

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 19 March 2024

DOCKET NUMBER: AR20230008638

APPLICANT REQUESTS: receipt of her late husband's Reserve Component (RC) Survivor Benefit Plan (SBP) annuity.

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)
- U.S. Army Reserve Personnel Center Memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 2 February 2001

FACTS:

1. The applicant, the surviving spouse of a deceased RC service member (SM), states she submitted documentation to claim her late husband's SBP annuity in March 2021, but sent the paperwork to the wrong location and never received a response. She contacted them a year later and they informed her that she'd sent the paperwork to the wrong location so she doesn't think it's her fault. She knows her husband signed paperwork for the SBP but doesn't know what happened to it.

2. The SM enlisted in the Regular Army on 28 June 1978. He was promoted to the rank/grade of specialist four/E-4 effective 1 November 1979. He was released from active duty on 25 June 1981 and transferred to the U.S. Army Reserve.

3. The SM and the applicant married on 3 July 1982.

4. The U.S. Army Reserve Personnel Center memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 2 February 2001, 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 memo[andum]** to submit

your DD Form 1883, Survivor Benefit Plan-Election Certificate. 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. Enclosed is [a] DD Form 1883 and detailed information about RC-SBP.

5. The SM's records contain no evidence indicating he made an RCSBP election within 90 days of receipt of his 20-year letter.

6. Headquarters, U.S. Army 90th Regional Support Command, Orders 02-039-007, 8 February 2002, reassigned him to the Retired Reserve effective 8 January 2002.

7. The SM's death certificate shows he passed away on 11 July 2016 at age 55. His marital status is shown as "Married" and the applicant is listed as his spouse and informant. The SM would have reached age 60 in 2020.

8. The SM's records contain:

a. a letter from the applicant to whom it may concern, 26 September 2022, informing whomever that her husband passed away and requesting all the benefits and entitlements due to her from his death, and

b. a DD Form 2656-7 (Verification for Survivor Annuity) with auxiliary documents, 26 September 2022, showing the applicant verified her eligibility for an annuity under the SM's RCSBP. She signed the form on 26 September 2022.

9. It appears the applicant applied for the deceased SM's RCSBP annuity as evidenced by a letter from the Chief, Gray Area Retirements Branch, U.S. Army Human Resources Command, 18 October 2022, wherein he stated:

This is to inform you that your application for a Survivor Benefit annuity based on the military service of your late spouse, [SM], has been denied. According to Title 31 of United States Code, Section 3702, any claim against the government must be submitted within six years. The statute of limitations for your claim was reached on July 11, 2022, and unfortunately our office does not have jurisdiction to process your application. If you disagree, with our decision, you may appeal to the board using the enclosed Application for Correction of Military Records (DD Form 149). The Army Board for Correction of Military Records (ABCMR) was established for the express purpose of considering the existence of error [or] injustice and to make appropriate recommendations for corrective actions.

10. The email correspondence from a Defense Finance and Accounting Service (DFAS) pay technician (Reply: Army Review Boards Agency Assistance), 22 February

2024, states the DFAS database does not contain any paperwork or show the SM elected to participate in the SBP. Further, the database does not show the deceased SM as having been placed on the retired rolls.

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

a. The applicant, the surviving spouse of a deceased RC service member (SM), states she submitted documentation to claim her late husband's SBP annuity in March 2021, but sent the paperwork to the wrong location and never received a response. She contacted them a year later and they informed her that she'd sent the paperwork to the wrong location, so she doesn't think it's her fault. She knows her husband signed paperwork for the SBP but doesn't know what happened to it.

b. The main issues in this case are whether the applicant was the FSM's lawful SBP beneficiary when the FSM passed away on 11 July 2016 at age 55, and whether the applicant applied for her SBP annuity within the Barring Act's 6-year statute of limitation. On review, the Board determined the applicant was a lawful SBP beneficiary when the FSM passed away, but she did not apply for her SBP annuity within the 6-year statute of limitation.

c. NDAA 2001 changed the SBP rules to require written spousal consent for a Reserve Component service member to be able to delay making an RCSBP election until age 60. Absent spousal consent, SBP coverage defaults to "Option C, Immediate Coverage" for the spouse. The new law is applicable to cases in which the 20-year letters were issued after 1 January 2001. The case file indicates the FSM's 20-year letter was issued 2 February 2001. Thus, the FSM's failure to elect an option within that 90-day widow should have resulted in the default election of Option C, Immediate Coverage for the applicant. The email in the case file from DFAS indicates that the FSM made no SBP election within the 90-day window (or ever for that matter) and that the applicant did not consent to any declination of SBP coverage. Consequently, the applicant's SBP beneficiary coverage should have defaulted to Option C, Immediate Coverage. Immediate SBP coverage meant that the applicant's right to apply for her SBP annuity accrued on the day her husband passed away (11 July 2016). This right accrued on that date because Option C, Immediate Coverage meant the applicant was entitled to an SBP annuity even though her husband (the FSM) did not live until age 60, his earliest age to begin receiving retirement pay.

d. As for the applicant applying for her SBP annuity within the Barring Act's 6-year statute of limitation, the case file indicates the applicant failed to apply for her SBP

annuity until September 2022. September 2022 is, of course, more than 6 years after the FSM's date of death, which was 11 July 2016. Consequently, the Barring Act prohibits DFAS from paying SBP annuity payments to the applicant. However, 10 U.S.C. § 1552 empowers the ABCMR to make records corrections to avoid injustices. In my opinion, an injustice would persist if the applicant were denied her SBP benefits.

e. Based on the totality of the case, the Board determined relief is warranted by amending the records to show that the applicant applied (either to HRC or to DFAS, or both) for her SBP annuity within six years of her husband's death on 11 July 2016.

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 the Army records of the individual concerned be corrected by:

- showing the applicant applied to the appropriate office for payment of the SBP annuity shortly after her husband's, the service member, death on 11 July 2016
- showing the appropriate office timely received and processed her application for payment

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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. 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, the 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 were 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. At that time, 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 have waited until he/she applied for retired pay and elected to participate in the standard SBP. If death does not occur before age 60, the RCSBP costs for Options B and C are deducted from the member's retired pay (costs for Option C being the more expensive). If RCSBP Option B or C is elected, there is a Reservist Portion cost added to the basic cost of the SBP to cover the additional benefit and assured protection should the member die prior to age 60.
3. Public Law 106-398, enacted 30 October 2000, required written spousal consent for a Reserve service member to be able to delay making an RCSBP election until age 60. The law is applicable to cases where 20-year letters were issued after 1 January 2001. In essence, failure to elect an option now results in the default election of Option C (Immediate Coverage). The declination, with the spouse's consent, must be made before the end of the 90-day period beginning on the date on which the member receives his/her 20-year letter.
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.

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 Reservists 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//