

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 3 December 2024

DOCKET NUMBER: AR20240005904

APPLICANT REQUESTS:

- reconsideration of her previous request for correction of her late husband's records to show he elected "Spouse and Child" Reserve Component Survivor Benefit Plan (RCSBP) coverage within 1 year marriage
- 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)
- Counsel's Memorandum (Request for Reconsideration of Prior Application for the Correction of Records – (Service Member (SM)), 8 February 2024
- Exhibit 1 – DD Form 214 (Certificate of Release or Discharge from Active Duty) for the Period Ending 18 April 2003
- Exhibit 2 – Joint Forces Headquarters, Maryland, Memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter), 3 January 2008
- Exhibit 3 – DD Form 2656-5 (RCSBP Election Certificate), 9 February 2008
- Exhibit 4 – Certificate of Marriage, 10 August 2012
- Exhibit 5 – Letter, 15 November 2023
- Exhibit 6 – SM's Last Will and Testament, 30 September 2017
- Exhibit 7 – SM's Certificate of Death, 5 December 2020
- Exhibit 8 – U.S. Army Human Resources Command (HRC) Letter, 18 February 2021
- Exhibit 9 – Previous DD Form 149, 29 March 2021
- Exhibit 10 – Army Board for Correction of Military Records (ABCMR) Docket Number AR20210013709, 2 December 2021
- Exhibit 11 – Email (Freedom of Information Act Request FA-23-0138 Follow Up), 6 July 2023
- Exhibit 12 – HRC Letter, 1 February 2024

FACTS:

1. Incorporated herein by reference are military records which were summarized in the previous consideration of the applicant's case by the ABCMR in Docket Number AR20210013709 on 2 December 2021.

2. The applicant, the surviving spouse of the deceased SM, defers to counsel.

3. Counsel states the SM's military service record should be updated to reflect that he elected RCSBP coverage for his wife and daughter within 1 year of the birth of his daughter as required by Public Law 95-397. In 2008, the SM was unmarried and he opted to defer his RCSBP election until he was 60 years old, a time at which he presumed he would be married with children. At the time of his unexpected passing in 2020, he was happily married with one daughter.

a. The error and injustice in this case stem from the Army's outright failure to inform the SM of the requirement to update his RCSBP election after marriage or birth of a child and, more broadly, the Army's failure to adequately inform unmarried retirees of the RCSBP elections and restrictions as it pertains to their unique situations.

b. If the SM was married in 2008 at the time of his RCSBP election, the Army would have automatically enrolled his spouse and child in the RCSBP (if he failed to make an election). Unmarried SMs are not provided the same protection for their prospective dependents. Pursuant to Public Law 95-397, if an unmarried SM retires and later acquires a dependent through marriage or childbirth, that SM must affirmatively opt into the RCSBP within a year of that qualifying event. Yet, the SM's Notification of Eligibility for Retired Pay at Age 60, 3 January 2008, fails to inform him of that requirement. It includes information that is entirely irrelevant to unmarried SMs and actually excludes information (i.e., the 1-year rule) that is vitally important to unmarried SMs wishing to pass on their retirement benefits to future dependents.

c. In rendering its previous denial, the ABCMR noted that the SM "would have easily been able to access information regarding his options upon remarrying [marrying] in 2012." Yet, that available option is of little value when the SM was never informed of the need to contact the Army upon marriage or the birth of his first child. It is meaningless that the SM could have clarified his options when based upon information previously provided from the Army, he clearly understood his only option to be enrolling his wife and daughter once he reached age 60. The evidence presented in this application illustrates that the forms: (1) collectively fail to mention that the SM was required to update his records within a year of marriage or otherwise obtaining a qualifying dependent and (2) lack sufficient warning for unmarried SMs that if you fail to update your dependents and you pass away prior to turning 60 years old, your spouse and

children may not receive your annuity. Both of these constitute substantial error and injustice in this case.

4. Following prior enlisted service in the Regular Army, the SM enlisted in the Army National Guard of the United States on 31 August 1990.

5. The Joint Forces Headquarters, MD, memorandum (Notification of Eligibility for Retired Pay at Age 60 (20-Year Letter), 3 January 2008, notified the SM that having completed the required years of service, he was eligible for retired pay upon application at age 60.

a. Paragraph 3 states:

Public Law 95-397, 30 September 1978, created the Reserve Components Survivor Benefit Plan (RCSBP), in which you are entitled to participate. RCSBP is your sole means of protecting your retired pay entitlement. NOTE: Public Law 106-398, 30 October 2000, requires that upon receipt of this Letter, a qualified Reserve Component member, who is married, will automatically be enrolled in the RCSBP under Option C, Spouse and Child(ren) coverage based on Full Retired Pay, UNLESS different coverage is selected within 90 days of receipt of this letter. Notarized spousal concurrence is required in order to decline full and immediate coverage for annuitants. FAILURE TO MEET THIS REQUIREMENT WILL RESULT IN THE RETENTION OF FULL COVERAGE FOR YOUR SPOUSE AND CHILD(REN). If you elect to remain covered under the automatic provision of Law you must provide this Command written correspondence (the enclosed DD Form 2656-5 (formally DD Form 1883 [Survivor Benefit Plan – Election Certificate]) is required) stating who you have designated as annuitant(s). The cost of this participation will commence upon your receipt of retired pay at age 60. Detailed information concerning RCSBP program and cost is enclosed. You must contact this Command for answers to specific individual questions.

b. The Survivor Benefit Summary and U.S. Army Reserve Personnel Center Pamphlet 135-2 (Handbook on Retirement Services for Army Reserve Component Personnel and their Families) were enclosed. (Note: the Survivor Benefit Summary and U.S. Army Reserve Personnel Center Pamphlet 135-2 are not available for review.)

6. The SM's DD Form 2656-5 (RCSBP Election Certificate) shows he indicated he was not married and had no dependent children. He elected "Option A – I decline to make an election until age 60." He signed the form on 9 February 2008 and his signature was witnessed the same day.

7. Headquarters, Maryland Army National Guard, Orders 116-111, 25 April 2008, honorably discharged the SM from the Army National Guard and assigned him to the Retired Reserve effective 31 March 2008.
8. The SM and the applicant married on 10 August 2012.
9. There is no evidence indicating the SM elected RCSBP "Spouse" coverage within 1 year of marriage.
10. The SM's last will and testament, 30 September 2015, lists the applicant as his spouse and the beneficiary of his residuary estate. The SM's will also mentions a daughter but does not specify her birthdate. The SM's will does not contain any language designating the applicant or his dependent daughter as his RCSBP beneficiary(ies).
11. The SM's death certificate shows he passed away on 5 December 2020 at 51 years of age. He was married to the applicant when he passed.
12. The SM died before becoming eligible to apply for retired pay.
13. The SM's National Guard Bureau Form 22 (National Guard Report of Separation and Record of Service), 14 December 2020, shows he completed 20 years, 3 months, and 22 days of qualifying service for retired pay and he was transferred to the Retired Reserve effective 31 March 2008.
14. On 18 February 2021, the Chief, Gray Area Retirements, HRC, notified the applicant that her request for a Survivor Benefit Plan (SBP) annuity based on the SM's service was denied. The letter states:

The Reserve Component Survivor Benefit Plan (RCSBP), established by Public Law 95-397, was to provide an annuity for the spouse and other eligible beneficiaries for Reserve Soldiers or former soldiers who have completed 20 years of qualifying service for retired pay at age 60. Upon your marriage [SM] had one year from that date to make an election change and submit it to this Command. Since your late spouse did not submit a Survivor Benefits Plan Election Change (DD Form 2656-6) designating you as the beneficiary; you are not eligible for an annuity.

If you disagree with our decision you may appeal to the board using the enclosed Application for Correction of Military Records (DD Form 149). The Army Board for Correction of Military Records (ABCMR) was established for the express purpose of considering the existence of error [or] injustice and to make appropriate recommendations for corrective actions.

15. The applicant's DD Form 149, 29 March 2021, shows she requested award of the SBP annuity.

16. On 2 December 2021 in Docket Number AR20210013709, the ABCMR denied the applicant's request for award of the SBP annuity based on the SM's service. The Board determined the evidence presented did not demonstrate the existence of a probable error or injustice and the overall merits of this case were insufficient as a basis for correction of the SM's records.

a. The Board majority noted that it appeared the SM had no eligible RCSBP beneficiaries when he received his notification of eligibility for retired pay at age 60. Because he had no eligible beneficiaries, he deferred his election until he applied for retired pay at age 60. The Board majority noted that detailed information concerning the RCSBP and its costs was enclosed with the SM's notification of eligibility for retired pay at age 60, and although the information he was provided is not available for review, the Board majority concluded the SM would have easily been able to access information regarding his options upon marrying in 2012. The Board majority determined there was insufficient evidence showing the SM attempted or intended to add his spouse as an RCSBP beneficiary after marriage. Based on a preponderance of the evidence, the Board majority found no evidence of error on the part of the Army in this case and denied the applicant's request.

b. The Board member in the minority found it likely that the SM was poorly informed of his options upon marrying, an event that occurred over 4 years after he received his notification of eligibility for retired pay at age 60, and his widow should not suffer the effects of any failure on the part of the Army to ensure the SM understood his options upon marrying. The Board member in the minority recommended correction of the SM's records to show he elected RCSBP "Spouse" coverage (Option C based on the full amount of his retired pay) within 1 year of his marriage to the applicant and to show his election was approved.

17. On 15 May 2023, A\_\_\_\_ N. B\_\_\_\_ submitted a Freedom of Information Act request on behalf of the applicant to the U.S. Army Reserve Command wherein she requested copies of the Survivor Benefit Summary and U.S. Army Reserve Personnel Center Pamphlet 135-2.

18. The applicant's letter, 15 November 2023, states she married the SM on 10 August 2012 and their daughter was born on 21 March 2017. During a discussion of estate planning, her husband informed her that upon reaching the age of retirement, he could elect to make her and their daughter beneficiaries of his military retirement. It was her husband's understanding that he would have to wait until age 60 to make her and their daughter beneficiaries since he was not married at the time of his military service. Her husband passed away due to unanticipated and unexpected complications associated

with coronavirus disease in 2020. When handling his affairs, she was informed that that she and her daughter were not entitled to an SBP annuity because her husband failed to add her and their daughter as his SBP beneficiaries within 1 year of marriage and childbirth. Her husband was not aware of the 1-year requirement.

19. On 1 February 2024, the HRC Freedom of Information Office provided documents to the applicant's counsel pertaining to her Freedom of Information Act request for copies of the Survivor Benefit Summary and U.S. Army Reserve Personnel Center Pamphlet 135-2, and noted the U.S. Army Reserve Personnel Center Pamphlet 135-2 is an obsolete publication and no longer available.

#### BOARD DISCUSSION:

1. The Board determined 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.

1. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was not warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered.

a. The applicant is the surviving spouse of a SM who received his 20-year letter in 2008 and transferred into the Retired Reserve. He was 38 years old and unmarried at the time. The SM's DD Form 2656-5 (RCSBP Election Certificate) shows he indicated he was not married and had no dependent children. He elected "Option A – I decline to make an election until age 60." He was transferred to the Retired Reserve effective 31 March 2008. The SM and the applicant married on 10 August 2012; however, there is no evidence indicating the SM elected RCSBP "spouse" coverage within 1 year of marriage.

b. The applicant and her attorney correctly note that neither the 20-year letter nor the DD Form 2656 inform Reserve Component service members of the ability and the method to add a spouse or child after the initial RCSBP election and prior to turning age 60. The SM married applicant in 2012 and had a one-year opportunity to change his election to include his new wife as beneficiary. He would also have had to choose between Option B (annuity starts paying to beneficiary when he would have turned 60 years old) or Option C (annuity starts immediately after his death regardless of age). There was no indication in the file that the SM took action or intended to take action to adjust his SBP election. He died unexpectedly in 2020 at age 51, before reaching retirement age. DFAS denied RCSBP to his widow. The Board found no error in this denial.



REFERENCES:

1. Army Regulation 135-180 (Retirement for Non-Regular Service) prescribes policies and procedures governing Non-Regular retirement. This regulation implements statutory authorities governing granting retired pay for Non-Regular (Reserve Component) service to Soldiers in the Army National Guard, Army National Guard of the United States, and U.S. Army Reserve.

a. To be eligible for retired pay at age 60, an individual need not have a military status at the time of application, but must have completed a minimum of 20 years of qualifying service. Reserve Component Soldiers who complete the eligibility requirements for receipt of retired pay will be notified in writing within 1 year after completion of the required service.

b. Soldiers who were issued a notification of eligibility for retired pay at age 60 after 1 December 1979 have been or will be furnished the RCSBP information and election certificate with their 20-year letter. All eligible personnel have 90 days from receipt of the 20-year letter to make their elections and return the form to the appropriate office.

c. It is the responsibility of all qualified individuals to submit their application for retired pay no earlier than 9 months and no later than 90 days prior to the date retired pay is to begin. Applications must be submitted on a DD Form 108 (Application for Retired Pay Benefits) and DD Form 2656 (Data for Payment of Retired Personnel). Soldiers and former Soldiers should contact their (former) military unit/regional personnel action center or State Adjutant General for assistance with obtaining required documentation.

d. Soldiers who elect Option B or C may provide a monthly annuity to their elected beneficiaries by law of up to 55 percent of the base amount minus an actuarial amount determined by the age of the beneficiary. The monthly cost of participation in the RCSBP will be withheld from the Soldier's monthly retired paycheck when retired pay begins.

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. Since its creation, it has been subjected to a number of substantial legislative changes.

3. Public Law 95-397, enacted 30 September 1978, established the RCSBP. The RCSBP provided a way for Reserve Component members, who qualified for Non-Regular (Reserve) retirement but were not yet age 60 and eligible to participate in

the SBP, to provide an annuity for their survivors should they die before reaching age 60. Three options were available:

- option A – elect to decline enrollment and choose at age 60 whether to start SBP participation
- option B – elect that a beneficiary receive an annuity if the member dies before age 60, but delay payment until the date of the member's 60th birthday
- option C – elect that a beneficiary receive an annuity immediately upon the member's death if before age 60

4. Title 10, U.S. Code, section 1448(a)(5), provides that a person who is not married and has no dependent child upon becoming eligible to participate in the SBP, but who later marries or acquires a dependent child, may elect to participate in the SBP. Such an election must be written, signed by the person making the election, and received by the Secretary concerned within 1 year after the date on which that person marries or acquires that dependent child. The Defense Finance and Accounting Service interprets the first part of Title 10, U.S. Code, section 1448(a)(5), to mean "who is not married or has no dependent child."

5. The Retired Reserve consists of all Reserve officers and enlisted personnel who are otherwise eligible for retired pay but have not reached age 60, who have not elected discharge and are not voluntary members of the Ready or Standby Reserve, and other retired Reservists under certain conditions.

//NOTHING FOLLOWS//