

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 30 August 2024

DOCKET NUMBER: AR20230013045

APPLICANT REQUESTS: correction of her deceased husband's records to show she made a timely application for the Annuity for Certain Military Surviving Spouses (ACMSS).

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)
- Excerpts of Service Member's (SM's) Military Records –
  - Fifth Army Area Form 119 (Statement of Service), 16 October 1954
  - WD AGO Form 53-98 (Military Record and Report of Separation – Certificate of Service), 16 January 1946
  - Marriage License, 30 September 1961
  - DD Form 108 (Application for Retired Pay Benefits), 11 December 1968
  - Office of the Adjutant General Letter, 14 February 1969
  - Office of the Adjutant General, U.S. Army Administration Center, Letter Orders (Retired Pay), 17 February 1969
  - Office of the Adjutant General Form 977 (Data for Retired Pay), 17 February 1969
- SM's Death Certificate, 22 July 1970
- DD Form 1173 (U.S. Uniform Service – Identification and Privilege Card), 13 January 2016
- two National Personnel Records Center Letters, 22 September 2022 and 8 December 2022
- Facsimile Cover Sheet with Correspondence to the Defense Finance and Accounting Service (DFAS), 18 November 2022
- Standard Form 180 (Request Pertaining to Military Records), 9 December 2022
- Department of Veterans Affairs (VA) Rating Decision, 9 December 2022
- two VA Letters, 12 December 2022 and 22 April 2023
- Congressional Representative Letter, 1 May 2023
- VA Form 5655, 22 May 2023

- Army Retirement Services, Office of the Deputy Chief of Staff, G-1, Letter 13 June 2023
- Congressional Representative Letter, 15 June 2023 and 10 July 2023
- Letter to Office of the Deputy Chief of Staff, G-1, 17 July 2023
- Shipment Receipt, 12 September 2023
- Congressional Representative Privacy Release Form, 13 October 2023
- Congressional Representative Letter, undated
- Office of the Chief Legislative Liaison Email ((Applicant) Congressional Inquiry), 16 October 2023

FACTS:

1. The applicant, the surviving spouse of the deceased retired SM, states she was not made aware that she needed to apply for the ACMSS. She never remarried after her husband passed away in 1970 and would like the ACMSS as she is 82 years old and needs the income to pay her living expenses. Her congressional representative informed her about the ACMSS Program in June 2023 and she is not eligible for any other benefits. She applied for VA benefits but was denied. She has a large credit debt from caring for her daughter until she passed away.
2. The SM's DA Form 66 (Officer Qualification Record) shows was appointed as a second lieutenant in the U.S. Army Reserve on 5 April 1934. He was further appointed as a second lieutenant in the Army of the United States on 15 April 1942. He was promoted to the rank/grade of lieutenant colonel/O-5 in the U.S. Army Reserve effective 7 June 1954.
3. On 30 September 1961, the SM and the applicant married.
4. On 11 December 1968, the SM applied for retired pay benefits.
5. On 14 February 1969, the SM's application for retired pay was approved.
6. Office of the Adjutant General, U.S. Army Administration Center, Letter Orders (Retired Pay), 17 February 1969, placed the SM on the Army of the United States Retired List in the grade of lieutenant colonel effective 10 February 1969. The Office of the Adjutant General Form 977 (Data for Retired Pay), 17 February 1969, shows he was authorized retroactive retired pay based on the decision of the Comptroller General of the United States.
7. The SM's death certificate, 3 August 1970, shows he died on 22 July 1970 at age 61. He was married to the applicant at the time of his death.

8. The applicant provided a copy of her U.S. Uniformed Services Identification and Privilege Card issued on 13 January 2016 showing the SM as her sponsor.
9. The applicant's correspondence with DFAS, 18 November 2022, requests an inquiry into her eligibility for survivor annuity benefits.
10. The National Personnel Records Center letters to the applicant, 22 September 2022 and 8 December 2022, provided a copy of the SM's WD AGO Form 53-98 in response to her request for the SM's DD Form 214 (Report of Separation) and noted DD Forms 214 were not issued prior to 1 January 1950.
11. The Standard Form 180, 9 December 2022, shows the applicant requested copies of the SM's DD Form 214 and Official Military Personnel File.
12. The VA Rating Decision, 9 December 2022, denied the applicant entitlement to aid and attendance or housebound benefits, and denied service connection for the SM's cause of death.
13. The VA letter to the applicant, 12 December 2022, granted her entitlement to a survivor's pension effective 1 September 2022 and payable from 1 October 2022. Her entitlement to a special monthly pension was denied.
14. The VA letter to the applicant, 22 April 2023, informed her that her compensation and pension benefits had changed, leading to a \$844 debt.
15. The VA Form 5655, 22 May 2023, shows her financial status.
16. The Army Retirement Services, Office of the Deputy Chief of Staff, G-1, letter to the applicant's congressional representative, 13 June 2023, explains the ACMSS Program and directs the applicant to apply to the ABCMR to request correction of the SM's records to show she applied when the ACMSS was enacted by Public Law 105-85 on 8 November 1997.
17. The applicant's letter to the Office of the Deputy Chief of Staff, G-1, 17 July 2023, requests entitlement to the ACMSS.
18. The email from the DFAS Board for Correction of Military Records/Congressional Team Lead (Reply: DFAS Information), 26 July 2024, verified the applicant is not authorized Survivor Benefit Plan (SBP) payments; the SM died in 1970 and letters were sent in 2022 and 2023 to inform the applicant that she was not eligible for an SBP annuity.

19. On 14 August 2024, the applicant provided a DD Form 2769 (Application for Annuity Certain Military Surviving Spouses), showing in:

a. Section I (Information Concerning Deceased Member), she entered the SM's name, social security number, and date of birth;

b. Section II (Eligibility):

(1) item 4 (Did the deceased member die before March 21, 1974, or in the case of a Reserve member die before October 1?), she checked the "Yes" box and entered the SM's date of death as 21 July 1970;

(2) item 5 (Was the member retired, or in the case of a Reserve member eligible for retirement by completing over 20 years of qualifying service?), she checked the "Yes" box and entered the SM's retirement date as 10 February 1969;

(3) item 6 (Were you legally married to the deceased at the time of death?), she checked the "Yes" box and entered their date of marriage as 30 September 1961;

(4) item 7 (Have you ever remarried?), she checked the "No" box; and

(5) item 8a (Are you receiving any other military survivor annuity of any kind on the record of this or any other deceased retiree?), she checked the "No" box;

c. Section III (Information Concerning Surviving Spouse), she entered her name, social security number, and date of birth;

d. Section VI (Certification and Signature), block 22a (Applicant/Legal Representative Signature), she signed the form on 14 August 2024;

e. Section VI, block 23a (First Witness or Notary Signature), a notary public signed the form the same day; and

f. Section VI, block 24a (Second Witness Signature), a witness signed the form the same day.

#### BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the SM's military records, the Board found that relief was warranted. The Board carefully considered the SM's record of service, documents submitted in support of the request and executed a comprehensive and standard review based on law, policy and

regulation. Upon review of the applicant's request and the SM's available military records, the Board determined the applicant met the criteria for the Annuity for Certain Military Surviving Spouses (ACMSS) based on the former servicemember's retirement and his date of death occurring within the qualifying years in addition to the surviving spouse not remarrying and not receiving any other monetary benefits.

2. The Board agreed based on the intent of the ACMSS which was enacted by Public Law (PL) 105-85, the applicant meets the eligibility criteria. Based on public law, the Board granted relief to show the applicant submitted her application in a timely manner.

BOARD VOTE:

Mbr 1      Mbr 2      Mbr 3

<input type="checkbox"/>	<input type="checkbox"/>	<input 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 to show the SM's surviving spouse did apply when Annuity for Certain Military Surviving Spouses (ACMSS) was enacted by Public Law (PL) 15-85.



  
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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. Public Law 105-85, 18 November 1997, created the ACMSS Program to provide a small annuity to surviving spouses. The initial ACMSS annuity was \$165 but increases with the yearly Cost of Living Allowance in the same manner as the SBP. As of 1 December 2022, the annuity is \$311.55 per month. The annuity is not subject to the barring act (Title 31, U.S. Code, section 3702(b)); however, the annuity can only be paid retroactive 6 years from the date of approval. ACMSS eligibility is prescribed as:

a. The surviving spouse of a retiree who retired prior to 21 September 1972 and died prior to 21 March 1974 or spouse of a Reservist eligible for reserve retired pay at age 60 who died prior to 1 October 1978.

b. The surviving spouse was legally married to the deceased retiree or Reservist at the time of death.

c. The surviving spouse must never have remarried or ACMSS is lost even if that marriage ends. Surviving spouses whose first remarriage following the death of retiree or Reservist is within the 6 years of eligibility prior to the date the ACMSS application is approved, will receive the portion of the ACMSS annuity that represents the annuity from the 6 years previous to the date of the ACMSS application approval to the date of the first marriage. If the surviving spouse's first remarriage was more than 6 years previous, the surviving spouse is not eligible even if the marriage was after the enactment of the ACMSS laws.

d. If receiving another military annuity for a deceased military retiree, active duty death, or Reservist, a surviving spouse is not eligible for ACMSS. The two disqualifying military annuities are SBP and Minimum Income Widow. (The Minimum Income Widow's benefit was enacted by Public Law 92-425, the same law that enacted the SBP. The widow must be receiving VA's non-service connected death benefit and the SM had to have been retired before 21 September 1972 and died before 20 March 1974).

e. Surviving spouses otherwise eligible who are receiving Dependency and Indemnity Compensation will have the ACMSS annuity offset dollar for dollar by the Dependency and Indemnity Compensation. However, they are eligible for the ACMSS and need to establish an account.

2. Title 31, U.S. Code, section 3702(b), 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//