

DATE: July 19, 2022

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-122809.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

DECISION

The claimant, a former spouse of a retired member of the U.S. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-122809, dated February 11, 2022.

Background

On August 25, 1973, the claimant and the member were married. In July 1977 the member completed a DA Form 4240, *Data for Payment of Retired Army Personnel*. On that form, the member elected spouse Survivor Benefit Plan (SBP) coverage for the claimant at the reduced amount of \$300.00. The SBP law at the time required that the member's spouse be notified of his decision to not to participate in SBP at the maximum level. On July 5, 1977, the claimant signed her acknowledgement that she was fully informed and counseled concerning the member's decision. On August 1, 1977, the member retired. On December 2, 2015, the claimant and the member divorced. The divorce decree incorporated a prior Affidavit of Dissolution which included a marital settlement agreement dated November 23, 2015, providing for the division of their property. Pursuant to that agreement, the claimant was awarded former spouse SBP coverage. Specifically, the agreement stated the following:

[The claimant], the Respondent, shall also be awarded former spouse coverage under the Survivor Benefit Plan, with [the member's] retired pay as the base amount.

On December 16, 2015, the claimant submitted to the Defense Finance and Accounting Service (DFAS) a DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election*. On that form, she erroneously put her name and information under the Member Identification section, and put the member's name and information under the Former Spouse Identification section. In addition, the member signed the form under the Former Spouse Signature section. On December 23, 2015, DFAS responded to the claimant's request. In pertinent part, DFAS's letter stated the following:

This letter is in reference [to] your application to deem an election of Survivor Benefit Plan (SBP) former spouse coverage.

A deemed election request must include a court order that specifically requires the member to elect coverage on behalf of his former spouse. In addition, the court order may not limit or qualify the former spouse SBP in a manner that is contrary to federal law.

We cannot reestablish former spouse SBP coverage on the basis of a deemed election request until we receive a copy of your divorce decree.

The record also contains a letter from DFAS to the claimant dated February 1, 2018. In that letter, DFAS advised the claimant her deemed election request was not timely. DFAS further advised the claimant a court order by itself cannot be used to institute former spouse coverage by a deemed election; an election can be deemed on the basis of a court order or court-approved agreement by the former spouse or the former spouse's attorney; and the request must be received along with the DD Form 2656-10 within one year of the date of the original court order that awarded the coverage.

On June 25, 2019, the member passed away. On October 8, 2019, the claimant submitted to DFAS a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. DFAS denied the claim on the basis that the member did not make a request to change his election to former spouse coverage, nor was a deemed election for former spouse cover made by the claimant. The claimant appealed DFAS's denial of her claim. She stated that at the time of their divorce, neither she nor the member knew about a form that had to be signed by the former spouse. She stated that at a later date the member did receive a DD Form 2656-10. She stated that in 2017 the member sent her the DD Form 2656-10 and she then forwarded that form to DFAS with the divorce decree. Throughout this time, she stated that she was being treated for a neurological disorder as well as clinical depression. She did her best to cooperate with DFAS's requirements. She stated that after she was initially denied her request for a deemed election, she was advised by an attorney (who was once a member of the Judge Advocate General's (JAG) Corps), to wait until the member passed away. She further requested that DFAS and DOHA consider that she served in the Army Nursing Corps for over six years,

was married to the member for over 42 years, and is medically disabled and living off of Social Security Benefits only, despite the member's sincere efforts to provide the SBP annuity to her.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim for the former spouse SBP annuity. He found that while there was evidence the claimant submitted a DD Form 2656-10, DFAS determined that her request was incomplete and notified her that she must submit a copy of the divorce decree. The attorney examiner further advised the claimant that she may find relief outside of the purview of DOHA with the Army Board for Correction of Military Records (ABCMR).

In the claimant's request for reconsideration, she states that throughout her marriage to the member she worked beside her husband in multiple offices, hospital clinics, and nursing homes. She states that she never received any direct compensation for her work with the member. It was not until 1990 that she requested enough funds to initiate an Individual Retirement Account (IRA) for herself. She states that these funds had to be reinvested into the member's medical office in 1995 to make up for the embezzlement of funds by his daughter. In her late forties she began exhibiting symptoms that severely interfered with her neurological functions, and it was not until 2000 that she underwent surgery to alleviate some of the most severe symptoms. The member announced to her in 2002 that he could do the "for better" but not the "for worse" part of the marriage. They then separated and lived apart but agreed not to remarry so that she could continue her health coverage and stay connected as a family, for the sake of their children and grandchildren. She states that in December 2015 she and the member met with their respective attorneys to make a final determination concerning their divorce settlement. She states that she was told her husband made a call to DFAS and explained that she was to continue to be his SBP beneficiary. She states that this provision was then incorporated into the divorce settlement. She believes that the member may not have followed through on his election of former spouse SBP coverage for her because he was also suffering from his own health issues at the time. She was also suffering from poor mental health during the divorce and two years after it. She had a lot of difficulty correlating information, especially from her ex-husband at that time. For these reasons, she requests that both DOHA and the ABCMR consider these factors while deliberating on her case.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. The claimant must prove their claim by clear and convincing evidence on the written record that the United States Department of Defense is liable for the claim. *See* DoD Instruction 1340.21 (May 12, 2004) ¶ E5.7. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under 10 U.S.C. § 1448(a)(1)(A), SBP is open to a member who is eligible for retired pay. Spousal coverage ends upon divorce, but the SBP includes provisions to allow a member to elect coverage for a former spouse. If a member elects

to provide coverage for a former spouse, he must notify the Secretary concerned with a written statement (in the form to be prescribed by that Secretary and signed by the member and the member's former spouse) setting forth whether the election is being made pursuant to a court order or to an agreement voluntarily entered into and incorporated in, ratified, or approved by the court order. *See* 10 U.S.C. § 1448(b)(5). Former spouse coverage must be established within one year from the date of the divorce, dissolution, or annulment. *See* 10 U.S.C. §1448(b)(3)(A)(iii). However, former spouse coverage can be established without the member's active participation. The former spouse may request a deemed election by providing the Secretary concerned with a written request and a copy of the court order requiring the SBP election. *See* 10 U.S.C. § 1450(f)(3)(A). The Service Secretaries have delegated their authority under the SBP law to DFAS.

The Secretary of Defense has issued implementing regulations for the SBP law pursuant to 10 U.S.C. § 1455. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 43, contains the regulations concerning SBP elections and election changes. Paragraph 430301 of the DoDFMR (Version April 2015), entitled *Elections by Member*, states that:

Department of Defense (DD) Form DD 2656, Data for Payment of Retired Personnel, DD 2656-1, SBP election Statement for Former Spouse Coverage, DD 2656-2, SBP termination Request, DD 2656-6, SBP Election Change Certificate, when available, are recommended for use by the member. Elections in writing, other than a termination request, signed by the member, which contain all information necessary for establishing or declining coverage are acceptable. Spousal concurrence of certain elections has been required since March 1, 1986.

Under DoDFMR ¶ 430301(B), entitled *Change in Election Coverage Spouse to Former Spouse (Retired Members)*, retired members wishing to change from spouse to former spouse SBP coverage should complete their changes on the DD Form 2656-1. When a member makes such an election, the member and the member's former spouse must complete an election statement indicating whether the election is being made pursuant to the requirements of a court order or by a voluntary written agreement. *See* DoDFMR ¶ 430504. The member has one year from the date of the divorce decree to make the election and submit the election statement to DFAS. *See* DoDFMR ¶ 430504(B).

The requirements for the former spouse's request for a deemed election are set forth under DoDFMR ¶ 430504(C). Under that paragraph, the former spouse's deemed election request must be submitted using a DD Form 2656-10 with a copy of the court order or agreement referring to SBP. This must be received by DFAS within one year of the date of the court order or filing. *See* DoDFMR ¶430504(C)(2).

In this case, the claimant was covered as the member's spousal SBP beneficiary from the time he retired in 1977 until such coverage ended with divorce in December 2015. In their marital settlement agreement, as incorporated into the divorce decree, the member agreed to provide a former spouse SBP annuity to the claimant. Although the record reflects that DFAS received the DD Form 2656-10, signed by the member, it was ineffective under the law as either

the member's former spouse SBP election or the claimant's deemed election request. First, the member's filing of his election had to be signed by his former spouse, the claimant, as required by 10 U.S.C. § 1448(b)(5), and the implementing regulations contained in the DoDFMR. Second, in order for the claimant's deemed election to have been accepted by DFAS, she had to have submitted the divorce decree which incorporated the marital settlement agreement within one year of the divorce. Neither of these two actions were taken. Under applicable law and regulation, the claimant's claim for the former spouse SBP annuity was properly denied. *See* DOHA Claims Case No. 96110703 (April 22, 1997).

As explained by the attorney examiner in the DOHA appeal decision, the claimant may have other available remedies that rest with the ABCMR under 10 U.S.C. § 1552 and 10 U.S.C. ¶ 1454. These remedies are outside of DOHA's purview and any request for a correction of records needs to be pursued with the ABCMR. Information for petitioning the ABCMR can be found on their website.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated February 11, 2022, disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board