

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 2 August 2024

DOCKET NUMBER: AR20230014824

APPLICANT REQUESTS:

- correction of her records to show she declined to participate in the Reserve Component Survivor Benefit Plan (RCSBP) with spousal concurrence
- 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)
- DD Form 2656 (Data for Payment of Retired Personnel), 1 August 2022
- Defense Finance and Accounting Service (DFAS) Online Customer Service Screenshot, 22 May 2023
- DFAS Letter, 5 June 2023

FACTS:

1. The applicant states she is appealing the 5 June 2023 DFAS denial decision relating to her declination to participate in the RCSBP. She had been a "gray area" retiree from June 2005 until reaching age 60 in April 2023. She submitted a DD Form 2656 to DFAS on 3 August 2022, electing not to participate in the SBP with spousal concurrence. She noticed a Survivor Benefit Plan (SBP) deduction upon receiving her first retirement annuity. She submitted an inquiry to DFAS via the Online Customer Service portal on 19 May 2023. She was advised to submit a 2023 SBP Open Season Provisional Form to discontinue participation, which she did. DFAS denied her participation in the 2023 SBP open season due to not being at full retirement age on 22 December 2022.
2. She enlisted in the Regular Army on 17 February 1983. She was honorably released from active duty by reason of expiration term of service on 13 June 1991 and transferred to the U.S. Army Reserve.
3. Her military records do not contain a marriage certificate and she did not provide a copy.

4. The U.S. Army Human Resources Command memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 21 January 2004, notified her that she completed the required qualifying years of service for retired pay upon application at age 60. Paragraph 4 stated:

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:

- a. Option A (defer enrollment until age 60 when you apply for retired pay).
- b. 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.
 - (2) Enroll child(ren) only
- c. 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.
 - (2) 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 military records do not contain a DD Form 2656-5 (RCSBP Election Certificate) showing she made an RCSBP election within 90 days of receipt of her 20-year letter.

6. She completed a DD Form 2656 on 1 August 2022, requesting retirement and showing in:

a. Section IX (Dependency Information), block 31 (Spouse), she entered "L____, T____ A." with a marriage date of 3 March 1984;

b. Section X (SBP Election), block 35 (Reserve Component Only) (This section refers to the decision you previously made on the DD Form 2656-5 or the old form, the DD Form 1883 when you were notified of your eligibility to retire, in most cases you do not have the right to make a new election on this form.), she placed an "X" in block a "Option A – Previously declined to make an election until eligible to receive retired pay";

c. Section X, block 36 (SBP Beneficiary Categories), she placed an "X" in block g "I elect not to participate in SBP" and indicated she did not have eligible dependents under the plan;

d. Section XI (Certification), block 41 (Member), she signed the form on 1 August 2022;

e. Section XI, block 42 (Witness), her witness, her son, signed the form on 1 August 2022;

f. Section XII (SBP Spouse Concurrence), block 43 (Spouse), her spouse signed the form on 1 August 2022; and

g. Section XII, block 44 (Notary Witness), a notary public witnessed his signature and signed the form on 1 August 2022.

7. She reached age 60 in April 2023.

8. U.S. Army Human Resources Command Orders C05-395213, 1 May 2023, retired her and placed her on the Army of the United States Retired List in the grade of sergeant major effective 28 April 2023.

9. The DFAS Online Customer Service screenshot shows:

a. On 19 May 2023, she stated she was a "gray area" retiree and became eligible for her benefits on 28 April 2023. She did not elect to participate in the SBP as depicted on her DD Form 2656. SBP premiums are being deducted from her retired pay in error.

b. On 22 May 2023, DFAS noted her RCSBP election was for automatic coverage for a spouse because she did not submit an RCSBP election at the time of her "gray area" retirement, which meant she was not able to decline SBP participation at her date of eligibility for retired pay. She had 90 days from the date of her "gray area" retirement to submit her RCSBP election to her Reserve personnel command before it became automatic coverage status by law. Her SBP would remain at "Spouse" coverage with the additional Reserve Component cost for RCSBP, covering her spouse in the event she passed away during "gray area" retirement. She had the option to discontinue "Spouse" coverage during the 2023 SBP open season. The Reserve Component cost for RCSBP would continue for 360 payments even though her spouse would not receive an SBP annuity upon her death. She would not be reimbursed for SBP "Spouse" coverage costs previously deducted.

10. The DFAS letter, 5 June 2023, informed her that they received her request to discontinue SBP coverage during the 2023 SBP open season. After review, DFAS found she was not eligible to discontinue SBP participation because she was not enrolled as of 22 December 2022.

11. Email correspondence from the DFAS Board for Correction of Military Records/ Congressional Team Lead (Reply: SBP Information), 24 July 2024, verified the applicant is currently enrolled in the SBP for spouse-only coverage. The Team Lead provided the applicant's SBP and RCSBP Open Season Election to Discontinue Participation, 23 May 2023, requesting discontinuation of participation. She and a notary public signed the form on 23 May 2023. Her spouse concurred on the same day as witnessed by a notary public.

BOARD DISCUSSION:

1. 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 Board carefully considered the applicant's record of service, documents submitted in support of the petition, and executed a comprehensive review based on public law, policy, and regulation. Upon review of the applicant's petition and available military

records, the Board determined the applicant was issued her Notice of Eligibility for Retired Pay at Age 60 in January 2004 and she did not complete a DD Form 2656-5 (Reserve Component Survivor Benefit Plan Election Certificate) within 90 days of the letter and was therefore automatically enrolled in coverage for her spouse. In August 2022, she submitted an application for retired pay and elected that she previously declined to make an election until eligible to receive retired pay. The Board noted the applicant's contention that upon her receipt of retirement pay, she noted the premiums were being deducted. She believed this to be in error.

2. Currently, the Defense Finance and Accounting Service shows the applicant's status as "Spouse Only." The Board concluded relief was warranted to show the applicant declined to participate in RCSBP with spousal concurrence as of August 2022 (2023 Open Season).

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

Mr 1	Mr 2	Mr 3
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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 applicant declined coverage as required by the relevant statutory provision and the request was received and processed by the appropriate office in a timely manner.

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 ABCMR 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 may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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. Army Regulation 600-8-7 (Retirement Services Program), paragraph 4-6, states Reserve Component Soldiers and spouses should be counseled on the RCSBP between the member's receipt of the 20-year letter and 60 days after receipt of the 20-year letter, to include categories available under Title 10, U.S. Code, section 1448(a), and the effects of such elections, in accordance with Title 10, U.S. Code, section 1455(b)(1). After receiving the notification of eligibility, Reserve Component Soldiers have 90 days to make their RCSBP elections using a DD Form 2656-5.
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 were 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 the annuity 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. If RCSBP Option B or C is elected, there is a Reserve Component cost added to the basic cost of the SBP to cover the additional benefit and assured protection should the member die prior to age 60. If death does not occur before age 60, the RCSBP costs for Options B and C are deducted from the member's retired pay (costs for Option C being the more expensive). 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.
4. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elects not to participate in the SBP. The statute also provides 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. No premiums will be refunded to those who opt to disenroll. Reservists who elected an option under the RCSBP will continue to have the Reservist Portion cost deducted from their retired pay.

7. Department of Defense Instruction 1332.42 (Survivor Annuity Program Administration) states a member may elect to discontinue participation by submitting DD Form 2656-2 (SBP Termination Request) 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 will not be refunded.

9. The DFAS website defines "gray area" retirees as Reserve Component members who served in the National Guard or Reserve, are qualified for retired pay, and have "retired" from their service (stopped drilling), but are not yet at the age where they can begin receiving retired pay. The time between their "retirement" from the service and the date when they are eligible to begin receiving retired pay is the "gray area." The "gray area" applies even if the member is assigned to the Retired Reserve.

//NOTHING FOLLOWS//