

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 27 November 2024

DOCKET NUMBER: AR20240002744

APPLICANT REQUESTS:

- correction of her deceased ex-husband's records to show she made a deemed election for "Former Spouse" Survivor Benefit Plan (SBP) coverage within 1 year of their divorce
- a personal appearance hearing before the Board

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)
- Self-authored Letter, undated
- Facsimile Correspondence with Defense Finance and Accounting Service (DFAS), 10 March 2011, with attachments –
 - Service Member's (SM) Retiree Account Statement (RAS), 29 January 2011
 - DFAS Retired and Annuitant Newsletter, February 2011
 - SM's Letter, 10 March 2011
 - Photocopy of Applicant's Identification Card (obverse illegible)
- Circuit Court Judgment of Absolute Divorce, 1 June 2012, with attachments –
 - Mediation Agreement, 10 May 2012
 - Consent Order, 30 May 2012
- SM's Certificate of Death, 11 October 2019

FACTS:

1. The applicant, the former spouse of the retired SM, states their divorce decree named her as the beneficiary of her ex-husband's SBP. Her ex-husband did not change his SBP election to "Former Spouse" coverage for unknown reasons.

a. She did all that was required per the military record updates. She called the Army on 10 March 2011 prior to filing for divorce, reviewed her records, and requested corrections. The survivor benefits were entered into their divorce decree. She was never told she should be listed as "Former Spouse" to receive his SBP annuity.

b. When they were leaving the military, they were advised that there was a 1-year window to cancel survivor benefits. After that, the SM can't terminate the SBP or change the beneficiary.

c. Her ex-husband remarried and enrolled his new wife and her children in the Defense Enrollment Eligibility Reporting System (DEERS), allowing them to receive benefits. She was required to turn in her dependent identification card, She was disenrolled from DEERS and did not have TRICARE health coverage. She had to obtain other medical insurance. Her ex-husband was allowed to remove his minor biological son from insurance coverage.

2. The SM enlisted in the Regular Army on 12 August 1980.

3. The SM's military records do not contain his and the applicant's marriage certificate and the applicant did not provide a copy.

4. 5th Personnel Service Branch, Fort Polk, Orders 245-0002, 2 September 1999, retired the SM effective 30 September 2000 and placed him on the Retired List in the rank of sergeant first class effective 1 October 2000.

5. The SM's DD Form 2656 (Data for Payment of Retired Personnel), 31 May 2000, shows in:

a. Section I (Pay Identification), block 3 (Retirement/Transfer Date), he entered "1 October 2000";

b. Section VI (Federal Income Tax Withholding Information), block 14 (Marital Status), he marked "Married";

c. Section VIII (Dependency Information):

- block 22 (Spouse) – "V____ M. G____"
- block 23 (Date of Marriage) – "21 October 1995"
- block 25 (Dependent Children) – he listed seven children with birthdates in 1982, 1983, 1986, 1984, 1988, 1991, and 1994

d. Section IX (SBP Election), block 26 (Beneficiary Categories), he checked the boxes for "I Elect Coverage for Spouse Only" and "I Do Have Dependent Children";

e. Section IX, block 27, he checked the box for "I Elect Coverage to Be Based on Full Gross Pay without Supplemental SBP"; and

f. Section XII (Certification):

- block 32 (Member) – he signed and dated the form on 31 May 2000
- block 43 (Witness) – a Retirement Services Officer witnessed, signed, and dated the form on 31 May 2000

6. The Headquarters, Joint Readiness Training Center and Fort Polk, Retirement Services, letter to the applicant, 7 June 2000, notified her of the SM's retirement and that he elected full SBP coverage for "Spouse."

7. The SM retired effective 30 September 2000. His DD Form 214 shows he completed 20 years and 14 days of net active service during this period. The applicant was listed as his nearest relative at the time of his retirement.

8. The SM corresponded with DFAS on 10 March 2011 to correct the applicant's date of birth shown on his RAS. The RAS noted the SM's SBP coverage was "Spouse Only" and he had paid 124 months towards his 360 months of paid SBP premiums.

9. The Circuit Court Judgment of Absolute Divorce, 1 June 2012, with handwritten mediation agreement, 10 May 2012, and Consent Order, 30 May 2012, state the SM would maintain survivor benefits for the applicant.

10. There is no evidence showing the SM submitted a DD Form 2656-6 (SBP Election Change Certificate) within 1 year of their divorce or the applicant submitted a DD Form 2656-10 (SBP/Reserve Component SBP Request for Deemed Election) within 1 year of their divorce.

11. The SM's death certificate, 11 October 2019, shows he died on 11 October 2019 at age 58. He was married at the time of his death. His surviving spouse is shown as N____ R____ G____.

12. The DFAS letter to the applicant, 30 January 2020, states she is not entitled to an SBP annuity because she did not submit a deemed election within 1 year of the divorce.

13. Counsel's letter to the Defense Office of Hearing and Appeals (DOHA), 25 February 2020, requested an extension to file an appeal on behalf of the applicant.

14. The DFAS letter to counsel, 15 June 2020, granted a 30-day extension until 15 July 2020. After that date, DFAS could not accept any further appeals. Pursuant to DOHA regulations, no further extensions could be granted.

15. The DFAS letter to the applicant's congressional representative, 29 August 2023, noted the applicant's appeal was untimely because she did not appeal within 30 days of the denial letter. DFAS could not accept any further appeals and the decision to deny her claim constituted their final action.

16. Email correspondence from the DFAS Board for Correction of Military Records/ Congressional Team Lead (Reply: SBP Information (Applicant)), 23 October 2024, notes the applicant's SBP coverage remains "Spouse Only" since his retirement on 1 October 2000. DFAS provided the following documentation:

a. the Headquarters, Joint Readiness Training Center and Fort Polk, Retirement Services, letter, 7 June 2000, described above;

b. the automated version of the SM's DD Form 2656, described above, with a certified mail receipt, 6 December 2000;

c. the DFAS letter, 30 January 2020, described above;

d. counsel's letter to DOHA, 25 February 2020, described above;

e. the DOHA letter 15 June 2020, described above; and

f. the DFAS letter to the applicant's congressional representative, 29 August 2023, described above.

BOARD DISCUSSION:

1. After reviewing the application, all supporting documents, and the evidence found within the SM's military records, the Board found that relief was not 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 request and former SM's available military records, the Board determined the former SM's record is absent evidence that he elected former spouse survivor benefit plan (SBP) coverage as required by their divorce decree.

2. The Board found no evidence and the applicant did not provide sufficient evidence to reflect her former spouse made the election or deemed an election within one year of their divorce as required by statute and regulation. The Board noted the former SM had remarried prior to his death in October 2019 and the record shows his current spouse is currently receiving and continues to receive the SBP annuity payments as the surviving spouse. The Board agreed the applicant's request would have an adverse impact on the surviving spouse by depriving her of the SBP annuity payments as his spouse. Based

on public law, the surviving spouse and the former spouse cannot receive the annuity at the same time. Based on this, the Board denied relief.

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.

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 the policies and procedures for correction of military records by the Secretary of the Army acting through the Army Board for Correction of Military Records (ABCMR). The ABCMR considers individual applications that are properly brought before it. The ABCMR will decide cases on the evidence of record; it is not an investigative body. The Board 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. The ABCMR members will 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 may, in its discretion, hold a hearing. Applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

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. Elections are made by category, not by name. An election, once made, was irrevocable except under very specific circumstances.

3. Public Law 97-252, the Uniformed Services Former Spouses Protection Act (USFSPA), enacted 8 September 1982, established SBP for former military spouses. This law also decreed that State courts could treat military retired pay as community property in divorce cases if they so choose. It established procedures by which a former spouse could receive all or a portion of that court settlement as a direct payment from the service finance center. The USFSPA contains strict jurisdictional requirements. The State court must have personal jurisdiction over the service member by virtue of the member's residence in the State (other than pursuant to military orders), domicile in the State, or consent.

4. Title 10, U.S. Code, section 1448(b)(3), incorporates the provisions of the USFSPA relating to the SBP. It permits a person to elect to provide an annuity to a former spouse. Any such election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date of the decree of divorce. The member must disclose whether the election is being made pursuant to the requirements of a court order or pursuant to a written agreement previously entered into voluntarily by the member as part of a proceeding of divorce.

5. 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//