

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 October 2024

DOCKET NUMBER: AR20230012209

APPLICANT REQUESTS:

- correction of her late husband's records to show she made a timely request for the Survivor Benefit Plan (SBP) annuity and arrears of pay
- a personal appearance hearing before the Board via video/telephone

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)
- Defense Finance and Accounting Service (DFAS) Email (Annuity Forms) to Applicant, 1 August 2022
- DFAS Retired and Annuitant Pay Letter to Applicant, 30 August 2022
- Appeal of Untimely Claim Decision Dated 30 August 2022 to DFAS, 7 September 2022
- Letter to DFAS, undated
- DFAS Letter to Congressional Representative, 19 September 2022
- Defense Office of Hearings and Appeals (DOHA) Letter to Applicant, 11 May 2023
- Example of DOHA Case Decision, 30 May 2012
- Excerpt of Title 31, U.S. Code, Section 3702 (Authority to Settle Claims), 16 January 2014

FACTS:

1. The applicant, the surviving spouse of the deceased retired service member (SM), states:

a. She is appealing the DFAS and DOHA denials of her claim for an SBP annuity as a surviving spouse. She was denied benefits under the Barring Act (Title 31, U.S. Code, Section 3702) because she did not apply for benefits until August 2022. However, she applied when informed by DFAS that she needed to apply. She was eligible for SBP payments and arrears of pay from July 2014 after her husband's death on 16 June 2014. The Wounded Warrior Project was assigned as her benefits power of attorney

and did not submit the required DD Form 2656-7 (Verification for Survivor Annuity) on her behalf.

b. DFAS was notified of her husband's death in July 2014. In August 2014, she was told she had to choose a benefit since concurrent receipt was not yet a law. The Dependency and Indemnity Compensation (DIC) benefit was higher and the one the benefits representative selected for her. She was instructed to follow concurrent receipt legislation and would receive benefits when it was passed by Congress.

c. In August 2022, she contacted DFAS to inquire about SBP payments and was instructed to submit a DD Form 2656-7, which she did the next day. After submitting the DD Form 2656-7, she was told she would receive 8 years of back pay and regular monthly payments would begin around October 2022. She was later denied benefits under the Barring Act because she did not apply in a timely manner. She was entitled to the benefits but was never told she needed to apply.

d. Her DOHA appeal was denied on 11 May 2023. She also submitted a waiver to the Secretary of the Army on 7 September 2022 but never received a response. She is financially suffering due to an egregious error by DFAS, which never informed her to submit a DD Form 2656-7. She thought she only needed to send her late husband's death certificate and service paperwork to receive benefits.

2. The SM and the applicant married on 22 July 1990.

3. Following prior enlisted service in the Regular Army [REDACTED] Army National Guard, the SM again enlisted in [REDACTED] Army National Guard on 23 January 2006. He was ordered to active duty as a member of his Reserve Component unit for 602 days on 30 October 2006 in support of Operation Enduring Freedom.

4. The DA Form 199 (Physical Evaluation Board (PEB) Proceedings), 15 September 2009, shows a PEB found the SM physically unfit and recommended a disability rating of 70 percent and temporary disability retirement. The PEB found the disability disposition was not based on disease or injury incurred in the line of duty in combat with an enemy of the United States and as a direct result of armed conflict or caused by an instrumentality of war and incurred in the line of duty during a period of war. His disability did not result from a combat-related injury under the provisions of Title 26, U.S. Code, section 104, or Title 10, U.S. Code, section 10216.

5. The SM completed a DD Form 2656 (Data for Payment of Retired Personnel) on 23 October 2009, showing the following entries in:

a. Section VI (Federal Income Tax Withholding Information), block 14 (Marital Status), the SM marked "Married";

b. Section VII (Dependency Information), block 22 (Spouse), the SM listed the applicant with a marriage date of 22 July 1990;

c. Section VII, block 25 (Dependent Children), the SM listed a daughter with a birthdate in 1990 and a son with a birthdate in 1988;

d. Section IX (SBP Election), block 26 (Beneficiary Categories), the SM elected coverage for "Spouse and Child(ren)";

e. Section IX (SBP Election), block 27 (Level of Coverage), the SM checked the box for "I elect coverage based on the threshold amount in effect on the date of retirement";

f. Section XI (Certification), block 30 (Member), the SM signed the form on 23 October 2009;

g. Section XI (Certification), block 31 (Witness), an SBP Counselor signed the form the same day; and

h. Section XI (Spouse Concurrence), block 32 (Spouse), the applicant concurred with the SM's elections the same day.

6. U.S. Army Installation Management Command and Headquarters, U.S. Army Garrison Command, Fort Knox, Orders 297-0023, 23 October 2009, released the SM from active duty in the rank/grade of sergeant (SGT)/E-5 effective 27 November 2009 and placed him on the Temporary Disability Retired List by reason of temporary physical disability in the retired grade of SGT/E-5 effective 28 November 2009.

7. U.S. Army Installation Management Command, Headquarters, U.S. Army Garrison Command, Fort Knox, Orders 328-0165, 24 November 2009, amended Orders 297-0023 to change the SM's rank and retired grade of rank from SGT/E-5 to staff sergeant (SSG)/E-6.

8. The SM retired on 27 November 2009 by reason of physical disability. His DD Form 214 (Certificate of Release or Discharge from Active Duty) shows he completed 3 years and 28 days of net active service during this period. His rank/grade is shown as SGT/E-5.

9. Headquarters, U.S. Army Physical Disability Agency, Orders D053-02, 22 February 2013, removed the SM from the Temporary Disability Retired List, permanently retired him, and placed him on the Retired List in the rank/grade of SSG/E-6 effective 22 February 2013.

10. The retired SM passed away on 19 June 2014.

11. The DFAS letter to the applicant, 27 October 2014, sent condolences on the death of the SM and regrettably informed her that DFAS had not received the SM's death certificate. DFAS requested a copy of the death certificate to continue SBP or Retired Serviceman's Family Protection Plan annuity payments.

12. The applicant sent an email (Annuity Forms), fax, and DD Form 2656-7 to DFAS on 1 August 2022, verifying her eligibility for an annuity under the SBP through a Wounded Warrior Project representative.

13. The DFAS letter in response to her request regarding her entitlement to the SBP annuity from the military retired pay account of her deceased husband, 30 August 2022, denied her request in full under the Barring Act (Title 31, U.S. Code, section 3702). DFAS records indicated her first application for an annuity was received on 3 August 2022, which was more than 6 years after the claim accrued and was considered untimely. Her entire claim was barred from consideration and denied. She had the right to appeal to DOHA within 30 days of the date of this letter; an appeal received after 30 days would not be accepted.

14. The applicant submitted an appeal to DOHA on 7 September 2022 wherein she stated:

Whereas I have read the decision, and understand the grounds for the initial denial, I believe this claim has a series of extenuating circumstances which warrant the reversal and payment of my claim, including the technicality that although the currently used annuitant claim forms were in fact not filed until August 3, 2022 – I did in fact meet my burden of claim by providing DFAS with my husbands [sic] report of casualty in July of 2014, and his Death Certificate in November of 2014 – and calculations were provided by DFAS which sent me in the direction of believing I had provided all necessary documentation, and due to the then Concurrent Receipt Laws – was not in fact eligible for an annuity payment prior to now.

I believe the basic construct of my SBP/Annuitant claim was submitted upon my husband's death in 2014 and was in fact timely – if not correctly handled by DFAS.

I believe at best I am entitled to the payment of arrears for a period of the last six years and at worst the initiation of payment of benefits commensurate with the phase in of the Concurrent Receipt Legislation passed in 2020.

15. In a separate letter to DOHA, undated, she noted the following items were previously omitted:

First and foremost, DFAS refers to my husband as SGT [REDACTED] throughout their response, my husband was a[n] SSG at retirement, and this is how he should be addressed – and his record should reflect this.

There is no inclusion in the DFAS response of the Notice of Casualty provided to them in July of 2014.

DFAS fails to provide any documentation that I was ever notified of my eligibility for SBP Annuitant pay or the AOP [arrears of pay] as they assert occurred in [A]ugust of 2014.

The monetary calculations by DFAS are incorrect, as they fail to calculate the Concurrent Receipt Legislation that began to be phased in in January of 2022 reducing the offset amounts (January of 2022 – current[ly] the offset would be reduced to 1/3 in my understanding)

At no time did I ever claim or state that the VA [Department of Veterans Affairs] told me anything regarding my SBP Annuity – all information I received regarding the offset and the VA DIC being the higher benefit came from DFAS directly.

16. The DFAS letter to the congressional representative, 19 September 2022, states:

- a. The SM was placed on the retired rolls effective 28 November 2009.
- b. The SBP allows retired members of the Uniformed Services an opportunity to provide a portion of their retired pay to their surviving beneficiaries.
- c. DFAS received the SM's death certificate on 11 November 2014, stating his date of death was [REDACTED]
- d. DFAS records show they received the applicant's DD Form 2656-7 on 3 August 2022.
- e. SBP-DIC Offset Phase Out. Prior to the law changes described below, an annuitant was entitled to either the amount of SBP that exceeds the DIC or DIC only, if it was greater than the SBP.

(1) The National Defense Authorization Act for Fiscal Year 2020 directs implementation of the phase-out of the SBP-DIC offset of SBP annuities by the amount of DIC.

(2) Based on the National Defense Authorization Act, spouse SBP annuitants who are subject to the DIC offset will see the first change in the SBP annuity payment

they receive on or after 1 February 2021. This is applicable automatically for all eligible annuitants. The law eliminates the SBP-DIC offset over the course of a 3-year period to end as of 1 January 2023.

(3) Regrettably, the VA provided incorrect information to the applicant regarding her eligibility for an SBP annuity. However, based on the DFAS audit of the SM's SBP, had the applicant applied in a timely manner, the DIC offset would have only suspended her entitlement to a monthly SBP annuity.

f. Arrears of Pay. Entitlement to retired pay terminates on the date of the retiree's death. The arrears of pay includes the unpaid compensation owed to the retiree at the time of his/her death. This would have been the SM's retired pay from 1 June 2014 through [REDACTED]. The arrears of pay is a one-time payment.

(1) A military retiree must waive a portion of their gross retired pay, dollar for dollar, by the amount of his/her entitlement to VA disability compensation, referred to as the VA Waiver.

(2) The SM's VA disability compensation exceeded his military retired pay since 1 April 2010; therefore, his military retired pay account was suspended.

(3) Because the SM was no longer receiving military retired pay, DFAS established a direct remittance account for him to pay his SBP premiums effective the same date as the suspension of his retired pay.

(4) Further audit of the SM's retired pay account determined he had a balance of \$1,032.70 (includes applicable interest) for unpaid SBP premiums for 1 April 2010 through 30 June 2014, DFAS applied the arrears of pay for \$1,381.33 to eliminate the premium balance owed, leaving \$348.63 due to the applicant.

17. On 11 May 2023, DOHA considered her claim for entitlement to an SBP annuity from the retired pay account of her late spouse, the SM, and disallowed her claim.

18. The applicant provided a DOHA claims case example provided to her by DOHA and an excerpt of Title 31, U.S. Code, section 3702.

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 Board found that, while the applicant may not have had a reason for applying for SBP after the SM's death, changes in law later made her eligible to receive both SBP and DIC, but the Barring Act prevents payment of her SBP claim. Based on a preponderance of the evidence, the Board determined it would be appropriate to correct the record to show the applicant submitted a timely application for SBP, and she should be paid the annuity retroactive to the first date authorized under the governing statute.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	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 submitted a timely application for SBP, and she should be paid the annuity retroactive to the first date authorized under the governing statute.

3/29/2025

X

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. 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 considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record; it is not an investigative body. The Board 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. The ABCMR members will direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record. The ABCMR may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

2. Public Law 92-425, the SBP, enacted 21 September 1972, 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.

3. Title 10, U.S. Code, section 1448(a)(2)(A), provides that a standard annuity participant is a person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he/she becomes entitled to retired pay, unless he/she elects (with spouse's concurrence, if required), not to participate in the Plan before the first day for which he/she is eligible for that pay. Section 1448(a)(4) provides that an election under paragraph (2)(A) is irrevocable if not revoked before the date on which the person first becomes entitled to retired pay.

4. Title 31, U.S. Code, section 3702, is the 6-year barring statute for payment of claims by the Government. In essence, if an individual brings a claim against the Government for monetary relief, the barring statute states the Government is only obligated to pay the individual 6 years in arrears from the date of approval of the claim. Attacks to the barring statute have resulted in litigation in the U.S. Court of Federal Claims. In the case of *Pride versus the United States*, the court held that the Board for Correction of Military Records is not bound by the barring act. The Board for Correction of Military Records decision creates a new entitlement to payment and the 6-year statute begins again. Payment is automatic and not discretionary when a Board for Correction of Military Records decision creates an entitlement.

//NOTHING FOLLOWS//