ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 20 March 2025

DOCKET NUMBER: AR20230011086

APPLICANT REQUESTS: through counsel, Survivor Benefits Plan (SBP) benefits, as a former spouse, with an effective date of the Former Service Member's (SM) death

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

- DD Form 149 (Application for Correction of Military Record)
- Legal brief in support of application
- Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter), 30 January 2002
- DD Form 1883 (SBP Election Certificate), 25 February 2002
- A letter issued by the Defense Finance Accounting Service (DFAS), 6 December 2013
- Qualifying Order Entitlement to Military Retired Pay, 12 February 2014
- DD Form 2656 (SBP Reserve Component (RC) SBP Request for Deemed Election), 4 March 2014
- DFAS-CL Form 1059 (Direct Deposit Authorization for Processing Federal Net Payments), 4 March 2014
- Form W-4P (Withholding Certificate for Pension or Annuity Payments), 4 March 2014
- Legal brief in support of Qualifying Order Entitlement to Military Retired Pay, 10 March 2014
- A letter to DFAS, 27 October 2022
- A letter issued by DFAS, 25 November 2022
- Legal Brief in Support of Defense office of Hearing and Appeals (DOHA) appeal, 22 December 2022

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant [former spouse] states, through counsel, in effect, she expected to receive SBP benefits from DFAS once the SM passed away. However, she was denied SBP benefits from DFAS. She appealed her case and has yet to receive a response, which is a clear constructive denial by DFAS. The applicant is requesting the benefits of SBP that was agreed to by a State Court Order, and due to the 106 premium payments the SM made towards SBP.

3. The applicant provides, and the service record shows:

a. On 27 December 1979, the SM was appointed as a commissioned officer, in the Army Reserves, at the rank of first lieutenant (1LT)/O-2.

b. The SM and the applicant [former spouse] were married on 14 February 1986.

c. On 30 January 2002, the SM was issued his twenty-year letter.

d. On 25 February 2002, the SM selected his then spouse [applicant] and children type of coverage. He also elected full and immediate coverage.

e. On 30 December 2002, the SM and the applicant [former spouse] were divorced.

f. On 11 November 2013, the SM retired from the U.S. Army Reserves.

g. On 6 December 2013, DFAS advised the applicant that her application for payment of a portion of the retired/retainer pay of the SM, could not be approved due to:

- obtain a certified copy of a clarifying order awarding either a fixed amount or a percentage of the member's retired/retainer pay, or which provides a formula wherein the only missing element is the denominator
- if the divorce decree specifies, she is to be designated as a former spouse beneficiary for SBP, she must make a 'deemed election' for coverage within one year of the divorce date or other court order requiring SBP coverage

h. On 12 February 2014 the SM and the applicant [former spouse], were issued a Qualifying Order for Entitlement to Military Retired Pay. This order further states:

- The SM at the time of his retirement, elected for the applicant [former spouse] an annuity under the survivor benefit plan
- The SM designated the applicant [former spouse] as the sole beneficiary of a survivor's benefit annuity at the maximum level

i. On 4 March 2014, through counsel, the applicant [former spouse], submitted her SBP request for deemed election to DFAS.

j. On 26 September 2022, the SM passed away.

k. On 27 October 2022, the applicant [former spouse], in a letter to DFAS, requested SBP benefits at the maximum level.

l. On 25 November 2022, DFAS denied her claim in full due to:

- SM did not change the spouse coverage to former spouse coverage at the time of the divorce
- The applicant [former spouse] was supposed to submit her deemed election for coverage within one year of the divorce date or other court order awarding her former spouse SBP coverage

m. On 22 December 2022, through counsel, the applicant [former spouse], submitted an appeal to DOHA.

4. On 11 March 2025, and 17 March 2025, DFAS provided the following:

a. The SM's certification of death, which shows the following:

- Date of Death: 26 September 2022
- Marital Status: Divorced
- Surviving Spouse Name: None

b. A letter issued to the SM, shows the applicant [former spouse], submitted an application for payment of a portion of his retired/retainer pay. This document does not show SBP benefits information.

c. SBP election statement for former spouse coverage.

d. The applicant's [former spouse], SBP request for deemed election.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The Board carefully considered the SM'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 request and the SM's available military records, the Board determined there is sufficient evidence to support the applicant's contentions. The Board noted the SM married the applicant on 14 February 1986, on 30 January 2002, the SM received his 20-year letter and subsequently elected full and immediate SBP coverage for his then spouse (the applicant) and children on 25

February 2002. Although the SM and applicant divorced on 30 December 2002, the record shows that the SM continued to intend for the applicant to remain the designated SBP beneficiary

2. The records show on 12 February 2014, the parties obtained a Qualifying Court Order for Entitlement to Military Retired Pay, which explicitly stated that the SM elected an annuity under the SBP for the applicant and designated her as the sole beneficiary at the maximum level. The applicant submitted a deemed election request to DFAS on 4 March 2014. While DFAS later denied her claim citing the absence of a timely deemed election within one year of divorce or court order, the Board found that the applicant made a good faith effort to comply with the requirements and that the Qualifying Court Order, coupled with her submission, satisfies the intent of the law and policy governing SBP elections. Further, the Superior Court of New Jersey issued a modification order in July 2024 reaffirming the applicant's designation as the sole SBP beneficiary.

3. The Board noted, the SM's death certificate confirms he was divorced at the time of death and had no surviving spouse, and there is no evidence either party remarried. The Board found the applicant's entitlement is supported by the SM's documented intent, the court order, and her proactive efforts to preserve her SBP rights. The Board also noted the applicant's willingness to pay any back premiums associated with the coverage. Based on the evidence provided the Board granted relief for correction of the military record to reflect the applicant as the eligible former spouse beneficiary under the Survivor Benefit Plan, with an effective date of the SM's death on 26 September 2022.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
XXX	XXX	XXX	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 to show the former spouse as the beneficiary under the Survivor Benefit Plan, with an effective date of 26 September 2022.

X //SIGNED//

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. Title 10 (Armed Forces), U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the Army Board for Correction of Military Records (ABCMR) to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. 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. Elections are made by category, not by name. 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.

3. Public Law 98-94, 24 September 1983, established former-spouse coverage for retired members.

4. 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.

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. Public Law 97-252, the Uniformed Services Former Spouses Protection Act (USFSPA), dated 8 September 1982, established SBP coverage for former spouses of retiring members. Title 10, U.S. Code, Chapter 73, provides that a spouse loses status as an SBP beneficiary upon divorce; however, the means by which the divorced (former) spouse may receive a survivorship annuity are: (1) if the service member voluntarily elects to provide a former spouse annuity; (2) the election is made in order to comply with a court order; or (3) the election is made to comply with a voluntary written agreement related to a divorce action and that voluntary agreement is part of a court order for divorce, dissolution, or annulment.

7. Public Law 105-85, enacted 18 November 1997, established the option to terminate SBP participation. Retirees have a one-year period, beginning on the second anniversary of the date on which their retired pay started, to withdraw from SBP. The spouse's concurrence is required. No premiums will be refunded to those who opt to disenroll. Reservists who elected an option under the RCSBP will continue to have the Reservist Portion cost deducted from their retired pay.

8. 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.

a. Three options are available: (A – Declination of Coverage) elect to decline enrollment and choose at age 60 whether to start SBP participation; (B – Deferred Annuity) 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 – Immediate Annuity) elect that a beneficiary receive an annuity immediately upon their death if before age 60.

b. 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). Once a member elects either Options B or C in any category of coverage, that election is irrevocable. Option B and C participants do not make a new SBP election at age 60. They cannot cancel SBP participation or change options they had in RCSBP – it automatically converts to SBP coverage. 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 have died prior to age 60.

7. Army Regulation 135-180 (Retirement for Non-Regular Service) prescribes policies and procedures governing Non-Regular (Reserve Component) retirement and implements statutory authorities governing granting retired pay for non-Regular service to Soldiers in the Army National Guard, Army National Guard of the United States, and U.S. Army Reserve. Chapter 3 provides policies and procedures for implementing the RCSBP. Soldiers who were issued a Notification of Eligibility for Retired Pay at Age 60 after 1 December 1979 have been or will be furnished the RCSBP information and election certificate with their 20-year letter. All eligible personnel have 90 days from receipt of the 20-year letter to make their elections and return the form to the appropriate office.

//NOTHING FOLLOWS//