

IN THE CASE OF: [REDACTED]

BOARD DATE: 20 June 2024

DOCKET NUMBER: AR20230012444

APPLICANT REQUESTS: reconsideration of his previous request for receipt of his late father's Reserve Component Survivor Benefit Plan (RCSBP) annuity.

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

- Letter, 2 November 2023
- Army Board for Correction of Military Records (ABCMR) Letter, 3 July 2023
- Previous DD Form 149 (Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552), 13 June 2022, with supporting documents –
 - Marriage License and Certificate, [REDACTED]
 - Birth Certification, filed [REDACTED]
 - State Certification of Death, issued [REDACTED]
 - Letter to U.S. Army Human Resources Command (HRC), 23 January 2023
 - Letter to Director, ABCMR, 14 August 2023
 - Letter to Congressional Liaison and Inquires, Army Review Boards Agency, 14 August 2023
 - Letter to The White House, 14 August 2023

FACTS:

1. 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 AR20220008998 on 16 May 2023.

2. The applicant, the surviving son of the deceased Reserve Component (RC) service member (SM), states he has not accepted the ABCMR's decision as final because his father served in the U.S. Army to protect this country in good faith. He wants to ensure he has done everything he can to receive what his father earned and failed to receive before he passed away. He is not convinced that the information he submitted was totally taken into consideration. His father's Survivor Benefit Plan (SBP) annuity should be paid to him as his surviving son.

a. According to his research, his father did not file a DD Form 1883 (RCSBP Election Certificate) because he never received one. His father was not married in [REDACTED]. Clearly any information that would have been recorded in the DD Form 1883 in April 1999 would not have named him as a beneficiary/survivor since he was born in 2001.

b. He is extremely disappointed with the system. His next step is to take the information public. He believes he is a victim of a Government scam.

3. Following enlisted service in the Army National Guard, the SM enlisted in the U.S. Army Reserve on 11 March 1977. He was promoted to rank/grade of sergeant/E-5 effective 6 June 1991.

4. The U.S. Army Reserve Personnel Command memorandum (Notification of Eligibility for Retired Pay at Age 60) (commonly known as the 20-year letter), 15 April 1999, notified the SM that he completed the required years of qualifying Reserve service and was eligible for retired pay upon application at age 60. Paragraph 4 states:

You are entitled to participate in the Reserve Component Survivor Benefit Plan (RC-SBP) established by Public Law 95-397. This plan enables you to provide an annuity for your spouse, and other eligible beneficiaries. By law, you have only 90 calendar days from the date you receive this memo[andum] to submit your DD Form 1883, Survivor Benefit Plan-Election Certificate. If you do not submit your election within 90 calendar days, you will not be entitled to survivor benefits coverage until you apply for retired pay at age 60. If you do not elect coverage and should die before age 60, your survivors will not be entitled to benefits. Enclosed is [a] DD Form 1883 and detailed information about RC-SBP.

5. The SM's records contain no evidence indicating he made an RCSBP election within 90 days of receipt of his 20-year letter. He was unmarried and had no dependent children at that time.

6. Headquarters, 89th Regional Support Command, Orders 00-112-020, 21 April 2000, reassigned the SM to the Retired Reserve effective 21 April 2000.

7. The SM's records contain:

a. his marriage certificate showing he and [REDACTED] married on [REDACTED]; and

b. the applicant's birth certificate showing he was born in [REDACTED].

8. The SM's records contain no evidence indicating he made an RCSBP election for "Spouse" coverage within 1 year of his marriage or "Child(ren) Only" coverage within 1 year of the applicant's birth.

9. The SM's death certificate shows he died on [REDACTED] at age 52. His death certificate shows he was divorced at the time of his death and does not name an informant. (Note: The applicant was 7 years old at the time of the SM's death.)

10. The SM would have reached age [REDACTED] in [REDACTED].

11. On 3 March 2022, the applicant submitted a letter to HRC wherein he stated he is a full-time student at the University [REDACTED] and has severe disabilities that hamper his success as a student. He is supported by Government agencies who help students like him succeed. He is in need of financial support and hopes the Department of Veterans Affairs can solve this problem for him. He completed a DD Form 2656-7 (Verification for Survivor Annuity), requesting SBP "Child Only" coverage. He is over 18 years old and is a full-time student.

12. The HRC letter to the applicant, 17 March 2022, denied his request for a survivor benefit annuity based on the military service of his late father. HRC informed him that any claim against the Government must have been submitted within 6 years. The statute of limitations for his claim was reached on 15 March 2015.

13. Sometime after receiving the letter from HRC that denied his request for a survivor benefit annuity, the applicant submitted a letter to the Defense Finance and Accounting Service U.S. Military Annuity Pay Office. He stated he was beyond disappointed and disturbed about the way he had to search to receive a benefit he was promised by his late father. When his late father died in 2009, he was told by the Department of Veterans Affairs in St. Louis, MO, to wait until his late father's retirement age to apply for survivor benefits.

14. On 23 January 2023, the applicant again submitted a letter to HRC. He expressed his disappointment, anger, and frustration about the way his claim was handled by the Army regarding benefits from late father's service. He was ultimately denied because he had passed the statute of limitations for monetary claims against the Government.

15. On 16 May 2023 in Docket Number AR2020008988, the ABCMR denied the applicant's request for receipt of an RCSBP annuity. The Board stated public law prohibits the payment of a claim against the U.S. Government unless the claim has been received by the Comptroller General within 6 years after the claim accrues. The Board agreed the SM did not submit an RCSBP election within 90 calendar days of receipt of his 20-year letter. The Board cannot assume the SM agreed to participate in

the RCSBP. The Board determined the evidence presented did not demonstrate the existence of a probable error or injustice.

16. He submitted letters to the ABCMR Director and Army Review Boards Agency Congressional Liaison and Inquires, both dated 14 August 2023, wherein he expressed his reasons why he should receive SBP annuity payments.

17. On 14 August 2023, the applicant submitted a letter to The White House requesting assistance in obtaining an SBP annuity based on his late father's military service.

18. The email correspondence from the Department of the Army G-1 SBP Program Manager, 11 June 2024, states the Defense Finance and Accounting Service system does not contain any paperwork or show the SM elected to participate in the RCSBP. Further, the system does not show the deceased SM as ever applying for retired pay. He died prior to reaching retirement age of eligibility (age 60). Without an RCSBP election, the SM would have defaulted to no coverage.

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 not warranted.

2. The Board noted that RCSBP is not an entitlement. It is an optional program service members may use to protect their dependents from loss of their military retirement income in the event of the service member's death. To participate in the program, the SM would have had to make an election for a beneficiary category within one year of acquiring an eligible beneficiary, in this case within one year of the applicant's birth. There is no evidence indicating the SM made an RCSBP election or intended to do so. Based on a preponderance of the evidence, the Board determined there is no error or injustice related to the absence of an RCSBP election in this case.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
■	■	■	DENY APPLICATION

BOARD DETERMINATION/RECOMMENDATION:

The evidence presented does not demonstrate the existence of a probable error or injustice. Therefore, the Board determined that the overall merits of this case are insufficient as a basis to amend the decision of the ABCMR set forth in Docket Number AR20220008998 on 16 May 2023.

12/19/2024

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 135-180 (Qualifying Service for Retired Pay Nonregular Service), effective 1 August 1987 and in effect at the time, implemented statutory authorities governing granting retired pay to Soldiers and former RC Soldiers.

a. Paragraph 2-2 stated it is the responsibility of each qualified individual to submit his or her application for retired pay. The DD Form 108 (Application for Retired Pay Benefits) is the only form on which application for this pay will be made. Approximately 6 months prior to reaching age 60, eligible Soldiers assigned to the Retired Reserve will receive a DD Form 108 and DA Form 4240 (Data for Payment of Retired Army Personnel) from the U.S. Army Reserve Personnel Center. The DD Form 108 should

not be submitted earlier than 120 days or later than 90 days prior to the date retired pay is to begin.

b. Paragraph 3-2 stated the RCSBP allows RC Soldiers and former Soldiers who have received notification of their eligibility for retired pay at age 60 to provide a survivor annuity for their dependents should the Soldier or former Soldier die before reaching age 60 and receipt of retired pay. Coverage is not automatic. Those eligible must elect one of the three options offered on the DD Form 1883. All eligible personnel have 90 days from the date of receipt of the DD Form 1883 to make their election and return the form to the appropriate office. Should the Soldier elect Option A or fail to return the DD Form 1883 within the prescribed time period, and die before reaching age 60, the survivors will not receive benefits under Public Law 95-397. Failure of a Soldier to initially elect coverage at this time does not preclude eligibility to subsequently elect survivor benefit coverage under the SBP with his/her application for retired pay upon reaching age 60.

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 very specific 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. However, surviving children are only entitled to SBP payments until reaching age 22 in certain cases. Changes in SBP options are not authorized except in specific instances, or authorized by law.

3. Public Law 95-397, the RCSBP, enacted 30 September 1978, provided a way for those who qualified for 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 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 elects either Option B or C in any category of coverage, that election is 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. A member must have made the election within 90 days of receiving the notification of eligibility to receive retired pay at age 60 or wait until he/she applied for retired pay and elected to participate in the standard SBP.

4. Public Law 99-145, enacted 8 November 1985 but effective 1 March 1986, required a spouse's written concurrence for a retiring member's election that provided less than maximum spouse coverage.

5. Title 10, U.S. Code, section 1447, defines "dependent child" as a person who is: (1) unmarried and (2) under 18 years of age, or at least 18 but under 22 years of age and pursuing a full-time course of study in a high school, college, or comparable recognized educational institution, or is incapable of self-support because of a mental or physical incapacity existing before the person's 18th birthday or incurred on or after the 18th birthday but before the 22nd birthday while pursuing a full time course of study or training; and (3) the child of a person to whom the plan applies, including an adopted child, a step or foster child, or a recognized natural child who lived with that person in a regular parent-child relationship.

6. Title 10, U.S. Code, section 1448(a)(5), provides that a person who is not married and has no dependent child upon becoming eligible to participate in the SBP but who later marries or acquires a dependent child may elect to participate in the SBP. Such an election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date on which that person marries or acquires that dependent child. The Defense Finance and Accounting Service interprets the first part of Title 10, U.S. Code, section 1448(a)(5) to mean "who is not married OR has no dependent child."

7. 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.

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.

//NOTHING FOLLOWS//