ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [redacted]

BOARD DATE: 28 March 2025

DOCKET NUMBER: AR20240006486

APPLICANT REQUESTS: correction of his Reserve Component Survivor Benefit Plan (RCSBP) to show he provided an annuity for his former spouse.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- Settlement Agreement and Final Judgement
- DD Form 93 (Record of Emergency Data)
- DD Form 2656-1 (SBP Election Statement for Former Spouse)
- DD For 2656 (Data for Payment of Retired Personnel)
- Letter from Defense Finance Accounting Service (DFAS)

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.

2. The applicant states he thought the correct paperwork was submitted. At the time he received his notice of eligibility (NOE), while in Afghanistan. Furthermore, he was not married to his current wife on 25 March 2010, and he cannot find any paperwork from that time period to indicate his step-daughter was a dependent. He does not believe his step-daughter was considered the “youngest child” listed, at the time. He was unaware that the SBP beneficiary was wrong until he got his first pay stub for his retirement pay. Upon applying for his retirement, he was required to complete a DD Form 2656, which required filling out a DD Form 2656-1 since he listed his ex-wife on the DD Form 2656.

3. The applicant provides the following documents:

a. Settlement Agreement and Final Judgement, 26 September 2008, states in pertinent part, he agrees to assign his ex-wife fifty percent of his total monthly benefits upon his retirement. He shall execute any documents necessary through DFAS to assign said interest to his ex-wife, including the forms necessary to elect the SBP.

b. SBP Election Statement for Former Spouse Coverage, 17 May 2022, shows in item 11 (Remarks) divorce decree states ex-wife gets SBP. He elected his former spouse as his SBP beneficiary. On 2 June 2022, he completed the Data for Payment of Retired Personnel, which shows the name of his current spouse, he elected immediate SBP coverage for his former spouse as named in item 40.

c. Letter from DFAS, 10 April 2024, states his SBP showed child only coverage. It further states, on or around 24 December 2009, he received an NOE of retired pay at age 60 where he needed to make an election for RCSBP coverage. If an election was not received, he would be automatically enrolled with his eligible beneficiaries, at the time of the 90 day date. Since he only had eligible children, as of 25 March 2010, child coverage was started for his stepchild who was the youngest listed, at that time. His former spouse election could not be honored.

4. The applicant's service record contains the following documents:

a. He had prior enlisted service in the Regular Army and the U.S. Army Reserve. On 3 May 2010, he took the oath of office as a Reserve Commissioned Officer.

b. On 24 December 2009, he was notified he had completed the required years of qualifying reserve service and was eligible for retired pay, on application, at age 60. He must complete his RCSBP election within 90 days of the date of the letter or he would be automatically enrolled under spouse and child(ren) coverage based on full retired pay.

c. On 1 July 2022, he was honorably transferred to the retired reserve and on 2 July 2022, he was honorably placed on the retired list. His service record is void of documentation showing his RCSBP coverage.

5. On 18 March 2025, DFAS responded to a request for information from ARBA, which reflects:

- Original Election: Child Full Effective 2 July 2022
- Reserve Component Option: 25 March 2010
- Current Election: Child, Full effective 1 July 2024

DFAS also states that the current annuitant listed is S- G- with a date of birth of 31 July 2002. DFAS was unable to bring up the election form showing the child only election. This should have been former spouse SBP since the applicant made the election prior to his retirement date.

6. On 10 March 2025, DFAS sent a follow-up email, which states, since at the time the applicant received his NOE he was married and elected child coverage, a spousal

concurrence would have been signed. If his spouse, at the time, signed off on a spousal concurrence, then all spouse(s)/former spouse(s) will be barred from coverage. DFAS does not have a copy of his notice of eligibility to verify if a spousal concurrence was signed off on.

7. The applicant's service record is void of information or documentation regarding his election or spousal concurrence for his RCSBP coverage.

BOARD DISCUSSION:

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. The Board found that the applicant was divorced from his former spouse in November 2008; the divorce agreement stipulated that the applicant provide Survivor Plan Benefits through the military to the former spouse. However, in December 2009, when the applicant received his Notification of Eligibility for Retired Pay at Age 60 (NOE), he did not make an SBP election within 90 days for former spouse; therefore, he was automatically enrolled in child-only coverage. Although the Board notes that the applicant requested to enroll his former spouse after the 90-day period, DFAS notified the applicant that he was not eligible to enroll his former spouse because he had not enrolled her in 2009 when he received his NOE. Therefore, the Board found no error or injustice and denied relief.

BOARD VOTE:

Mbr 1	Mbr 2	Mbr 3	
:	:	:	GRANT FULL RELIEF
:	:	:	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
XX	XX	XX	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.

[redacted]

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. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Public Law 95-397, the RCSBP, enacted 30 September 1978, provided a way for those who qualified for Reserve retirement but were not yet age 60 to provide an annuity for their survivors should they die before reaching age 60. Three options are available: (A) elect to decline enrollment and choose at age 60 whether to start SBP participation, (B) elect that a beneficiary receive an annuity if they die before age 60 but delay payment of it until the date of the member's 60th birthday, and (C) elect that a beneficiary receive an annuity immediately upon their death if before age 60. Once a member elects either Option B or C in any category of coverage, that election is irrevocable. Option B and C participants do not make a new SBP election at age 60. They cannot cancel SBP participation or change options they had in the RCSBP. RCSBP coverage automatically converts to SBP coverage upon retirement. If RCSBP Option B or C is elected, there is a Reservist Portion cost added to the basic cost of the SBP to cover the additional benefit and assured protection should the member die prior to age 60.

3. Public Law 97-252, the Uniformed Services Former Spouses Protection Act (USFSPA), 8 September 1982, established the 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 retired SM by virtue of the retired SM's residence in the State (other than pursuant to military orders), domicile in the State, or consent.

4. Title 10 U.S. Code 1448 states a person who is a participant in the plan and is providing coverage for a spouse or a spouse and child (even through there is not beneficiary currently eligible for such coverage) and who has a former spouse who was not that person's former spouse, when that person became eligible to participate in the plan may elect to provide an annuity to that former spouse.

5. 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.

6. 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.

7. Title 10, U.S. Code, section 1448(f)(3), provides that if a person entitled to retired pay is required under a court order to provide an annuity to a former spouse upon becoming eligible to be a participant in the Plan, the Secretary shall pay an annuity to that former spouse as if the person had been a participant in the Plan and had made an election to provide an annuity to the former spouse, if the Secretary receives a written request from the former spouse concerned that the election be deemed to have been made in the same manner as provided in section 1450(f)(3) of this title.

8. Title 10, U.S. Code, section 1450(f)(3)(A), permits a former spouse to make a written request that a Survivor Benefit Plan (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.

9. DoDI 1332.41 (SBP) states a member who elected spouse coverage upon becoming eligible to participate in SBP or RCSBP, and later divorces, may elect to cover that former spouse (who was not the member's former spouse at the time the member became eligible to participate) within 1 year after the date of the decree of divorce, dissolution, or annulment. Former spouse coverage is not automatic upon divorce, dissolution, or annulment. A court order alone does not create coverage.

10. Department of Defense Instruction 1332.42, enclosure 3, paragraph 7, provides that a member who does not have a spouse or dependent child when the member becomes eligible to participate and who later marries or acquires a dependent child may elect to participate in the Program by submitting a signed, written election that is received by the Secretary concerned within the 1-year period after acquiring the first spouse or dependent child. An election under this paragraph is irrevocable unless otherwise provided by law.

11. The DFAS website defines "gray area" retirees as Reserve Component members who served in the National Guard or Reserve, are qualified for retired pay, and have

"retired" from their service (stopped drilling), but are not yet at the age where they can begin receiving retired pay. The time between their "retirement" from the service and the date when they are eligible to begin receiving retired pay is the "gray area." The "gray area" applies even if the member is assigned to the Retired Reserve.

//NOTHING FOLLOWS//