

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 October 2024

DOCKET NUMBER: AR20240000005

APPLICANT REQUESTS: in effect, correction of her former husband's records to show, in effect, he elected "Spouse" Survivor Benefit Plan (SBP) coverage at the time of his retirement and elected "Former Spouse" SBP coverage pursuant to his divorce decree. .

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)
- Applicant's Sworn Affidavit, 16 December 2023
- Marriage License
- Judicial Circuit Court of [REDACTED]
- Applicant's Driver License
- Applicant's social security card
- DD Form 2656-1 (SBP Election Statement for Former Spouse Coverage)
- Applicant's Direct Deposit Form
- Defense Finance and Accounting Service (DFAS') response to the applicant's request for a Deemed Election – Denied

FACTS:

1. The applicant, who is the former spouse of the retired service member (SM), states:

a. She was awarded her former spouse's SBP coverage based on their divorce decree. She never turned down her rights for SBP at any time. She had been with her former spouse since 27 November 1976 until 6 September 2023.

b. As of 15 December 2023, DFAS told her, per a phone conversation that there exists a form signed by her and her then spouse (SM). This form is said that she declined her SBP coverage rights. She has never been aware of this document and does not have any knowledge or has ever seen this document. If one exists, it is a forged document. She has never and nor would she ever turn down her right to SBP. She can only assume that her former spouse (SM) forged this document.

c. At or around the time that this document was said to appear, she was home

taking care of her special needs daughter who had been physically and sexually assaulted by a former teacher's aide in [REDACTED]. She was tending to her daughter's physical, emotional, and legal needs at the time and was nowhere near any military documents. She was busy trying to employ a lawyer and get her daughter counseling. The daughter has since passed away on [REDACTED].

2. The applicant provides the following documents:

a. State [REDACTED] Marriage License, dated [REDACTED], which shows the SM was married to the applicant in the County [REDACTED], in the State [REDACTED].

b. Judicial Circuit Court [REDACTED] Country [REDACTED] Judgment and Decree of Dissolution of Marriage, [REDACTED] states, the SM "...due to his military service is eligible for participation in the Survivor Benefit Plan (SBP). [Applicant] shall be named as the surviving spouse on the Survivor Benefit Plan for [SM's] military retirement benefits. [Applicant] is responsible for all costs or premiums associated with participation in the Survivor Benefit Plan. [SM] will assist [Applicant] is (sic) all paperwork associated with this change.

c. DD Form 2656-1, 26 October 2023, reflects the applicant submitted to DFAS as the former spouse of the SM, requesting direct payment from the SM's retired pay. She enclosed a copy of the division of property document.

d. A letter from DFAS, 6 December 2023 responded to the applicant's request by stating, "We have received your Survivor Benefit Plan (SBP) request for Deemed Election in accordance with [Title] 10 United States Code Section 1450(f)(3). Your request cannot be approved for the following reason: The SBP deemed election cannot be honored because records indicate that the [service] member elected not to participate in the SBP program for spouse coverage at the time the member retired from military service".

3. The SM record shows the following documents:

a. On 30 January 1976, he enlisted in the Regular Army.

b. The SM's DD Form 214 shows he was honorably retired on 31 January 1996. He completed 20 years and 1 day of net active service this period. Item 19b (Nearest Relative) reflects the applicant as his wife.

c. It is unknown if the SM is deceased or remarried.

4. An email from DFAS, provided the following documents:

a. Orders 46-306, 15 February 1995, show he was to be released from active duty on 31 January 1996, and the retired list on the following day, 1 February 1996.

b. DD Form 2625, 17 July 1995, reflects the SM elected coverage for children only, and for said coverage to be based on his full gross retired pay. This document further shows, the applicant concurred with the election on 17 July 1995.

BOARD DISCUSSION:

After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The applicant requests a records correction to reflect, in effect, that her husband elected "Spouse" Survivor Benefit Plan (SBP) coverage at the time of his retirement and elected "Former Spouse" SPB coverage pursuant to his divorce decree. There is a signed and notarized DA Form 2656 signed by the former servicemember (SM) and applicant on 17 July 1995. The SM elected/checked "I elect coverage for children only" and acknowledged he was married. The SM elected SBP coverage for his children based on full gross retired pay. The applicant signed in Block 35, concurring with the Survivor Benefit Plan election and their signatures were witnessed the same day (17 July 1995) at Fort Leonard Wood, MO.

b. The Board determined the applicant has not demonstrated by a preponderance of evidence the existence of an error or injustice warranting relief. As required by Title 10, United States Code, the applicant concurred in the SM's election declining spousal SBP coverage prior to retirement. Despite her sworn statement to the contrary, the document does not appear forged and was witnessed the same day her spouse (SM) signed it. The applicant and SM received the benefit of child-only SBP coverage and the economic benefit of not electing spousal coverage during marriage (i.e. no spousal coverage SBP premiums owed/paid approximately 27 years post-retirement).

c. The Board also determined the applicant has demonstrated an injustice warranting relief. Title 10, U.S. Code, section 1450(f)(3)(A), permits a former spouse to make a written request that an SBP election of former spouse coverage be deemed to have been made when the former spouse is awarded the SBP annuity incident to a proceeding of divorce. Section 1450(f)(3)(C) provides that an election may not be deemed to have been made unless the request from the former spouse is received within 1 year of the date of the court order or filing involved. DFAS notified applicant they received her SBP request for Deemed Election in accordance with 10 U.S.C. §1450(f)(3) on 6 December 2023. DFAS stated, however, that applicant's SBP deemed election cannot be honored because records indicate that the member (SM) elected not to participate in the SBP program for spouse coverage at the time the member retired

from military service. This decision is consistent with the DA Form 2656 signed by both SM and applicant (and witness) in the file in July 1995.

d. It is unknown whether the SM has remarried. It is unfortunate that applicant clearly believed from family court filings that she would receive SBP benefits upon SM's death. Favorable action, however, would adversely affect the rights of any potential current spouse. Absent proof that there is no current spouse (and if so, that they signed/notarized an affidavit relinquishing their right to the annuity and that SM elected spousal SBP coverage) this claim is appropriately pursued in the courts and not before the ABCMR.

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 the overall merits of this case are insufficient as a basis for correction of the records of the individual concerned.

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. 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. Elections are made by category, not by name. 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.
2. Public Law 98-94, 24 September 1983, established former-spouse coverage for retired members.
3. Public Law 99-661, 14 November 1986, permitted divorce courts to order SBP coverage without the member's agreement in those cases where the retiree had elected spouse coverage at retirement or was still serving on active duty and had not yet made an SBP election.
4. Title 10, U.S. Code, section 1450(f)(3)(A), permits a former spouse to make a written request that an SBP election of former spouse coverage be deemed to have been made when the former spouse is awarded the SBP annuity incident to a proceeding of divorce. Section 1450(f)(3)(C) provides that an election may not be deemed to have been made unless the request from the former spouse of the person is received within 1 year of the date of the court order or filing involved.

//NOTHING FOLLOWS//