

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 March 2024

DOCKET NUMBER: AR20230008535

APPLICANT REQUESTS: entitlement to the Service Member's (SM) Reserve Component (RC) Survivor Benefit Plan (SBP) compensation benefit. A personal appearance before the Board via video or telephone.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Personal Letter
- Instructions for Submitting Archive Records Request
- Request for Michigan Army National Guard (MIARNG) Records
- Memorandum, Subject: Notification of Eligibility for Retired Pay at Age 60, 27 June 1996
- DD Form 1883-R (SBP Election Certificate), 28 August 1996
- Michigan Birth Certificate
- Florida Marriage Certificate
- Michigan Death Certificate
- National Guard Bureau (NGB) Form 22 (Report of Separation and Record of Service), 31 August 1996
- MIARNG Honorable Discharge Certificate, 31 August 1996
- Divorce Decree
- Michigan Office of Retirement Services form
- NGB Form 23A (ARNG Current Annual Statement), 30 September 1996
- Orders Number 243-014, 30 August 1996
- Department of Defense (DoD) Safe Confirmation Sheet
- Email Correspondence with MIARNG

FACTS:

1. The applicant did not file within the three-year time frame provided in Title 10, United States Code (USC), section 1552 (b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant, on behalf of the SM, states in pertinent part, she is the daughter of the SM. The SM attempted to file for his MIARNG pension after turning age 60 but was unsuccessful in completing the request as he had passed in March 2022. At this time, the applicant is requesting entitlement to his SBP benefit.

3. A review of the SM's available records reflect the following:

a. On 18 May 1976, the SM enlisted in the MIARNG.

b. DA Form 4836 (Oath of Extension of Enlistment of Reenlistment), dated 2 May 1992 shows the SM extended his enlistment with the MIARNG for a period of 6 years.

c. On 27 June 1996, Headquarters, MIARNG issued a Memorandum for Notification of Eligibility for Retired Pay at Age 60. The memorandum shows a SBP summary as an attachment but does not list DD Form 1883 nor does it mention SBP within the body of the letter.

d. On 30 August 1996, The State of Michigan, Department of Military Affairs, issued Orders Number 243-014 honorably discharging the SM from the MIARNG and assigning him to the U.S. Army Reserve Control Group (Retired Reserve), effective 31 August 1996 and placed him on the Retired List effective 1 September 1996 at the rank of sergeant (SGT).

e. NGB Form 22, dated 31 August 1996 shows an honorable release from the MIARNG at the rank of SGT with service from 18 May 1976 to 31 August 1996 for a net service this period of 20 years, 3 months, and 14 days.

4. The applicant provides the following:

a. Instructions for Submitting Archive Records Request showing the applicant requested the SM's records.

b. Request for MIARNG Records wherein the applicant was requesting the SM's records to submit to this Board.

c. DD Form 1883-R dated 28 August 1996 showing the SM elected full coverage for spouse and children. Item 9c shows Option A (Defer). Both dependent children were under the age of 18 at the time of the form completion. Presently, both children are now over the age of 22. The beneficiaries are listed as follows:

- S- L- (Spouse) married 10 October 1986
- L- L- (Dependent Child)

- K- L- (Dependent Child)
 - d. Michigan Birth Certificate showing the applicant's birth parents as the SM and the former spouse (Mrs. S- L-).
 - e. Florida Marriage Certificate showing the applicant's marriage to M -M- on 15 April 2014.
 - f. Michigan Death Certificate showing the SM's passing on 31 March 2022.
 - g. MIARNG Honorable Discharge Certificate, dated 31 August 1996 showing the SM's discharge from the National Guard.
 - h. Divorce Decree showing the SM was married to S- L- and officially divorced on 2 December 1997. The document is void of any entry regarding entitlement to SBP benefits.
 - i. Michigan Office of Retirement Services form showing the FSM completed the form to apply for retirement related to his service in the ARNG.
 - j. NGB Form 23A showing the SM's service in the ARNG from 18 May 1976 to 31 August 1996, totaling 20 years, 3 months, and 13 days of creditable service for retired pay.
 - k. DoD Safe Confirmation Sheet as unspecified supporting evidence.
 - l. Email Correspondence with MIARNG wherein the applicant was attempting to apply for the SBP benefits with the state Adjutant.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that partial relief was warranted. The Board carefully considered the applicant's record of service, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation. Upon review of the applicant's petition and available military records, the Board determined that the service member (SM) retired from the Michigan Army National Guard in August 1996 after completing 20 qualifying years of service. A valid Notification of Eligibility (NOE) was issued, confirming the SM's eligibility for non-regular retirement pay upon reaching age 60. In accordance with DoD Instruction 1332.42 and Volume 7B, Chapter 54 of the DoD Financial Management Regulation, gray area retirees—those who have completed qualifying service but have not yet reached

retirement age are eligible to elect RC-SBP coverage within 90 days of receiving their NOE.

2. The Board found that the SM completed DD Form 1883-R (SBP Election Certificate) on 28 August 1996, electing Child(ren)-Only coverage under RC-SBP. There was no indication of an election for his former spouse following a divorce finalized on 15 December 1997. At the time of SBP eligibility activation in 2015, upon reaching age 60, the SM was unmarried and his children had aged out of eligibility, thereby excluding SBP benefits from being added to the retirement package. The applicant applied for retirement benefits on 9 March 2022, well after eligibility began in 2015. Despite the delayed application, the Board found merit in the claim based on the SM's prior attempt to submit documentation and the passing of records to retirement services.

3. However, the Board agreed there is insufficient evidence to support the applicant's claim for entitlement to RC-SBP compensation. The SM's SBP elections and family status at the time do not support a continuing benefit. As such, the Board denied relief.

4. Based upon the totality of the facts, the Board concluded that changing the FSM's record showing he made a timely submission for retirement pay was warranted and for payment of those benefits to be determined by the Defense Finance and Accounting Service.

5. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

: : : GRANT FULL RELIEF

:XXX :XXX :XXX GRANT PARTIAL RELIEF

: : : GRANT FORMAL HEARING

: : : DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

1. The Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by showing the FSM's made a timely submission for retirement pay to receive retirement pay benefits; however, with the passing of the FSM, the Defense Finance and Accounting Service will determine the appropriate payee for such payment.
2. The Board further determined the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to entitlement to the Service Member's (SM) Reserve Component (RC) Survivor Benefit Plan (SBP) compensation benefit.

//SIGNED//

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. Title 10, USC, section 1552(b), provides that applications for correction of military records must be filed within three years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the three-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.
2. Public Law 95-397, the Reserve Component SBP (RCSBP), enacted 30 September 1978 provided a way for those who had 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
- C: elect that a beneficiary receive an annuity immediately upon their death if before age 60

3. Title 31, USC, 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 says that the government is only obligated to pay the individual 6 years 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 (BCMR) is not bound by the barring act, that the BCMR decision creates a new entitlement to payment and the 6 years starts running over again, and that payment is automatic and not discretionary when a BCMR decision creates an entitlement.

4. Army Regulation 15-185 (Army Board for Correction of Military Records (ABCMR)) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that 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.

//NOTHING FOLLOWS//