

IN THE CASE OF: [REDACTED]

BOARD DATE: 21 October 2024

DOCKET NUMBER: AR20240000529

APPLICANT REQUESTS: in effect, correction of her deceased husband's records to show he elected to participate in the Reserve Component Survivor Benefit Plan (RCSBP) and she is authorized the annuity.

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 214 (Certificate of Release or Discharge from Active Duty) for the Period Ending 27 September 1980
- Marriage License, [REDACTED]
- Marriage Record Certification, undated
- DD Form 214 for the Period Ending 25 August 1991
- DD Form 215 (Correction to DD Form 214), 11 June 1992
- U.S. Army Reserve (USAR) Personnel Command Memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 22 June 2000
- Certificate of Death, 22 November 2010

FACTS:

1. The applicant, the surviving spouse of the deceased service member (SM), states she was trying to enroll in the Defense Enrollment Eligibility Reporting System and was unaware of the statute of limitations (presumed to mean the Barring Act). She is now ineligible for a Survivor Benefit Plan (SBP) annuity. She believes her late husband's records contain errors because there is no registration in the system (presumed to mean an RCSBP election) reflecting her marital status or RCSBP eligibility.

2. The SM enlisted in the USAR on 20 May 1977 under the Delayed Entry/Enlistment Program with a commitment to enlist in the Regular Army by 28 September 1977. The SM was discharged from the Delayed Entry/Enlistment Program and enlisted in the Regular Army on 28 September 1977.

3. The SM was released from active duty on 27 September 1980 and transferred to the USAR Control Group (Reinforcement).

4. The SM and the applicant married on 3 October 1986.
5. Headquarters, USAR Command, Orders 97-069-050, 10 March 1997, discharged the SM from the USAR effective 10 March 1997.
6. The SM again enlisted in the USAR on 18 April 1997.
7. The USAR Personnel Command memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter)), 22 June 2000, notified the SM that having completed the required years of service, he was eligible for retired pay upon application at age 60 in accordance with statutory guidance. Paragraph 4 stated:

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 benefit 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.

8. The SM's military records contain no evidence showing he completed and submitted a DD Form 1883 (SBP Election Certificate) to his command within 90 calendar days of receiving his 20-year letter.
9. The SM's death certificate, 28 October 2010, shows he died on 28 September 2010 at age 51. He was married to the applicant at the time of his death.
10. Email correspondence from a Defense Finance and Accounting Service (DFAS) Supervisory Military Pay Specialist, 19 April 2024, states the applicant submitted two notifications, but DFAS was unable to contact her because she didn't provide any contact information. The SM was not on the retired rolls so DFAS has no records for him.
11. Email correspondence from the DFAS Board for Correction of Military Records/ Congressional Team Lead, 19 September 2024, notes the SM's pay records have been purged from the system since he is deceased. DFAS provided the following documentation:
 - a. an Authorization for Automatic Payroll Deposits, 13 September 2021; a Standard Form 1199A (Direct Deposit Sign-Up Form), 17 September 2021; and an

Internal Revenue Service Form W-4P (Withholding Certificate for Pension or Annuity Payments), 17 September 2021; to establish a pay account;

b. a DD Form 2656-7 (Verification for Survivor Annuity), 17 September 2021, verifying her eligibility for an annuity under the Retired Serviceman's Family Protection Plan (RSFPP), SBP, and/or RCSBP;

c. the SM's DA Form 5016 (Chronological Statement of Retirement Points), 23 September 2021, showing the SM's status changed to USAR Retired on 1 November 2000; and

c. the U.S. Army Human Resources Command Gray Area Retirements Branch letter, 23 September 2021, denying the applicant's request for an SBP annuity. The Gray Area Retirements Branch Chief noted, in part:

According to Title 31 of United States Code, Section 3702, any claim against the government must be submitted within six years. The statute of limitation for your claim was reached on September 28, 2016 and unfortunately our office does not have jurisdiction to process your application.

The Reserve Component Survivor Benefit [Plan] (RCSBP) established by Public Law 95-397, was to provide an annuity for the spouse and other eligible beneficiaries for Reserve soldiers or former soldiers who have completed 20 years of service for retired pay at age 60. By law [SM] had 90 calendar days from June 22, 2000, the date of the 20 year letter to submit a Survivor Benefit [Plan] Election Certificate (DD Form 1883). If an election was not made within the required 90 calendar days, he would not be entitled to Survivor Benefit coverage until he applied for retirement at age 60.

If you disagree, with our decision, you may appeal to the board using the enclosed Application for Correction of Military Records (DD Form 149). The Army Board for Correction of Military Records (ABCMR) was established for the express purpose of considering the existence of error injustice and to make appropriate recommendations for corrective actions.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the SM's military records, the Board found relief was not warranted.
2. The Board carefully considered the applicant's request, the evidence in the FSM's record to include the 20-year letter, the response from HRC Grey Area Retirements Branch and the response from DFAS regarding the absence of SBP documents in the

acting through the ABCMR. Board members will review all applications that are properly before them to determine the existence of an error or injustice and direct or recommend changes in military records to correct the error or injustice, if persuaded that material error or injustice exists and that sufficient evidence exists in the record. 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.

2. Army Regulation 135-180 (Retirement for Non-Regular Service), effective 1 August 1987 through 27 May 2015, prescribed policies and procedures governing Non-Regular (Reserve Component) retirement. This regulation implemented statutory authorities governing granting retired pay to Soldiers and former Reserve Component Soldiers. Chapter 3 provided policies and procedures for implementing the RCSBP. The RCSBP allows Reserve Component 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 (SBP Election 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 Soldiers to initially elect coverage at this time does not preclude eligibility to subsequently elect survivor benefit coverage under the SBP with their application for retired pay upon reaching age 60.

a. Reserve Component Soldiers and former Soldiers not yet 60 years old, who were issued letters of notification of eligibility for retired pay on or before 1 December 1979, were furnished the SBP information and Election Certificate to allow for election of options prior to the cutoff date of 1 April 1980.

b. Soldiers who complete 20 qualifying years of service after 1 December 1979 have or will be furnished the SBP information and Election Certificate with issuance of their notification of eligibility (20-year) letter.

3. Public Law 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP provided a way for those who qualified for Non-regular (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 of it 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 death does occur before age 60, the RCSBP costs

for Options B and C are deducted from the annuity (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. At the time, a member must have made the election within 90 days of receiving the notification of eligibility to receive retired pay at age 60 or else have waited until he/she applied for retired pay and elected to participate in the standard SBP.

4. Public Law 106-398, enacted 30 October 2000, required written spousal consent for a Reserve service member to be able to delay making an RCSBP election until age 60. The law is applicable to cases where 20-year letters were issued after 1 January 2001. In other words, failure to elect an option now results in the default election of Option C. The declination, with the spouse's consent, must be made before the end of the 90-day period beginning on the date on which the member receives his/her 20-year letter.

5. Title 31, U.S. Code, section 3702(b)(1), commonly known as the Barring Act, 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.

6. 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 known as the "gray area." The "gray area" applies even if the member is assigned to the Retired Reserve.

//NOTHING FOLLOWS//