

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 May 2024

DOCKET NUMBER: AR20230011164

APPLICANT REQUESTS: in effect, payment of the Former Service Member's (FSM) Retroactive Stop Loss Special Pay Compensation (RSLSPC).

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

- DD Form 149 (Application for Correction of Military Record)
- DA Form 4187 (Personnel Action)
- State of IL Orders Number 330-082
- DD Form 2064 (Certificate of Death (Overseas))
- DD Form 1300 (Report of Casualty)
- Federal Register – RSLSPC article
- DD Form 827 (Application for Arrears in Pay)
- Defense Finance and Accounting Service (DFAS) letter
- Letter to U.S. Army Financial Management Command (FMC)
- U.S. Army FMC letter
- excerpt from Title 31 United States Code (USC), section 3702 (Authority to Settle Claims)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code (USC), 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 states in effect, her husband (the FSM) was involuntarily extended (Stopped Loss) in the service and ordered to active duty. He was deployed to Iraq and then killed in action. A law for RSLSPC which was retroactive was passed after his death. As the beneficiary of the FSM's unpaid pay and allowances, she should receive payment of the RSLSPC; however, she was not aware the FSM was involuntarily extended or of this entitlement until recently. She requests to be paid the FSM's RSLSPC, he would have been paid had he not been killed in action.

3. On 17 June 1998, the FSM enlisted in the Army National Guard in military occupational specialty 63B (Light Wheel Vehicle Mechanic).
4. The FSM's DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he was ordered to active duty for training on 8 June 1999. He was released from active duty on 30 November 1999. It also shows the FSM completed 5-months and 23-days of active service.
5. On 23 February 2003, the FSM's Expiration Term of Service (ETS) dated of 16 June 2004, was involuntarily extended to 30 June 2004 due to stop loss as referenced in Military Personnel Message Number 03-041.
6. On 13 November 2003, the FSM's ETS date of 16 June 2004 was involuntarily extended to 28 February 2005 due to stop loss.
7. The FSM's record contains a marriage certificate showing the FSM and Ms. E- L- were married on 20 November 2003.
8. On 26 November 2003, Orders Number 330-082, issued by the State of IL, the FSM was ordered to active duty in support of Operation Iraqi Freedom, effective 7 December 2003, for a period 545 days.
9. On 5 September 2004, the FSM was killed in action by shrapnel to the torso from hostile fire in or around Baghdad, Iraq.
10. The certificate of death dated 20 September 2004, shows the FSM was pronounced deceased in Baghdad, Iraq, from shrapnel wounds to the torso. The applicant was listed as the FSM's spouse.
11. The FSM's service record is void of his DD Form 93 (Record of Emergency Data).
12. The applicant provides:
 - a. Federal Register article referencing RSLSPC stated effective 1 February 2019, a final rule removed Department of Defense's (DoD) regulation which contained obsolete DoD policy regarding RSLSPC, a program which was terminated on 21 October 2012. In accordance with law, this rule was issued to provide for RSLSPC. The last day for submission of claims to the Secretaries of the Military Departments was 21 October 2012. Following that date, the Secretaries concerned are not authorized to make payments.
 - b. DD Form 827, which states, in effect, the applicant was not aware she was eligible to receive the FSM's RSLSPC until recently. The FSM's ETS was 16 June 2004,

and he was involuntarily extended until 28 February 2005. He was ordered to active duty in support of Operation Iraqi Freedom on 7 December 2003. The FSM was killed in action in Baghdad, Iraq, on 5 September 2004. Had the FSM not been involuntarily extended in the service and deployed to Iraq, he would not have been killed in action. As the spouse of the FSM, she should receive the RSLSPC that was due to the FSM for the period he was extended until his death of 7 December 2003 through 5 September 2004.

c. DFAS letter dated 19 May 2023, stated her claim for the FSM's RSLSPC was received more than 6-years after the date it accrued of 28 February 2005, and it was barred from consideration by the provisions of the barring act. The applicant was informed she could request a waiver for the barring act through the U.S. Army FMC.

d. Letter from the applicant to the U.S. Army FMC stated she requested a waiver of the barring act as DFAS denied her request for the FSM's RSLSPC. The FSM was involuntarily extended in the service and then ordered to active duty and deployed. The FSM was killed in action on 5 September 2004.

e. U.S. Army FMS letter stated the DoD policy which governed the RSLSPC is obsolete as the program was terminated on 21 October 2012, the last day for submission of claims to the Secretaries of the military departments. The authority to process the applicant's request no longer existed.

f. Excerpt from Title 31, USC, section 3702, which states in part, paragraph b (1) a claim against the Government must be received by the official responsible for settling the claim or by the agency that conducts the activity from which the claim arises within 6-years after the claim accrues except as provided by another law or a claim of a State, the District of Columbia or a territory or possession of the United States. When a claim accrues during or within 5-years before a war begins, the claim must be received within 5-years after peace is established or within the period provided in paragraph 1, whichever is later.

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 applicant's contentions, the military record, and regulatory guidance were carefully considered. Additionally, the Board concur with the administrative notes referencing administrative corrections to the DD Form 214.

2. The Board supports payment of the former service members retroactive stop loss pay compensation. The FSM was put into a stop-loss status and then he was killed in the line of duty. The FSM made the ultimate sacrifice for this country; the least the government can do is pay his spouse the pay he was due.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The Board concurs with the corrections addressed in Administrative Note(s) below and 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:

a. showing the Defense Finance and Accounting Service received the applicant's claim for the FSM's Retroactive Stop Loss Special Pay Compensation on 1 October 2004, and timely approved the request.

b. paying the applicant the FSM's Retroactive Stop Loss Special Pay Compensation.

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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.

ADMINISTRATIVE NOTE(S): reissue his DD Form 214 (Certificate of Release or Discharge from Active Duty) ending 30 November 1999 to show the entry "HONORABLE" in item 24 (Character of Service).

REFERENCES:

1. Title 10, USC, 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 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. Title 31, USC, section 3702, is the 6-year barring statute for payment of claims by the government. In essence, if an individual brings a claim against the government for monetary relief, the barring statute says that the government is only obligated to pay the individual 6 years from the date of approval of the claim. Attacks to the barring statute have resulted in litigation in the U.S. Court of Federal Claims. In the case of *Pride versus the United States*, the court held that the Board for Correction of Military Records (BCMR) is not bound by the barring act, that the BCMR decision creates a new entitlement to payment and the 6 years starts running over again, and that payment is automatic and not discretionary when a BCMR decision creates an entitlement.
3. Title 32 Code of Federal Regulations, section 279 (Retroactive Stop Loss Special Pay Compensation), provides for Retroactive Stop Loss Special Pay as authorized and appropriated in section 310 of Public Law 111-32 and as described in this part. The Secretaries concerned shall employ the Retroactive Stop Loss Special Pay authority and appropriated funding to compensate Service members, including members of the Reserve components, former and retired members under the jurisdiction of the Secretary who, at any time during the period beginning on 11 September 2001, and ending on 30 September 2009, served on active duty while the Service members' enlistment or period of obligated service was extended pursuant to any provision of law authorizing the President to extend any period of obligated service of a Service member in time of war or of national emergency declared by Congress or the President. The amount of compensation shall be \$500.00 per month for each month or any portion of a month during the period specified above that the member was retained on active duty as a result of application of the Stop Loss Authority. The Military Departments are to determine and certify who is eligible to receive the Retroactive Stop Loss Special Pay and provide this information to DFAS for payment.
 - a. By law, Reserve Component members retained under Stop Loss Authority will receive Retroactive Stop Loss Special Pay only for service on active duty. As such, Reserve Component members may have periods before mobilization and after

demobilization while under Stop Loss Authority where no Retroactive Stop Loss Special Pay can be paid.

b. If an eligible member dies before the payment is made, the Secretary of the Military Department concerned shall make the payment in accordance with section 2771 of Title 10, USC.

c. The last day for submission of claims to the Secretaries of the Military Departments for Retroactive Stop Loss Special Pay is 21 October 2012. The Secretaries concerned are not authorized to make payments on claims that are submitted after 21 October 2012.

4. Title 10 USC, section 2771 (Final settlement of accounts: deceased members), (a) In the settlement of the accounts of a deceased member of the armed forces, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

- beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned
- surviving spouse
- children and their descendants, by representation
- father and mother in equal parts or, if either is dead, the survivor
- legal representative
- person entitled under the law of the domicile of the deceased member

//NOTHING FOLLOWS//