

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 26 March 2024

DOCKET NUMBER: AR20230008921

APPLICANT REQUESTS: correction of her former husband's records to show he elected "Former Spouse" Survivor Benefit Plan (SBP) coverage within 1 year of divorce.

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

- two DD Forms 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552)
- Applicant's Letter to the Army Review Boards Agency, 10 May 2023
- Superior Court Settlement Agreement, 26 August 2002
- Superior Court Final Judgment and Decree, 10 September 2002
- Service Member's (SM's) Letter to the Defense Finance and Accounting Service (DFAS), 20 September 2005
- SM's Certificate of Death, 7 February 2021
- Department of Defense Office of Hearings and Appeals (DOHA) Claims Appeals Board Reconsideration Decision, 23 March 2023

FACTS:

1. The applicant, the former spouse of the deceased retired SM, states she discovered her former husband failed to make her the beneficiary of his SBP as required by the terms of their settlement agreement and divorce decree. Her former husband received their house with 3 acres of land and an additional 19 acres of farmland. Her former husband willfully misrepresented the truth, stopped payments, and denied her the financial support as agreed in their divorce proceedings.

a. A DFAS representative advised her to submit an application to the Army Board for Correction of Military Records (ABCMR) with a copy of their divorce settlement to correct the SM's record. On 27 December 2004, she completed the DD Form 149 and submitted it to the ABCMR, within the legal time limitation required by Title 10, U.S. Code, section 1552 (Correction of Military Records: Claims Incident Thereto).

b. The DOHA appeal decision, 20 October 2002, states the ABCMR received the DD Form 149 on 5 January 2005 and sent her a letter with instructions to complete the process of correcting her former husband's record. She believes the Board also

contacted her former husband because on 20 September 2005, in direct contradiction to their divorce settlement, her former husband removed her from his SBP coverage.

c. She received \$65,000.00 – which was half of their life savings, a 6-year-old car, and her former husband's SBP. She gave up her claim on the house and land in order to receive his SBP. Her former husband's obligation to pay the monthly premiums and to make her the beneficiary of his SBP for as long as she lives is noted in their settlement agreement.

d. She understands that DOHA had no other choice but to follow the law when they upheld DFAS's decision to deny her request for the SBP annuity. However, she also understands that under Title 10, U.S. Code, section 1552, the Secretary of the Army, acting through the ABCMR, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. Her former husband acted dishonorably; he did not honor their settlement agreement.

2. The SM was inducted into the Army of the United States on 19 November 1957. He subsequently enlisted in the Regular Army on 19 November 1959.

3. The SM and the applicant married on 5 July 1965.

4. The SM's DA Form 199 (Physical Evaluation Board (PEB) Proceedings) shows a PEB convened at Fort Gordon, GA, on 8 September 1977 to determine the SM's medical fitness for continued service in the Army. The PEB determined he was physically unfit for service and recommended a disability rating of 50 percent and his permanent disability retirement.

5. The SM's DA Form 4240 (Data for Payment of Retired Army Personnel) shows in:

a. Part II (SBP Election):

(1) item 9 (Are you married?), he placed an "X" in the "Yes" box;

(2) item 10 (Do you have dependent children?), he placed an "X" in the "Yes" box;

(3) item 11 (Check one of the following to indicate the type of coverage you desire), he placed an "X" in the "Spouse and Children" box;

(4) item 13a (Name of Spouse), he entered "C\_\_\_\_ A\_\_\_\_ T\_\_\_\_" (the applicant); and

(5) item 13d (Name), he listed three dependent daughters with birthdates in 1965, 1966, and 1969; and

b. Part VII (Certification), item 20 (Signature of Member), he did not sign the form.

6. U.S. Army Military Personnel Center Orders D215-18, 7 November 1977, retired the SM because of permanent physical disability effective 21 November 1977 and placed him on the Retired List effective 22 November 1977.

7. On 21 November 1977, the SM retired in the rank/grade of master sergeant/E-8 by reason of permanent physical disability. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 20 years and 3 days of total active service.

8. The Superior Court Settlement Agreement, 26 August 2002, states: "Husband [SM] agrees to continue to pay the life insurance (SBP) obtained thru [through] the military which names the Wife [Applicant] as beneficiary on his life [insurance]. Husband [SM] agrees to never change the beneficiary on said policy for so long as Wife [Applicant] lives."

9. The SM and the applicant divorced on 10 September 2002. The Superior Court Final Judgment and Decree, 10 September 2002, states: "It is hereby considered, ordered and adjudged that the contract and agreement heretofore entered into between the parties on the 26th day of August, 2002 is expressly made the judgment of the Court, and it is further considered, ordered and decreed that each party thereto shall carry out the terms and conditions of said contract and agreement, and compliance therewith is made mandatory."

10. On 27 December 2004, the applicant submitted an application to the ABCMR, requesting correction of the SM's records to reflect her as the SM's "Former Spouse" SBP beneficiary as ordered in their settlement agreement and divorce decree.

11. On 20 September 2005, the SM sent a letter to DFAS, requesting removal of the applicant as his SBP beneficiary and termination of his participation in the SBP.

12. The SM's death certificate shows he died on 7 February 2021. His marital status is shown as "Divorced" and his daughter, B\_\_\_\_ C\_\_\_\_, is listed as the informant.

13. On 24 May 2021, the applicant requested assistance from her congressional representative in obtaining her former husband's SBP annuity. She stated her former husband informed the Department of Defense that he never signed the document. DFAS is refusing to pay her the annuity and she wants to be reinstated as the beneficiary of his SBP.

14. On 13 August 2021, DFAS notified the applicant it was determined that she was not entitled to receive an annuity under her former husband's SBP because DFAS did not receive an SBP "Former Spouse" election from the SM or a request for a deemed selection of SBP former spouse coverage from her within 1 year of their divorce.

15. On 27 June 2022, the applicant submitted rebuttal to DFAS's decision to deny her request for her former husband's SBP annuity wherein she stated her former husband failed to make her the beneficiary of his SBP as required by their court-ordered settlement agreement and divorce decree.

16. On 20 October 2022, DOHA considered her claim for the SBP annuity as the former spouse of the SM. DOHA denied her request based on the following:

a. The applicant's marriage to the SM was dissolved by a Final Judgment and Decree of Divorce by the Superior Court of Pierce County, Georgia, dated 10 September 2002, The Final Judgment and Decree states, "It is hereby considered, ordered and adjudged that the contract and agreement heretofore entered into between the parties on the 26th day of August, 2002 is expressly made the judgment of the Court, and it is further considered, ordered and decreed that each party thereto shall carry out the terms and conditions of said contract and agreement, and compliance therewith is made mandatory. Husband [SM] agrees to continue to pay the life insurance (SBP) obtained thru [through] the military which names Wife [Applicant] as beneficiary on his life [insurance]. Husband [SM] agrees to never change the beneficiary on said policy for so long as Wife [Applicant] lives."

b. On 27 December 2004, the applicant completed a DD Form 149, requesting the ABCMR to make a change in Defense Department records to make the applicant the designated former spouse beneficiary of the SM, as he had failed to make a former spouse election for an SBP annuity for the applicant as required by their divorce judgment within a year of their divorce. The applicant mailed the DD Form 149 to the ABCMR address listed on the form, but never received a decision or any response from the Army on the requested correction.

c. DOHA made an inquiry through DFAS and received two pages in response from the ABCMR. This response shows the ABCMR received the applicant's DD Form 149 on 5 January 2005, and sent the applicant a letter on 10 January 2005 requesting the applicant to submit a power of attorney from the SM in order to process the request. The letter stated that if SM was dead, a death certificate should be submitted and the power of attorney should be from the SM's heir or legal representative in order to process the request.

d. On 20 September 2005, the SM wrote to DFAS in direct contradiction to the divorce settlement, requesting to remove the applicant from his records as his beneficiary for SBP coverage and to discontinue enrollment in SBP.

e. On 7 February 2021, the SM died of natural causes. On 25 February 2021, the applicant completed a DD Form 2657-10 (SBP Former Spouse Request for Deemed Election) wherein she requested a deemed election for an SBP annuity as the former spouse of the SM based on the divorce judgment and the DD Form 149. On 17 June 2021, her congressional representative made an inquiry to DFAS on her behalf and received a response from DFAS on 21 June 2021. The applicant completed a DD Form 2657-7 (Verification for Survivor Annuity), 8 July 2021, wherein she claimed an SBP annuity as the former spouse of the SM. DFAS denied her claim on the grounds that DFAS had to have received either an SBP former spouse election from the SM or a request from the applicant for a deemed election of SBP former spouse coverage within 1 year of divorce to establish SBP former spouse coverage. Since neither had been received, DFAS denied the applicant's claim.

f. On 10 January 2022, the applicant appealed the denial. DFAS reconsidered the applicant's claim in their Administrative Report dated 1 April 2022 but denied it again on the same grounds. On 27 June 2022, the applicant submitted a rebuttal to the Administrative Report.

17. On 23 March 2023, DOHA reconsidered her previous request for the SBP annuity, 20 October 2022.

a. The record reflects that neither the SM nor the applicant took any action within 1 year from the date of divorce to elect former spouse SBP coverage for the applicant. After the SM's death, the applicant submitted a DD Form 2656-7, 8 July 2021, to DFAS. On 10 January 2022, DFAS denied her claim on the basis that the SM did not make a request change to his SBP election to former spouse coverage, nor did the applicant make a deemed election.

b. On 10 January 2002, the applicant appealed the denial of her claim for the former spouse SBP annuity. In response to her appeal, DFAS issued an administrative report upholding the denial of her claim.

c. On 27 June 2022, the applicant filed a rebuttal to DFAS's administrative report. In her rebuttal, she acknowledged that the original paperwork was not processed properly, nor was it filed within the allotted 1-year requirement to request former spouse SBP coverage after the divorce. The applicant stated she was told by someone in DFAS to submit a DD Form 149 to the ABCMR, along with her divorce decree, which she did on 27 December 2004. She stated that she did not hear anything more about her request to the ABCMR.

c. In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He explained that an election for former spouse SBP coverage, whether voluntary, ordered, or deemed, had to have been received by DFAS within one year of the date of the divorce. The applicant was covered as the SM's spouse SBP beneficiary from the time he retired in 1977 until spouse coverage ended with their divorce in 2002. However, the SM failed to establish former spouse SBP coverage and the applicant did not file a timely deemed election. Therefore, DFAS properly denied the applicant's claim for the SBP annuity.

18.. Email correspondence from a DFAS representative, 7 March 2024, noted the SM's current SBP status is "no beneficiary."

#### BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the servicemember's (SM's) military records, the Board found that relief was warranted. The applicant's contentions, the SM's military records, and regulatory guidance were carefully considered. The SM retired on 21 November 1977, in the rank/grade of MSG/E-8 by reason of permanent physical disability. He elected spouse and children SBP coverage. The SM and applicant were divorced on 26 August 2002 with an explicit decree provision for the SM to provide for and pay the associated premiums for SBP annuities to the former spouse as beneficiary. The SM not only failed to abide by the court divorce decree but specifically acted in contravention of said order with his 20 September 2005 memo wherein he attempted to remove the former spouse from SBP related records. Further, it should be noted there is no pending adverse claim(s) for SBP benefits since DFAS indicated the SM's SBP status does not have a current beneficiary. The SM died on 7 February 2021. The Board felt the SM acted in poor faith. The applicant claims she was the victim of numerous inequities all stemming from the SM's 'repentant' tendencies resulting in the dire-financial situation she claims of. The SM was legally obligated to update DFAS within the year statutory requirement but failed to do so and then acted to specifically thwart the will of the court by asking DFAS to remove his former spouse from their records. The Board determined an injustice occurred and voted to grant relief.

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 timely deemed a former spouse election with 1 year of her divorce on 26 August 2002
- showing the applicant timely applied to the appropriate office for payment of the SBP annuity shortly after her husband's, the former service member, death on 7 February 2021
- showing the appropriate office timely received and processed her application for payment of an SBP annuity, less any premiums owed

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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 certain circumstances. The election must be made before the effective date of retirement or coverage defaults to automatic spouse coverage. Elections are made by category, not by name. Since its creation, it has been subjected to a number of substantial legislative changes.

2. Public Law 97-252, the Uniformed Services Former Spouses Protection Act (USFSPA), enacted 8 September 1982, established SBP for former military spouses. This law also decreed that State courts could treat military retired pay as community property in divorce cases if they so choose. It established procedures by which a former spouse could receive all or a portion of that court settlement as a direct payment from the service finance center. The USFSPA contains strict jurisdictional requirements. The State court must have personal jurisdiction over the service member by virtue of the member's residence in the State (other than pursuant to military orders), domicile in the State, or consent.

3. Title 10, U.S. Code, section 1448(b)(3), incorporates the provisions of the USFSPA relating to the SBP. It permits a person to elect to provide an annuity to a former spouse. Any such election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date of the decree of divorce. The member must disclose whether the election is being made pursuant to the requirements of a court order or pursuant to a written agreement previously entered into voluntarily by the member as part of a proceeding of divorce.

4. Title 10, U.S. Code, section 1450(f)(3)(A), permits a former spouse to make a written request that an SBP election of "former spouse" coverage be deemed to have been made when the former spouse is awarded the SBP annuity incident to a proceeding of divorce. Section 1450(f)(3)(C) provides that an election may not be deemed to have been made unless the request from the former spouse of the person is received within 1 year of the date of the court order or filing involved.

//NOTHING FOLLOWS//