

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 25 June 2024

DOCKET NUMBER: AR20230012148

APPLICANT REQUESTS: in effect, correction of her records to show she declined to participate in the Survivor Benefit Plan (SBP) with spousal concurrence in connection with her permanent disability retirement.

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's Letter, 28 August 2023
- SBP and Reserve Component SBP (RCSBP) Open Season Election to Discontinue Participation, 16 February 2023
- Defense Finance and Accounting Service (DFAS) Letter, 4 April 2023, with auxiliary documents
- Interactive Personnel Electronic Records Management System Screenshot, 29 August 2023

FACTS:

1. The applicant states she was a dual-status military technician who retired from both the U.S. Army Reserve (USAR) and federal civil service when she incurred a non-combat related injury in the line of duty. She was considered by a physical evaluation board (PEB) and placed on the Permanent Disability Retired List. She retired by both military and civilian channels.

a. The SBP coverage needs to be corrected as neither she nor her husband ever elected to participate. This election was made by DFAS as an automatic default election. She was never told that she was missing any documents or told she could decline the SBP within the initial year. Her husband was never contacted regarding the declination. This record should match the SBP election she made as a civil servant as that record is correct. For years she was informed that the automatic election was irrevocable, but she was recently advised by DFAS during the SBP discontinuance process as to a correction process by this Board.

b. A PEB determined her injury would not allow her to continue to serve in either military or civilian capacity. Her dual-status retirement process took a long time as she had to be retired from both the military and civil services, which did not happen concurrently. She was formally placed on the military Retired List on 26 March 2010. On 31 March 2012, she finally received her civil service retirement. The stresses of undergoing a forced retirement, loss of income, caring for family, her husband's deployment, and trying to rehabilitate a severe medical injury became overwhelming and impacted her overall well-being. The process for submitting retirement packets for both military and civil service was cumbersome due to many delays in the boarding process and the many layers and agencies involved in the medical retirement process.

c. Dual-status employees like her did not receive detailed assistance with their medical retirement packets or get timely or accurate answers to questions.

d. She submitted the DD Form 2656 (Data for Payment of Retired Personnel) and did not elect SBP coverage for her spouse. She asked for copies of documents located in her Official Military Personnel File, but documents were not available or could not be located by the Army. When she retired from both military and civilian roles, she was advised that SBP premiums are automatically deducted unless records show the SBP was declined. She has a copy of the notarized election of declination that was processed with her civil service retirement, but she was never asked to supply a declination for her military retirement. Her spouse was never notified of her declination. It was never her or her spouse's intention to participate in the SBP. They have retained other life insurance over their lifetimes and it was not prudent for them to add an additional SBP annuity. She has endured financial hardships over this loss of funds and was disheartened time and time again by being told that nothing could be done. She recently learned that SBP participation can be discontinued. She understands that once SBP is discontinued she forfeits enrolling at a later date.

2. Following enlisted service in the California Army National Guard, she was appointed as a Reserve commissioned officer of the Army in the USAR in the rank/grade of second lieutenant/O-1 and executed her oath of office on 25 May 1989.

3. Her marriage certificate shows she and A\_\_\_ D\_\_\_ W\_\_\_ married on 1 June 1991.

4. The U.S. Army Human Resources Command memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 22 March 2007, notified her that she completed the required qualifying years of Reserve Component service for retired pay upon application at age 60. Paragraph 4 states:

Public Law 95-397, 30 Sep[tember] 1978, created the Reserve Component Survivor Benefit Plan (RCSBP), in which you are entitled to participate. RCSBP is your sole means of protecting your retired pay entitlement. NOTE: Public

Law 106-398, 30 Oct[ober] 2000, requires that upon receipt of this Letter, a qualified Reserve Component member, who is married, will automatically be enrolled in the RCSBP under Option C, Spouse and Child(ren) coverage based on Full Retired Pay, UNLESS spouse concurrence is provided to allow one of the following elections:

- Option A (defer enrollment until age 60 when you apply for retired pay).
- Option B (enroll and pay an annuity when YOU would have been age 60):  
(1) Enroll spouse or spouse and child(ren) at LESS THAN the maximum level; or (2) Enroll child(ren) only.
- Option C (enroll and pay an annuity immediately upon your death) but: (1) Enroll spouse or spouse and child(ren) at LESS THAN the maximum level, or Enroll children only.

You must notify this Command, using the DD Form 2656-5, Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate or DD Form 1883, Survivor Benefit Plan – Election Certificate, one of which is found in the enclosed booklet, of your decision within 90 days of the date of this Letter. If you have been mobilized and deployed OCONUS [outside the continental United States], you or your spouse may notify this Command of your status and inability to make an election. During the period of your mobilization/active duty deployment you will automatically be covered under SBP for Spouse and Children. Upon receipt of a written request for deferment, accompanied by a copy of the mobilization/ deployment order, you will be granted a deferment from election. The deferment will end 90 days following your release from active duty. At that time you must have notified this Command of your election or you will be automatically enrolled under Option C, Full Coverage, Spouse and Children. The cost for this participation will commence upon your receipt of retired pay at age 60. Detailed information concerning the RCSBP program and costs is enclosed. ANY WRITTEN CORRESPONDENCE (letter or forms) THAT INVOLVE A CHANGE FROM FULL COVERAGE UNDER OPTION C FOR SPOUSE REQUIRE THE SIGNATURE OF YOUR SPOUSE BEFORE A NOTARY, OR A RETIREMENT SERVICES OFFICER AND ONE OTHER WITNESS. FAILURE TO MEET THIS REQUIREMENT WILL RESULT IN THE RETENTION OF FULL COVERAGE FOR YOUR SPOUSE AND CHILD(REN). You may contact this Command for answers to specific individual questions by dialing 1-800-318-5298, extension 4.

5. Her records do not contain an RCSBP election made within 90 days of receipt of her Notification of Eligibility for Retired Pay at Age 60.

6. She was promoted to the rank/grade of lieutenant colonel effective 21 May 2007.

7. The DA Form 199 (PEB Proceedings) – Informal Reconsideration, 16 February 2010, shows a PEB convened at Fort Lewis, WA, on 11 February 2010 to determine her medical fitness for continued service in the Army. The PEB determined she was physically unfit and recommended a disability rating of 40 percent and her placement on the Permanent Disability Retired List. She concurred and waived a formal hearing of her case on 16 February 2010.
8. U.S. Army Physical Disability Agency Orders D-050-12, 19 February 2010, retired her with a disability rating of 40 percent and placed her on the Retired List in the grade of lieutenant colonel effective 26 March 2010.
9. Her SBP and RCSBP Open Season Election to Discontinue Participation, 16 February 2023, shows she indicated she currently had "Spouse-only" SBP coverage and requested to discontinue participation in the SBP. She and her spouse both signed the document on 16 February 2023 and their signatures were witnessed by a notary public on the same date.
10. The DFAS letter, 4 April 2023, informed her that DFAS could not take action on her request because DFAS did not receive her original SBP election and neither DFAS nor the U.S. Army Human Resources Command has a record of her DD Form 2656.
11. Her spouse's letter, 28 August 2023, states he and his wife never wanted to elect SBP coverage at the time of her retirement because they were already covered by life insurance policies. He was never notified by the Army about an SBP election for her military retirement but was asked to submit a notarized statement at the time her civil service retirement was being processed. In January 2023, he read that Public Law 117-263 had passed and this was the first opportunity to terminate participation in the SBP. He and his wife immediately submitted a notarized SBP Open Season Election to Discontinue Participation application in February 2023. When his wife contacted DFAS to check on status of the application, she was told it was placed on hold due to missing records. She was advised instead to submit a DD Form 149 to try to obtain a refund of her involuntary SBP contributions as far back as possible.
12. She provided an Interactive Personnel Electronic Records Management System screenshot showing her SBP documents are not located in her service record.
14. Her DA Form 5016 (Chronological Statement of Retired Points), 7 June 2024, shows she completed 23 years, 9 months, and 10 days of qualifying service for retirement.
15. The email correspondence from the DFAS Board for Correction of Military Records/ Congressional Lead (Reply: Army Review Boards Agency Assistance), 6 June 2024, notes the applicant was automatically enrolled in the SBP with "Spouse Only" coverage

as of her retirement date of 26 March 2010. The DFAS database contains: her SBP and RCSBP Open Season Election to Discontinue Participation, 16 February 2023, described above; and her DD Form 2656-8 (SBP – Automatic Coverage Fact Sheet), 28 March 2023, showing she and her spouse, A\_\_\_ W\_\_\_, married in 1991 and have no dependent children. She signed/dated this form before a witness on 28 March 2023.

#### 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 applicant's contentions, his military records, and regulatory guidance were carefully considered.

a. The evidence indicates the applicant was married as of March 1991. She received her 20 year letter on 22 March 2007. The letter alerted her that she would be automatically enrolled under Option C, Full Coverage, Spouse and Children, unless she took action to decline or defer coverage. There is no evidence she took any action. As a result, she was automatically enrolled in the RCSBP. The applicant retired on 26 March 2010 due to disability. Again, no action was taken by the applicant and since she was still married, her coverage defaulted to spouse SBP.

b. She and her spouse attempted to take advantage of the most recent SBP “open season” to terminate SBP coverage currently in place that covers her spouse. This coverage began in 2010, the year the applicant started to receive retirement pay. The SM’s SBP and RCSBP Open Season Election to Discontinue Participation, 16 February 2023, shows she indicated she currently had "Spouse-only" SBP coverage and requested to discontinue participation in the SBP. She and her spouse both signed the document on 16 February 2023 and their signatures were witnessed by a notary public on the same date. The 2022/2023 SBP Open Season allows eligible members and former members who were enrolled in SBP or RCSBP as of December 22, 2022 to permanently discontinue their SBP coverage. The law requires the covered beneficiaries to concur in writing with the election to discontinue. Previously paid premiums will not be refunded.

c. The applicant’s 16 February 2023 termination document successfully arrived at DFAS in February, March, or April of 2023. This time period is well in advance of the final date for the most recent “open season,” which was 1 January 2024. DFAS refused to implement the applicant’s request to terminate SBP coverage because DFAS had not received her original (i.e., 2010) election on DD Form 2656. However, the reason DFAS did not receive a DD Form 2656 is because the applicant’s coverage defaulted to “spouse only” coverage since she failed to make any SBP election in 2010.

d. The Board noted that the SM has demonstrated that she and her spouse made a good faith effort to terminate her SBP participation during the most recent SBP "open season." She also has submitted sufficient evidence indicating that their efforts were unfairly thwarted by DFAS. Therefore, the Board determined the applicant has demonstrated error and/or injustice by a preponderance of evidence and voted to correct the applicant's record by showing that she successfully terminated her SBP participation during the most recent "open season" and that the termination occurred in March 2023. Additionally, the Board determined refund of any premiums that the applicant paid prior to March 2023 is unwarranted.

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 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:

- showing the applicant timely submitted a request to terminate SBP coverage in March 2023, with spouse concurrence
- showing the appropriate office timely received and processed her termination request effective March 2023.

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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. Army Regulation 135-180 (Retirement for Non-Regular Service) prescribes policies and procedures governing Non-Regular retirement. This regulation implements statutory authorities governing granting retired pay for Non-Regular (Reserve Component) service to Soldiers in the Army National Guard, Army National Guard of the United States, and U.S. Army Reserve. Chapter 3 provides policies and procedures for implementing the RCSBP. Soldiers who were issued a Notification of Eligibility for Retired Pay at Age 60 after 1 December 1979 have been or will be furnished the RCSBP information and election certificate with their 20-year letter. All eligible personnel have 90 days from receipt of the 20-year letter to make their elections and return the form to the appropriate office.
2. 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. Since its creation, it has been subjected to a number of substantial legislative changes.
3. Public Law 95-397, the RCSBP, enacted 30 September 1978, provided a way for those who qualified for Nonregular (Reserve) retirement but were not yet age 60 to provide an annuity for their survivors should they die before reaching age 60. Three options are available: (A) elect to decline enrollment and choose at age 60 whether to start SBP participation, (B) elect that a beneficiary receive an annuity if they die before age 60 but delay payment of it until the date of the member's 60th birthday, and (C) elect that a beneficiary receive an annuity immediately upon their death if before age 60. Once a member elected either Option B or C in any category of coverage, that election was irrevocable. Option B and C participants do not make a new SBP election at age 60. They cannot cancel SBP participation or change options they had in the RCSBP; RCSBP coverage automatically converts to SBP coverage upon retirement.
4. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elected not to participate in the SBP. The statute also provided for automatic enrollment for spouse coverage at the full base amount unless a member affirmatively declined to participate in the SBP prior to receiving retired pay.
5. Public Law 99-145, enacted 8 November 1985 but effective 1 March 1986, required written concurrence by the spouse in a member's decision to decline the SBP or elect spouse coverage at less than the full base amount.

6. Public Law 105-85, enacted 18 November 1997, established the option to terminate SBP participation. Retirees have a 1-year period beginning on the second anniversary of the date on which their retired pay started to withdraw from the SBP. The spouse's concurrence is required. No premiums will be refunded to those who opt to disenroll. The effective date of termination is the first day of the first calendar month following the month in which the election is received by the Secretary concerned.

7. Department of Defense Instruction 1332.42 (Survivor Annuity Program Administration) states a member may elect to discontinue participation by submitting a DD Form 2656-2 during the period that is more than 2 years but less than 3 years after the first date of entitlement to receive retired pay. The member must submit the request no earlier than the 1st day of the 25th month, and no later than the last day of the 36th month from the date of entitlement to retired pay, with spousal concurrence if applicable. A member electing to terminate coverage is not eligible for continuation in the Program; however, the member has 30 days after submitting a request to discontinue participation to revoke the request.

8. The National Defense Authorization Act for Fiscal Year 2023 included an SBP open season. The SBP open season began on 23 December 2022 and ended on 1 January 2024.

a. The SBP open season allowed retirees receiving retired pay, eligible members, or former members awaiting retired pay who were currently not enrolled in the SBP or RCSBP as of 22 December 2022 to enroll. For a member who enrolled during the SBP open season, the law generally required that the member would be responsible to pay retroactive SBP premium costs that would have been paid if the member had enrolled at retirement (or enrolled at another earlier date, depending on the member's family circumstances). For retirees receiving pay, enrollment requires paying the premiums plus interest for the period since the date they were first eligible to enroll, as well as the monthly premiums moving forward.

b. The SBP open season also allowed eligible members and former members who were currently enrolled in the SBP or RCSBP as of 22 December 2022 to permanently discontinue their SBP coverage. The law generally required the covered beneficiaries to concur in writing with the election to discontinue. Previously paid premiums would not be refunded.

//NOTHING FOLLOWS//