

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 13 February 2024

DOCKET NUMBER: AR20230011362

APPLICANT REQUESTS: via remand by the U.S. Court of Federal Claims, reconsideration of Army Board for Correction of Military Records (ABCMR) Docket Number AR20180009257, 23 December 2020; specifically, correction of her former spouse's records to show she is the beneficiary of her former spouse's Survivor Benefit Plan (SBP) coverage.

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

- U.S. Court of Federal Claims Complaint, 9 February 2022
- U.S. Court of Federal Claims Plaintiff's Motion for Judgment on the Administrative Record, 15 July 2022
- U.S. Court of Federal Claims Opinion and Order, 14 September 2023

FACTS:

1. Counsel's complaint to the U.S. Court of Federal Claims, 9 February 2022, states:

a. This is a Tucker Act claim arising from the improper denial of annuity payments to the Plaintiff, (Applicant), for her deceased former husband's (service member's (SM's)) SBP pursuant to Title 10, U.S. Code, section 1447, et sequentes (and the following) (i.e., the money-mandating statute). Prior to filing this lawsuit, the applicant sought relief through the ABCMR, which denied her the relief she requests herein. In so holding, the applicant contends here that the ABCMR has acted arbitrarily, capriciously, without substantial evidence, and/or contrary to law as this Court established through inter alia (among other things), *Filo v. United States*, 154 Fed. Cl. 17 (Fed. Cl. 2021).

b. In the situation of a SM going through divorce proceedings where the non-military former spouse is awarded the SM's SBP, the Plan provides a mechanism for the former spouse to make a "deemed election" on behalf of the SM if the former spouse's request is in writing and accompanied by a copy of the "court order, regular on its face, which requires such election or incorporates, ratifies or approves the written agreement of such person." Like in *Filo*, as here, the applicant's and her ex-husband's initial divorce proceedings failed to require an election of SBP for the applicant, and instead, their Final Consent Order from 2 May 2013 "contemplated an additional order for the purpose

of effectuating the SBP award." Specifically, the Final Consent Order provided that "A military pension division order shall be entered...Plaintiff [Applicant] may elect to receive SBP coverage for her portion of the military retirement but she shall be required to pay for such coverage. The Plaintiff's [Applicant's] counsel shall prepare the MPDO [Military Pension Division Order]." The Final Consent Order also provided that the North Carolina Court retained jurisdiction so as to enter the MPDO.

c. Subsequent to that, the SM married A____ W____ on 5 October 2013. While serving on active duty on 22 October 2015, the SM was killed in action in Iraq. Because of this, A____ W____, the SM's surviving spouse, began receiving SBP annuity payments. A____ W____ was also the administrator for his estate. To resolve the MPDO issues not yet resolved as had been contemplated, the applicant petitioned the North Carolina Court to substitute the SM's estate (i.e., A____ W____ as Administrator) as the Defendant in lieu of the SM, which was approved and entered through the Consent Order based on the concurrence of A____ W____. Thereafter, on 2 June 2016, the North Carolina Court entered a Clarifying Consent Order to require the award of SBP to the applicant. In addition, A____ W____ even signed a "CONSENT TO WAIVER OF RIGHTS TO BENEFITS PAYABLE UNDER THE SURVIVOR BENEFIT PLAN," indicating that she consented and agreed that she had "no right, title or interest in the Survivor Benefit Plan and...consent[ed] to said benefits being assigned to [Applicant]."

d. After receiving the Clarifying Consent Order, the applicant submitted a DD Form 2656-10 (SBP Former Spouse Request for Deemed Election) to the Defense Finance and Accounting Service (DFAS), deeming the election for her award of the SM's SBP on 22 June 2016, less than a month from when the Clarifying Consent Order first required the SBP award. On 1 February 2017, the applicant also submitted a DD Form 2656-7 (Verification for Survivor Annuity) to DFAS to claim the SBP annuity. On 7 August 2017, however, DFAS denied the applicant's SBP claim.

e. On 10 May 2018, the applicant then submitted an application to the ABCMR, requesting a records correction to cure the SBP denial as an error and/or injustice, given the SBP annuity was timely sought following North Carolina's first court order which required that SBP be awarded to the applicant. Notwithstanding A____ W____'s [the SM's surviving spouse] consent to have the applicant be awarded the SBP, the ABCMR denied relief. By letter dated 18 February 2021, in just a single sentence, the ABCMR concluded that "based upon public law, the Board determined the request is not authorized."

f. Accordingly, the applicant seeks entry of a judgment awarding her the SBP annuity; to receive backpay for the SBP payments she was properly due, along with all other available remedies as are just and appropriate, including attorney's fees, interest, and costs pursuant to the Equal Access to Justice Act.

g. Factual Allegations.

(1) The applicant was married to the SM on 19 July 1998 and over a 13-year marriage they had three children together. When they divorced on 25 October 2011, a separate case to resolve the claims and counterclaims over the division of property was "severed and preserved for hearing at a later date."

(2) On 2 May 2013, the District Court in Moore County, North Carolina, first took up the issue on the division of property, entering a Final Consent Order which provided that "A[n] MPDO shall be entered...Plaintiff [Applicant] may elect to receive SBP coverage for her portion of the military retirement but she shall be required to pay for such coverage. The Plaintiff's [applicant's] counsel shall prepare the MPDO."

(3) Thereafter, the SM married A____ W____ on 5 October 2013. While serving on active duty on 22 October 2015, the SM was killed in action in Iraq. This resulted in DFAS beginning SBP payments to A____ W____, as the surviving spouse.

(4) Because the applicant had not yet resolved the remaining matters that were subject to the contemplated MPDO as referenced in the 2 May 2013 Final Consent Order, the applicant sought to have the SM's Estate (being administered by A____ W____ as its Personal Representative) substituted as the Defendant in the pending matter concerning the MPDO.

(5) On 25 April 2016, the North Carolina Court entered a "CONSENT ORDER SUBSTITUTING PERSONAL REPRESENTATIVE AS DEFENDANT" because "the nature of this action is such that the cause of action survives the death of the named Defendant."

(6) On 2 June 2016, the North Carolina Court entered a Clarifying Consent Order to require the award of SBP to the applicant, stating:

(a) Finding of Fact paragraph 8(c) on page 3 of the final consent order [from May 2, 2013] is revised to include the following language: "Plaintiff as the 'former spouse' is awarded the survivor's benefits in Defendant's [SM's] military retirement. Defendant [SM] will promptly elect former spouse survivor benefit plan coverage for Plaintiff [applicant]."

(b) Decretal paragraph 10 of the final consent order is revised to include the following language: "Plaintiff as the 'former spouse' is awarded the survivor's benefits in Defendant's [SM's] military retirement (SBP). Defendant [SM] will promptly elect former spouse survivor benefit plan coverage for Plaintiff [applicant]."

(7) On or about 22 June 2016, the applicant submitted a DD Form 2656-10 to DFAS, deeming an election for award of the SM's SBP as the former spouse. On or about 1 February 2017, the applicant also submitted a DD Form 2656-7 to DFAS to claim the SBP annuity.

(8) By letter dated 7 August 2017, DFAS denied the applicant's SBP claim.

(9) On 9 November 2017, A_____ W_____ [SM's surviving spouse] waived her rights to the SBP, stating she "consent[s] and agree[s] that [she has] no right, title or interest in the Survivor Benefit Plan and [she] hereby consent[s] to said benefits being assigned to [Applicant]."

(10) On 10 May 2018, the applicant submitted an application to the ABCMR, requesting the SBP annuity due to error and/or injustice in light of the foregoing events.

(11) The applicant was notified by letter dated 18 February 2021 that her requested relief was denied. In the Record of Proceedings explaining the basis for the ABCMR's decision, the ABCMR concluded that "based upon public law, the Board determined the request is not authorized."

(12) The ABCMR's decision referenced the following for which it was relying to reach its above conclusion that public law did not authorize the applicant's award of the SBP: (i) "Public Law 92-425, enacted 21 September 1972, establish[ing] the SBP"; (ii) "Public Law 97-252, the Uniformed Services Former Spouses Protection Act (USFSPA), dated 8 September 1982, establish[ing] SBP for former military spouses"; (iii) Title 10, U.S. Code, section 1448(b)(3), incorporate[ing] the provisions of the USFSPA relating to the SBP"; and (iv) "Title 10, U.S. Code, section 1450(f)(3)(A), permit[ing] 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."

h. The applicant fully complied with statutory requirements and submitted the necessary documents to DFAS, requesting a deemed election within 1 year of the date of the court order. The ABCMR's decision was arbitrary, capricious, and unsupported by substantial evidence, and/or contrary to law. Counsel also requested relief in that the Court award the applicant the SBP and any related back pay; issue an order directing the United States to correct the SM's military records to reflect the applicant's entitlement to the SBP and associated back pay; and award interest, costs, and attorney fees, and any other entitled relief.

2. In the applicant's Motion for Judgment on the Administrative Record, 15 July 2022, counsel moved the U.S. Court of Federal Claims to award her the relief requested in the complaint. Counsel noted the applicant complied with all statutory requirements, the

ABCMR findings misapplied and misunderstood the statutory laws associated with the SBP, and the applicant is the rightful recipient of the SM's SBP benefits (see attachment for further details).

3. In the 14 September 2023 opinion and order, the Court determined there was no basis for the ABCMR's conclusion that the applicant's request for a deemed SBP election was not authorized. The Court remanded the action to the ABCMR to reconsider the applicant's request for a deemed election and issuance of a new written decision consistent with the order (see attachment for further details).

4. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20180009257 on 23 December 2020.

5. The SM enlisted in the U.S. Army Reserve under the Delayed Entry Program on 28 October 1994. He was discharged from the Delayed Entry Program and enlisted in the Regular Army on 11 January 1995.

6. The SM's records show he and the applicant married on 19 July 1998.

7. The SM was promoted to the rank/grade of master sergeant/E-8 effective 1 June 2011.

8. The General Court of Justice District Court Division Order for Summary Judgment and Judgment of Divorce shows the applicant and the SM were granted a divorce on 24 October 2011. The order does not contain language addressing SBP benefits.

9. The General Court of Justice District Court Division Final Consent Order, filed 2 May 2013, shows the applicant and the SM went to court for claims and counterclaims for child custody and equitable distribution and the applicant's claims for post-separation support, alimony, child support, and attorney's fees.

a. Paragraph 8c states:

A military pension division order shall be entered which allocates fifty percent (50%) of the marital portion of the Defendant's [SM] military retired pay to the Plaintiff [applicant] with this order reflecting a date of marriage of July 19, 1998, a date of separation of July 22, 2010 and the Defendant's [SM's] active duty military service beginning January 11, 1995. The marital portion shall be defined as a fraction whose numerator represents the number of months that the parties were married to and living with one another and the denominator being the total number of months of the Defendant's [SM's] creditable military service. The Plaintiff [applicant] may elect to receive SBP coverage for her

portion of the military retirement but she shall be required to pay for such coverage. The Plaintiff's [applicant's] counsel shall prepare the MPDO. b. This order noted the Court retained jurisdiction over this matter to enter an MPDO consistent with the terms and conditions specified.

10. The SM's records show he and A_____ B. W_____ married on 5 October 2013.
11. The applicant did not submit a DD Form 2656-10 to DFAS, deeming an SBP election of former spouse coverage within 1 year of the 2 May 2013 General Court of Justice District Court Division Final Consent Order.
12. The DD Form 2064 (Certificate of Death (Overseas)), 25 October 2015, documented the SM's death on 22 October 2015 in Iraq as the result of multiple gunshot wounds. The form shows he was married and lists his wife as A_____ B. W_____.
13. The DD Form 1300 (Report of Casualty), 27 October 2015, documented the SM's death on 22 October 2015 as killed in action as a result of hostiles in Iraq. His duty status is shown as active duty in the rank of master sergeant. The form shows his dependents as his surviving spouse (A_____ B. W_____) and his four sons.
14. The SM's DA Form 1506 (Statement of Service – For Computation of Length of Service for Pay Purposes), 15 November 2015, documented the SM's total creditable years of service as 20 years, 9 months, and 12 days.
15. Counsel filed a Motion to Substitute Defendant on 16 March 2016 in the General Court of Justice District Court Division in regard to the MPDO, requesting that A_____ B. W_____, the surviving spouse of the deceased SM who died on 22 October 2015 and the Administrator of the SM's estate, be substituted as the defendant in this action.
16. The General Court of Justice District Court Division Consent Order Substituting Personal Representative as Defendant, ordered that A_____ B. W_____ (surviving spouse), the Administrator of the SM's Estate, be substituted as the defendant in the title to the action on 22 April 2016.
17. Counsel filed a Motion to Clarify Language in Consent Order on 28 April 2016 in the General Court of Justice District Court Division, wherein the 2 May 2013 order required the former spouse to elect SBP coverage; however, the order should have been written to state the SM would elect SBP coverage for the former spouse. In the alternative, the former spouse requests the Court sign an MPDO which provides only for the allocation of SBP coverage to her as the former spouse (since there is no retired pay to divide due to the SM's death). Counsel therefore asks the Court to clarify the 2 May 2013 Final Consent Order by including language to allow the applicant to submit a "deemed

election" under Title 10, U.S. Code, section 1450(f)(3)(A), and to allow her to obtain SBP coverage.

18. The applicant submitted a DD Form 2656-10, 27 May 2016, with associated documents, showing in:

- a. Section I (Member Identification), the SM's name;
- b. Section II (Former Spouse Identification), the applicant's name, address, and birthdate;
- c. Section II, block 12 (Marriage History), the entries:
 - Date Married to Member – 19 July 1998
 - Date of Divorce – 25 October 2011
 - Are You Currently Married – "No"
- d. Section III (Authority to Request Deemed SBP Election), she answered the following questions by placing an "X" in the appropriate box:
 - Is election made pursuant to requirements of a court order? – "Yes"
 - Is election being made pursuant to written agreement as part of or incident to a proceeding of divorce, dissolution, or annulment that has been incorporated in, ratified, or approved by a court order? – "No"
- e. Block 15 (Remarks), she entered the following comments: "See boxes 4 and 5 above. The member is not retired and did not retire. He was eligible for retirement, but died while serving on active duty on October 22, 2015"; and
- f. Section V (Former Spouse Signature), she signed the form on 27 May 2016.

19. The General Court of Justice District Court Division Consent Order to Clarify Language in Prior Consent Order, 2 June 2016, with the consent of the parties (i.e., [Applicant] and [surviving spouse], ordered that the 2 May 2013 Final Order is clarified as follows:

1. Finding of Fact paragraph 8(c) on page 3 of the final consent order is revised to include the following language: Plaintiff as the "former spouse" is awarded the survivor's benefits in Defendant's [SM's] military retirement. Defendant [SM] will promptly elect former spouse survivor benefit plan coverage for Plaintiff [Applicant].

2. Decretal paragraph 10 of the final consent order is revised to include the following language: Plaintiff as the "former spouse" is awarded the survivor's benefits in Defendant's [SM's] military retirement (SBP). Defendant [SM] will promptly elect former spouse survivor benefit plan coverage for Plaintiff [Applicant].

3. This order shall authorize Plaintiff [Applicant] to submit a "deemed election" under [Title 10, U.S. Code, section] 1450(f)(3)(A) and to allow Plaintiff [Applicant] to obtain SBP coverage.

4. Plaintiff [Applicant] shall take no steps to seek disgorgement of any benefits received by [surviving spouse] prior to the entry of this Consent Order.

5. If required by DFAS, by the Army Board for the Correction of Military Records, or any federal agency, [surviving spouse] agrees to and shall sign a notarized Affidavit relinquishing her rights to SPB benefits in favor of Plaintiff [Applicant].

6. This Court retains jurisdiction over the parties and the subject matter herein to enter further orders consistent with the terms and conditions of this Clarifying Order.

20. The applicant submitted a DD Form 2656-7, 25 January 2017, verifying her eligibility for an annuity under the SBP as the former spouse. She noted she was not married to him on the date of his death and that there were no children of the deceased SM under age 23 or incapacitated. She also noted she was not married.

21. The DFAS letter to the applicant through her counsel, 7 August 2017, states DFAS acknowledges receipt of her SBP request for deemed election in lieu of the surviving spouse (A____ W____). DFAS denied her request and noted the following reasons, in part (see attachment for further details):

No Member Election.

Pursuant to the SBP law, if a member divorces prior to retirement, such member may still elect former spouse SBP at any time prior to retirement per [Title 10, U.S. Code, section] 1448(b)(2). An active duty member can make a former spouse election any time prior to retirement. If a member makes a former spouse election prior to retirement, such member must disclose whether such election is made in compliance with a court order or written agreement per [Title 10, U.S. Code, section] 1448(b)(5). In this case, there is no record of [SM] making a former spouse SBP election at any time prior to his death on active duty in the line of duty.

No Possible Deemed Election.

Under [Title 10, U.S. Code, section] 1450(f)(3), if a member is required to elect SBP coverage for his former spouse under the terms of a court order and he "fails or refuses to make such an election," the member may be deemed to have made the election if the former spouse submits (a) a DD Form 2656-10 (Request for Deemed Election) and (b) a copy of a valid court order which requires that the former spouse be designated as the SBP beneficiary "within one year of the date of the court order or filing involved." [Title 10, U.S. Code, section] 1450(f)(3).

In this case, you have conceded that the 2 May 2013 "Final Consent Order" imposed no duty on [SM] to elect former spouse SBP coverage. Thus, prior to his death, [SM] was not obligated to make any court ordered election. Accordingly, no "deemed election" was or could be made under [Title 10, U.S. Code, section] 1450(f)(3) based on the 2 May 2013 "Final Consent Order" alone. Consequently, on the date of [SM's] death there was no requirement to have former spouse SBP and [SM] had made no election for former spouse SBP.

SBP When Death on Active Duty.

[SM] died on active duty in the line of duty on 22 October 2015. When a member dies on active duty, in the line of duty, survivor benefit plan annuity benefits are governed by [Title 10, U.S. Code, section] 1448(d). Specifically, the SBP law provides that if the member has a former spouse at the time of his death and there is a court order or spousal agreement requiring the member to provide an annuity to a former spouse upon becoming eligible to be a participant in the SBP and the member has made an election under subsection 1448(b) to provide an annuity to a former spouse, or the former spouse has deemed an election pursuant to [Title 10, U.S. Code, section] 1450(f)(3), the Secretary shall pay the annuity to the former spouse, instead of the surviving spouse. [Title 10, U.S. Code, section] 1448(d)(3).

If on the date of the member's death, there is no mandatory former spouse annuity, the annuity is payable to the member's surviving spouse. For a payment of an SBP annuity, all events fixing the governments liability occur on the date of the member's death (see *Hart v. U.S.*, 910 F.2d. 815 (Fed. Cir. 1990)). Consequently, the Secretary concerned must determine the eligible beneficiary for SBP on the date of the member's death under Federal law. In this case, on the date [SM] died, he had a surviving spouse, had not made an election for SBP coverage for his former spouse, was not under a court ordered obligation to make such an election, and his former spouse had not requested a deemed election (nor would any such request, if made, have been honored given there

was no SBP awarded in the court orders). As a result, [SM's] current spouse is the SBP beneficiary.

No Posthumous Deemed Elections.

After [SM's] death, and after Federal law had been applied to determine the SBP beneficiary, [SM's] former spouse had a Final Consent Order entered which imposed for the first time a duty on the deceased member to elect former spouse SBP coverage. Your client subsequently requested the Secretary deem an election on her behalf on the basis of this court order. The issue in this case is whether the 2 June 2016 "Consent Order to Clarify Language in Prior Consent Order" which was issued eight months after [SM's] death and eight months after his pay stopped, may be relied upon by your client to now "deem" her as the former spouse beneficiary under [Title 10, U.S. Code, section] 1450(f)(3). We conclude that it cannot.

The Comptroller has held previously that "amounts payable from federal funds under federal law to the survivors of deceased service members are not assets of the members' estates, and such amounts due may not be paid in any manner other than as specified by the applicable federal statutes." See Comp. Gen B- 230824 (1988). The law requires that in order to make a deemed election, the member must have an obligation "to provide an annuity to a former spouse" and then subsequently "fail or refuse" to make the former spouse election. [SM] did not have any obligation to elect former spouse coverage. As a result, the Federal benefit, due in this case was determined on the date of his death to be the surviving spouse. By the time the 2 June 2016 "Consent Order to Clarify Language in Prior Consent Order" was entered, [SM] had been deceased for eight months. After his death, it cannot be said that [SM] "failed or refused" to elect former spouse coverage. In these cases, the Secretary is required by law to only make a former spouse election on behalf of the member, if the member failed or refused to do something. The member did not fail or refuse to do anything during his lifetime. A member's death is not cause of "failure" or "refusal." Moreover, the Secretary cannot "deem" an election retroactively under the law. A deemed former spouse election is effective from the date the order is final which is the date of entry; in this case, after the member's death.

In another context, the Comptroller General has held that where a "retiree had never had an opportunity to elect annuity coverage for a former spouse before his death because there was no statutory authorization it cannot be said that he has "failed or refused" to make an election under the terms of [Title 10, U.S. Code, section] 1450(f)(3)(A). Therefore, if a member dies before the effective date of the statutory amendment that would have permitted the member to elect a former spouse as SBP beneficiary, there can be no deemed election under [Title 10, U.S. Code, section] 1450(f)(3)(A)." In [SM's] case, since [SM]

never had an obligation to elect annuity coverage for a former spouse before his death because there was no such requirement in the relevant court orders, it cannot be said that he has "failed or refused" to make an election under the terms of [Title 10, U.S. Code, section] 1450(f)(3)(A). Additionally, the SBP law provides that the SBP annuity is payable to an "eligible former spouse" effective as of "the first day after the death" of a member per [Title 10, U.S. Code, section] 1450(a). However, on 22 October 2015, the date of [SM's] death, [Applicant] was not an eligible former spouse. No former spouse coverage had been voluntarily established by the member under [Title 10, U.S. Code, section] 1448(b)(3)(A). No "deemed former spouse election" was or could have been made by your client under [Title 10, U.S. Code, section] 1450(f)(3). The former spouse "deemed election" provisions exist because Congress recognized that the issue of whether an SBP participant would designate a former spouse as a beneficiary could very well become an item of negotiation in a divorce settlement, thus Congress concluded that if an SBP participant voluntarily agreed in writing to make such an election, the former spouse should be entitled to rely upon the agreement. However, after [SM] died, he obviously could not have been involved in any negotiation about the terms of his divorce. Additionally, in this case, as in countless others, the property settlement resulting from the divorce was being settled through negotiation. Those negotiations were not completely concluded before [SM's] death. The estate purports to speak on behalf of [SM] through the 2 June 2016 "Consent Order to Clarify Language in Prior Consent Order." But the estate has the benefit of hindsight information about the cost and value of the SBP and other federal benefits that [SM] did not have, such as knowing that there would be no cost to the SBP and that the surviving spouse would receive DIC [Dependency and Indemnity Compensation]. [SM] had ample opportunity to elect his former spouse as his SBP beneficiary before he died (if that is truly what he wanted to do). However, he did not make such an election....

Please note that [surviving spouse's] consent to give up her rights to an SBP annuity is immaterial. "The fact that the member's current spouse is willing to relinquish her SBP coverage does not allow coverage to be established for his former spouse. SBP elections must be made according to law." See DOHA [Defense Office of Hearings and Appeals] Claims Case 99102810 (March 8, 2002)....

Your client has the right to submit an appeal of the above determinations to the Defense Office of Hearings and Appeals ("DOHA")... [Note: There is no evidence of an appeal submitted to the Defense Office of Hearings and Appeals by the applicant.]

22. The Court document titled: "Consent to Waiver of Rights to Benefits Payable under the Survivor Benefit Plan" shows the surviving spouse (A____ B. W____) waived and

relinquished her entitlement to receive SBP coverage upon the SM's death on 22 October 2015. She further consented and agreed that she would have no right, title, or interest in the SBP and consented to the benefits being assigned to the SM's former spouse. She signed this document on 9 November 2017 and the document was notarized on the same date.

23. The applicant petitioned the ABCMR for correction of her ex-husband's records to reflect a timely election for "former spouse" SBP coverage. On 23 December 2020 in Docket Number AR20180009257, the ABCMR denied her request and noted:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The FSM [former service member] was killed in action while on active duty. Therefore, no SBP election and premium payments were made, as it was automatically awarded to his current spouse. The Board understands the widow agreed to allow the applicant to receive SBP payments. However, based upon public law, the Board determined the request is not authorized.

24. In a 30 January 2024 notarized statement, the surviving spouse stated she had no knowledge of the processes and how to navigate the system regarding benefits and other entitlements after a military member's death (see attachment for further details).

a. She signed the document giving her consent for his ex-spouse (former spouse) to receive his SBP instead of her, unaware of the ramifications. She honestly had no idea what she was signing but relied on her husband's unit's chosen attorney and felt pressured to sign the document.

b. She was not notified of the current lawsuit that was in the U.S. Court of Federal Claims nor was she aware of the ABCMR appeal filed by her husband's former spouse. She had not been given an opportunity to join in the litigation or have her arguments heard. She has medical issues and losing his SBP benefits would be economically devastating to her family and the basis of the income her family has lived on for the last 8 years.

c. She additionally notes that if the SBP annuity is awarded to her husband's former spouse, she would owe a debt to the Government that she could not repay. When she was awarded the SBP annuity, she relied on these lifetime benefits.

26. The ABCMR Director's memorandum for record (ABCMR Record of Proceeding for (SM), AR20230011362), 31 January 2024, noted:

In the course of preparing the above referenced case for review by the Army Board for Correction of Military Records (ABCMR), two documents were obtained from the Defense Finance and Accounting Service (DFAS) that included financial information of a third party.

The ABCMR is required by statute to provide a copy to the applicant of all correspondence and communications to or from the board with an entity outside the board that pertain directly to the applicant's case. However, this does not apply to information about third parties that is potentially protected by the Privacy Act. It is furthermore the policy of this agency that boards will not consider information from outside the agency to which applicants have not been provided access.

I direct the two documents be withheld from production to the applicant and withheld from review by the ABCMR other than the following information:

Monthly SBP and SSIA payments based on the record of [SM] were made to his surviving spouse beginning in March 2016 and continuing through the present.

DFAS has indicated that, if the ABCMR makes a correction that changes the SBP beneficiary, DFAS intends to waive recovery of the resulting debt subject to certain conditions.

27. On or about 5 February 2024, the Director's memorandum for record and the SM's surviving spouse's statement were provided to the applicant and her counsel for review and an opportunity to comment and/or rebut.

28. The applicant, through counsel, responded to these documents on 9 February 2024 in a memorandum with exhibits (see attachment for further details).

a. Counsel noted the Court directed remand to the ABCMR and stated:

In sum, despite the fact that [Applicant] had not submitted a request for a deemed election at the time of [SM's] death, nothing in the statute precluded her from doing so once she received the Moore County Court's clarifying order. In its denial of [Applicant's] request, the ABCMR failed to provide any discussion or rationale in support of its conclusion that because [SM's] SBP benefits were initially awarded to A____ W____ (his surviving spouse), they could not later be awarded to [Applicant] (his former spouse) under the deemed election provisions in [Title 10, U.S. Code, section] 1448(d)(3). There is therefore no basis for the ABCMR's conclusion that [Applicant's] request "is not authorized."

b. Counsel states the surviving spouse's letter has no legal significance to override the statutory requirement, as found by the Court, that the SBP must be awarded to the applicant because she timely satisfied what was needed to deem an election. The surviving spouse inaccurately demonstrates she was pressured to sign away her right to the SM's SBP annuity since she consented and which was notarized by her own attorney. A____ W____'s present recollection of what happened is flawed, and likely offered in attempt to persuade the Board to decide against ceasing her SBP payments or her having to pay back any amounts she has previously received. But given the Court of Federal Claims' opinion, the law mandates that the applicant be awarded the SBP from when she timely deemed the election.

c. Counsel states to ease the burden that may exist for A____ W____, DFAS noted if the Board makes a correction that changes the SBP beneficiary, DFAS intends to waive recovery of the resulting debt that the surviving spouse would owe on the payments that should have been made to the applicant. Therefore, that would alleviate the concern raised by A____ W____ in her letter that she would "owe a debt to the government that she cannot pay back."

d. In conclusion, counsel states the applicant should be awarded the SBP consistent with the Court of Federal Claims' Opinion and Order, retroactive to when she timely deemed an election.

e. Exhibit 1 contains the U.S. Court of Federal Claims' Opinion and Order that has been previously discussed.

f. Exhibits 2 through 5 contain the applicant's attorney letters and court documents wherein the surviving spouse consented and waived her rights to the deceased SM's SBP.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

2. The Board may correct any military record when necessary to correct an error or remove an injustice. In this matter, there are competing interests to consider when determining whether the Board should correct the record. Both the applicant and the surviving spouse (the current beneficiary of the SBP) have compelling claims.

3. First, the Board acknowledges the Court's finding that the applicant's efforts, including a posthumous clarification of the property division order, constituted a successful deemed SBP election. The Board also notes the surviving spouse signed off

on these efforts in 2016 and 2017, although the SBP payments the surviving spouse offered to relinquish were considerably less than they are now due to recent elimination of a Department of Veterans Affairs offset. However, the Board was primarily concerned that granting full relief to the applicant at this point would deprive the SM's surviving spouse of a Government benefit, upon which she has relied since 2015, without meaningful due process. Upon contact by the Board, the SM's surviving spouse provided a statement describing her confusion about the court processes after her spouse's death and her current dependence on the SBP payments. She stated she was previously unaware of the existence of the federal court case making findings about whether the payments would continue. She had no opportunity to obtain counsel and make arguments during the proceedings that concluded in the applicant's favor. Despite the suit being filed in federal court in February 2022, the SM's surviving spouse was not provided notice or an opportunity to respond until she was contacted by the Board in January 2024.

4. Ultimately the Board determined that correcting the record to show the applicant as the beneficiary of the SM's SBP would be fundamentally unfair to the current recipient of the SBP payments. Because the requested record correction would adversely impact the surviving spouse and deprive her of a benefit without adequate due process, the Board declined to exercise its discretionary authority in this case. Even if an error occurred when the surviving spouse began receiving the SBP, the error does not warrant a grant of relief by the Board.

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 overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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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, 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 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 member by virtue of the retired member'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, incorporates the provisions of the USFSPA relating to the SBP. Paragraph (d) (Coverage for Survivors of Members Who Die on Active Duty) provides that:
 - a. Surviving Spouse Annuity. Except as provided in paragraph (2)(B), the Secretary concerned shall pay an annuity under this subchapter to the surviving spouse of:
 - (1) a member who dies while on active duty after:
 - (a) becoming eligible to receive retired pay;
 - (b) qualifying for retired pay except that the member has not applied for or been granted that pay; or
 - (c) completing 20 years of active service but before the member is eligible to retire as a commissioned officer because the member has not completed 10 years of active commissioned service; or
 - (2) a member not described in subparagraph (A) who dies in the line of duty while on active duty.
 - b. Dependent Children.

(1) Annuity when No Eligible Surviving Spouse. In the case of a member described in paragraph (1), the Secretary concerned shall pay an annuity under this subchapter to the member's dependent children under subsection (a)(2) or (a)(4) of section 1450 of this title as applicable.

(2) Optional Annuity when There Is an Eligible Surviving Spouse. In the case of a member described in paragraph (1) who dies after 7 October 2001, and for whom there is a surviving spouse eligible for an annuity under paragraph (1), the Secretary may pay an annuity under this subchapter to the member's dependent children under subsection (a)(3) or (a)(4) of section 1450 of this title, if applicable, instead of paying an annuity to the surviving spouse under paragraph (1), if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children under this paragraph instead of an annuity for the surviving spouse under paragraph (1).

c. Mandatory Former Spouse Annuity. If a member described in paragraph (1) is required under a court order or spousal agreement to provide an annuity to a former spouse upon becoming eligible to be a participant in the Plan or has made an election under subsection (b) to provide an annuity to a former spouse, the Secretary:

(1) may not pay an annuity under paragraph (1) or (2); but

(2) shall pay an annuity to that former spouse as if the member had been a participant in the Plan and had made an election under subsection (b) to provide an annuity to the former spouse, or in accordance with that election, as the case may be, if the Secretary receives a written request from the former spouse concerned that the election be deemed to have been made in the same manner as provided in section 1450(f)(3) of this title.

5. Title 10, U.S. Code, section 1450(b), provides that, until 31 December 2020, if a surviving spouse was receiving SBP but was also entitled to Dependency and Indemnity Compensation (DIC) from the Department of Veterans Affairs under Title 38, U.S. Code, section 1311(a), the surviving spouse will receive SBP payments in the amount that the annuity exceeds DIC. The offset was gradually phased out from 1 January 2021 through 31 December 2022.

6. 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.

7. Department of Defense Financial Management Regulation, Volume 7B, chapter 43 (SBP – Elections and Election Changes), states that if a member dies before making an election, a former spouse's request, which is otherwise qualified, must be honored even if the date of the request is after the date of the member's death. However, if the request for a court order was initiated with the court after the member's death, the order will not be honored.

8. 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.

9. 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//