

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 28 October 2024

DOCKET NUMBER: AR20240000660

APPLICANT REQUESTS:

- correction of his records to show he elected not to participate in the Survivor Benefit Plan (SBP) in connection with his disability retirement on 1 February 2023
- reimbursement of SBP premiums already paid

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)
- Certified Transcript of Marriage, 8 January 2005
- DD Form 2656 (Data For Payment if Retired Personnel), 4 February 2022
- Standard Form 3107-2 (Spouse's Consent to Survivor Election), 9 January 2023
- Joint Force Headquarters – New York, Memorandum (Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years)), 6 April 2023
- DA Form 5016 (Retirement Accounting Statement), 28 February 2024
- DD Form 2656-2 (SBP Termination Request), 16 August 2024
- Spouse's Letter, 16 August 2024

FACTS:

1. The applicant states he elected SBP coverage upon his projected disability retirement in February 2022. After speaking with his wife, he contacted the Fort Drum, NY, Retirement Services Officer (RSO) because he no longer wanted SBP coverage upon retirement. The RSO advised him the Defense Finance Accounting Service (DFAS) rescinded his original SBP election paperwork and his SBP election was not processed.

a. His retirement date was moved to 20 January 2023 and the RSO stated none of his previous retirement paperwork from February 2022 was valid. From February 2022 to January 2023, he was not retired but was still being charged SBP premiums.

b. He spoke with DFAS on multiple occasions to explain that he was not retired and there was an error in processing his SBP election. DFAS notified him that he could not discontinue SBP participation during the 2023 SBP Open Season.

2. He enlisted in the Army National Guard of the United States on 31 January 2003.

3. He and K_____ N. M_____ married on 8 January 2005.

4. Office of the Adjutant General, State of New York, Orders 36-329-0019, 25 November 2019, ordered him to active duty as a member of his Reserve Component unit for a period of 400 days in support of Operation Enduring Freedom (Spartan Shield) with a reporting date of 23 January 2020.

5. The DA Form 199 (Informal Physical Evaluation Board Proceedings), 5 November 2021, shows a PEB convened at Joint Base San Antonio, TX, on 5 November 2021 to determine his medical fitness for continued service in the Army. The PEB determined he was physically unfit and recommended a disability rating of 60 percent and his placement on the Permanent Disability Retired List.

6. His DD Form 2656, 4 February 2022, shows in:

a. Section I (Pay Identification), block 4 (Retirement/Transfer Date), his retirement date as 16 February 2022;

b. Section IX (Dependency Information):

- block 29 (Spouse) – he entered K_____ C_____ with a marriage date of 8 January 2005
- block 32 (Dependent Children) – he entered two children with birthdates in 2010 and 2017

c. Section X (SBP Election):

- block 34 (SBP Beneficiaries) – he placed an "X" in block b (I elect coverage for spouse and children)"
- block 35 (Level of Coverage) – he placed an "X" in block a (I elect coverage based on full gross pay)

d. Section XI (Certification):

- block 39 (Member) – he signed the form on 4 February 2022
- block 40 (Witness) – his witness signed the form on 4 February 2022

7. U.S. Army Installation Management Command and Headquarters, U.S. Army Garrison, Fort Drum, Orders 038-1012, 7 February 2022, released him from assignment by reason of physical disability effective 15 February 2022 and placed him on the Retired List in the rank of sergeant first class effective 16 February 2022.

8. He did not provide evidence showing SBP premiums were deducted from his retired pay effective 16 February 2022.

9. On 14 February 2022, the Adjutant General, Joint Force Headquarters – New York, approved his request for continuation on Active Reserve for 1 year.

10. U.S. Army Installation Management Command and Headquarters, U.S. Army Garrison, Fort Drum, Orders 046-101, 15 February 2022, revoked Orders 038-1012, 7 February 2022.

11. Headquarters, U.S. Army Physical Disability Agency, Orders D-279-13, 6 October 2022, released him from assignment by reason of permanent physical disability and placed him on the Retired List in the rank of sergeant first class effective 2 February 2023.

12. The Standard Form 3107-2 (Spouse's Consent to Survivor Election), 9 January 2023, shows he marked "I have elected no regular or insurable interest survivor annuity for my current spouse. I understand that no survivor annuity will be paid to my spouse after my death." His spouse, K____ C____, signed the form on 9 January 2023, indicating she freely consented with his election and her consent is not revocable, and her signature was notarized on 9 January 2023.

13. There is no evidence showing he completed a new DD Form 2656 indicating he declined SBP coverage with spousal concurrence in connection with his adjusted retirement date.

14. On 1 February 2023, he retired by reason of permanent disability in the rank/grade of sergeant first class. His National Guard Bureau Form 22 (National Guard Report of Separation and Record of Service) shows he completed 20 years of total service.

15. The Joint Force Headquarters – New York memorandum (Notification of Eligibility for Retired Pay for Non-Regular Service (20 Years)), 6 April 2023, notified him that having completed the required years of service, he was eligible for retired pay upon application at age 60. (Note: He retired by reason of physical disability effective 1 February 2023. He was immediately eligible for the standard SBP.)

16. His DD Form 2656-2 (SBP Termination Request), 16 August 2024, shows he requested to voluntarily discontinue participation in the SBP.

17. His spouse's letter, 16 August 2024, states she is signing the SBP Termination Request of her own volition. When her husband was retiring in January 2022, they agreed to participate in the SBP. They then realized they did not want SBP coverage so they contacted the office handling his retirement and asked how to cancel the SBP election they made on 4 February 2022. Her husband was then approved to continue on Active Reserve and his retirement was postponed for 1 year. In January 2023, they completed a Standard Form 3107 in which they believed they were declining SBP coverage. However, the office that processed her husband's retirement used his 4 February 2022 DD Form 2656, showing he elected "Spouse and Child(ren)" coverage. She acknowledges that they completed the wrong form, but their phone calls and documentation prove they do not want to participate in the SBP.

18. Email correspondence from the DFAS Board for Correction of Military Records/ Congressional Lead (Reply: Army Board for Correction of Military Records (ABCMR) Request: (Applicant)), 8 October 2024, notes the applicant's SBP account began as "automatically enrolled" effective 31 January 2023; the applicant requested "Spouse and Child(ren)" coverage, but the request was missed by DFAS' Establishments Department. DFAS requested a DD Form 2656-8 (SBP Automatic Coverage Fact Sheet) and has not received a response to date.

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 and standard review based on law, policy and regulation. Upon review of the applicant's petition, available military records, the Board determined the applicant was directed to receive permanent disability retirement orders with an effective date of 15 February 2022. The Board noted, in preparation for his pending retirement, the applicant submitted his DD Form 2656 requesting spouse and child SBP coverage.

2. Evidence shows, the applicant prior to his retirement received continuation on active-duty (COAD) orders deferring his retirement to 1 February 2023 for a year from the New York State National Guard (NYS-NG). The Board found the applicant received his notice of eligibility (NOE) separately qualifying him for non-regular retirement benefits with instructions to accept /deny SBP enrollment with a 90-day window by submitting a DD Form 2656-5. Furthermore, the Board determined, based on the evidence the applicant was automatically enrolled effective 31 January 2023, 1 day prior to his directed retirement effective date. The Board agreed, the applicant and his spouse submitted a notarized intent to revoke the previously submitted SBP enrollment interest on 9 January 2023, which was prior to the creation of his retirement pay account. Based

on the preponderance of evidence the Board determined correction of the applicant's records to show he elected not to participate in the Survivor Benefit Plan (SBP) in connection with his disability retirement on 1 February 2023 and reimbursement of SBP premiums already paid is warranted. As such, the Board granted relief.

BOARD VOTE:

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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 he properly declined the Survivor Benefit Plan (SBP) on 9 January 2023, with proper spousal concurrence, and his election was received and processed in a timely manner by the appropriate DFAS office. Such relief should result in the repayment of any previously paid SBP premiums.

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 policies and procedures for correction of military records by the Secretary of the Army 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. 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.
3. 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. 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.
4. Department of Defense Instruction 1332.42 (Survivor Annuity Program Administration) states a member may elect to discontinue participation by submitting DD Form 2656-2 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.
5. Department of Defense Financial Management Regulation, volume 7B, chapter 43, paragraph 430202, provides that in the case of a member electing a standard SBP annuity, the member must make such election before retired pay becomes payable, or if there is no eligible beneficiary at that time, within 1 year of acquiring an eligible beneficiary.

6. Department of Defense Financial Management Regulation, volume 7B, chapter 43, paragraph 7.1.3., provides that if termination is not otherwise prohibited by Title 10, U.S. Code, section 1448, a spouse or former spouse who concurs in the request for termination is considered notified in accordance with the law. A spouse or former spouse who changes his/her mind after concurrence has 30 days from the date of the first request to submit a letter withdrawing their concurrence. If concurrence is withdrawn within 30 days, the request to withdraw from SBP participation is void. The concurrence of the former spouse is applicable even though the coverage may be currently in a suspended status due to the former spouse's remarriage. Child concurrence is not required when a member elects to discontinue SBP participation for child coverage.

//NOTHING FOLLOWS//