

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 5 March 2024

DOCKET NUMBER: AR20240000267

APPLICANT REQUESTS:

- correction of her deceased daughter's records to show the line-of-duty (LOD) determination was completed prior to January 2023
- correction of her deceased daughter's Survivor Benefit Plan (SBP) to show "Spouse and Child(ren)" coverage effective 1 January 2023

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)
- Certificate of Death, 16 September 2021
- DD Form 1300 (Report of Casualty), 16 September 2021
- Spouse Statement of Desired SBP Election, 10 November 2021
- Part 5 – Surviving Spouse Verification of SBP Counseling, 24 November 2021
- DD Form 2656-7 (Verification for Survivor's Annuity), 24 November 2021
- Internal Revenue Service Form W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 24 November 2021
- U.S. Army Human Resources Command Memorandum (LOD Determination), 3 December 2021
- DD Form 2790 (Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces), 7 December 2021
- Financial Management Service Form 11-92 (Fast Start Direct Deposit), 7 December 2021
- two Superior Court Letters of Guardianship, 3 May 2022 and 18 May 2023
- Office of the Deputy Chief of Staff, G-1, Memorandum (Advisory Opinion – (SM) (Deceased)), 22 December 2023
- Killeen Police Department Letter, undated

FACTS:

1. The applicant, the mother of the deceased SM and legal guardian of the SM's surviving child, states she believes it is an injustice that the SM's surviving spouse's request to transfer the SBP annuity to the SM's child (i.e., "Child-Only" coverage) could

not be elected because the process was not completed prior to 1 January 2023, the effective date of the "Optional Child Only SBP" election law repeal.

2. The SM enlisted in the Regular Army on 26 April 2016.

3. The SM's death certificate shows she was pronounced deceased on 16 September 2021 as the result of an injury to the head caused from the projectile of a firearm. Her marital status at the time of death is shown as "Married" and her surviving spouse's name is shown as T____ M____ M____.

4. The SM's record is void of any certificate of marriage which shows the date she married T____ M____ M____.

5. The SM's DD Form 1300, 20 October 2021, shows she was declared deceased on 16 September 2021 as the result of a gunshot wound of the head.

6. The SM's DA Form 2173 (Statement of Medical Examination and Duty Status), 10 November 2021, states the SM was at a nightclub with friends and was pursued by a Soldier from another brigade. The other Soldier proceeded to fire several 9-millimeter rounds from a handgun into the car in which the SM was riding. The SM was struck in the head by one of the rounds and taken to Seton Hospital in Harker Heights, and eventually airlifted to Baylor Scott and White Medical Center in Temple, TX.

7. On 19 November 2021, the SM's surviving spouse, T____ M____, completed the Spouse Statement of Desired SBP Election showing:

a. She acknowledged she previously received an initial comprehensive briefing from an Army SBP counselor about the SBP options available to her and reviewed the Survivor Benefit Report. She understood this decision was irrevocable and should only be made when she had adequate time to review all the SBP data needed to make an informed decision.

b. She elected "Child Only, Spouse Excluded" SBP coverage. She desired that the Army make the SBP election on her behalf. She understood that all of the deceased Soldier's SBP-eligible children would receive an equal share of the SBP annuity. The children would receive the annuity until age 18 or age 22 if full-time unmarried students, or forever if incapable of self-support due to a condition incurred while eligible for the SBP. She understood she could request the annuity for an SBP-eligible child who was incapacitated to be paid to a special needs trust for the care of that child. She also understood the SBP would end when the last child was no longer eligible. If, on 1 January 2023, she were eligible to receive the SBP annuity, she will begin receiving it by law. The children will no longer receive the annuity. She understood that child SBP is taxable for the child.

8. On 24 November 2021, the SM's surviving spouse, T____ M____, completed a DD Form 2656-7, verifying the SM's son's eligibility for the SBP annuity as the deceased SM's surviving child. The DD Form 2656-7 was accompanied with the necessary documents for establishment of financial payments to the SM's spouse.
9. The U.S. Army Human Resources Command memorandum (LOD Determination), 3 December 2021, determined the SM, who died in Temple, TX, on 16 September 2021 as the result of homicide, was found "In Line of Duty" at the time of death.
10. The applicant's DD Form 2790, 7 December 2021, certified that her grandson was the unmarried child of the deceased SM.
11. The two Superior Court Letters of Guardianship, 3 May 2022 and 18 May 2023, affirmed the applicant as the legal guardian of the SM's son and his estate.
12. The Department of the Army Office of the Deputy of Chief of Staff, G-1, memorandum from the Director, Army Retirement Services (Advisory Opinion – (SM) (Deceased)), 22 December 2023, states:
 - a. Title 10, U.S. Code, section 1448(d)(1)(B), requires that the member who died on active duty and was not qualified for retirement must die in the LOD to be eligible for coverage under the SBP.
 - b. Title 10, U.S. Code, section 1448(d)(2)(B), allows an eligible surviving spouse to transfer the SBP annuity to eligible children.
 - c. Public Law 116-92, section 622, repealed the authority for an optional annuity for dependent children effective 1 January 2023. Effective the same date, it restored the annuity to any eligible spouses who previously elected to transfer the annuity to their surviving children.
 - d. The spouse's request to transfer the SBP annuity to "child only" was submitted to the Army SBP Board prior to repeal of the authority for the optional annuity for dependent children effective 1 January 2023.
 - e. The submitted request was not processed in a timely manner.
 - f. If the Army SBP Board processed the request in a timely manner, he would still have had the ability to elect the "Optional Child Only SBP" by law on behalf of the Secretary of the Army from the date of the SM's death until 31 December 2022.
 - g. After careful review and in the interest of fairness, he supports the applicant's request to transfer the SBP annuity to "child only" effective the date of the SM's death

until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023.

13. The Killeen Police Department letter from the Criminal Investigation Division Robbery-Homicide Unit lead detective investigating the death of the SM occurring on 4 September 2021, undated, states he found no evidence to suggest T_____ M_____ (SM's spouse) was involved in the SM's murder.

BOARD DISCUSSION:

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 applicant's contentions, the SM's military records, and regulatory guidance were carefully considered. The applicant is the deceased service member's mother and legal guardian of the SM's child. The SM died on active duty on 26 September 2021, prior to 1 January 2023. After receiving their SBP counseling, the surviving spouse requested that the SBP annuity be transferred to the SM's child. The LOD investigation was completed on 3 December 2021, after the SBP election was made and shortly before the change in law. If the LOD investigation was timely completed and timely sent to the Army SBP prior to 1 January 2023, she would still have had the ability to elect the optional child-only SBP by law from the date of the SM's death until 31 December 2022. No one is currently receiving the SBP annuity. After careful review and in the interest of justice and fairness, the Board determined relief is warranted and supports the applicant's request to transfer the SBP annuity to the surviving child effective the date of the SM's death until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

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

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 Line of Duty Investigation was completed before 1 January 2023
- showing the applicant submitted a request to transfer the SBP annuity to her child effective the date of the SM's death (16 September 2021) until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023
- paying the SBP annuity to the child between 21 December 2021 and 31 December 2002 and to the surviving spouse effective 1 January 20232.

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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. Title 10, U.S. Code, section 1448(d)(20(B), states that in the case of a member who dies on or after the date of enactment of the National Defense Authorization Act for Fiscal Year 2004, 24 November 2003, and for whom there is a surviving spouse eligible for an annuity under paragraph (1), the Secretary may pay an annuity to the member's dependent children, if applicable, instead of paying an annuity to the surviving spouse if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children instead of an annuity for the surviving spouse.

2. Public Law 116-92, section 622 (Phase-out of Reduction of SBP Survivor Annuities by Amount of Dependency and Indemnity Compensation (DIC)), 20 December 2019, states the Secretary of the Military Department concerned shall restore annuity eligibility to any eligible surviving spouse who, in consultation with the Secretary, previously elected to transfer payment of such annuity to a surviving child or children under the provisions of Title 10, U.S. Code, section 1448(d)(20(B), as in effect on the day before the effective date of 1 January 2023. Such eligibility shall be restored whether or not payment to such child or children subsequently was terminated due to loss of dependent status or death. For the purposes of this subsection, an eligible spouse includes a spouse who was previously eligible for payment of such annuity and is not remarried, or remarried after having attained age 55, or whose second or subsequent marriage has been terminated by death, divorce, or annulment.

a. The DIC is a monetary benefit offered by the VA to survivors of SMs and retirees whose death results from a service-related injury or disease.

(1) Spouse SBP annuitants, except for those who remarry after age 55 (or in other specific circumstances), cannot receive full SBP and DIC at the same time before 2023. Beginning in 2021, there are significant changes to the offset of SBP and DIC.

(2) Please note: DIC payments made directly to children, or to a guardian on behalf of children, do not affect SBP child annuity payments.

(3) In 2022 when DFAS is informed by the VA that a spouse annuitant is receiving DIC, the law requires that DFAS deduct one-third of the amount of DIC received from the amount of SBP payable and pay the remaining amount of the SBP to the annuitant. This is called the SBP/DIC offset. The reduction of the SBP/DIC offset from the full amount of DIC to one-third of DIC is effective 1 January 2022.

(4) For example, in 2022, if an annuitant receives a monthly SBP annuity of \$1,200 from DFAS and receives a monthly DIC award of \$1,500 from the VA, DFAS will deduct one-third of the amount of DIC (\$500) from the \$1,200 SBP and pay the

remaining \$700 to the annuitant. The annuitant will continue receive the full amount of DIC from the VA (in this example \$1,500).

(5) On 1 January 2023, the offset will be completely eliminated. Eligible surviving spouses will receive their full SBP payments and their full DIC payments.

(6) Please note the change in the law does not affect DIC payments, it only affects SBP payments when the surviving spouse is also receiving DIC. Please see the DFAS SBP/DIC news webpage for details and Frequently Asked Questions.

(7) When a spouse is eligible to receive SBP and DIC, and those payments are subject to the SBP/DIC offset, the spouse will also receive the SSIA.

b. The SSIA is a benefit for surviving spouses who receive an SBP annuity that is offset by a DIC payment from the VA.

(1) In 2022, SSIA will be paid at up to \$346 per month. Eligible survivors will continue to receive the SSIA, up to the maximum amount per month, or up to the gross amount of SBP (if the gross amount of SBP is less than the maximum amount) until 31 December 2022. SSIA will not be paid in 2023.

(2) SSIA is not used to repay past-due SBP premiums. If the spouse annuitant is entitled to SSIA, DFAS will pay the SSIA, even when there are past-due premiums.

(3) DIC payments to children do not affect SBP child annuitant payments, so child annuitants are not eligible to receive SSIA.

//NOTHING FOLLOWS//