

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 4 October 2024

DOCKET NUMBER: AR20230011172

APPLICANT REQUESTS:

- correction of the former service member's (SM) record to show he elected "Spouse Only" Survivor Benefit Plan (SBP) coverage within 1 year after the death of his former spouse
- a video/telephonic appearance before the Board

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)
- District Court Final Decree of Divorce, 9 November 1995
- Certificate of Marriage, 17 February 1996
- Letter to Defense Finance and Accounting Service (DFAS), 20 September 1996
- Former Spouse's Certificate of Death, 6 November 2013
- Certificate of Death, 24 March 2020
- Defense Office of Hearings and Appeals (DOHA) Letter, 19 May 2022
- DFAS Letter, 21 September 2022

FACTS:

1. The applicant, the surviving spouse of the deceased SM, states DFAS has failed to comply with Department of Defense Instruction 1340.21 (Procedures for Settling Personnel and General Claims), paragraph e7.6. DFAS's repeated defiance to provide SBP annuity benefits based on indisputable documentation and reported error is reprehensible.

2. The SM's DD Form 1172 (Application for Uniformed Services Identification and Privilege Card), 2 September 1983, shows the SM and E____ D____ (M____) J____ married on 12 August 1967.

3. The SM's DA Form 4240 (Data for Payment of Retired Army Personnel), 30 June 1986, shows he indicated in:

a. Part III (SBP Election):

- (1) item 10 (Are you married?), he placed an "X" in the "Yes" box;
- (2) item 11 (Do you have dependent children?), he placed an "X" in the "No" box;
- (3) item 12 (Check one of the following to indicate the type of coverage you desire), he placed an "X" in the "Spouse Only" box;
- (4) item 14a (Name of Spouse), he entered "E____ D____ J____"; and
- (5) item 14d (Name), no entries; and

b. Part VI (Certification), item 19 (Signature of Member), he signed the form on 30 June 1986.

- 4. On 30 June 1986, the SM retired in the rank/grade of sergeant first class/E-7. He completed 23 years, 10 months, and 21 days of total active service.
- 5. The SM and E____ D____ J____ divorced on 9 November 1995. The District Court Final Decree of Divorce, 9 November 1995, makes no mention of the SBP. The court reserved jurisdiction to issue clarifying orders pursuant to the divorce decree.
- 6. On 17 February 1996, the SM and the applicant married.
- 7. On 30 September 1996, the SM sent a letter to DFAS, requesting to change his SBP beneficiary to the applicant, J____ C____ J____, due to remarriage.
- 8. On 6 November 2013, E____ D____ J____ died.
- 9. The SM died on 24 March 2020. He was married to the applicant at the time of his death.
- 10. The applicant's DD Form 2656-7 (Verification for Survivor Annuity), 28 April 2020, shows she submitted a claim for SBP benefits as the SM's surviving spouse. She acknowledged she was legally married to the SM on the date of his death.
- 11. On 14 May 2020, DFAS denied her request for SBP benefits on the grounds that the SM's first wife had made a timely deemed election for SBP former spouse coverage within 1 year of their divorce; therefore, the first wife was entitled to receive the SBP annuity.

12. On 19 May 2020, the applicant appealed the DFAS denial, stating:

I was dismayed to be denied an annuity under (SBP) Survival [sic] Benefit Plan which I am entitled since [SM's] former spouse died in 2013 as reported to him by her daughter and the military in 2015. The funds were in an account from 2013-2015 when the military informed [SM] to file for reimbursement of spousal benefits held since her death, which he did.

After which no further spousal benefits were withheld from his retirement (monthly pension) pay. Therefore, how can a deceased former spouse receive an annuity under SBP, when a surviving spouse who is alive cannot? Please correct this error and provide the annuity under SBP which I am entitled. All data can be validated by the military retirement and annuitant pay account if it is thoroughly reviewed within your data system. This above information was relayed by phone on 5/18/20 [18 May 2020] upon receipt of the denial letter.

Thank you in advance for your prompt attention to correct this error, I am entitled to my deceased spouse's SBP annuity program benefits. This is a financial burden being denied these benefits.

13. The DFAS Administrative Report 234-20 (not in evidence), 2 November 2020, DFAS denied her request for SBP benefits on the grounds that the SM's first wife had made a timely deemed election for SBP former spouse coverage within 1 year of the divorce and that the first wife was therefore entitled to receive the SBP annuity.

14. The DOHA letter to DFAS, 19 May 2022, states the Administrative Report, 2 November 2020, did not specify the basis, authority, or provide analysis to the facts for why DFAS's initial determination should have been upheld. The Administrative Report failed to state anything other than the timeline, a listing of statutes, and a historical reference to the methodology of making a written deemed election. DOHA remanded the case back to DFAS, requesting further analysis of the legal issues and additional evidence, providing the applicant the opportunity to provide rebuttal to and revised administrative report issued by DFAS.

15. On 10 June 2022, DFAS issued an amended administrative report (not in evidence) with additional evidence and further analysis of the legal issues. The amended administrative report explained that DFAS's initial denial on the basis of the SM's former spouse making a deemed election within 1 year of the divorce was not accurate. DFAS explained that while a deemed election was made on E____ J____'s behalf, it was made within 1 year of the first court order requiring the member to elect former spouse SBP coverage, that is, within 1 year of the Order of Division of Property after Divorce Nunc Pro Tunc (now for then), 4 March 1998 (not in evidence). The Amended Administrative Report explained that Congress amended the SBP statute in 2015

terminating SBP participation and coverage upon the death of a former spouse SBP beneficiary. However, Congress allowed a special open season to permit a retired SM whose former spouse died and who had remarried to elect to participate in the SBP and to designate his/her new spouse as his/her SBP beneficiary. DFAS sent an eligibility notification letter to retirees whose former spouses had died, informing them that they could elect to participate in the SBP and to designate their new spouse as an SBP beneficiary by 16 November 2016. The SM did not submit an election to participate in the SBP and designate the applicant as his SBP beneficiary within this 1-year open season. The Amended Administrative Report states:

While DFAS did send out eligibility notification letters to retirees whose former spouse SBP coverage was suspended due to the death of their former spouse, the [SM] likely did not receive a letter, as DFAS was not notified of E____'s death until [the applicant] submitted her administrative appeal in May 2020.

16. On 21 September 2022, DFAS notified the applicant that her request for an extension of time to submit an appeal to DOHA concerning DFAS's denial of her claim was granted. She had until 23 October 2022 to submit her appeal.

17. On 4 October 2022, the applicant submitted a second rebuttal, addressing the amended Administrative Report wherein she stated the SM's former spouse's attorney did not submit the deemed election request to DFAS until 17 March 1998 and DFAS did not grant her deemed election until 6 May 1998. Therefore, the deemed election was not timely and was not submitted within the 1-year statutory deadline.

18. On 23 August 2023, DOHA considered her claim for the SBP annuity as the surviving spouse of the SM. DOHA denied her request based on the following, in part:

In this case, [SM] established SBP spouse coverage for his then spouse, E____ J____, upon his retirement in 1986, but that coverage was ended by the issuance of the Final Decree of Divorce on November 9, 1995. See DOHA Claims Case No. 2017-CL-XXXXXX.X (April 10, 2018), copy enclosed. [SM's] former spouse was not awarded former spouse SBP coverage in the 1995 divorce decree; the court expressly reserved jurisdiction to issue clarifying orders pursuant to the divorce decree. Although you and [SM] then married on February 20, 1996, on March 4, 1998, an Order of Division of Property after Divorce Nunc Pro Tunc was issued awarding E____ J____ the former spouse SBP annuity. The attorney for E____ J____ timely submitted a deemed election within one year of the court order, satisfying the requirements of the statute under 10 U.S.C. 1450(f)(3) [Title 10, U.S. Code, section 1450(f)(3)]. See DOHA Claims Case No. 2022-CL-XXXXXX.X (February 23, 2023). Although E____ J____ successfully deemed a former spouse election and became [SM's]

SBP former spouse beneficiary in 1998, as stated above, she died on June 11, 2013.

19. Email correspondence from a DFAS representative, 12 June 2024, noted the applicant's claim for the SBP annuity was denied and she was notified by letter on 18 September 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 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, the widowed spouse of the deceased former service member (SM) was subject to a situation outside of her control based on the former spouse of the SM preceeding the SM in death several years prior to the SM's death in 2020. Therefore, the Board concluded an injustice exists and granted relief to amend the SM's record to show he elected "Spouse Only" Survivor Benefit Plan (SBP) coverage within 1 year after the death of his former spouse.

2. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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 that the evidence presented was 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 service member deemed an election of "Spouse Only" coverage within one year after the death of his former spouse as required by the relevant statutory provision and the request was received and processed by the appropriate office in a timely manner.

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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.
5. The National Defense Authorization Act for Fiscal Year 2016 amended the SBP statute to provide a member who had made an election to provide SBP or Reserve Component SBP coverage for a former spouse the ability to cover a subsequent spouse if the former spouse dies. The enactment of this legislation included provisions in the form of an open enrollment season to accommodate members whose covered former-spouse beneficiaries were already deceased when the legislation was enacted.

6. Department of Defense Instruction 1332.42 (Survivor Benefit Plan), Section 4 (Notification and Election), paragraph 4.5 (Electing Spouse Coverage upon Death of Covered Former Spouse), states in accordance with Title 10, U.S. Code, section 1448(b), as amended by Public Law 114-92, section 641, a retiree who is participating in the SBP or Reserve Component SBP with former spouse coverage, may, upon the death of that former spouse, elect to cover his or her spouse under certain conditions described in paragraphs 4.5.a. through 4.5.c.

a. Remarried before Death of Former Spouse on or after 25 November 2015:

(1) If the covered participant was married to a new spouse before the death of his or her former spouse, the participant may elect to cover his or her new spouse if the former spouse died on or after 25 November 2015.

(2) The election to cover the new spouse must be made by the participant in writing to the Secretary concerned within 1 year of the death of the former spouse. Coverage is not automatic.

(3) The covered participant may not change the level of coverage already in place.

(4) Coverage for the new spouse is effective as of the first day of the first month following the month of the death of the former spouse beneficiary, or the first anniversary of the marriage, whichever is later.

b. Remarried after Death of Former Spouse on or after 25 November 2015:

(1) If the covered participant marries a new spouse after the death of his or her former spouse, the participant may elect to cover his or her spouse if the former spouse died on or after 25 November 2015.

(2) The election to cover the new spouse must be made by the participant in writing to the Secretary concerned within 1 year of remarriage. Coverage is not automatic.

(3) The covered participant may not change the level of coverage.

(4) Coverage for the new spouse is effective as of the first day of the first month following the month in which the election is received by the Secretary concerned, or the first anniversary of the marriage, whichever is later.

c. Special Provisions when the Former Spouse Died before 25 November 2015:

(1) In the case of a covered participant who was already remarried before 25 November 2015 and whose former spouse beneficiary died before 25 November 2015, there is a 1-year window to designate the new spouse as beneficiary, in accordance with Public Law 114-92. The enrollment window for such participants ended on 24 November 2016. While the level of coverage was required to remain the same, the effective date of coverage depended on how long the covered participant was married to the new spouse in relation to the death of the former spouse:

(a) If the covered participant was married to the new spouse for at least 1 year at the time of the death of the former spouse, the effective date of spouse coverage is the first day of the first month after the death of the former spouse.

(b) If the covered participant married the new spouse within the year immediately before the death of the former spouse, or after the death of the former spouse, the effective date of spouse coverage is the first day of the first month following the first anniversary of the remarriage.

(2) If the former spouse died before 25 November 2015, but the covered participant was not yet married to the new spouse as of 25 November 2015, that covered participant has 1 year from the date of marriage to elect coverage for the new spouse. Coverage is not automatic.

//NOTHING FOLLOWS//