

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 18 December 2024

DOCKET NUMBER: AR20240002853

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
- 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)
- Ask MyPay – Online Customer Service Printout
- Department of Veterans Affairs (VA) Rating Decision, 31 March 2015
- Defense Finance and Accounting Service (DFAS)-Cleveland (DFAS-CL) Form 1077 (SBP Withdrawal Consent), 19 December 2023
- SBP and Reserve Component Survivor Benefit Plan (RCSBP) Open Season Election to Discontinue Participation, 26 December 2023
- DFAS U.S. Military Retired Pay Letter, 6 January 2024
- DFAS Letter, 2 February 2024, with Enclosures –
 - DFAS U.S. Military Retired Pay Letter, undated
 - SBP Withdrawal Fact Sheet
 - DFAS-CL Form 1077 (SBP Withdrawal Consent), blank
 - Letter to DFAS, undated

FACTS:

1. The applicant states:

a. He was medically retired and no one reviewed any of the paperwork with him at that time. Unfortunately, he was automatically enrolled in the SBP program. Immediately after finding out, he called DFAS and was told a ticket would be created since he was within the 30-day time frame for withdrawal. He waited yet nothing happened. He called DFAS again and was instructed to submit a DFAS-CL Form 1077. He believes he is

eligible for VA Dependency and Indemnity Compensation, which is better than the SBP program. After numerous inquiries to DFAS with no resolution, he petitioned his congressional representative for assistance.

b. He was later informed he could submit his termination request after 24 months from his retirement date. He was also informed he could submit an application to the Army Board for Correction of Military Records. He notes DFAS's claim of not having been rated as 100-percent disabled is incorrect; has been unemployable for over 10 years and he sent DFAS paperwork to that effect. To this point he has wasted his time and just wants to be disenrolled from the SBP and his paid premiums refunded.

2. His marriage certificate shows he and A____ M____ D____ married on 1 April 2008.

3. Following enlisted service in the California Army National Guard (CAARNG), he was appointed as a Reserve commissioned officer of the Army in the CAARNG in the rank/grade of second lieutenant/O-1 and executed his oath of office on 14 May 2009.

4. The VA Rating Decision, 31 March 2015, notes he has service-connected disabilities and he was entitled to individual unemployability effective 31 July 2014 because he was unable to secure or follow a substantially gainful occupation as a result of his service-connected disabilities.

5. The Superior Court Request for Judgment, Judgment of Dissolution of Marriage, and Notice of Entry of Judgment, shows he and A____ D____-S____ were granted a divorce on 5 October 2011. (Note: The court document does not contain language regarding SBP coverage.)

6. He was promoted to the rank/grade of major/O-4 effective 4 October 2021.

7. His DA Form 199-1 (Formal Physical Evaluation Board (PEB) Proceedings), 17 July 2023, shows a formal PEB convened at Joint Base San Antonio, TX, on 22 June 2023 to consider his medical condition of post-traumatic stress disorder. The PEB found him physically unfit and recommended a 100-percent disability rating and permanent disability retirement. He did not concur with the findings and recommendation and did not request reconsideration of his VA findings on 10 July 2023. He indicated his written appeal was attached. (Note: His records are void of a written appeal and he did not provide one for review.)

8. CAARNG Orders 0005493646.00, 27 July 2023, transferred him to the Permanent Disability Retired List by reason of mandatory retirement effective 17 August 2023.

9. National Guard Bureau Special Orders Number 244-AR, 1 August 2023, transferred him to the U.S. Army Reserve Control Group (Retired Reserve) and withdrew his federal recognition effective 16 August 2023.

10. His National Guard Bureau Form 22 (National Guard Report of Separation and Record of Service) shows he completed 15 years, 5 months, and 20 days of total service for retired pay effective 16 August 2023.

11. His DD Form 2656 (Data for Payment of Retired Personnel), 16 August 2023, shows in:

a. Part I (Retired Pay Information), Section I (Pay Identification), block 4 (Retirement/Transfer Date), he entered "16 August 2023";

b. Part III (SBP), Section IX (Dependency Information), block 31 (Spouse), he entered the name of his spouse as "T____ L. M____-D____" with a marriage date of 18 August 2016;

c. Part III (SBP), Section IX, block 34 (Dependent Children), he listed K____ L. S____, a daughter with a birthdate in 2016, and N____ S. S____, a daughter with a birthdate in 2021;

d. 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), block 36 (SBP Beneficiary Categories), and block 37 (SBP Level of Coverage), are missing election options (Note: He was immediately eligible for the standard SBP);

e. Part IV (Certification), Section XI (Certification), block 41 (Member), he digitally signed the form on 16 August 2023 and his signature was neither witnessed nor signed; and

f. Part V (Spouse SBP Concurrence) is void of any name or signature of his spouse or a notary public witness as required.

12. He retired by reason of permanent physical disability effective 16 August 2023. He was immediately eligible for the standard SBP.

13. His DFAS-CL Form 1077, 19 December 2023, shows he and his current wife, T____ M____-D____, requested withdrawal from the SBP and both signed the form on 19 December 2023.

14. His SBP and RCSBP Open Season Election to Discontinue Participation, 26 December 2023, shows he indicated he currently had "Spouse and Child" SBP coverage and requested to discontinue participation in the SBP with spousal concurrence. He and his current spouse, T____ A. M____-D____, both signed the document on 26 December 2023 and their signatures were witnessed by a notary public on the same date.

15. The DFAS letter, 6 January 2024, notified him that DFAS received his enrollment request for the SBP Open Season. After review, DFAS noted he was not eligible to enroll as he was already enrolled in the SBP and was therefore not eligible to change his coverage during the SBP Open Season. DFAS further explained that the SBP Open Season allows eligible members and former members who were enrolled in the SBP or RCSBP as of 22 December 2022 to permanently discontinue their SBP coverage.

16. The DFAS letter, 2 February 2024, responded to his congressional representative regarding the applicant's request pertaining to his SBP election. The Chief of Staff, Operations, stated:

[Applicant] has a retirement date of August 17, 2023.

We received [Applicant's] Data for Payment of Retired Personnel (DD Form 2656) on August 19, 2023, in which was missing an election for SBP coverage in section 36. However, because the document was missing spousal concurrence, it made the election request invalid. Enclosed is a copy.

Therefore, we placed [Applicant's] SBP account into Automatic spouse and child coverage and began deducting premiums in the current amount of \$396.98 from his military retired pay.

[Applicant] indicated in his inquiry a desire to use the SBP Open Season to disenroll his SBP coverage.

The SBP Open Season allowed for **retirees receiving retired pay, eligible members, or former members awaiting retired pay**, who are **currently not enrolled** in SBP or Reserve Component Survivor Benefit Plan (RC-SBP) to **enroll**. For a member who enrolls during the SBP Open Season, the law generally requires that the member will be responsible to pay retroactive SBP premium costs that would have been paid if the member had enrolled at retirement (or enrolled at another earlier date, depending on the member's family circumstances).

The SBP Open Season also allowed eligible members and former members who are **currently enrolled by December 22, 2022**, in either SBP or RC-SBP to

permanently discontinue their SBP coverage. The law generally requires the covered beneficiaries to concur **in writing** with the election to discontinue. Previously paid premiums will not be refunded.

[Applicant's] request did not meet the requirements for the SBP Open Season NDAA [National Defense Authorization Act] 2023 due to him being enrolled after the cutoff date of December 22, 2022.

[Applicant] can find more information about the SBP Open Season at SBP Open Season NDAA 2023 at www.dfas.mil. We will keep retirees notified of SBP Open Season enrollment periods through newsletters, social networks, and our web site.

However, there are some options available to [Applicant]. Public Law 105-85, Section 641, allows a military retiree to voluntarily discontinue their participation in SBP between the 25th and 36th month of their retirement. Enclosed is a Survivor Benefit Plan (SBP) Termination Request (DD Form 2656-2) that he may complete and mail along with any supporting documentation, to the appropriate address listed on the form. This form should be sent when he is at his 25th month of retirement.

[Applicant] may petition the Board for the Correction of Military Records (BCMR) to review his SBP account. We do not have the authority to change his military retired pay records without authorization from the BCMR.

Enclosed is an Application for Correction of Military Record (Form DD 149) which he may complete and send, along with any supporting documentation, to the appropriate address listed on the form.

17. The DFAS U.S. Military Retired Pay letter, undated, notified him of the process to withdraw from the SBP due to a qualifying VA disability, and provided a fact sheet with important information regarding withdrawing from the SBP. It included an SBP Withdrawal Fact Sheet and a blank DFAS-CL Form 1077 for his possible use (see attachment for details).

18. He provided the following documents for consideration:

a. an undated self-authored letter (presumed to be to DFAS) stating he never asked to be enrolled in the SBP and asking to be disenrolled from SBP effective when he received his first retired pay on 5 October (2023). He believes he asked to be disenrolled within 30 days, which was never acted on, and he submitted a DFAS-CL Form 1077 to withdraw from the SBP based on guidance he received. He notes he has

a 100-percent disability rating and has been unemployable since 14 August 2023 (see statement for details); and

b. his Ask MyPay – Online Customer Service printout showing his interactions with DFAS.

19. The email correspondence from the DFAS Board for Correction of Military Records/Congressional Lead (Reply: Army Review Boards Agency Assistance), 19 November 2024, notes the applicant currently has "Spouse and Child(ren)" SBP coverage. The applicant requested assistance from his congressional representative regarding his VA disability rating in order to disenroll from the SBP. DFAS notes the applicant did not receive a 100-percent VA disability rating until 1 October 2020. DFAS noted he was determined to be individual unemployable (IU) as of 1 September 2013, which gave him 100 percent compensation from the VA, but that is not considered 100-percent disabled. Therefore, he cannot withdraw from the SBP due to disability at this time. The soonest he could discontinue (with spousal concurrence) would be within 25-36 months of his retirement date of 17 August 2023 by submitting a DD Form 2656-2 (SBP Termination Request). The DFAS database contains:

- a. the applicant's DD Form 2656, 16 August 2023, described above;
- b. the applicant's SBP and RCSBP Open Season Election to Discontinue Participation, 26 December 2023, described above;
- c. the applicant's DFAS-CL Form 1077, 12 October 2023, showing he requested withdrawal from the SBP. (Note: His spouse did not sign this form).
- d. an email from the applicant's congressional representative to DFAS requesting stoppage of his SBP participation;
- e. the DFAS letter, 6 January 2024, described above;
- f. the DFAS letter, 18 March 2024, responding to his congressional representative regarding the the applicant's request pertaining to his SBP election wherein the Chief of Staff, Operations, stated:

[Applicant] retired on August 17, 2023. We established [Applicant's] military retired pay account with automatic SBP Spouse and Child coverage, as explained in our letter to you dated February 2, 2024.

A retiree may withdraw from SBP if they are rated by the Department of Veterans Affairs (DVA) as totally disabled for a continuous period of 10 or more years; or if they have a total disability rating from the DVA for at least

five continuous years immediately following the last date of discharge or release from active duty.

[Applicant] does not qualify for withdrawal under this condition.

When the DVA awards Individual Unemployability (IU), it allows a veteran to be paid at the 100 percent rate, even though their actual disability rating is less than 100 percent.

The DVA uses the IU designation when a member's disability rating is 60 percent or greater, but less than 100 percent. They pay the member at the 100 percent rate while assigned the IU designation. When all of the member's service-connected disability codes equal 100 percent, IU is not a disability or a diagnosis.

[Applicant] was determined by the DVA to have Individual Unemployability effective September 1, 2013, which pays him compensation at the 100 percent rate. He was not considered to have a 100 percent disability rating at that time.

[Applicant's] DVA disability rating is 100 percent effective October 1, 2020. Because he has not been rated as 100 percent disabled for 10 years, he cannot withdraw from SBP under this condition.

If [Applicant] questions his disability rating in relation to his IU, he should contact the DVA directly at 1-800-827-1000.

However, there are some options available to [Applicant], Public Law 105-85, Section 641, allows a military retiree to voluntarily discontinue their participation in SBP between the 25th and 36th month of their retirement. We previously enclosed a Survivor Benefit Plan (SBP) Termination Request (DD Form 2656-2) that he may complete and mail along with any supporting documentation, to the appropriate address listed on the form. This form should be sent to us when he is at his 25th month of retirement.

[Applicant] may petition the Board for the Correction of Military Records (BCMR) to correct his record to show that he declined to participate in SBP at the time of retirement. We do not have the authority to change his military retired pay records without authorization from the BCMR.

We previously enclosed an Application for Correction of Military Record (Form DD 149) which he may complete and send, along with any supporting documentation, to the appropriate address listed on the form.

We trust this information will be of assistance to you in your reply to [Applicant]. If he has further questions, he may contact one of our customer care representatives at 1-800-321-1080, between 8 a.m. and 5 p.m., Eastern Time, Monday through Friday, write to Defense Finance and Accounting Service, U.S. Military Retired Pay, 8899 East 56th Street, Indianapolis, IN, 46249-1300, or fax correspondence to 1-800-469-6559. Please visit our website at www.dfas.mil/retiredmilitary.

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 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 petition and available military records, the Board found insufficient evidence to support correction of the applicant's military records to reflect that he declined participation in the Survivor Benefit Plan (SBP) with spousal concurrence in connection with his permanent disability retirement, and to reimburse SBP premiums already paid.

2. The Board noted the applicant was immediately eligible for standard SBP coverage upon retirement. His DD Form 2656, dated 16 August 2023, did not include a valid SBP election. Specifically: Section X (SBP Election) was incomplete, Section V (Spouse Concurrence) lacked the required spousal signature and notary witness, and the form was digitally signed by the applicant but not witnessed. The Board found due to the absence of a valid SBP election and spousal concurrence, DFAS properly defaulted the applicant to automatic "Spouse and Child" SBP coverage in accordance with governing policy. Premium deductions began accordingly. Evidence in the record show the applicant submitted DFAS-CL Form 1077 on 19 December 2023, signed by both himself and his spouse, requesting withdrawal from SBP. However, DFAS denied the request, citing ineligibility due to enrollment after the SBP Open Season cutoff date of 22 December 2022.

3. The Board agreed, the applicant's record is absent evidence that he properly declined SBP coverage with spousal concurrence at the time of retirement. The DD Form 2656 submitted was incomplete and invalid. DFAS acted in accordance with law and regulation by establishing automatic SBP coverage. The applicant's later attempts to disenroll were not eligible under the SBP Open Season provisions, and his VA disability status does not meet the criteria for withdrawal due to disability. Furthermore, reimbursement of premiums is not authorized under current law. SBP premiums are non-refundable once coverage is established, even if later discontinued.

Per Public Law 105-85, Section 641, the applicant may request SBP termination between the 25th and 36th month of retirement using DD Form 2656-2, with spousal concurrence. Therefore, the Board denied relief.

BOARD VOTE:

Mbr 1 Mbr 2 Mbr 3

:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XXX	XXX	XXX	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.

X //SIGNED//

CHAIRPERSON

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. 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.

2. Title 10, U.S. Code, section 1448, required 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.

3. 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.

4. Public Law 96-402, enacted 9 October 1990, provided that any person who has elected to participate in the SBP and who is suffering from a service-connected disability rated by the VA as totally disabling, and has suffered from such disability while so rated for a continuous period of 10 or more years (or, if so rated for a lesser period, has suffered from such disability while so rated for a continuous period of not less than 5 years from the date of such person's last discharge or release from active duty), may discontinue participation in the SBP by submitting a request to discontinue participation in the Plan to the Secretary concerned. Any such person's participation in the Plan shall be discontinued effective the first day of the first month following the month in which a request is received by the Secretary concerned.

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 for disenrollment. 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.

8. The National Defense Authorization Act for Fiscal Year 2023 included an SBP Open Season. The SBP Open Season began on 23 December 2022 and ended on 1 January 2024.

a. The SBP Open Season allowed retirees receiving retired pay, eligible members, or former members awaiting retired pay who were currently not enrolled in the SBP or RCSBP as of 22 December 2022 to enroll. For a member who enrolled during the SBP Open Season, the law generally required that the member would be responsible to pay retroactive SBP premium costs that would have been paid if the member had enrolled at retirement (or enrolled at another earlier date, depending on the member's family circumstances). For retirees receiving pay, enrollment requires paying the premiums plus interest for the period since the date they were first eligible to enroll, as well as the monthly premiums moving forward.

b. The SBP Open Season also allowed eligible members and former members who were currently enrolled in the SBP or RCSBP as of 22 December 2022 to permanently discontinue their SBP coverage. The law generally required the covered beneficiaries to concur in writing with the election to discontinue. Previously paid premiums would not be refunded.

//NOTHING FOLLOWS//