

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 10 May 2024

DOCKET NUMBER: AR20230009757

APPLICANT REQUESTS:

- in effect, correction of his records to show he declined Reserve Component Survivor Benefit Plan (RCSBP) coverage
- reimbursement of SBP premiums already paid

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

- DD Form 149 (Application for Correction of Military Record)
- DD Form 2656-2 (SBP Termination Request), 13 November 2023
- Defense Finance and Accounting Service (DFAS)-Cleveland Form 7220/148 (Retiree Account Statement), effective 23 October 2023

FACTS:

1. The applicant states he misunderstood the phrasing of question 33 of the DD Form 2656 (Data for Payment of Retired Personnel) when he applied for his retired pay and apparently he elected to have RCSBP spouse coverage deducted from his retired pay.

a. It was apparent that this election was not the choice intended as he also completed Part V (Spouse SBP Concurrence), which shows his spouse's concurrence with his election to decline spouse coverage in the presence of a notary public. He contacted DFAS on several occasions to review his case and DFAS informed him that he should submit a DD Form 2656-2 to terminate his SBP.

b. He requests removal of the SBP premiums from his monthly retired pay and reimbursement of SBP premiums already deducted.

c. This correction should be made for two reasons. The first reason is that the intent of his DD Form 2656 was clear to decline SBP spouse coverage as shown in Part V. The second reason is his misinterpretation of question 33. When he transferred to a "gray area" retirement 20 years ago, he completed documentation that stated he did not want SBP spouse coverage when he reached age 60. He interpreted question 33

"Option B – Previously elected coverage to begin at age 60 (Do not make election in Block 34, you have already elected coverage)" to mean the election he made 20 years ago to decline SBP spouse coverage.

2. Following enlisted service in the Regular Army, he enlisted in the U.S. Army Reserve (USAR) on 19 May 1984. He was promoted to the rank/grade of sergeant first class (SFC)/E-7, effective 27 November 1990.

3. The U.S. Army Reserve Personnel Command memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), dated 20 June 2001, notified him that having completed the required qualifying years of Reserve Component service, he was eligible for retired pay upon application at age 60 in accordance with statutory guidance. Paragraph 4 stated:

You are entitled to participate in the RCSBP 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 benefit 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 RCSBP.

4. His DD Form 1833, dated 6 September 2001, shows he was married with dependent children. He placed a checkmark in the "None" block for the type of coverage he desired and placed an "X" in the "Option A (Defer)" block as his election status. Option A states: "I decline to make an election at this time. (I will remain eligible to make an election for coverage at age 60)." He and his spouse signed the form on 6 September 2001.

5. U.S. Army Human Resources Command Orders C-10-424412, dated 21 October 2004, reassigned him from the U.S. Army Reserve Control Group (Reinforcement) to the Retired Reserve, effective 17 November 2004 by reason of non-participation.

6. His DD Form 108 (Application for Retired Pay Benefits) shows he applied for retired pay beginning 15 February 2023. He signed the form on 9 September 2022.

7. His DD Form 2656, dated 14 September 2022, shows in:

- a. Part I (Retired Pay Information), Section I (Pay Identification), block 4 (Retirement/Transfer Date), he entered 15 February 2023;
  - b. Part III (SBP), Section IX (Dependency Information), block 29 (Spouse), he entered L\_\_\_\_ M. S\_\_\_\_ with a marriage date of 25 May 1991;
  - c. Part III, Section IX, block 32 (Dependent Children), he entered two children, a daughter, M\_\_\_\_ N. S\_\_\_\_, with a birthdate in 1997, and a son, D\_\_\_\_ S. S\_\_\_\_, with a birthdate in 2000;
  - d. Part III, Section X (SBP Election), block 33 (Reserve Component Only – This section refers to the decision you previously made on the DD Form 2656-5 (RCSBP Election Certificate) when you were notified of eligibility to retire, in most cases you do not have the right to make a new election on this form.), he placed an "X" in the box by the statement: "Option B – Previously elected coverage to begin at age 60 (Do not make an election in Block 34, you have already elected coverage.)";
  - e. Part IV (Certification), Section XI (Certification), block 39 (Member), he signed the form on 14 September 2022 and his signature was witnessed on the same date; and
  - f. Part V (Spouse SBP Concurrence – Required ONLY when the member is married and elects either: (a) child only SBP coverage, (b) does not elect full spouse SBP coverage; or (c) declines SBP coverage. The date of the spouse's signature in Block 41c MUST NOT be before the date of the member's signature in Block 39c, or on or after the date of retirement listed in Part I, Section I, Block 4. The spouse's signature MUST be notarized.), Section XII (SBP Spouse Concurrence), block 41 (Spouse), his spouse signed the form on 15 September 2022 before a notary public.
8. He reached age 60 in February 2023.
  9. U.S. Army Human Resources Command Orders C03-393063, 22 March 2023, retired him and placed him on the Army of the United States Retired List in the grade of SFC, effective 15 February 2023.
  10. His Retiree Account Statement, effective 23 October 2023, shows he has "Spouse Only" SBP coverage and premiums are being deducted from his retired pay.
  11. His DD Form 2656-2, dated 13 November 2023, shows he and his spouse requested to discontinue participation in the SBP. He and his spouse signed and dated the form on 13 November 2023, which was notarized by a witness on the same date. The form does not contain a notary public seal containing the notary public's registration number and commission expiration date.

12. Email correspondence from a DFAS pay technician (Reply: Army Board for Correction of Military Records Assistance), dated 19 July 2021, notes the applicant has SBP spouse coverage since his retirement date of 15 February 2023 with premiums being deducted from his retired pay. The DFAS database contains:

- a. his SFC promotion orders;
- b. his Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter), 20 June 2001, described above;
- c. his DD Form 1883, 9 June 2001, described above;
- d. U.S. Army Human Resources Command Orders C-10-424412, 21 October 2004, assigning him to the Retired Reserve, described above;
- e. his DD Form 108, 9 September 2022, with allied documents, described above;
- f. his DD Form 2656, 14 September 2022, described above; and
- g. U.S. Army Human Resources Command Orders C03-393063, 22 March 2023, retiring him and placing him on the Army of the United States Retired List in the grade of SFC, effective 15 February 2023.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the applicant's military records, 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 review based on public law, policy, and regulation. Upon review of the applicant's petition and available military records, the Board determined the applicant was issued his Notification of Eligibility for Retired Pay (20-Year Letter) in June 2001 and in September 2001 submitted an SBP election form, including his spouse's signature, deferring election until age 60. In November 2004, he was transferred to the Retired Reserve and in September 2022, whilst applying for retired pay, submitted a DD Form 2656 electing Option B "Previously Elected Coverage to Begin at Age 60." His spouse authenticated the form intended to deny coverage and her signature was notarized. The Board noted the applicant retired in February 2023 and began receiving retired pay and SBP premiums were deducted.

2. The Board noted the applicant's contention that he intended to decline enrollment in the SBP as demonstrated by his notarized spouse's concurrence; however, the premiums deducted indicate the applicant did in fact have coverage and therefore

recommended partial relief by granting his termination request and denying the reimbursement of premiums request.

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:

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 showing he properly declined SBP, effective the date of this action, and his election was received and processed in a timely manner by the appropriate office.
2. The Board further determined that 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 repayment of any previously paid SBP premiums.

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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. 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 qualified for Nonregular (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, and (C) elect that a beneficiary receive an annuity immediately upon their death if before age 60. Once a member elected either Option B or C in any category of coverage, that election was irrevocable. Option B and C participants do not make a new Survivor Benefit Plan (SBP) election at age 60. They cannot cancel SBP participation or change options they had in the RCSBP; RCSBP coverage automatically converts to SBP coverage upon retirement.
3. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elected not to participate in the SBP. The statute also provided for automatic enrollment for spouse coverage at the full base amount unless a member affirmatively declined to participate in the SBP prior to receiving retired pay.
4. Public Law 99-145, enacted 8 November 1985 but effective 1 March 1986, required written concurrence by the spouse in a member's decision to decline the SBP or elect spouse coverage at less than the full base amount.
5. Public Law 105-85, enacted 18 November 1997, established the option to terminate SBP participation. Retirees have a 1-year period beginning on the second anniversary of the date on which their retired pay started to withdraw from the SBP. The spouse's concurrence is required. No premiums will be refunded to those who opt to disenroll. The effective date of termination is the first day of the first calendar month following the month in which the election is received by the Secretary concerned.
6. 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

other words, failure to elect an option upon receipt of the 20-year letter results in the default election of Option C.

7. Department of Defense Instruction 1332.42 (Survivor Annuity Program Administration) states a member may elect to discontinue participation by submitting a DD Form 2656-2 (SBP Termination Request) during the period that is more than 2 years but less than 3 years after the first date of entitlement to receive retired pay. The member must submit the request no earlier than the 1st day of the 25th month, and no later than the last day of the 36th month from the date of entitlement to retired pay, with spousal concurrence if applicable. A member electing to terminate coverage is not eligible for continuation in the Program; however, the member has 30 days after submitting a request to discontinue participation to revoke the request.

8. "Gray area" retirees are 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 start 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 in the Retired Reserve.

//NOTHING FOLLOWS//