

IN THE CASE OF: [REDACTED]

BOARD DATE: 9 September 2024

DOCKET NUMBER: AR20230008499

APPLICANT REQUESTS: in effect, correction of her late husband's records to show he changed his Survivor Benefit Plan (SBP) election from "Former Spouse" to "Spouse" within 1 year of enactment of the National Defense Authorization Act for Fiscal Year 2016 that enabled retirees to transfer their SBP eligibility to a new spouse upon the former's spouse's death.

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)
- State Marriage License, [REDACTED]
- Headquarters, VII Corps, Germany, Orders 59-3, 17 October 1990
- DD Form 214 (Certificate of Release or Discharge from Active Duty), 30 November 1990
- District Court Final Decree of Divorce, [REDACTED], with auxiliary documents
- Translation of Marriage Certificate, [REDACTED] with original document written in German
- State Certificate of Death, [REDACTED]
- Death Certificate, [REDACTED]
- U.S. Department of State Report of Death of a U.S. Citizen or U.S. Non-Citizen National Aboard), issued 2 February 2022
- Internal Revenue Service Form W-8BEN (Certificate of Foreign Status of Beneficial Owner for U.S. Tax Withholding and Reporting (Individuals)), 4 April 2023

FACTS:

1. The applicant, the surviving spouse of a deceased retired service member (SM), states her late husband's former spouse was awarded his SBP coverage based on their divorce decree. Her late husband's former spouse is deceased and she would like his SBP coverage changed from "Former Spouse" to "Spouse," making her eligible for his SBP annuity.

2. The SM enlisted in the Regular Army on 3 November 1970.

3. The SM and [REDACTED] married on [REDACTED]
4. The SM was promoted to the rank/grade of staff sergeant/E-6 effective 15 March 1977.
5. Headquarters, VII Corps, Germany, Orders 59-3, 17 October 1990, retired the SM on 30 November 1990 and placed him on the Retired List in the rank of staff sergeant effective 1 December 1990.
6. The SM's DD Form 4240 (Data for Payment of Retired Personnel), 30 November 1990, shows in:
 - Part I (Pay Identification), block 8 (Date of Retirement), 1 December 1990;
 - Part V (SBP Election), block 14 (Are You Married?), he placed an "X" in the "Yes" box;
 - Part V, block 14a (Do you have dependent children?), he placed an "X" in the "Yes" box;
 - Part V, block 15 (Check One of the Following to Indicate the Type of Coverage You Desire), he placed an "X" in the "Spouse Only" box;
 - Part V, block 16 (If You Checked 15a, b, c, d, or e, Do You Elect to Provide an Annuity Based on Full Amount of Retired Pay or on a Reduced Portion of Retired Pay?), he placed an "X" in the "FULL" box;
 - Part V, block 17a (Name of Spouse/Former Spouse), he listed [REDACTED] and [REDACTED]
 - Part VI (Certification), the SM and a witness each signed the form on [REDACTED] at Fort Bliss, TX.
7. The SM retired in the rank/grade of staff sergeant/E-6 on 30 November 1990. He completed 20 years and 12 days of total active service.
8. The District Court Final Decree of Divorce ordered the dissolution of the marriage between the SM and [REDACTED] effective [REDACTED]. The decree states:

The Court further finds that at the present [SM], as a result of his service in the United States Army, is entitled to make an election to provide the Armed Services Survivor Benefit Plan benefits to [REDACTED] payable on his death. The Court further finds that, as a just and right division of the estate of the parties, having due regard for the rights of the parties and any children of the marriage, such Armed Services Survivor Benefit Plan election should be made and/or be continued and maintained in full force and effect and that same should not be altered or withdrawn by [SM] during his lifetime.

IT IS THEREFORE ORDERED AND DECREED that, as part of a just and right division of the estate of the parties, [SM] elect to provide the Armed Services Survivor Benefit Plan benefits payable on his death to [REDACTED] IT IS FURTHER ORDERED AND DECREED that [SM] immediately designate [REDACTED] his former spouse, the beneficiary of the Armed Service Survivor Benefit Plan to the full extent permissible by the Plan.

IT IS FURTHER ORDERED AND DECREED that [SM] immediately obtain, fully complete, sign, and return to (branch of Finance center) or such other entity as may be required to effect the Armed Services Survivor Benefit election the following documents, papers, and forms:

(1) USAFAC [U.S. Army Finance and Accounting Center] Form 20-237 [Survivor Benefit Plan Election Statement for Former Spouse Coverage], and/or

(2) USAFAC Form 20-238 [Survivor Benefit Plan Election Change], and

(3) any other documents, papers, and forms necessary to provide the Armed Services Survivor Benefit Plan benefits to [REDACTED] as [SM's] former spouse, and shall provide [REDACTED] copies of those documents, papers and forms simultaneously. IT IS FURTHER ORDERED AND DECREED that [REDACTED] do such other acts, deeds, and things as are necessary to immediately designate [REDACTED] the beneficiary of the Armed Services Benefit Plan.

IT IS FURTHER ORDERED AND DECREED that [SM] shall not, during his lifetime, revoke, modify, amend, withdraw, or in any other form alter the election to provide the Armed Services Survivor Benefit Plan for the benefit of [REDACTED] which presently would pay to him [sic] on the death of [SM] the survivor benefits, and [SM] is hereby permanently ENJOINED AND RESTRAINED from revoking, withdrawing, amending, or in any other way modifying or altering such benefit plan election.

Change of Name

IT IS ORDERED AND DECREED that Petitioner's [REDACTED] name is changed to [REDACTED]

9. The SM and the applicant, [REDACTED] married on [REDACTED] in Amberg, Germany.

10. The Texas Certificate of Death shows [REDACTED] died on [REDACTED] [REDACTED] The informant is shown as the SM's and [REDACTED] daughter.

11. The SM's death certificate shows he died in Amberg, Germany, on [REDACTED] and he was married to the applicant at the time of his death.
12. The U.S. Department of State Report of Death of a U.S. Citizen or U.S. Non-Citizen National Aboard), issued 2 February 2022, shows the SM died on [REDACTED] in Amberg, Germany, and lists the applicant as his spouse. Notifications were sent to the U.S. Social Security Administration and [REDACTED] Vital Records Agency.
13. The applicant provided an Internal Revenue Service Form W-8BEN (Certificate of Foreign Status of Beneficial Owner for U.S. Tax Withholding and Reporting (Individuals)), which she signed on 4 April 2023.
14. The email correspondence from a DFAS pay technician (Army Review Boards Agency Assistance), 22 February 2024, notes the deceased SM's election at retirement (1 December 1999) was "Spouse Only" coverage. Currently the deceased SM's SBP coverage is "no beneficiary" since his divorce on 30 August 2010 (Note: This date is, in fact, the date of his former spouse's death). There is no former spouse election or deemed election on file. The DFAS database contains the same documents as provided by the applicant with the exception of the SM's marriage certificate to the applicant and the SM's death certificate.

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 applicant's contentions, the SM's military records, and regulatory guidance were carefully considered.

a. The applicant who is the surviving spouse of a deceased retired service member (SM), states her late husband's former spouse was awarded his SBP coverage based on their divorce decree. Her late husband's former spouse is now deceased, and she (the applicant) would like his SBP coverage changed from "Former Spouse" to "Spouse," making her eligible for his SBP annuity. DFAS advised that the deceased SM's election at retirement (1 December 1999) was "spouse only" coverage. Currently the deceased SM's SBP coverage is "no beneficiary" since his former spouse died on 30 August 2010. There is no former spouse election or deemed election on file.

b. The SM retired on 30 November 1990. He was married to [REDACTED] at the time. He submitted an SBP election electing spouse SBP coverage based on the full amount. He and [REDACTED] were divorced on [REDACTED]. Their divorce decree required the SM to provide SBP benefits to [REDACTED] payable on his death. The SM and applicant married on [REDACTED]. The former spouse [REDACTED] died on [REDACTED], and the SM died on [REDACTED]. He was married to the applicant at the time of his death.

c. The applicant bears the burden of demonstrating error or injustice by a preponderance of evidence. The Board did not find the applicant provided sufficient evidence to prove an error or an injustice. In the past, the Board was willing, in certain cases, to enforce records corrections to change an SBP beneficiary from Beneficiary A to Beneficiary B when the evidence is clear that that the SM intended to make Beneficiary B his lawful beneficiary, but the SM's own mistakes, misapprehensions, neglect, or procrastination thwarted the SM's intent.

d. An injustice would occur if the SM's well-documented intent would be unfulfilled, even if the cause of the problem was neglect or mistakes committed by the SM, his family members, or his former spouse. In this case, the Board did not find any evidence that the SM desired to make the applicant his SBP beneficiary. The underlying rationale for granting relief in this case is absent. Thus, the Board found no compelling error or injustice is proven by the applicant.

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 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. 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.
2. The National Defense Authorization Act for Fiscal Year 2016 amended the SBP statute to provide a member who had made an election to provide SBP or Reserve Component SBP coverage for a former spouse the ability to cover a subsequent spouse if the former spouse dies. The enactment of this legislation included provisions in the form of an open enrollment season to accommodate members whose covered former-spouse beneficiaries were already deceased when the legislation was enacted.
3. Public Law 114-92, section 641 (Death of Former Spouse Beneficiaries and Subsequent Remarriages under the SBP), 25 November 2015, amended Title 10, U.S. Code, section 1448(b), by adding the following new paragraph:
 - (7) Effect of Death of Former Spouse Beneficiary:
 - (A) Termination of Participation in Plan. A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) and whose former spouse subsequently dies is no longer a participant in the Plan, effective on the date of death of the former spouse.
 - (B) Authority for Election of New Spouse Beneficiary. If a person's participation in the Plan is discontinued by reason of the death of a former spouse beneficiary, the person may elect to resume participation in the Plan and to elect a new spouse beneficiary as follows: (i) Married on the Date of Death of Former Spouse. A person who is married at the time of the death of the former spouse beneficiary may elect to provide coverage to that person's spouse. Such an election must be received by the Secretary concerned within one year after the date of death of the former spouse beneficiary. (ii) Marriage after Death of Former Spouse Beneficiary. A person who is not married at the time of the death of the former spouse beneficiary and who later marries may elect to provide spouse coverage. Such an election must be received by the Secretary concerned within one year after the date on which that person marries.
 - (C) Effective Date of Election. The effective date of election under this paragraph shall be as follows: (i) An election under subparagraph (B)(i) is effective as of the

first day of the first calendar month following the death of the former spouse beneficiary. (ii) An election under subparagraph (B)(ii) is effective as of the first day of the first calendar month following the month in which the election is received by the Secretary concerned.

(D) Level of Coverage. A person making an election under subparagraph (B) may not reduce the base amount previously elected.

(E) Procedures. An election under this paragraph shall be in writing, signed by the participant, and made in such form and manner as the Secretary concerned may prescribe.

(F) Irrevocability. An election under this paragraph is irrevocable.

(b) Effective Date. Paragraph (7) of section 1448(b) of Title 10, U.S. Code, as added by subsection (a), shall apply with respect to any person whose former spouse beneficiary dies on or after the date of the enactment of this Act.

(c) Applicability to Former Spouse Deaths before Enactment.

(1) In General. A person: (A) who before the date of the enactment of this Act had a former spouse beneficiary under the Survivor Benefit Plan who died before that date; and (B) who on the date of the enactment of this Act is married, may elect to provide spouse coverage for such spouse under the Plan, regardless of whether the person married such spouse before or after the death of the former spouse beneficiary. Any such election may only be made during the one-year period beginning on the date of the enactment of this Act.

(2) Effective Date of Election if Married at Least a Year at Death Former Spouse. If the person providing the annuity was married to the spouse beneficiary for at least one year at the time of the death of the former spouse beneficiary, the effective date of such election shall be the first day of the first month after the death of the former spouse beneficiary.

(3) Other Effective Date. If the person providing the annuity married the spouse beneficiary after (or during the one-year period preceding) the death of the former spouse beneficiary, the effective date of the election shall be the first day of the first month following the first anniversary of the person's marriage to the spouse beneficiary.

(4) Responsibility for Premiums. A person electing to participate in the Plan under this subsection shall be responsible for payment of all premiums due from the effective date of the election.

4. Department of Defense Instruction 1332.42 (Survivor Benefit Plan), Section 4 (Notification and Election), paragraph 4.5 (Electing Spouse Coverage upon Death of Covered Former Spouse) states in accordance with Title 10, U.S. Code, section 1448(b), as amended by Public Law 114-92, section 641, a retiree who is participating in the SBP or Reserve Component SBP with former spouse coverage, may, upon the death of that former spouse, elect to cover his or her spouse under certain conditions described in paragraphs 4.5.a. through 4.5.c.

a. Remarried before Death of Former Spouse on or after 25 November 2015:

(1) If the covered participant was married to a new spouse before the death of his or her former spouse, the participant may elect to cover his or her new spouse if the former spouse died on or after 25 November 2015.

(2) The election to cover the new spouse must be made by the participant in writing to the Secretary concerned within 1 year of the death of the former spouse. Coverage is not automatic.

(3) The covered participant may not change the level of coverage already in place.

(4) Coverage for the new spouse is effective as of the first day of the first month following the month of the death of the former spouse beneficiary, or the first anniversary of the marriage, whichever is later.

b. Remarried after Death of Former Spouse on or after 25 November 2015:

(1) If the covered participant marries a new spouse after the death of his or her former spouse, the participant may elect to cover his or her spouse if the former spouse died on or after 25 November 2015.

(2) The election to cover the new spouse must be made by the participant in writing to the Secretary concerned within 1 year of remarriage. Coverage is not automatic.

(3) The covered participant may not change the level of coverage.

(4) Coverage for the new spouse is effective as of the first day of the first month following the month in which the election is received by the Secretary concerned, or the first anniversary of the marriage, whichever is later.

c. Special Provisions when the Former Spouse Died before 25 November 2015:

(1) In the case of a covered participant who was already remarried before 25 November 2015 and whose former spouse beneficiary died before 25 November 2015, there is a 1-year window to designate the new spouse as beneficiary, in accordance with Public Law 114-92. The enrollment window for such participants ended on 24 November 2016. While the level of coverage was required to remain the same, the effective date of coverage depended on how long the covered participant was married to the new spouse in relation to the death of the former spouse:

(a) If the covered participant was married to the new spouse for at least 1 year at the time of the death of the former spouse, the effective date of spouse coverage is the first day of the first month after the death of the former spouse.

(b) If the covered participant married the new spouse within the year immediately before the death of the former spouse, or after the death of the former spouse, the effective date of spouse coverage is the first day of the first month following the first anniversary of the remarriage.

(2) If the former spouse died before 25 November 2015, but the covered participant was not yet married to the new spouse as of 25 November 2015, that covered participant has 1 year from the date of marriage to elect coverage for the new spouse. Coverage is not automatic.

//NOTHING FOLLOWS//