

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 1 October 2024

DOCKET NUMBER: AR20230010029

APPLICANT REQUESTS:

- correction of her late ex-husband's records to show he elected Survivor Benefit Plan "Former Spouse" coverage within 1 year of their divorce
- retroactive payment of SBP annuities beginning 11 March 2022

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)
- Counsel Letter, 28 June 2023, with 14 Enclosures –
 - Enclosure 1 – Power of Attorney, 7 September 2022
 - Enclosure 2 – Defense Finance Accounting Service (DFAS) Letter, 31 August 2022
 - Enclosure 3 – Certificate of Marriage, 24 February 2001
 - Enclosure 4 – Letter to Service Member (SM), 2 September 2015
 - Enclosure 5 –
 - County Circuit Court Marital Settlement and Separation Agreement, 16 September 2016
 - County Circuit Court Judgment of Dissolution of Marriage, 20 September 2016
 - Enclosure 6 – Email Screenshot (Verification for Survivor Annuity 2022), 28 March 2022
 - Enclosure 7 – SM's DFAS-Cleveland Form 7220/148 (Retiree Account Statement), 7 November 2016
 - Enclosure 8 – DD Form 2656-7 (Verification of Survivor Annuity), 28 March 2022
 - Enclosure 9 – DFAS Letter, 15 September 2022
 - Enclosure 10 – Counsel Letter to DFAS, 26 September 2022

- Enclosure 11 – DFAS Defense Office of Hearings and Appeals (DOHA) Letter, 15 October 2022
 - Enclosure 12 – DOHA Defense Legal Services Agency Letter, 20 March 2023
 - Enclosure 13 – Attorney Letter, 16 November 2022
 - Enclosure 14 – Letter of Support, undated
- SM's Certificate of Death, 11 March 2022

FACTS:

1. The applicant, the former spouse of the deceased retired SM, defers to counsel.

2. Counsel states:

a. The SM named the applicant as his SBP spouse beneficiary upon eligibility to do so. The two divorced and the SM was required to continue SBP coverage for the applicant as his former spouse beneficiary. The required documentation was submitted to DFAS by the applicant a few weeks after their divorce. Unfortunately, DFAS never processed the documents and the applicant was told she did not qualify for SBP annuity payments, despite the fact that the SM continued to make SBP premium payments following their divorce and repeatedly told her that she would receive the SBP annuity in the event that he predeceased her.

b. The applicant's deemed election for SBP "Former Spouse" coverage was filed in accordance with the marital settlement agreement entered into during the course of their divorce proceedings. The SM continued to have SBP premiums deducted from his retired pay and his retiree account statements continue to show the applicant as his SBP beneficiary. The two parties had been operating under the misguided assumption that so long as the SM continued to have the SBP premiums deducted from his retired pay and the applicant was named as his beneficiary, there would be no issues regarding her entitlement to the SBP annuity upon his death.

c. This Board has routinely voted in favor of the applicant in matters such as these when it has found that a divorce decree requiring SBP "Former Spouse" coverage exists and that failure to submit a "Former Spouse" coverage election or "Former Spouse" coverage deemed election is the only bar the applicant must overcome.

3. Following prior active duty Reserve commissioned service in the U.S. Navy Reserve, the SM was appointed as a Reserve commissioned officer of the Army on 5 February 1992. The SM entered active duty on 4 July 1999.

4. The SM and the applicant married on 24 February 2001.

5. Headquarters, U.S. Army Center of Excellence and Fort Gordon, Orders 114-0907, 24 April 2014, retired the SM from active duty effective 31 March 2015 and placed him on the Retired List in the rank/grade of colonel/O-6 effective 1 April 2015.

6. The SM's DD Form 2656 (Data Payment of Retired Personnel), 15 October 2014, shows he indicated in:

a. Section I (Pay Identification), item 3 (Retirement/Transfer Date), his retirement date as 1 April 2015;

b. Section VIII (Dependency Information), item 22a (Spouse), he listed B____ S. A____ with a marriage date of 24 February 2001;

c. Section VIII, item 25 (Dependent Children), no entries;

d. Section IX (SBP Election), item 26 (Beneficiary Categories), he placed an "X" in the "I Elect Coverage for Spouse Only" box;

e. Section IX, item 27 (Level of Coverage), he placed an "X" in the "I Elect Coverage to Be Based on Full Gross Pay" box;

f. Section XII (Certification), item 30a (Member), he signed the form on 15 October 2014; and

g. Section XII, item 31b (Witness), his witness signed the form on 15 October 2014.

7. On 31 March 2015, the SM retired from active duty in the rank/grade of colonel/O-6. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 23 years, 8 months, and 17 days of total active service.

8. The applicant's letter to the SM, 2 September 2015, encouraged him to complete alcohol dependency treatment. She stated his alcoholism ruined their lives and jeopardized their marriage, family, and friendships.

9. The County Circuit Court Marital Settlement and Separation Agreement, 16 September 2016, states, in part: "Wife [Applicant] agrees to and shall waive any interest in Husband's [SM's] Military Pension. Husband [SM] agrees to, however, continue to name Wife [Applicant] as the beneficiary to any survivor benefits under his Military Retirement Pension."

10. The SM and the applicant divorced on 20 September 2016.

11. The SM's Retiree Account Statement, 7 November 2016, shows he continued to pay SBP premiums after his divorce from the applicant.

12. The SM's death certificate shows he died on 11 March 2022 at age 64. He was divorced at the time of his death.

13. The applicant's DD Form 2656-7 (Verification for Survivor Annuity), 28 March 2022, shows she submitted a claim for SBP benefits as the SM's former spouse. She acknowledged she was not married to the SM on the date of his death and they divorced on 16 September 2016.

14. On 13 August 2021, DFAS notified the applicant 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 election of SBP "Former Spouse" coverage from her within 1 year of their divorce.

15. On 15 September 2022, DFAS notified the applicant that her request for extension of time to submit an appeal to DOHA concerning the denial of her claim for an SBP annuity was granted.

16. On 26 September 2022, the applicant's counsel submitted a rebuttal to DFAS's decision to deny her request for her former husband's SBP annuity, wherein counsel stated the SM submitted the required paperwork to ensure the applicant was covered under his SBP in the event of his death. The applicant also submitted all the required paperwork to ensure that a deemed election was made within 1 year of their divorce. The paperwork appeared to have been lost or was never processed by DFAS.

17. On 15 October 2022, DOHA considered the applicant's claim for the SBP annuity as the former spouse of the SM. After considering the applicant's arguments, DFAS concluded that it properly followed the applicable laws, regulations, and instructions. The applicant was awarded "Former Spouse" SBP coverage in the County Circuit Court Separation and Property Settlement Agreement, which was incorporated into the Absolute Divorce Summary Judgment, but the SM did not voluntarily elect "Former Spouse" SBP coverage nor was a deemed election received from the applicant within 1 year from the date of their divorce. Consequently, DFAS appropriately denied payment of the "Former Spouse" SBP annuity.

18. On 20 March 2023, DOHA notified the applicant's legal counsel that her appeal for the SBP annuity as the former spouse of the SM was denied.

19. Counsel provided the following additional documents in support of the applicant's request:

a. a screenshot of her email account which shows the divorce documents were scanned into her computer on 7 October 2017, prior to submission of a deemed election of SBP "Former Spouse" coverage to DFAS;

b. a supporting statement from the attorney who represented her during her divorce from the SM, 16 November 2022, wherein he stated the SM agreed to and was ordered to continue to name the applicant as his beneficiary for any survivor benefits he may have under his military pension. He informed the applicant that the SM would need to complete a DD Form 2656-10 (SBP Former Spouse Request for Deemed Election). The applicant informed her attorney that the form had been completed and mailed to DFAS approximately 10 days later; and

c. a supporting statement from the SM's son, wherein he states he believes the applicant is entitled to SBP benefits. His father mentioned on several occasions that the applicant would be taken care of through military spouse benefits if he should ever pass away. Even after they divorced, his father would mention that the applicant would be taken care of financially. He believes his father would want her to receive his SBP benefits. The applicant is honest, hardworking, and would never lie about something being owed to her.

20. Email correspondence from a DFAS representative, 10 May 2024, noted the SM's SBP account was closed and there was no deemed election for SBP "Former Spouse" coverage from the applicant.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The applicant is the former spouse of the servicemember (SM). They divorced on 16 September 2016 and as part of the divorce decree, the former spouse was to be named as the beneficiary to any survivor benefits under his Military Retirement Pension. The Court directed divorce decree was not communicated to DFAS. Consequently, upon the SM's passing on 11 March 2022, DFAS denied the former spouse's request for SBP benefits since the divorce communication was outside the one-year window. Since the divorce decree clearly stipulated that the applicant would be the beneficiary as a former spouse, and since the SM continued to pay SBP premiums, and since the SM passed as a divorcee with no other party contending for survivor benefits, the Board determined an injustice has occurred and voted to grant relief by correcting the record to show the former spouse submitted a timely deemed a former spouse SBP election within 1 year of her divorce.

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 (the former spouse) submitted a request for deemed election to DFAS within 1 year of her divorce on 20 September 2016
- showing DFAS or the appropriate office timely received, processed, and entered her deemed election into the SM's records
- establishing an SBP annuity to be paid to the applicant (former spouse) retroactive to the SMs death on 11 March 2022

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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//