

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 April 2024

DOCKET NUMBER: AR20230009878

APPLICANT REQUESTS: correction of her ex-husband's records to show he made a timely election to change his Survivor Benefit Plan (SBP) election to "Former Spouse" coverage within 1 year of their divorce.

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)
- Certificate of Registry of Marriage, [REDACTED]
- State Superior Court Judgment and Amendment to Judgment, filed 19 March 1998
- State Certificate of Death, [REDACTED]
- Department of Defense, Defense Legal Services Agency, Defense Office of Hearings and Appeals (DOHA), Appeal Decision, 19 May 2023

FACTS:

1. The applicant, the former spouse of the deceased retired service member (SM), states her ex-husband's records need to be corrected to show he made a timely election for "former spouse" SBP coverage within 1 year of their divorce. DOHA denied her claim as the beneficiary of his SBP annuity after his death. Their divorce decree states she is his beneficiary of any and all survivor benefits under the SBP and all other benefits arising out of his retirement.
2. After having enlisted service in the Regular Air Force, U.S. Air Force Reserve, and U.S. Naval Reserve, the SM enlisted in the Regular Army on 6 November 1978 in the rank/grade of private first class/E-3.
3. The SM and the applicant, [REDACTED] married on [REDACTED]
4. The SM was promoted to the rank/grade of sergeant first class/E-7 effective 1 April 1990.

5. The SM's DA Form 2339 (Application for Voluntary Retirement), 9 September 1994, shows he requested retirement after serving 20 years and 25 days of total active service for retirement with a desired retirement date of 1 December 1994.

6. Headquarters, Fifth U.S. Army and Fort Sam Houston, Orders 259-00309, 16 September 1994, retired the SM and placed him on the Retired List effective 1 December 1994.

7. The SM's DA Form 4240 (Data for Payment of Retired Army Personnel), 14 November 1994, shows in:

- a. Part I (Pay Identification), block 8 (Date of Retirement), 1 December 1994;
- b. Part II (Tax Status – Withholding Exemptions), block 10a (Marital Status), he placed an "X" in the "Married" box;
- c. Part V (SBP Election), block 14 (Are you married?), he placed an "X" in the "Yes" box;
- d. Part V, block 14a (Do you have dependent children?), he placed an "X" in the "Yes" box;
- e. Part V, block 15 (Check one of the following to indicate the type of coverage you desire), he placed an "X" in the box by the statement "Spouse Only";
- f. 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;
- g. Part V, block 17a (Name of Spouse/Former Spouse), he listed
████████████████████
- h. Part V, block 17d (I Have the Following Dependent Children), he listed a daughter and a son with birthdates in 1984 and 1988, respectively; and
- i. Part VI (Certification), he and a Military Personnel Division Retirement Services witness signed the form on 14 November 1994 at Fort Sam Houston, TX.

8. The SM retired on 30 November 1994 in the rank/grade of sergeant first class/E-7. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 20 years and 25 days of total active service.

9. The State Superior Court Judgment and Amendment to Judgment, filed 19 March 1998, shows the SM and the applicant were granted a divorce on [REDACTED]. The Amendment to Judgment notes in:

5. Survivor Annuity: By agreement of the parties, the Petitioner-Mother [Applicant] is expressly designated as the beneficiary of any and all survivor benefits under the Respondent's [SM] military Survivor Benefit Plan, or any similar survivor benefit rights or benefits arising out of his U.S. military retirement with the Army during marriage. Respondent shall not name any new beneficiary without first obtaining a court order authorizing any such change in beneficiary or a new written agreement expressly consented to by the Petitioner-Wife [Applicant]. No application for a change of beneficiary shall be made by the Respondent [SM] without proper notice to the Petitioner [Applicant].

6. Enforcement of the Division of the Respondent's Military Retirement Pay: The court retains jurisdiction for all purposes to issue any and all orders necessary or helpful to ensure the appropriate division of the community property portion of the Respondent's [SM's] military retirement pay for years of service worked in the United States armed forces. The court determines that the Petitioner's [Applicant's] share, as her portion of community property, shall be 26% of the total military retirement benefits paid to the Respondent [SM]. This sum shall be paid directly to the Petitioner-Wife [Applicant] by warrant issued by the Department of Defense or any other appropriate issuing authorities managing or controlling Respondent's [SM's] pension benefits. The current dollar amount payable to the Petitioner [Applicant] from the Respondent [SM] as her share of his military pension is \$338 per month commencing March 1, 1998. Said sum shall be payable to the Petitioner [Applicant] by the Respondent [SM] directly, without delay, until such time as the direct payment is made by the military authorities to the Petitioner [Applicant]. Petitioner [Applicant] shall receive her pro-rata share of any increase in monthly benefits paid to which the Respondent [SM] is entitled in the future based upon his overall pension benefits. The court retains jurisdiction to issue any Qualified Domestic Relations Order, or any similar of supplementary order as may be necessary or helpful to ensure the payment of pension benefits by the military authorities to the Petitioner-Wife [Applicant], at any time in the future.

10. The SM's death certificate shows he died on [REDACTED] at age 72. His marital status is shown as "Divorced" and the SM's daughter, [REDACTED] is shown as the informant.

11. DOHA responded to the applicant's appeal in a 19 May 2023 letter wherein the claims adjudicator noted, in part:

We have considered your claim for a Survivor Benefit Plan (SBP) annuity as the surviving former spouse of [SM] United States Army (Retired) (Deceased). Under [T]itle 31, United States Code (U.S.C.), section 3702(a), our Office settles claims concerning the retired pay of members of the uniformed services, including SBP claims. Prior to July 1, 1996, such claims were settled under that statute by the Comptroller General of United States. For the reasons explained below, we have disallowed your claim for the SBP annuity. We have allowed you the refund of 50% of the SBP premiums that were deducted from his retired pay for SBP spouse coverage after your divorce, if otherwise correct.

The record shows that [SM] was a member of the United States Army (USA). In preparation for his retirement, he completed a DA Form 4240, Data for Payment of Retired Army Personnel, dated November 14, 1994. On it, he identified three dependents in items 12 and 17: (1) you, his spouse; (2) a daughter born in 1984; and (3) a son born in 1988. In item 12, he designated that any retired pay of his that was unpaid at the time of his death should be divided and paid in the following shares: 50% to you and 25% each to the two children. He elected SBP spouse and children coverage based on his full retired pay in items 15b and 16.

[SM] retired on December 1, 1994. SBP coverage is partially funded by premiums collected by deductions from the member's retired pay and they were deducted from [SM's] retired pay for his SBP spouse and children coverage.

You filed for divorce in case no. [number] [REDACTED] in Superior Court of [REDACTED] County of [REDACTED]. By Judgment issued [REDACTED], that court dissolved your marriage to [SM] effective [REDACTED]....

However, DFAS [Defense Finance and Accounting Service]-Retired and Annuitant Pay, which administers the SBP, was not advised of your divorce from [SM]. They continued to deduct SBP premiums from [SM's] retired pay for spouse and children coverage instead of children-only coverage. SBP premium deductions continued at the spouse-only rate after the children lost their SBP eligibility and were made for the rest of [SM's] life.

[SM] died on [REDACTED] in [REDACTED]. His death was reported to DFAS by telephone on September 22, 2021, by his son. A screen shot of that report from the DFAS SBP database showed that [SM] had no spouse; also showed that he had SBP spouse coverage; and flagged that contradiction with "MARITAL STATUS DOES NOT MATCH SBP INFORMATION." [SM's] Certificate of Death, issued [REDACTED], showed his marital status as divorced (item 12).

You executed and submitted a DD Form 2656-7, Verification for Survivor Annuity, dated October 24, 2021, wherein you claimed an SBP annuity as [SM's] former spouse in items 2g and 2h. DFAS-Retired and Annuitant Pay denied your claim by letter to you dated November 23, 2021, on the grounds that within one year of your divorce, [SM] did not elect SBP former spouse coverage for you, nor did you request an SBP former spouse deemed election. The letter concluded with instructions on how to appeal their denial of your claim.

Your SBP spouse coverage was ended by your divorce from [SM] on March 18, 1998.

The case file does not show that within a year of your divorce, that [SM] elected SBP former spouse coverage, either voluntarily or pursuant to the Judgment that dissolved your marriage to him. The case file also does not show that within one year of your divorce, that you requested an SBP deemed election of former spouse coverage based on the Judgment. Accordingly, there is no basis for allowing your claim for an SBP annuity as [SM's] former spouse.

...Second, 10 U.S.C. 1552 [Title 10, U.S. Code, section 1552], states: "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." Requests for action wider those statutes regarding members of the Army are considered by the Secretary of the Army acting through the Army Board for Correction of Military Records (ABCMR). Under those statutes, the ABCMR has a discretionary authority to correct the record that is broader than our authority to settle a claim. We hasten to add that the record correction authorities are beyond the purview of our Office and the possibility of a record correction does not guarantee it. Deciding whether or not to pursue a record correction under 10 U.S.C. 1454 [Title 10, U.S. Code, section 1454] and/or 10 U.S.C. 1552 [Title 10, U.S. Code, section 1552] is matter of your own discretion. To date, no record correction has been made under either statute in the matter of [SM] and SBP former spouse coverage of you.

12. The email correspondence from a DFAS pay technician (Reply: Army Review Boards Agency Assistance), 4 April 2024, states the DFAS database does not contain the original documents on file. DFAS shows the SM's SBP coverage was "Spouse and Child(ren)" at the time of his retirement on 1 December 1994. His SBP coverage was "No Beneficiary" at the time of his death.

BOARD DISCUSSION:

1. 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 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 the former servicemember elected full spousal survivor benefit program coverage November 1994 for when he was eligible for full military retirement. Evidence in the records shows the former SM retired on 1 December 1994 and was married to the applicant during the time of his election, however the record shows they divorced 27 February 1998.

2. The Board noted the terms of their court order, the form SM was obliged to leave his former spouse as the beneficiary of his SBP. The Board determined the form SM did not change his SBP election from spouse to former spouse in accordance with public law. Furthermore, the records show the applicant did not make a deemed election request within the allotted one-year timeframe as required by Title 10, U.S. Code, section 1448(b)(3). Based on the preponderance of evidence, the Board determined that an injustice occurred, and it was the intent of the former SM to provide coverage for his former spouse. The Board agreed the former SM record should be corrected to show he elected former spouse coverage within one year of their divorce order. As such, the Board granted 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 former SM deemed an election of, former spouse SBP coverage within one year of the divorce as required by the relevant statutory provision and the request was received and processed by the appropriate office in a timely manner.

5/6/2024

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, the SBP, enacted 21 September 1972, provided that military members could elect to have their retired pay reduced to provide for an annuity after death to surviving dependents.
2. Public Law 97-252, the Uniformed Services Former Spouses' Protection Act (USFSPA), 8 September 1982, established SBP coverage for former spouses of retiring members. Public Law 98-94, 24 September 1983, established former spouse coverage for retired members. 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 retired SM by virtue of the retired SM's residence in the State (other than pursuant to military orders), domicile in the State, or consent.
3. Public Law 99-661, 14 November 1986, permitted divorce courts to order SBP coverage without the member's agreement in those cases where the retiree had elected spouse coverage at retirement or was still serving on active duty and had not yet made an SBP election.

4. 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.
5. 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.
6. Title 10, U.S. Code, section 1454 (Correction of Administrative Errors), states the Secretary concerned may, under regulations prescribed under section 1455 of this title, correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error.
7. Title 10, U.S. Code, section 1552 (Correction of Military Records: Claims Incident Thereto), states the Secretary of a Military Department may correct any military record of the Secretary's Department when the Secretary considers it necessary to correct an error or remove an injustice. Such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that Military Department.

//NOTHING FOLLOWS//