

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 24 July 2024

DOCKET NUMBER: AR20240002797

APPLICANT REQUESTS:

- in effect, correction of his records to show he declined participation in the Survivor Benefit Plan (SBP) with spousal concurrence in connection with his permanent disability retirement
- 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)
- DD Form 2656 (Data for Payment of Retired Personnel), 17 November 2023
- DD Form 2656, 22 January 2024
- Jurat (Spousal Concurrence Affidavit), 22 January 2024

FACTS:

1. The applicant states he had limited time to complete the DD Form 2656 and he and his wife were not in a position to make an election together and have the form notarized by the suspense date provided by the command. He is rated 100-percent disabled by the Department of Veterans Affairs (VA) and receiving VA compensation in lieu of retired pay. His command never provided retirement briefings or any information regarding the SBP to allow him to make an educated election.
2. His records show he enlisted in the U.S. Army Reserve on 11 May 2002.
3. His records show he and A\_\_\_\_ C. M\_\_\_\_ married on 27 December 2020.
4. The DA Form 199 (Informal Physical Evaluation Board (PEB) Proceedings), 6 November 2023, shows a PEB convened at Joint Base San Antonio, TX, on 25 October 2023 to determine his medical fitness for continued service in the Army. The PEB determined he was physically unfit and recommended a disability rating of 80 percent and his placement on the Permanent Disability Retired List. He concurred and waived a formal hearing of his case on 29 October 2023.

5. U.S. Army Physical Disability Agency Orders D-310-23, 6 November 2023, retired him by reason of permanent physical disability effective 6 December 2023 with a disability rating of 80 percent and placed him on the Retired List in the grade of sergeant first class effective 7 December 2023.

6. Department of the Army Orders 0006501392, 7 November 2023, placed him on the Permanent Disability Retired List in the rank of sergeant first class effective 6 December 2023.

7. He did not complete 20 years of qualifying Reserve Component service and he was not issued a Notification of Eligibility for Retired Pay at Age 60. However, he retired by reason of permanent physical disability effective 6 December 2023 and was therefore immediately eligible for the standard SBP.

8. His DD Form 2656, 17 November 2023, shows in:

a. Part I (Retired Pay Information), block 4 (Retirement/Transfer Date), he entered 6 December 2023;

b. Part III (SBP), Section IX (Dependency Information), block 31 (Spouse), he entered A\_\_\_\_ C. M\_\_\_\_ with a marriage date of 27 December 2020;

c. Part III, Section X (SBP Election (If you make no election, maximum coverage will be established for your spouse and/or eligible dependent children.)), block 35 (Reserve Component Only (This section refers to the decision you previously made on the DD Form 2656-5 (Reserve Component SBP Election Certificate) when you were notified of eligibility to retire, in most cases you do not have the right to make a new election on this form), he placed an "X" in the box by the statement: "Option C – Previously elected or defaulted to immediate RC-SBP [Reserve Component SBP] Coverage";

d. Part IV (Certification), Section XI (Certification), block 41 (Member), he signed the form on 17 November 2023 and his signature was witnessed and signed on the same date in Grass Valley, CA.

9. He provided another DD Form 2656, 22 January 2024, showing in:

a. Part I (Retired Pay Information), block 4 (Retirement/Transfer Date), he entered 6 December 2023;

b. Part III (SBP), Section IX (Dependency Information), block 31 (Spouse), he entered A\_\_\_\_ C. M\_\_\_\_ with a marriage date of 27 December 2020;

c. Part III, Section X (SBP Election (If you make no election, maximum coverage will be established for your spouse and/or eligible dependent children.)), block 35 (Reserve Component Only (This section refers to the decision you previously made on the DD Form 2656-5 (Reserve Component SBP Election Certificate) when you were notified of eligibility to retire, in most cases you do not have the right to make a new election on this form), he placed an "X" in the box by the statement: "Option A – Previously declined to make an election until eligible to receive retired pay";

d. Part III, Section X, block 36 (SBP Beneficiary Categories), he placed an "X" in the box by the statement: "I elect not to participate in SBP";

e. Part IV (Certification), Section XI (Certification), block 41 (Member), he signed the form on 22 January 2024 and his signature was witnessed and signed on the same date in Carmichael, CA; and

f. Part V (Spouse SBP Concurrence), block 43 (Spouse), his spouse signed the form on 22 January 2024 and attached a jurat stating her signature was witnessed by a notary public on the same date.

10. The email correspondence from the Defense Finance and Accounting Service (DFAS) Board for Correction of Military Records/Congressional Lead (Reply: Army Review Boards Agency Assistance), 2 July 2024, notes the applicant currently has "Spouse Only" coverage. The DFAS database contains his original DD Form 2656, 17 November 2023, showing he elected coverage under Option C.

#### 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 and available military records the Board determined the applicant incorrectly indicated in item 35 on the DD Form 2656 that he had previously made a reserve component (RC) election, specifically option C-immediate coverage. The Board noted, since the applicant did not have 20 qualifying years of service for retirement and never received a notice of retirement eligibility, item 35 should have been left blank.

2. The Board determined based on the evidence, the applicant's enrollment in SBP is an injustice under these circumstances. The Board agreed the record should be corrected to show the second DD Form 2656 (with the spousal concurrence) was submitted to the appropriate offices prior to retirement. The Board noted, the applicant

should be notified he can withdraw from SBP two (2) years after his retirement. However, he would still owe the premiums for all the months until that time. Based on this, the Board granted relief.

3. The applicant's request for a personal appearance hearing was carefully considered. In this case, the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.

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 the evidence presented is sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of Army records of the individual concerned be corrected to show the applicant submitted his DD Form 2656 with spousal concurrence to the appropriate offices prior to his retirement.

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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. 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 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 evidence. The ABCMR may, in its discretion, hold a hearing (sometimes referred to as an evidentiary hearing or an administrative hearing) or request additional evidence or opinions. 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. An election, once made, was irrevocable except in certain circumstances. 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. Title 10, U.S. Code, section 1448, requires notice to a spouse if a member elected not to participate in the SBP. The statute also provided for automatic enrollment for spouse coverage at the full base amount unless a member affirmatively declined to participate in the SBP prior to receiving retired pay.
4. Public Law 99-145, enacted 8 November 1985 but effective 1 March 1986, required written concurrence by the spouse in a member's decision to decline the SBP or elect spouse coverage at less than the full base amount.
5. 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. No premiums will be refunded to those who opt to disenroll. 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.
6. Department of Defense Instruction 1332.42 (Survivor Annuity Program Administration) states a member may elect to discontinue participation by submitting a 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.

7. The DFAS website provides that retirees who meet one of the following two criteria are eligible to discontinue participation in the SBP: (1) the retiree has had a service-connected disability rated by the VA as totally disabled for a continuous period of 10 or more years; or (2) the retiree has had a total disability rating from the VA for at least 5 continuous years immediately following the last date of discharge or release from active duty.

a. Discontinuing SBP coverage due to qualifying VA disability (also referred to as withdrawing from SBP coverage due to VA disability) is different than terminating SBP coverage between the 25th and 36th month of retirement.

b. A request to discontinue SBP participation requires the written consent of the beneficiary or beneficiaries. Consent for a dependent child may be given by a parent, stepparent, foster parent, or guardian.

//NOTHING FOLLOWS//