

DATE: June 17, 2019

In Re:)
 [REDACTED]) Claims Case No. 2018-CL-091702.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A surviving spouse's failure to submit an application for the annuity within six years of the member's death, bars her Survivor Benefit Plan (SBP) claim under 31 U.S.C. § 3702(b).

DECISION

The surviving spouse, hereinafter claimant, of a deceased member of the U.S. Navy requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-091702, dated May 3, 2019. In that case, DOHA denied the claim for the member's Survivor Benefit Plan (SBP) annuity because it was filed more than six years after the member's death.

Background

On May 27, 1971, the member and the claimant were married. In anticipation of the member's retirement, he executed a NAVCOMPT (Navy Comptroller) Form 2272 on September 23, 1992, indicating his election of SBP spouse only coverage. On December 1, 1992, he retired from the Navy, and the claimant and the member resided in the Philippines. On March 4, 2007, the member passed away. On March 13, 2007, the Defense Finance and Accounting Service (DFAS) was advised of the member's death by the Retired Activities Office (RAO) in the Philippines. On March 28, 2007, DFAS sent the claimant a letter of condolence. On August 2, 2007, the RAO sent DFAS an email advising them that the claimant had not received any communication from them. The RAO suggested that DFAS send any communications to the claimant through their office for safety reasons.

On August 3, 2007, the claimant executed a Standard Form (SF) 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*. DFAS received the SF 1174 on August 21, 2007, and as a result, on January 22, 2008, paid the claimant \$331.90 for the member's unpaid retired pay during the period March 1, 2007, through March 4, 2007.

On February 5, 2008, the RAO faxed DFAS a message asking DFAS when the claimant's SBP annuity would become effective. In response, on June 26, 2008, DFAS mailed the claimant a DD Form 2656-7, *Verification for Survivor Annuity*, for claiming the SBP annuity. On September 2, 2008, the claimant forwarded a copy of the SF 1174, dated August 3, 2007, to DFAS requesting that DFAS begin payment of her SBP annuity. On September 22, 2008, DFAS responded by letter to the claimant advising her that she must submit the DD Form 2656-7 in order to claim the SBP annuity.

On January 19, 2017, the claimant executed a DD Form 2656-7, claiming the SBP annuity. DFAS received that form on January 20, 2017. On April 8, 2017, DFAS denied her claim because it was untimely. Her claim was not filed within the six years as required under 31 U.S.C. § 3702(b), also referred to as the Barring Act. DFAS advised the claimant that in addition to filing an appeal of their decision to DOHA, she had the right to request waiver of the Barring Act through the Assistant Secretary of the Navy, but she would be limited to payment of \$25,000.00. On May 21, 2018, DFAS advised her that because of the circumstances surrounding her claim for the SBP, she may also consider petitioning the Board for Correction of Naval Records (BCNR).

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim due to the application of the Barring Act. The adjudicator also explained that the claimant had the right to request waiver of the Barring Act through the Assistant Secretary of the Navy. The adjudicator then explained that the BCNR has the authority under 10 U.S.C. § 1552, to correct a member's record when the Secretary concerned considers it necessary to correct an error or remove an injustice.

In her request for reconsideration, the claimant requests payment of the SBP annuity because of her financial situation. She refers the Board to the documents contained in her original appeal file.

Discussion

The SBP now codified under 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 31 U.S.C. § 3702(b), a survivor has six years to file a claim for the SBP annuity. In pertinent part, section (b)(1) states the following:

A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues . . .

All the events giving rise to the government's liability to make SBP annuity payments to a survivor occur at the date of the member's death, and the survivor has six years from that date to file the claim. Claims filed more than six years after a member's death are barred. *See* DOHA Claims Case No. 2018-CL-061204.2 (January 18, 2019); DOHA Claims Case No. 2017-CL-062703.2 (August 31, 2017); DOHA Claims Case No. 02082608 (March 26, 2003); and DOHA Claims Case No. 98033020 (June 12, 1998).

In this case, the member elected coverage for the claimant at his retirement in 1992. The events which fixed the liability of the government and entitled the claimant to make a claim arose at the time of the member's death in 2007. Although the claimant, through the RAO, and through her own correspondence, asked DFAS about her entitlement to SBP, the critical fact is that DFAS did not pay the claim for the SBP. Instead, DFAS sent the claimant, on two separate occasions, the DD Form 2656-7, with instructions on how to file the claim for SBP. The claimant failed to make a claim for the SBP by filing the DD Form 2656-7 with DFAS until nine years after it arose. Although we acknowledge her poor health and financial condition, we have no authority to allow her claim for the SBP annuity. DOHA has no authority to modify or waive the provisions of the Barring Act or make any exceptions to the time limitations it imposes. *See* DOHA Claims Case No. 08112402 (November 26, 2008); Comptroller General decisions B-260835, May 10, 1995; B-260207, Nov. 6, 1995; B-249968, Feb. 16, 1993; and B-204542, Nov. 30, 1981.

As explained by the DFAS and the DOHA, the claimant may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Navy. Under 31 U.S.C. § 3702(e), upon request of the Assistant Secretary of the Navy, the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for claims involving a uniformed service member's pay, allowances or survivor benefits. Under DoD Instruction 1340.21 ¶ E6.4 (May 12, 2004), the Director of DOHA is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. However, the claimant must file her request directly with the Assistant Secretary of the Navy at the following address:

Assistant Secretary of the Navy
(Financial Management & Comptroller)
720 Kennon Street SE, Bldg 36,
Room 104
Washington Navy Yard, DC 20374

We note that under 31 U.S.C. § 3702(e), waiver shall only be granted to allow payment up to a maximum of \$25,000.00, and the claimant will not be granted the SBP annuity prospectively. Therefore, the claimant may wish to also pursue the matter with the BCNR. Under 10 U.S.C. § 1552, the Secretary of a military department, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated May 3, 2019.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board