

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 6 February 2025

DOCKET NUMBER: AR20240006702

APPLICANT REQUESTS: receipt of her late husband's Survivor Benefit Plan (SBP) annuity.

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)
- State Certificate of Marriage, 29 November 2005
- DD Form 2064 (Certificate of Death (Overseas)), 30 May 2007
- DD Form 1300 (Report of Casualty), prepared 21 June 2007
- Defense Finance and Accounting Service (DFAS) Letter, 8 March 2023
- Letter to DFAS/Defense Office of Hearings and Appeals (DOHA) (DOHA Request for Extension for Appeal, Gold Star SBP), 7 April 2023
- Letter to DFAS/DOHA (DOHA Request for Award of Full Entitlement of SBP), 16 May 2023
- Joint Base San Antonio and Fort Sam Houston Letter to DFAS/DOHA (DOHA Request for Full Entitlement of Survivor Benefit Plan and Special Survivor Indemnity Allowance), 16 May 2023
- Defense Casualty Information Processing System (DCIPS) Report – Casualty Status Report, printed 16 May 2023 (5 pages)
- DFAS Letter, undated, with enclosures –
 - DD Form 2656-7 (Verification for Survivor Annuity – Special), 31 January 2024
 - DFAS Certificate of Eligibility for Surviving Spouse, 31 January 2024
 - DFAS-Cleveland (DFAS-CL) Form 1059 (Direct Deposit Authorization), 31 January 2024
 - Internal Revenue Service Form W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 31 January 2024

FACTS:

1. The applicant, the surviving spouse of the deceased service member (SM) who died on active duty, is requesting a full administrative correction as it pertains to the SBP

annuity as the surviving spouse of her late husband who was killed in action in Iraq in 2007. On 16 May 2023 after learning of the changes to the SBP in the National Defense Authorization Act eliminating the SBP/Dependency and Indemnity Compensation (DIC) offset, she visited the Fort Sam Houston Retirement Services Office for assistance with SBP reversion applications. The Fort Sam Houston Retirement Services Officer (RSO) discovered her initial SBP application process with the Fort Sam Houston Casualty Assistance Office was never finalized and she was not eligible for the 2023 SBP reversion process. She is requesting receipt of the SBP annuity effective from the date of her late husband's death in 2007. Denial of the SBP annuity would be an injustice to her late husband's service and loss of life in support of our country.

2. The SM enlisted in the Regular Army on 4 April 2005 in the rank/grade of private first class/E-3. Following completion of initial entry training, he was awarded military occupational specialty 21B (Combat Engineer).
3. The applicant's marriage certificate, 29 November 2005, shows she and the SM married on 25 November 2005.
4. The SM was promoted to the rank/grade of specialist/E-4 effective 1 December 2006.
5. The DD Form 2064, 30 May 2007, shows the SM died on 21 May 2007 in Baghdad, Iraq, as a result of blast injuries. The applicant is shown as his next of kin.
6. The DD Form 1300 – Final Report, 21 June 2007, reported the death of the SM on 21 May 2007 as the result of hostilities in Iraq. This report replaced the Interim Report, 24 May 2007.
7. Although not available for review, it appears the applicant submitted a claim for the SBP annuity to DFAS as evidenced in the DFAS letter, 8 March 2023.

- a. DFAS denied her claim in full and noted:

"The Barring Act", 31 U.S.C. § 3702 [Title 31, U.S. Code, section 3702], bars payment of any claim not received within 6 years from the date it accrues. SBP annuity claims accrue upon the death of the retired member. You presented a claim for an annuity on February 1, 2023, which is more than 6 years after the claim accrued. Therefore, your claim is untimely. The entirety of your claim is barred from consideration by this office and must be denied. The total claim amount for the retroactive annuity amount is \$136,823.00 for the period May 21, 2007, through February 28, 2023.

b. DFAS stated this letter was the final decision by DFAS on her claim and noted she had the following rights:

- the right to appeal this decision to the DOHA within 30 days of this letter
- the right to request a waiver of application of the Barring Act to her claim
- the right to petition her circumstances to the Army Board for Correction of Military Records for correction of a perceived error or to remove an injustice

8. On 7 April 2023, she requested a 30-day extension to appeal to DFAS/DOHA as she was currently working with the JSBA and Fort Sam Houston RSO, Casualty Assistance Office, and Department of the Army G-1 SBP Program Manager.

9. Her letter to DFAS/DOHA, 16 May 2023, noted the recent National Defense Authorization Act changes eliminating the SBP/DIC offset and showing she was eligible for the SBP annuity.

10. The Joint Base San Antonio and Fort Sam Houston RSO letter to DFAS/DOHA, 16 May 2023, requested overturn of the denied of the applicant's SBP claim. The RSO noted the applicant was not provided any counseling or communications from the Fort Sam Houston Casualty and Mortuary Affairs Office regarding her survivor benefits, including SBP benefits. The RSO included the DCIPS Casualty Status Report that listed the SM's incident details as well as his next of kin information (see attachment for details).

11. The undated DFAS letter notified the applicant of the changes to the SBP Optional Annuity for Dependent Children and the reversion of SBP annuity payments to eligible surviving spouses in 2023. DFAS informed her that its records show an election was made to pay the SBP annuity to the surviving child/children when her spouse died. Changes in the law, effective 1 January 2023, directed payment of the SBP annuity to the member's surviving spouse, if eligible, instead of to the child(ren). This letter included documents she needed to complete to determine her eligibility (see letter for details).

a. The DD Form 2656-7 Dependent Reversion, 31 January 2024, shows she verified her eligibility for an annuity under the SBP as the surviving spouse. She signed the form on 31 January 2024.

b. She certified the DFAS Certificate of Eligibility for Surviving Spouse on 31 January 2024, establishing her marital status as not married after the death of the SM to establish her eligibility to receive an SBP annuity beginning in January 2023.

c. The DFAS-CL Form 1059 and Internal Revenue Service Form W-4P, 31 January 2024, established her account for receipt of financial payments.

12. The email correspondence from the DFAS Boards for Correction of Military Records Technician (Reply: Army Review Boards Agency Assistance), 11 December 2024, states the deceased retired SM's death was found to be in the line of duty; however, an SBP election form was never received from the Army or the surviving spouse.

13. The Department of the Army Office of the Deputy of Chief of Staff, G-1, memorandum from the Director, Army Retirement Services (Advisory Opinion – (SM) (Deceased), Issue: SBP), 16 January 2025, states:

a. The SM died on active duty on 21 May 2007 and, according to the notes in DCIPS, his death was determined to have occurred in the line of duty. According to the application for review, the surviving spouse's claim was never completed by her servicing Casualty Assistance Office for the SBP annuity in accordance with Title 10, U.S. Code, section 1448(d)(1)(B). Since the applicant stated she has not remarried, if she claimed the spouse SBP annuity, she would continue receiving the spouse SBP the annuity in accordance with Title 10, U.S. Code, section 1450(b), which terminates spouse SBP annuity upon the death or remarriage of the surviving spouse before age 55.

b. According to Title 10, U.S. Code, section 1451(c)(2), the spouse SBP annuity shall be reduced by a portion of the amount of DIC to which the surviving spouse is entitled under Title 38, U.S. Code, section 1311(a). This offset was phased out in accordance with Title 10, U.S. Code, section 1450(c), and eliminated effective 1 January 2023.

c. According to Title 10, U.S. Code, section 1450(m), a surviving spouse eligible to receive both the spouse SBP annuity and spouse DIC and whose spouse SBP annuity is offset by spouse DIC, is eligible to receive the Special Survivor Indemnity Allowance (SSIA) effective 1 October 2008. Because of the elimination of the offset of spouse SBP by spouse DIC, so too was SSIA effective 1 January 2023.

d. Title 31 U.S. Code, section 3702, limits the Secretary of Defense to settle claims to those received within 6 years after the claim accrues. In this case, the claim for the spouse SBP annuity accrues upon the death of the SM on 21 May 2007.

e. In order for the applicant to receive both the SBP and SSIA, she must have first claimed the spouse SBP annuity within 6 years of the date of the SM's death.

f. Prior to 2008, surviving spouses were not counseled by a certified Army SBP Counselor. When the SSIA law came into effect, there was a communication campaign by long-term care, which was part of the Army Casualty and Mortuary Affairs Operations Center at the time, to reach out to the surviving spouses who would have been affected

by this law change. There is no way to confirm that all surviving spouses affected by this law change were notified. The applicant's original SBP claim was never finalized and submitted by the Casualty Assistance Office. As a result, she never received the SBP annuity from 21 May 2007 and the SSIA that would have accrued due to the offset of spouse SBP by spouse DIC from 1 October 2008 to 31 December 2022. In the interest of fairness, the G-1 recommends correction of the SM's records to reflect the applicant claimed the spouse SBP annuity effective upon the SM's death.

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 warranted.

2. The Board carefully considered the applicant's contentions, the SM's military records, the applicant's correspondence with DFAS and the denial of her claim. The Board considered the review and conclusions of the DCS G1 advising official. The Board found that the applicant was eligible to claim an SBP spouse annuity at the time of the Soldier's death. Based on a preponderance of evidence, the Board determined that a records correction is warranted to correct an injustice.

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 that the evidence presented was sufficient to warrant a recommendation for relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by:

- showing the applicant timely claimed the spouse SBP annuity effective upon the SM's death on 21 May 2007
- showing the request was received and processed by the appropriate office in a timely manner
- paying the applicant the SBP annuity due her as a result of this correction.

[REDACTED]

[REDACTED]

[REDACTED]

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 1448(d)(2)(B), states that in the case of a member who dies on or after the date of enactment of the National Defense Authorization Act for Fiscal Year 2004, 24 November 2003, and for whom there is a surviving spouse eligible for an annuity under paragraph (1), the Secretary may pay an annuity to the member's dependent children, if applicable, instead of paying an annuity to the surviving spouse if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children instead of an annuity for the surviving spouse.
2. Title 31, U.S. Code, section 3702, is the 6-year barring statute for payment of claims by the Government. In essence, if an individual brings a claim against the Government for monetary relief, the barring statute states the Government is only obligated to pay the individual 6 years in arrears from the date of approval of the claim. Attacks to the barring statute have resulted in litigation in the U.S. Court of Federal Claims. In the case of *Pride versus the United States*, the court held that the Boards for Correction of Military Records (BCMR) is not bound by the barring act. The BCMR decision creates a new entitlement to payment and the 6-year statute begins again. Payment is automatic and not discretionary when a BCMR decision creates an entitlement.

3. Title 10, U.S. Code, section 1448(d)(2)(B), states that in the case of a member who dies on or after the date of enactment of the National Defense Authorization Act for Fiscal Year 2004, 24 November 2003, and for whom there is a surviving spouse eligible for an annuity under paragraph (1), the Secretary may pay an annuity to the member's dependent children, if applicable, instead of paying an annuity to the surviving spouse if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children instead of an annuity for the surviving spouse.

4. Public Law 116-92, section 622 (Phase-out of Reduction of SBP Survivor Annuities by Amount of DIC), 20 December 2019, states the Secretary of the Military Department concerned shall restore annuity eligibility to any eligible surviving spouse who, in consultation with the Secretary, previously elected to transfer payment of such annuity to a surviving child or children under the provisions of Title 10, U.S. Code, section 1448(d)(2)(B), as in effect on the day before the effective date of 1 January 2023. Such eligibility shall be restored whether or not payment to such child or children subsequently was terminated due to loss of dependent status or death. For the purposes of this subsection, an eligible spouse includes a spouse who was previously eligible for payment of such annuity and is not remarried, or remarried after having attained age 55, or whose second or subsequent marriage has been terminated by death, divorce, or annulment.

5. The DFAS website "www.dfas.mil/retired-military/survivors/Understanding-SBP-DIC-SSIA/" provides guidance relating to the SBP for spouses and DIC benefits from the Department of Veterans Affairs (VA).

a. The DIC is a monetary benefit offered by the VA to survivors of SMs and retirees whose death results from a service-related injury or disease.

(1) Spouse SBP annuitants, except for those who remarry after age 55 (or in other specific circumstances), cannot receive full SBP and DIC at the same time before 2023. Beginning in 2021, there are significant changes to the offset of SBP and DIC.

(2) DIC payments made directly to children, or to a guardian on behalf of children, do not affect SBP child annuity payments.

(3) In 2022 when DFAS was informed by the VA that a spouse annuitant is receiving the DIC, the law required that DFAS deduct one-third of the amount of the DIC received from the amount of SBP payable and pay the remaining amount of the SBP to the annuitant. This is called the SBP/DIC offset. The reduction of the SBP/DIC offset from the full amount of DIC to one-third of DIC was effective 1 January 2022.

(4) For example, in 2022 if an annuitant receives a monthly SBP annuity of \$1,200 from DFAS and receives a monthly DIC award of \$1,500 from the VA, DFAS will deduct one-third of the amount of DIC (\$500) from the \$1,200 SBP and pay the remaining \$700 to the annuitant. The annuitant will continue receive the full amount of DIC from the VA (in this example, \$1,500).

(5) On 1 January 2023, the offset was completely eliminated. Eligible surviving spouses will receive their full SBP payments and their full DIC payments.

(6) The change in the law does not affect DIC payments, it only affects SBP payments when the surviving spouse is also receiving the DIC. Refer to the DFAS SBP/DIC news webpage for details and Frequently Asked Questions.

(7) When a spouse is eligible to receive the SBP and DIC, and those payments are subject to the SBP/DIC offset, the spouse will also receive the SSIA.

b. SSIA is a benefit for surviving spouses who receive an SBP annuity that is offset by a DIC payment from the VA.

(1) In 2022, the SSIA will be paid at up to \$346 per month. Eligible survivors will continue to receive the SSIA up to the maximum amount per month, or up to the gross amount of the SBP (if the gross amount of SBP is less than the maximum amount) until 31 December 2022. The SSIA will not be paid in 2023.

(2) SSIA is not used to repay past-due SBP premiums. If the spouse annuitant is entitled to the SSIA, DFAS will pay the SSIA, even when there are past-due premiums.

(3) DIC payments to children do not affect SBP child annuitant payments, so child annuitants are not eligible to receive the SSIA.

//NOTHING FOLLOWS//