

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]

BOARD DATE: 15 October 2024

DOCKET NUMBER: AR20240011023

APPLICANT REQUESTS: correction of:

- her deceased husband's records to show the line-of-duty (LD) determination was completed prior to 1 January 2023
- her deceased husband's Survivor Benefit Plan (SBP) to show "Spouse and Child(ren)" coverage effective 1 January 2023

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 6 March 2007
- Certificate of Death, 11 November 2021
- Service Member's (SM's) Enlisted Record Brief, 12 November 2021
- DD Form 1300 (Report of Casualty), 21 November 2021
- Part 5 – Surviving Spouse Verification of SBP Counseling, 14 December 2021
- DD Form 2790 (Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces), 14 December 2021
- two DD Forms 2656-7 (Verification for Survivor Annuity), 14 December 2021
- two Internal Revenue Service Forms W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 14 December 2021
- Financial Management Service Form 2231 (Direct Deposit Sign-up Form), 14 December 2021
- DA Form 1506 (Statement of Service for Computation of Length of Service for Pay Purposes), 17 December 2021
- U.S. Army Human Resources Command (HRC) Memorandum (SBP Eligibility Information on Member Dying on Active Duty), 17 December 2021
- HRC Memorandum (LD Determination Change for (SM)), 4 March 2024
- Defense Finance and Accounting Service (DFAS) Certificate of Eligibility for Surviving Spouse, 22 July 2024
- DD Form 2656-7 (Verification for Survivor Annuity), 22 July 2024
- Internal Revenue Service Form W-4P (Withholding Certificate for Periodic Pension or Annuity Payments), 22 July 2024

- Financial Management Service Form 2231 (Direct Deposit Sign-up Form), 22 July 2024

FACTS:

1. The applicant, the surviving spouse of the deceased SM who died on active duty, 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 SM enlisted in the Regular Army on 30 October 2002.
3. The SM's records show he and the applicant married on 3 March 2007.
4. The SM was promoted to the rank/grade of sergeant first class/E-7 effective 1 December 2012.
5. The SM's Enlisted Record Brief, 12 November 2021, summaries his military service.
6. The SM's death certificate shows he died on 11 November 2021 as a result of blunt force trauma.
7. The DD Form 1300 – Final Report, 9 December 2021, documents the SM's death on 11 November 2021 as a result of blunt force trauma at Raeford, NC, per his death certificate. The SM was posthumously promoted to the rank/grade of master sergeant/ E-8 effective 11 November 2021.
8. On 14 December 2021, the applicant 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. It showed she elected "Child Only, Spouse Excluded" SBP coverage.
9. The applicant's DD Form 2790, 14 December 2021, certified that her two children are the unmarried children of the deceased SM.
10. The applicant's two DD Forms 2656-7, 14 December 2021, verified her children's eligibility for the SBP annuity as the deceased SM's surviving children. These documents were accompanied by the necessary documents for establishment of financial payments to her family.

11. The DA Form 1506, 17 December 2021, shows the SM completed 19 years and 12 days of total creditable service for pay.

12. The HRC memorandum for Director of Finance and Accounting Cleveland Center (SBP Eligibility Information on Member Dying on Active Duty), 17 December 2021, provided the SM's information for their use in making a determination concerning eligibility for SBP. The SM was a sergeant first class with 19 years and 12 days of active military service.

13. The SM's records contain the DD Form 261 (Report of Investigation – LD and Misconduct Status), 21 June 2022, showing an investigation was conducted into the SM's death.

a. The report shows in:

(1) block 10a (Circumstances), the incident occurred at 2328 on 11 November 2021 at Raeford, NC;

(2) block 10a(4) (How Sustained), the entry "Motorcycle Accident";

(3) block 10b (Medical Diagnosis), the entry "Blunt Force Trauma";

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

(5) block 10e (Was Intentional Misconduct or Neglect the Proximate Cause), an "X" was placed in the "Yes" box;

(6) block 10f (Was Individual Mentally Sound), an "X" was placed in the "Yes" box; and block 10g (Remarks), the entry "Reference exhibit 23 (Mental Soundness Review)" (Note: This exhibit is not available for review.);

(7) block 11 (Findings), the investigating officer marked "Not In Line of Duty – Due to Own Misconduct."

b. The appointing authority disapproved the findings with his signature on 14 July 2022. Block 16 (Appointing Authority – Reasons and Substituted Findings) contains the following comments:

I find (SM) to be in Line of Duty (FINDING-ILD). A preponderance of the evidence supports that (SM) operated his motorcycle in a state of voluntary intoxication. However, the evidence does not establish that (SM) otherwise operated his vehicle negligently. The investigating officer was not able to conclude that (SM's) voluntary intoxication was the proximate cause of the

accident. In accordance with AR [Army Regulation] 600-8-4 [Line of Duty Policy, Procedures, and Investigations], "for intoxication alone to be the basis for determining misconduct with respect to a related injury there must be a clear showing that the Soldier's physical or mental faculties were impaired due to intoxication at the time of the injury, that the impairment was voluntary, and that the impairment was the proximate cause of the injury." Here, the evidence fails to meet the "clear showing" standard as it relates to the proximate cause of the injury.

c. The reviewing authority on 19 July 2022 did not place an "X" in the approved or disapproved box; however, block 18 (Approving Authority – Reasons and Substituted Findings) contains the following comments:

I recommend that (SM) be found in Line of Duty (FINDING-ILD). IAW [in accordance with] AR 600-8-4, para[graph] 2-4 states that a Soldier's injury, illness, disease, or death is presumed to have occurred in the line of duty unless rebutted by evidence. While preponderance of the evidence supports that (SM) operated his motorcycle in a state of intoxication, there is insufficient evidence to establish that (SM) otherwise operated his vehicle negligently and the investigating officer was not able to conclude that (SM)'s intoxication was the proximate cause of the accident. By contrast, evidence indicates that (SM) was driving within the posted speed limit, with the proper equipment, and in an appropriate manner for the road conditions. In accordance with AR 600-8-4, "for intoxication alone to be the basis for determining misconduct with respect to a related injury there must be a clear showing that the Soldier's physical or mental faculties were impaired due to intoxication at the time of the injury, that the impairment was voluntary, and that the impairment was the proximate cause of the injury." I concur with the appointing authority that, in this circumstance, the evidence fails to meet the "clear showing" standard as it relates to the proximate cause of the injury.

14. The SM's records contain a DA Form 2173 (Statement of Medical Examination and Duty Status), 22 June 2022, showing he pronounced dead on arrival outside the Womack Army Medical Center, Fort Bragg, NC. The form shows in:

- a. item 28 (Duty Status), an "X" was placed in the "Excused" box;
- b. item 36 (Details of Incident – Remarks) contains a timeline of the accident and the following comments:

(SM) died from blunt force trauma as a result of a motorcycle accident on the night of 11 November 2021. The exact cause of the accident is unknown. The reporting officer to the scene of the accident stated accidents like this are

primarily from driver intoxication or the driver falling asleep behind the wheel. The reporting officer stated there were no signs of alcohol involvement; however, the toxicology report indicates (SM) had a Blood Alcohol Content of 0.20. When the accident occurred, (SM's) riding partner was not in view of him and could therefore not verify exactly what caused or led to the crash. While the specific details of what caused the accident are unknown (falling asleep, animal in the road, etc.), the fact remains that (SM) was riding with an elevated level of alcohol in his system which is assessed as a key contributor of the accident.

c. item 37 (Formal Line of Duty Investigation Required), an "X" was placed in the "Yes" box; and

d. the form was signed by the unit commander on 22 June 2022.

15. The HRC memorandum from the Chief, Casualty and Mortuary Affairs Operations Division (LD Determination), 12 January 2023, determined the SM who died as the result of injuries suffered in a motorcycle accident on 11 November 2021 in Raeford, NC, has been found "Not in Line of Duty – Due to Own Misconduct" at the time of death.

16. On 12 January 2023, the Chief, Casualty and Mortuary Affairs Operations Division sent a letter to the applicant informing her of the LD determination. He also informed her that the findings may result in the loss of certain benefits and that she had 3 years from the date of the LD determination to appeal the finding to HRC.

17. It appears the applicant appealed the LD determination as evidenced by the HRC memorandum from the Chief, Casualty and Mortuary Affairs Operations Division (LD Determination Change for (SM)), 4 March 2024. The Chief, Casualty and Mortuary Affairs Operations Division noted after a thorough administrative review, that the SM's LD determination was changed from "Not in Line of Duty-Due to Own Misconduct" to in the "LD" at the time of death.

18. The DFAS Certificate of Eligibility for Surviving Spouse was certified by the applicant on 22 July 2024, establishing her marital status as "not married after the death of the SM" to establish her eligibility to receive an SBP annuity beginning January 2023.

19. The applicant's subsequent DD Form 2656-7, 22 July 2024, verified her eligibility for the SBP annuity as the deceased SM's surviving spouse. These documents were accompanied by the necessary documents for establishment of financial payments to her family.

20. 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 September 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, it restored the annuity to any eligible spouses who previously elected to transfer the annuity to their surviving children.

d. The applicant, whose spouse died on active duty prior to 1 January 2023 and after receiving the SBP counseling, requested that the SBP annuity be transferred to their child.

e. The LD determination was completed and determined to be "In the Line of Duty" after 1 January 2023.

f. If the LD investigation were completed and sent to the Army SBP Board prior to 1 January 2023, the Director of Army Retirement Services would have had the ability to elect the Optional Child-Only SBP by law on behalf of the Secretary of the Army from the date of the SM's 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 child-only 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:

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 applicant's contentions, the SM's military records, and regulatory guidance were carefully considered. The applicant's spouse died on active duty on 11 November 2021, prior to 1 January 2023. After receiving their SBP counseling, she requested that the SBP annuity be transferred to their child(ren). The LOD investigation was not completed and sent to the Army SBP Board until after 1 January 2023. If the LOD investigation was completed and sent to the Army SBP prior to 1 January 2023, she would still have had the ability to elect the optional child-only SBP by law from the date of the SM's death until 31

December 2022. After careful review and in the interest of justice and fairness, the Board determined relief is warranted and 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 VOTE:

Mbr 1 Mbr 2 Mbr 3

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:	:	:	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 Line of Duty Investigation was completed before 1 January 2023
- showing the applicant submitted a request to transfer the SBP annuity to her child(ren) effective the date of the SM's death (6 June 2017) until 31 December 2022 and to revert to the eligible surviving spouse on 1 January 2023

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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//