

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 31 July 2024

DOCKET NUMBER: AR20240006769

APPLICANT REQUESTS: correction of her deceased husband's Survivor Benefit Plan (SBP) to show "Child(ren)-Only" coverage.

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)
- Marriage Certificate, filed 23 April 2014
- Certificate of Death, certified 15 January 2020
- DD Form 1300 (Report of Casualty), 19 February 2020
- U.S. Army Human Resources Command (HRC) Memorandum (Line of Duty (LD) Determination), 11 February 2021
- HRC Memorandum (LD Determination, (Service Member (SM)), 25 March 2024
- Initial SBP Counseling Statement for a Surviving Spouse with Children, 21 May 2024
- Spouse Statement of Desired SBP Election, 21 May 2024
- HRC Casualty Assistance Center Memorandum (Active Duty Death SBP Election – (SM), Active Duty Deceased), 21 May 2024
- DD Form 2790 (Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces), 21 May 2024
- two DD Forms 2656-7 (Verification for Survivor Annuity), 21 May 2024
- two Standard Forms 119A (Direct Deposit Sign-up Form), 21 May 2024
- two Internal Revenue Service Forms W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 21 May 2024
- two Social Security Cards

FACTS:

1. The applicant, the surviving spouse of the deceased SM who died on active duty, states that as the surviving spouse, she requests correction of her husband's LD determination to show it was completed prior to 1 January 2023. She believes it is an injustice that her request to transfer the SBP annuity to her children (i.e., "Child-Only" coverage) could not be elected because the LD determination was not completed prior to 1 January 2013, the effective date of the Optional Child-Only election law repeal.

2. The marriage certificate, filed 23 April 2014, shows the applicant's marriage to the SM on 19 April 2014.
3. The SM's death certificate shows the SM died on 22 November 2019 as a result of asphyxiation.
4. The SM's records contain a DA Form 2173 (Statement of Medical Examination and Duty Status), 4 December 2019, showing he was admitted to the Samaritan Medical Center, Watertown, NY, on 22 November 2019. He was pronounced dead on arrival. The form shows in:
 - a. item 15 (Details of Accident or History of Disease), the entry: "On 22Nov2019@20:14 [22 November 2019 at 8:14 p.m.] SM was found in the Evans Mills Walmart parking lot after he experienced a medical emergency where bystander CPR [cardiopulmonary resuscitation] was initiated. SM taken by Guilfoyle Ambulance to SMC [Samaritan Medical Center] where he was pronounced by Dr. C_____ S_____ at @21:00 [at 9 p.m.]";
 - b. item 29 (Duty Status at Time of Death if Different from Time of Injury or Contraction of Disease), an "X" was placed in the "Present for Duty" box;
 - c. item 31 (Formal Line of Investigation Required), an "X" was placed in the "Yes" box; and
 - d. the form was signed by the unit commander on 4 December 2019.
5. The DD Form 1300 (Report of Casualty – Final), 19 February 2020, documented the SM's death as a result of asphyxiation on 22 November 2019 in Watertown, NY.
6. The HRC memorandum for Director of Finance and Accounting Cleveland Center (SBP Eligibility Information on Member Dying on Active Duty), 4 March 2020, provided the SM's information for their use in making a determination concerning eligibility for SBP. The SM was a chief warrant officer 2 with 17 years, 1 month, and 21 days of active military service.
7. The SM's records contain the DD Form 261 (Report of Investigation – LD and Misconduct Status), undated, showing an investigation was conducted into the SM's death.
 - a. The report shows in:
 - (1) item 10a (Circumstances), the incident occurred at 8:15 p.m. on 22 November 2019 at Evans Mills, NY;

(2) item 10a(4) (How Sustained), the entry: "Accidental death from inhalation of 1,1-Difluoroethane [colorless and odorless gas used as refrigerant, an aerosol propellant]";

(3) item 10b (Medical Diagnosis), the entry: "Asphyxiation due to lethal intoxication of 1,1-Difluoroethane";

(4) item 10c (Present for Duty), an "X" was placed in the "Yes" box;

(5) item 10g (Remarks), the entry: "The death of [SM] was caused by asphyxiation due to lethal intoxication of 1,1-Difluoroethane. [SM] was present for duty at the time of his death. A mental soundness review found the deceased "stable" in the final days of his life, and stated [SM] "was mentally sound at the time he inhaled 1,1-Difluoroethane." In view of these findings, and IAW [in accordance with] AR [Army Regulation] 600-8-4 [Line of Duty Policy, Procedures, and Investigations], Appendix D Rules 1 and 3, the Investigating Officer finds the death of [SM] resulted from misconduct; as such, the death of [SM] is found Not in the Line of Duty"; and

(6) item 11 (Findings), the investigating officer marked "Not in Line of Duty – Due to Own Misconduct."

b. The appointing authority approved the findings with his signature on 16 October 2020 and the reviewing authority approved the findings on 13 January 2021.

8. The HRC memorandum from the Chief, Casualty and Mortuary Affairs Operations Division (LD Determination), 11 February 2021, determined the SM who died as the result of asphyxiation from lethal intoxication on 22 November 2019 in Watertown, NY, has been found "Not in Line of Duty – Due to Own Misconduct" at the time of death.

9. It appears the applicant appealed the LD determination through counsel as evidenced by the HRC Casualty and Mortuary Affairs Operations Division memorandum for her counsel (LD Determination, (SM)), 25 March 2024. The Casualty and Mortuary Affairs Operations Division Chief noted that after receiving an independent behavioral health evaluation and a thorough administrative review of the SM's LD investigation, she determined the findings of "Not in Line of Duty – Due to Own Misconduct" shall be changed to read "In Line of Duty" (see attached memorandum for detailed review).

10. On 21 May 2024, the applicant completed the Spouse Statement of Desired SBP Election showing:

a. She acknowledged she previously received an initial comprehensive briefing from an Army SBP counselor about the SBP options available to her and reviewed the Survivor Benefit Report. She understood this decision was irrevocable and should only

be made when she had adequate time to review all the SBP data needed to make an informed decision.

b. She elected "Child Only, Spouse Excluded" SBP coverage. She desired that the Army make the following SBP election on her behalf. She understood that all of the deceased Soldier's SBP-eligible children would receive an equal share of the SBP annuity. The children would receive the annuity until age 18 or age 22 if full-time unmarried students, or forever if incapable of self-support due to a condition incurred while eligible for the SBP. She understood she could request the annuity for an SBP-eligible child who was incapacitated to be paid to a special needs trust for the care of that child. She also understood the SBP would end when the last child was no longer eligible. If, on 1 January 2023, she were eligible to receive the SBP annuity, she will begin receiving it by law. The children will no longer receive the annuity. She understood that child SBP is taxable for the child.

11. The HRC Casualty Assistance Center memorandum (Active Duty Death SBP Election – (SM), Active Duty Deceased), 21 May 2024, notes the applicant elected "Child Only, Spouse Excluded" SBP after counseling.

12. The applicant's DD Form 2790, 21 May 2024, certified that her two children are the unmarried children of the deceased SM.

13. The applicant's two DD Forms 2656-7, 21 May 2024, verified her and her children's eligibility for the SBP annuity as the deceased SM's surviving spouse and children. These documents were accompanied with the necessary documents for establishment of financial payments to her family. She also submitted her children's social security cards for verification.

14. 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), Issue: Surviving Spouse Request to Transfer SBP Annuity to Child Only until 31 December 2022), 26 June 2024, states:

a. Title 10, U.S. Code, section 1448(d)(1)(B), requires that the member who died on active duty and was not qualified for retirement must die in the LD to be eligible for coverage under the SBP.

b. Title 10, U.S. Code, section 1448(d)(2)(B), allows an eligible surviving spouse to transfer the SBP annuity to eligible children.

c. Public Law 116-92, section 622, repealed the authority for an optional annuity for dependent children effective 1 January 2023. Effective the same date, the law restored

the annuity to any eligible spouses who previously elected to transfer the annuity to surviving children.

d. The applicant's spouse died while serving on active duty prior to 1 January 2023.

e. The surviving spouse was not given the opportunity to receive the SBP counseling prior to 1 January 2023 because the original LD determination was "Not in the Line of Duty."

f. If the LD determination was originally found to be "In Line of Duty," the surviving spouse would have been counseled in a timely manner and completed the required documents prior to 1 January 2023. The Army Retirement Services Director would still have had the ability to elect the Optional Child-Only SBP by law on behalf of the Secretary of the Army from the SM's date of death until 31 December 2022.

g. After careful review and in the interest of fairness, the Army Retirement Services Director supports the applicant's request to transfer the SBP annuity to her children effective the date of the SM's death until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023.

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. The Board carefully considered the SM's military records, documents submitted in support of the petition and executed a comprehensive and standard review based on law, policy and regulation, and published Department of Defense guidance for liberal and clemency determinations requests for upgrade of his characterization of service. Upon review of the applicant's petition, available SM's military records and the Office of the Deputy Chief of Staff, G-1-Army Retirement Services advisory opinion, the Board concurred with the advising official recommendation for approval finding in the interest of fairness, the applicant's request to transfer the SBP annuity to her children effective the date of the SM's death until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023 is warranted.

2. The Board determined the applicant is the surviving spouse of an active-duty service member who dies on 22 November 2019. Evidence shows the line of duty investigation was not completed until after 1 January 2023. The Board noted that an offset between survivor benefit plan (SBP) and the Dependent and indemnity Compensation (DIC), a VA program is currently being phased out, which limited the applicant's ability to make the proper SBP elections that impacted her family, The Board agreed an injustice occurred and based on the preponderance of evidence, correction of the applicant's

deceased husband's Survivor Benefit Plan (SBP) to show "Child(ren)-Only" coverage is warranted. Therefore, the Board granted relief.

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 the Army records of the individual concerned be corrected to reflect the applicant's deceased husband's Survivor Benefit Plan (SBP) shows "Child(ren)-Only" coverage.

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. Public Law 116-92, section 622 (Phase-out of Reduction of SBP Survivor Annuities by Amount of Dependency and Indemnity Compensation (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)(20(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.

3. The Defense Finance and Accounting Service website: [www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-Special Survivor Indemnity Allowance \(SSIA\)/](http://www.dfas.mil/retiredmilitary/survivors/Understanding-SBP-DIC-Special-Survivor-Indemnity-Allowance-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//