Plan annuity payments based on the military service of your late father, [SM] is approved. Your claim has been forwarded to the Director, Retired Pay, Defense Finance and Accounting Service, Cleveland, Ohio for processing.

To determine your entitlement to a Uniformed Services Identification and Privilege Card, DD Form 1173, you should present this letter along with the death certificate, and birth certificates to the nearest military identification card issuing facility.

You may contact the nearest Retirement Services Officer (RSO) for additional information and assistance regarding your eligibility for Army benefits. A listing of RSOs by country, state, and installation is available on the internet at <http://soldierforlife.army.mil/retirement>.

i. an RCSBP for the United States Retired Armed Forces spreadsheet that has the SM's data and shows his SBP election as Option C with "Child Only" coverage. It further shows the survivor's name as [REDACTED]

j. financial documents for establishment of financial payments to her; and

k. an undated Defense Finance and Accounting Service letter to the applicant's Member of Congress replying to the applicant's request for entitlement to the deceased SM's RCSBP annuity. This official noted:

[Applicant] requested that the Army change [SM's] military records to reflect that he named her as a spouse beneficiary of his SBP account. However, the Army Board for Correction of Military Records (BCMR) denied her request in a decision in Docket # AR20160014317.

She has no recourse options through Defense Finance and Accounting Service, as we do not have the ability to overturn the BCMR's decision. She may wish to consult with a private attorney regarding additional options.

#### BOARD DISCUSSION:

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

2. A majority of the Board found the applicant's claims to have merit, noting that she was deprived of the opportunity to concur with the SM's RCSBP election. A majority of the Board determined the SM's record should be corrected to show he changed his RCSBP election to spouse and children within one year of their marriage.

3. The member in the minority determined there is no error or injustice in this case.

a. The SM had two opportunities to make or change an RCSBP election: within 90 days of receiving his 20-year letter and within 1 year of his marriage to the applicant. The record shows he took no action during either period. By taking no action within 90 days of receiving his 20-year letter, because he was not married at the time, his RCSBP election defaulted to children only. By taking no action to change his election to spouse and children within one year of his marriage to the applicant, he forfeited his second opportunity. Any attempts to make an election outside of those two windows of opportunity were not valid.

b. Further complicating matters is the fact that, as noted in this case and in the previous consideration of this case, the SM is survived by a dependent child who is currently entitled to the RCSBP annuity in light of the SM's irrevocable child coverage election. As stated in the previous case, that the child may not be deprived of his vested interest in the RCSBP annuity without due process of law.

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 that the evidence presented was sufficient to warrant amendment of the ABCMR's decision in Docket Number AR20160014317 on 18 September 2018. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing he elected spouse and children RCSBP coverage within one year of his marriage on 13 August 2005.

9/3/2024

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 very specific 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. Public Law 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP provided a way for RC 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. A member must have made the election within 90 days of receiving the notification of eligibility to receive retired pay at age 60 or else wait until he/she applies for retired pay and elect to participate in the standard SBP. Once a member elects either option B or C in any category of coverage, that election becomes 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; the RCSBP automatically converts to SBP coverage. 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

3. Title 10, U.S. Code, section 1448(a)(5), provides that a person who is not married and has no dependent child upon becoming eligible to participate in the SBP but who later marries or acquires a dependent child may elect to participate in the SBP. 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.

4. Public Law 106-398, enacted 30 October 2000, required written spousal consent for a Reserve service member to delay making an RCSBP election until age 60. The law is applicable to cases where 20-year letters have been issued after 1 January 2001. In essence, failure to elect an option upon receipt of the 20-year letter results in the default election of Option C.

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 Reserve members under certain conditions.

6. The DFAS website defines "gray area" retirees as RC 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.

//NOTHING FOLLOWS//