

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 14 March 2025

DOCKET NUMBER: AR20230012076

APPLICANT REQUESTS: correction of the servicemember's (SM) records to show his Survivor Benefit Plan (SBP) payment goes to his former spouse.

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

- DD Form 149 (Application for Correction of Military Record)
- Letter from Attorney
- Exhibit A - Consent Judgement of Divorce
- Exhibit B - Notarized Affidavit from Ms. S- M. R-
- Exhibit C - Certificate of Death
- Exhibit D - DD Form 214 (Certificate of Release or Discharge from Active Duty)
- Exhibit E - Application to Marry

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, the former spouse of the SM, defers to her counsel who states on her behalf:

a. The SM's military records should be amended to reflect that the applicant is his former spouse for the purpose of receiving SBP payments. By valid court order, the applicant has been awarded the SM's SBP disbursements in the case where the SM predeceases the applicant. Currently, the applicant is unable to receive the benefits she is entitled to because she was not elected as the SM's former spouse. It is requested the applicant be listed as the SM's former spouse so she may receive the SBP disbursements as ordered by the Consent Judgement of Divorce.

b. This correction should be made because there is a Final Consent Judgment of Divorce from a court of competent jurisdiction that required the SM to continue to pay his SBP coverage and make arrangements to have the monthly cost automatically

disbursed to the applicant. Prior to the SM's death, he neither elected the applicant as his former spouse nor did he inform the applicant that she needed to elect herself as the SM's former spouse for the purpose of receiving SBP disbursements. Unless this change is made, the applicant will not be eligible to receive said disbursements. The one year deadline to submit a DD Form 2656 (Data for Payment of Retired Personnel) has passed. Amending the SM's records to reflect the applicant is his former spouse is the only avenue that complies with the Consent Judgement of Divorce.

c. The applicant was married to the SM for over 15 years, many of which the SM served deployed to Iraq. Because of exposure to noxious gases, during his service, the SM was diagnosed with terminal lung disease. He and the applicant divorced in May 2017. As a condition of the divorce, the applicant was awarded the SM's SBP payments. Unfortunately, the SM passed away, due to his lung disease, in November 2022. The applicant respectfully requests the Board correct the SM's military records to reflect she is his former spouse for the purpose of receiving SBP payments.

3. The applicant provides the following documents:

a. Consent Judgment of Divorce, states in pertinent part, each party is awarded all interest in any retirement pension plan(s) in which she/he has an interest with the following exception: Defendant [SM] shall continue to pay for the extended SBP coverage included in Defendant's military pension, which currently costs approximately \$151 monthly. Defendant shall make arrangements to have the monthly cost automatically deducted from his monthly benefit.

b. Notarized Affidavit of the applicant, the former wife of the SM, states in pertinent part, she was in a relationship with the SM for over 19 years and married to him for 16 years. The SM contracted chronic lung disease and was forced to medically retire with a 100 percent Department of Veterans Affairs disability rating. She and the SM divorced and as a condition of the divorce the SM is obligated to ensure the applicant is the sole beneficiary of his SBP payments. After the SM's death, the applicant reached out to Defense Finance Accounting Service (DFAS) to inform them the SM died and that her portion of SBP payments needed to be directly disbursed to her. DFAS informed her she could not receive the SM's SBP payments because she was not elected as his former spouse. She was informed, to remain an eligible beneficiary, an election needed to be made within one year of the Consent Judgement of Divorce. The SM did not submit the proper forms or inform her she needed to submit anything to remain his beneficiary. She is currently not eligible for the SBP payments that were awarded to her pursuant to a valid Michigan state court order. She believes the SM was not of sound mind and was unaware of the requirements to submit any forms to DFAS following their divorce.

c. SM's Certificate of Death shows he died on 14 November 2022. An application to marry shows the applicant and SM applied to be married on 16 February 2001.

4. The SM's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States) shows he enlisted in the Regular Army on 14 June 2006.

b. Orders 041-0007, show he was reassigned for separation processing effective 14 Nov 22)19 February 2016 with a retirement/separation date of 21 March 2016. The orders state SBP must be completed with the counselor not less than 60 days prior to retirement. He was being retired due to disability at a 100 percent disability rating.

c. DD Form 2656 (Data for Payment of Retired Personnel), 2 March 2016, shows the applicant and their daughter were his dependents. He elected SBP coverage for his spouse and children based on full gross pay. He named his wife and daughter as beneficiaries.

d. DD Form 214 (Certificate of Release or Discharge from Active Duty) shows the SM was honorably retired on 21 March 2016 due to disability, permanent (enhanced).

4. On 7 March 2025, DFAS responded to a request for information stating the SM elected full spouse and child SBP coverage upon his retirement. DFAS was not notified of the divorce between the SM and applicant until after the SM's death. His annuity is currently not being paid from his account.

BOARD DISCUSSION:

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. After a review of the evidence, the record reflects that the FSM intended to maintain SBP coverage for the applicant post-divorce, as evidenced by the language in the divorce decree and applicant's credible account of FSM's verbal assurances. The failure to submit the required election form appears to have been an administrative oversight rather than a deliberate omission. Given the FSM's medical condition and the continuity of SBP premium deductions, it is reasonable to conclude that FSM did not intend to deprive applicant of coverage and therefore the Board granted relief.

BOARD VOTE:Mbr 1 Mbr 2 Mbr 3

:XX	:XX	:XX	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 applicant deemed an election of "Former Spouse" coverage within one year of his divorce and the request was received and processed by the appropriate office in a timely manner.


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, 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 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. Army Regulation 15-185 (Army Board for Correction of Military Records) prescribes the policies and procedures for correction of military records by the Secretary of the Army acting through the Army Board for Correction of Military Records (ABCMR). The ABCMR will decide cases on the evidence of record; it is not an investigative body. The ABCMR begins its consideration of each case with the presumption of administrative regularity. The applicant has the burden of proving an error or injustice by a preponderance of the evidence.
3. 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.
4. 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.
5. 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.
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 Instruction 1332.42 (Survivor Benefit Plan), 30 December 2020, establishes policy, assigns responsibilities, and provides procedures for administration of the SBP Program, Reserve Component SBP Program, Special Survivor Indemnity Allowance, and SBP Advisory Group. Section 10 (Annuities), paragraph 10.1 (Annuities Payable to Survivors of Members who Die in the Line of Duty) states:

a. Eligibility. The Secretary concerned will pay an immediate annuity to the survivors of:

(1) a member who dies in the line of duty while serving on active duty on or after 10 September 2001.

(2) a member who dies not in the line of duty while serving on active duty and who:

(a) was eligible to receive retired pay;

(b) was qualified for that pay but had not applied for or been granted that pay; or

(c) had completed 20 or more years of active service but was not yet eligible to retire as a commissioned officer due to not having 10 years of commissioned service.

(3) a Reserve Component member who dies from an illness or injury incurred or aggravated in the line of duty during inactive duty training performed on or after 10 September 2001;

(4) a Reserve Component member who dies after completing the years of service required to qualify for a Non-Regular retirement pursuant to Title 10, U.S. Code, chapter 1223, but who:

(a) has not yet received a Notification of Eligibility for Retired Pay at Age 60; or

(b) has received a Notification of Eligibility for Retired Pay at Age 60 but 90 days have not passed from receipt of that notification, and the member has not yet elected or declined to participate in the Reserve Component SBP.

b. Order of Priority for Payment of Annuities. An annuity will be paid to survivors of an SM who died in the line of duty in the following order of priority:

(1) the member's former spouse, if:

(a) the member was required under a court order or spousal agreement to provide an annuity to the former spouse at the time of the member's death, regardless of whether the deemed former spouse election requirements contained in section 5 have been completed;

(b) the member has previously made an election to provide an annuity to the former spouse; or

(c) upon the member's death there was a court case pending regarding the award of former spouse SBP that was subsequently awarded after member's death, but only if the Secretary concerned determines that the deceased member's interests were adequately represented in those court proceedings occurring after the member's death;

(2) the surviving spouse, if married at the time of death of the member, regardless of the length of the marriage;

(3) a dependent child if the member's spouse beneficiary is determined to be ineligible to receive the annuity due to remarriage before age 55, or there is no surviving spouse; or

(4) in certain situations described in paragraphs 10.1.c. and 10.1.d., to a dependent child or children even if there is an eligible surviving spouse, or to an insurable interest if there is no other eligible former spouse, spouse, or dependent child.

8. Department of Defense Financial Management Regulation, Volume 7B, chapter 46 (SBP – Annuities), states the purpose of this chapter is to provide information for those eligible to receive annuities, how they are paid, and the amounts to be paid. Section 3 (Death of Member on Active Duty), paragraph 3.2 (Qualified Annuitants), states the annuity payments will be made based on the following priority, in part:

a. Former Spouse Based on the Court Order. The annuity is payable to a former spouse if the member is required by a court order or spousal agreement or has made an election to provide such coverage or if the former spouse has deemed an election in accordance with Title 10, U.S. Code, section 1450(f)(3). No payment may be made to a surviving spouse if the member is required under a court order to provide an annuity to a former spouse even if the former spouse has not deemed an election in accordance with Title 10, U.S. Code, section 1450(f)(3). If there are multiple court orders ordering the member to elect former spouse SBP coverage, the court order with the earliest date will take precedence.

b. Current Spouse. The annuity is payable to a surviving spouse unless the annuity is payable to a former spouse.

9. 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.

10. 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//