

IN THE CASE OF: [REDACTED]

BOARD DATE: 16 November 2023

DOCKET NUMBER: AR20230012092

APPLICANT REQUESTS: correction of her deceased husband's Survivor Benefit Plan (SBP) to show "Child(ren)-Only" coverage.

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)
- Spouse Statement of Desired SBP Election, 31 October 2022, with auxiliary documents
- Part 5 – Surviving Spouse Verification of SBP Counseling, 31 October 2022
- DD Form 2790 (Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces), 31 October 2022
- three DD Forms 2656-7 (Verification for Survivor Annuity), 31 October 2022
- three Internal Revenue Service Forms W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 31 October 2022
- three Financial Management Service Forms 2231 (Direct Deposit Sign-up Form), 31 October 2022
- Defense Finance and Accounting Service Certificate of Eligibility for Surviving Spouse, 31 October 2022
- U.S. Army Human Resources Command (HRC) Memorandum (Line of Duty (LOD) Determination), 19 July 2023
- DD Form 1300 (Report of Casualty), 29 September 2023

FACTS:

1. The applicant, the surviving spouse of the deceased service member (SM) who died on active duty, requests correction of her husband's LOD determination to show it was completed prior to 1 January 2023. She believes it is an injustice that her request to transfer the SBP annuity to her children (i.e., "Child-Only" coverage) could not be elected because the LOD determination was not completed prior to 1 January 2013, the effective date of the optional child-only election law repeal.

2. The SM's records contain a marriage certificate showing his marriage to the applicant on 15 July 2009.

3. The SM's death certificate is not available for review.
4. The SM's records do not contain a DA Form 2173 (Statement of Medical Examination and Duty Status) or DA Form 261 (Report of Investigation – LOD Misconduct Status) showing an examination or investigation into the circumstances of his death.
5. On 31 October 2022, the applicant completed the Spouse Statement of Desired SBP Election showing:
 - a. She acknowledged she previously received an initial comprehensive briefing from an Army SBP counselor about the SBP options available to her and reviewed the Survivor Benefit Report. She understood this decision was irrevocable and should only be made when she had adequate time to review all the SBP data needed to make an informed decision.
 - b. She elected "Child Only, Spouse Excluded" SBP coverage. She desired that the Army make the following SBP election on her behalf. She understood that all of the deceased Soldier's SBP-eligible children would receive an equal share of the SBP annuity. The children would receive the annuity until age 18 or age 22 if full-time unmarried students, or forever if incapable of self-support due to a condition incurred while eligible for the SBP. She understood she could request the annuity for an SBP-eligible child who was incapacitated to be paid to a special needs trust for the care of that child. She also understood the SBP would end when the last child was no longer eligible. If, on 1 January 2023, she were eligible to receive the SBP annuity, she would begin receiving it by law. The children will no longer receive the annuity. She understood that child SBP is taxable for the child.
6. The applicant's DD Form 2790, 31 October 2022, certified that her two children are the unmarried children of a deceased SM.
7. The applicant's three DD Forms 2656-7, 31 October 2022, verified her and her children's eligibility for the SBP annuity as the deceased SM's surviving spouse and children. These documents were accompanied by the necessary documents for establishment of financial payments to her family.
8. Defense Finance and Accounting Service Certificate of Eligibility for Surviving Spouse was certified by the applicant on 31 October 2022, establishing her marital status as "not married after the death of the SM" to establish her eligibility to receive an SBP annuity beginning January 2023.
9. The U.S. Army Human Resources Command memorandum from the Chief, Casualty and Mortuary Affairs Operations Division (LOD Determination), 19 July 2023,

determined the SM who died in [REDACTED], on 12 September 2022 as the result of suicide was found to be in the LOD at the time of his death.

10. The DD Form 1300 (Report of Casualty) – Corrected Final Report, 29 September 2023, documented the SM's death on 12 September 2022 as a result of asphyxia due to hanging at [REDACTED], per his death certificate.

11. The Department of the Army Office of the Deputy of Chief of Staff, G-1, memorandum from the Director, Army Retirement Services (Advisory Opinion – [REDACTED] (Deceased), 29 September 2023, states:

a. Title 10, U.S. Code, section 1448(d)(1)(B), requires that the member who died on active duty and was not qualified for retirement must die in the LOD to be eligible for coverage under the SBP.

b. Title 10, U.S. Code, section 1448(d)(2)(B), allows an eligible surviving spouse to transfer the SBP annuity to eligible children.

c. Public Law 116-92, section 622, repealed the authority for an optional annuity for dependent children effective 1 January 2023. Effective the same date, the law restored the annuity to any eligible spouses who previously elected to transfer the annuity to surviving children.

d. The applicant's spouse who died while serving on active duty prior to 1 January 2023 and after receiving her SBP counseling, requested transfer of the SBP annuity to their surviving children.

e. The LOD investigation was not completed and sent to the Army SBP Board until after 1 January 2023.

f. If the LOD investigation were completed and sent to the Army SBP Board prior to 1 January 2023, the Army Retirement Services Director would still have had the ability to elect the Optional Child-Only SBP by law on behalf of the Secretary of the Army from the date of the SM's death until 31 December 2022.

g. After careful review and in the interest of fairness, the Army Retirement Services Director supports the applicant's request to transfer the SBP annuity to her children effective the date of the SM's death until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the SM's military records, the Board found relief is warranted.

2. The applicant's spouse died on active duty on [REDACTED], prior to 1 January 2023. After receiving SBP counseling, she requested that the SBP annuity be transferred to their children. The LOD investigation was not completed and sent to the Army SBP Board until after 1 January 2023. If the LOD investigation had been completed prior to 1 January 2023, she would still have had the ability to elect the optional child only SBP by law from the date of the SM's death until 31 December 2022. After careful review and in the interest of justice and fairness, the Board determined relief is warranted and supports the applicant's request to transfer the SBP annuity to her children effective the date of the SM's death until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023.

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 Line of Duty Investigation was completed before 1 January 2023
- showing the applicant submitted a request to transfer the SBP annuity to her child(ren) effective the date of the SM's death ([REDACTED]) until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023

2/16/2024



 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 1448(d)(2)(B), states that in the case of a member who dies on or after the date of enactment of the National Defense Authorization Act for Fiscal Year 2004, 24 November 2003, and for whom there is a surviving spouse eligible for an annuity under paragraph (1), the Secretary may pay an annuity to the member's dependent children, if applicable, instead of paying an annuity to the surviving spouse if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children instead of an annuity for the surviving spouse.
2. Public Law 116-92, section 622 (Phase-out of Reduction of SBP Survivor Annuities by Amount of Dependency and Indemnity Compensation (DIC)), 20 December 2019, states the Secretary of the Military Department concerned shall restore annuity eligibility to any eligible surviving spouse who, in consultation with the Secretary, previously elected to transfer payment of such annuity to a surviving child or children under the provisions of Title 10, U.S. Code, section 1448(d)(2)(B), as in effect on the day before the effective date of 1 January 2023. Such eligibility shall be restored whether or not payment to such child or children subsequently was terminated due to loss of dependent status or death. For the purposes of this subsection, an eligible spouse includes a spouse who was previously eligible for payment of such annuity and is not

remarried, or remarried after having attained age 55, or whose second or subsequent marriage has been terminated by death, divorce, or annulment.

3. The Defense Finance and Accounting Service website: [www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-Special Survivor Indemnity Allowance \(SSIA\)](http://www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-Special%20Survivor%20Indemnity%20Allowance%20(SSIA)) provides guidance relating to the SBP for spouses and DIC benefits from the Department of Veterans Affairs (VA).

a. The DIC is a monetary benefit offered by the VA to survivors of SMs and retirees whose death results from a service-related injury or disease.

(1) Spouse SBP annuitants, except for those who remarry after age 55 (or in other specific circumstances), cannot receive full SBP and DIC at the same time before 2023. Beginning in 2021, there are significant changes to the offset of SBP and DIC.

(2) DIC payments made directly to children, or to a guardian on behalf of children, do not affect SBP child annuity payments.

(3) In 2022 when DFAS was informed by the VA that a spouse annuitant is receiving the DIC, the law required that DFAS deduct one-third of the amount of the DIC received from the amount of SBP payable and pay the remaining amount of the SBP to the annuitant. This is called the SBP/DIC offset. The reduction of the SBP/DIC offset from the full amount of DIC to one-third of DIC was effective 1 January 2022.

(4) For example, in 2022 if an annuitant receives a monthly SBP annuity of \$1,200 from DFAS and receives a monthly DIC award of \$1,500 from the VA, DFAS will deduct one-third of the amount of DIC (\$500) from the \$1,200 SBP and pay the remaining \$700 to the annuitant. The annuitant will continue receive the full amount of DIC from the VA (in this example, \$1,500).

(5) On 1 January 2023, the offset was completely eliminated. Eligible surviving spouses will receive their full SBP payments and their full DIC payments.

(6) The change in the law does not affect DIC payments, it only affects SBP payments when the surviving spouse is also receiving the DIC. Refer to the DFAS SBP/DIC news webpage for details and Frequently Asked Questions.

(7) When a spouse is eligible to receive the SBP and DIC, and those payments are subject to the SBP/DIC offset, the spouse will also receive the SSIA.

b. SSIA is a benefit for surviving spouses who receive an SBP annuity that is offset by a DIC payment from the VA.

(1) In 2022, the SSIA will be paid at up to \$346 per month. Eligible survivors will continue to receive the SSIA up to the maximum amount per month, or up to the gross amount of the SBP (if the gross amount of SBP is less than the maximum amount) until 31 December 2022. The SSIA will not be paid in 2023.

(2) SSIA is not used to repay past-due SBP premiums. If the spouse annuitant is entitled to the SSIA, DFAS will pay the SSIA, even when there are past-due premiums.

(3) DIC payments to children do not affect SBP child annuitant payments, so child annuitants are not eligible to receive the SSIA.

//NOTHING FOLLOWS//