

DATE: September 24, 2019

In Re:

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Claimant

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Claims Case No. 2019-CL-041101.2

**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. The claimant must prove by clear and convincing evidence on the written record that the government is liable under the law for the amount claimed.

DECISION

The claimant, the widow of a retired U.S. Army member, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-041101, dated July 12, 2019. In that decision, DOHA denied the claim for a Survivor Benefit Plan (SBP) annuity because the member did not elect SBP coverage for his spouse within one year of their marriage.

Background

The member, after serving in the U.S. Army during World War II, transferred to the Reserves. He served in the Reserves until his retirement in September 1974, at age 60. He retired at the rank of Colonel. He was unmarried when he retired. As part of the paperwork to receive retired pay, the member submitted a DD Form 4240, *Data for the Payment of Retired Army Personnel*. He marked that he was single and had no dependent children in the appropriate boxes. He named his brother as his beneficiary for the unpaid arrears of his retired pay (AOP).

On August 12, 2013, the member married the claimant. On December 10, 2016, the member passed away. In January 2017 the claimant submitted to the Defense Finance and Accounting Service (DFAS) a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as

the surviving spouse of the member. In February 2017 DFAS denied the SBP claim because the member had not elected to participate in SBP within one year of the marriage. The claimant appealed the denial to DOHA through DFAS.

On appeal the claimant argued the member had made a timely election to participate in SBP within one year of their marriage. In support of her claim she submitted a copy of a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, signed by the member before a notary on May 11, 2014, in which he requested SBP coverage for his spouse and child. She also submitted two statements from witnesses who observed the member's completion of the SBP paperwork. DFAS has no record of receiving this DD Form 2656-6. There also is no record of SBP premiums being withheld from the member's retired pay or a change in the member's AOP beneficiary.

In the appeal decision, the DOHA adjudicator accepted the fact that the member executed a DD Form 2656-6 on May 11, 2014. The adjudicator concluded that under the SBP law, the member was required to file the election with DFAS within one year of the date of his marriage to the claimant. Since the statutory language required that DFAS actually receive the member's election within one year of his marriage, the claim for the SBP annuity was disallowed.

In requesting reconsideration of that decision, the claimant relies on documentation in the record. She maintains the member's SBP election was valid and that the DD Form 2656-6 was submitted to DFAS by the U.S. Postal Service within one year of their marriage. She states that DFAS did not act on the DD Form 2656-6 in a timely manner, resulting in the disallowance of her SBP claim. She relies on the fact the DD Form 2656-6 was notarized and witnessed. She maintains that this is evidence the member submitted a timely election for a SBP coverage for his spouse. She requests a personal appearance before the DOHA Claims Appeals Board.

Discussion

The rights of individuals to receive benefits under Federal statutes are by virtue of the language of the statute and subject to the conditions and limitations contained therein. *See* Comptroller General decision B-203903, Feb. 11, 1985. When the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2017-CL-062708.2 (December 11, 2017); and DOHA Claims Case No. 2012-CL-061105.2 (September 27, 2012). The claimant must prove by clear and convincing evidence on the written record, that the United States is liable to the claimant for the amount claimed. *See* DOHA Claims Case No. 2016-CL-111002.2 (October 31, 2017).

The SBP program, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the dependents of deceased members of the uniformed services. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation in the SBP is automatic for members who are married or have dependent children when they become eligible to participate in SBP, *i.e.*, when they become eligible for retired pay. *See* 10 U.S.C. § 1448(a)(1)(A) and (a)(2)(A). Members who marry or acquire a dependent child after becoming eligible for retired pay may elect to include that spouse or

dependent child in the program if they provide the statutory notice. *See* 10 U.S.C. § 1448(a)(5)(A). The member's election must be in writing and received by the Secretary concerned, *i.e.*, DFAS, within one year after the date on which that member marries. *See* 10 U.S.C. § 1448(a)(5)(B).

DFAS has verified that they have no record of receiving the DD Form 2656-6 in question prior to the claimant's filing of the DD Form 2656-7, after the member's death. DOHA must accept the version of facts presented by the agency in the absence of clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 09091701 (September 24, 2009). The applicable statutory law renders the claim unpayable. The member's election was not received by DFAS within one year of the marriage. In addition, DFAS did not withhold SBP premiums from the member's retired pay and there is no evidence the member ever questioned why there was no withholding of premiums reflected on his monthly retired account statements after executing the DD Form 2656-6 in May 2014.

The claimant requests a correction of the record. Our Office only has jurisdiction to adjudicate claims based on statute and regulation. However, the claimant may have other available remedies that rest with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. These remedies are outside DOHA's authority and any request for a correction of the record needs to be pursued with the ABCMR.

The claimant has asked that DOHA hold a hearing. Under DoD Instruction 1340.21 (May 12, 2004), there is no authority for DOHA to hold oral hearings.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2019-CL-041101 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

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