

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 8 May 2024

DOCKET NUMBER: AR20240002378

APPLICANT REQUESTS: correction of her deceased husband's Survivor Benefit Plan (SBP) to show "Child(ren)-Only" coverage.

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)
- Enlisted Record Brief, 21 November 2012
- Certificate of Death, 21 November 2012
- U.S. Army Human Resources Command (AHRC) Memorandum (SBP Eligibility Information on Member Dying on Active Duty), 3 December 2012
- DA Form 1506 (Statement of Service – For Computation of Length of Service for Pay Purposes), 3 December 2012
- SBP Beneficiary Worksheet, 10 December 2012
- Spouse Statement of Desired SBP Election – Active Duty Death, 10 December 2012
- DD Form 2790 (Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces), 10 December 2012
- Internal Revenue Service Form W-4P (Withholding Certificate for Pension or Annuity Payments) – 2012, 10 December 2012
- Defense Finance and Accounting Service (DFAS)-Cleveland Form 1059 (Direct Deposit Authorization), 10 December 2012
- DD Form 1300 (Report of Casualty), 20 May 2013
- AHRC Memorandum (Line of Duty (LD) Determination), 20 September 2013
- AHRC Casualty and Mortuary Affairs Operations Division Letter, 21 March 2022
- two DD Forms 2656-7 (Verification for Survivor Annuity), 10 December 2023
- Financial Management Service Form 2231 (Direct Deposit), 4 January 2023
- Internal Revenue Service Form W-4P – 2023, 2 January 2024

FACTS:

1. The applicant, the surviving spouse of the deceased service member (SM) who died while serving on active duty, states that as the surviving spouse, states her husband's LD determination was changed to "In LD" in March 2022. However, she did not make an

immediate SBP decision because this new decision granted potential eligibility for Dependency and Indemnity Compensation (DIC) payments. The appeal process with the Department of Veterans Affairs (VA) took nearly 2 years, which delayed her ability to make an SBP decision. She is therefore requesting a decision to grant child-only SBP coverage with retroactive benefits.

2. The SM enlisted in the Regular Army on 9 November 2009 in the rank/grade of private first class/E-3.
3. The SM's and the applicant married on 25 March 2011.
4. The SM's death certificate shows he died on 21 November 2012 due to multiple drug toxicity in Bethesda, MD.
5. The AHRC Form 1569 (Transcript of Military Record) shows the SM died on active duty in the rank/grade of specialist/E-4 on 21 November 2012. This form shows he served in Germany from 17 June 2010 to 28 February 2011 and in Afghanistan from 28 February 2011 through 1 August 2011.
6. The AHRC memorandum from the Chief, Veterans Inquiry Section (SBP Eligibility Information on Member Dying on Active Duty), 3 December 2012, determined the SM who died on active duty had 3 years and 13 days of total creditable service. In connection with this memorandum was a DA Form 1506, 3 December 2012, showing the same creditable service.
7. The applicant provided an SBP Beneficiary Worksheet, 10 December 2012, showing she was counseled and elected the SBP category of "Child(ren), Spouse excluded." She and the counselor both signed the form on 10 December 2012.
8. On 10 December 2012, the applicant completed the Spouse Statement of Desired SBP Election – Active Duty Death, showing she reviewed the SBP options, was counseled, and elected the following with her initials:

Children Only. I desire the Secretary of the Army to make the following-SBP election on my behalf. I understand that this election authorizes all of my Soldier spouse's eligible children to receive an equal share of the SBP annuity. All eligible children will receive the annuity until age 18 or age 22 if a full-time unmarried student, or forever if the child is incapable of self-support due to a condition incurred before age 18, or age 22 until all children are ineligible. I understand that the SBP will not revert to Spouse when the last child becomes ineligible and I will not receive SSIA [Special Survivor Indemnity Allowance].

9. The applicant's DD Forms 2790, 10 December 2012, certified that her child was the unmarried son of the deceased SM. She further included an Internal Revenue Service Form W-4P, 10 December 2012, and a DFAS-Cleveland Form 1059, 10 December 2012.

10. The SM's records contain the DD Form 261 (Report of Investigation – LD and Misconduct Status), 27 December 2012, showing an investigation was conducted into the SM's death.

a. The report shows in:

(1) block 3 (Status), the SM was a Regular Army Soldier;

(2) block 10a (Circumstances), the incident occurred at 0800 on 21 December 2012 [sic] in Bethesda, MD;

(3) block 10a(4) (How Sustained), the entry: "[SM] took a combination of heroin and prescription medication, causing death";

(4) block 10b (Medical Diagnosis), the entry: "Death due to multiple drug toxicity";

(5) block 10c (Present for Duty), an "X" was placed in the "Yes" box;

(6) block 10e (Was Intentional Misconduct or Neglect the Proximate Cause), an "X" was placed in the "Yes" box;

(7) block 10f (Was Individual Mentally Sound), an "X" was placed in the "Yes" box; and

(8) block 11 (Findings), the investigating officer marked "Not in Line of Duty – Due to Own Misconduct."

b. The appointing authority approved the findings with his signature on 14 January 2013. The reviewing authority, the same as the final authority, approved the findings on an unspecified date.

11. The DD Form 1300 – Final Report, 20 May 2013, documented the SM's death on 21 November 2012 as the result of multiple drug toxicity per his death certificate. His duty status was noted as "active duty – off duty."

12. The AHRC memorandum from the Casualty and Mortuary Affairs Operations Division Director (LOD Determination), 20 September 2013, determined the SM, who

died in Bethesda, MD, on 21 November 2012 as the result of drug toxicity, was "Not in Line of Duty – Due to Own Misconduct" at the time of his death.

13. The applicant petitioned the ABCMR to correct her husband's records to reverse his LD determination finding of "Not in Line of Duty – Due to Own Misconduct" to read "In Line of Duty." On 28 October 2021 in ABCMR Docket Number AR20190004373, the Board determined the evidence presented warranted a recommendation for relief, thus finding the SM's LD determination should be changed to "In Line of Duty."

14. The AHRC Casualty and Mortuary Affairs Operations Division letter, 21 March 2022, informed the applicant the ABCMR recommended changing the SM's LD determination from "Not in Line of Duty – Due to Own Misconduct" to "In Line of Duty."

15. The applicant additionally provided two DD Forms 2656-7, 10 December 2023, again verifying her and her son's eligibility for the SBP annuity as the deceased SM's surviving spouse and surviving child. These documents were accompanied with the necessary documents for establishment of financial payments to her family.

16. The Department of the Army Office of the Deputy of Chief of Staff, G-1, memorandum from the Army Retirement Services Director (Advisory Opinion – (SM) (Deceased), 27 February 2024, 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 LD 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 surviving children.

d. The applicant's spouse, who died on active duty prior to 1 January 2023 and after receiving their SBP counseling, requested transfer of the SBP annuity to their child on 10 December 2012.

e. The LD investigation originally determined the SM's death as "Not in Line of Duty – Due to Own Misconduct." As a result, the optional child-only SBP was not elected by Secretary of the Army's the delegated authority.

f. The ABCMR recommended changing the finding of "Not In Line of Duty – Due to Own Misconduct" to "In Line of Duty" (Reference Docket Number AR20190004373).

g. The corrected LD determination was published on 21 March 2022.

h. In order to make an informed decision, the applicant waited to pursue the optional child-only original election until she knew whether the VA would change their denial of the DIC based on the overturned LD determination.

i. If the LD investigation were originally found to be "in Line of Duty" and the packet sent to the Army SBP Board when the applicant had originally made the decision to request the optional child-only SBP election prior to 1 January 2023, the Army Retirement Services Director 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 SM's date of death until 31 December 2022.

j. After careful review and in the interest of fairness, the Army Retirement Services Director supports the applicant's request to transfer the SBP annuity to child-only coverage effective the date of the SM's death until 31 December 2022, and to revert to the eligible surviving spouse effective 1 January 2023.

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 Board carefully considered the former servicemember'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, former SM's available military records, the Board determined the applicant is requesting correction of her deceased spouse records who passed away in the line of duty while on active duty. The Board found in the interest of fairness and to correct an error that prevents any injustice, relief is appropriate to reflect the deceased husband's Survivor Benefit Plan (SBP) election as "Child(ren)-Only" coverage. As such, the Board granted relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

■	■	■	GRANT FULL RELIEF
:	:	:	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 former servicemember Survivor Benefit Plan (SBP) election as "Child(ren)-Only" coverage.

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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)(2)(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 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.

3. The Defense Finance and Accounting Service website: www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-SSIA/ provides guidance relating to the SBP for spouses and DIC benefits from the VA.

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) 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 was informed by the VA that a spouse annuitant is receiving the DIC, the law required that DFAS deduct one-third of the amount of the 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 was 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 was completely eliminated. Eligible surviving spouses will receive their full SBP payments and their full DIC payments.

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

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

b. 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, the 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 the SBP (if the gross amount of SBP is less than the maximum amount) until 31 December 2022. The 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 the 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 the SSIA.

//NOTHING FOLLOWS//