DATE: June 3, 2019

In Re:	)	
[REDACTED]	)	Claims Case No. 2018-CL-090705.2
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 deceased 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. 2018-CL-090705, dated May 2, 2019.

Background

On November 1, 1977, the claimant and the member were married. On August 1, 1996, the member retired from the Army, and elected spouse and child Survivor Benefit Plan (SBP) coverage. On April 26, 2004, the claimant and the member were divorced. The divorce decree awarded the claimant a portion of the member's disposable retired pay and also, former spouse SBP coverage. On July 2, 2004, the claimant's attorney sent a letter to the Defense Finance and Accounting Service (DFAS) – Garnishment Operations Directorate, Cleveland, Ohio, requesting DFAS begin making monthly payments to his client of her share of the member's retired pay as set forth in the divorce decree. On August 10, 2004, DFAS-Garnishment Operations Directorate sent the claimant a letter acknowledging receipt of her application for payment of a portion of the member's retired pay. In the letter, DFAS also advised the claimant that if the divorce decree awarded her former spouse SBP coverage, she must request a "deemed election" for SBP within one year of the date of her divorce directly to DFAS – U.S. Military Retirement Pay, London, Kentucky. However, the member did not make a former spouse SBP election within one year of

the date of the divorce, nor did the claimant make a request for a deemed election within one year of the date of divorce. On June 15, 2017, the member passed away and the claimant submitted a claim for the SBP annuity.

DFAS subsequently denied the claimant's claim for a SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election. DFAS also advised the claimant that since she was the designated beneficiary of the member's arrears of pay (AOP), she would be entitled to any AOP owed on the member's account, pending the outcome of her claim for SBP. In this regard, DFAS continued to deduct spouse SBP premiums from the member's retired pay after the divorce when he did not have a spouse beneficiary. The claimant appealed DFAS's denial of her claim for the SBP to DOHA. In the appeal decision, DOHA upheld DFAS's denial of the claim.

In her reconsideration request, the claimant attaches DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018), a case cited by the attorney examiner in the DOHA appeal decision. She alleges various errors in that decision, such as her marriage and divorce dates, the member's retirement date and his date of death. She also maintains that her divorce attorney submitted all required documents to DFAS in 2004 in order to affect her former spouse SBP coverage. She cites the language in the divorce decree stating that the court finds that she is presently named the spouse beneficiary of the member and that this should continue by the member designating her as a former spouse beneficiary. She attaches the attorney's July 2, 2004, letter to DFAS – Garnishment Operations Directorate, which provided DFAS the divorce decree. She questions why she should trust that DFAS actually sent her instructions on how to file a deemed election given all the mistakes they have made in her case. In addition, she attaches the member's June 1, 2005, Retirement and Annuitant Statement (RAS) reflecting that he continued to pay SBP premiums for spouse and child coverage after the divorce. Finally, she argues that the Barring Act, 31 U.S.C. § 3702(b), should not apply to her claim for SBP, as DFAS previously indicated to her.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2016-CL-111002.2 (October 31, 2017). Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions. Preliminarily, we will address the claimant's concern that the attorney examiner erred by citing to DOHA Claims Case No. 2017-CL-081403.2, *supra*, and attaching it to the appeal decision in her case. The decision included in the appeal decision is legal precedent and was cited by the attorney examiner as analogous to the situation presented in the claimant's case. The dates addressed in that decision are not pertinent to the claimant's case.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. *See* DOHA Claims Case No. 2016-CL-111002.2, *supra*; and DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012). Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for his former spouse, he must notify DFAS in writing of the divorce and his intention to provide

coverage for his former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. Former spouse coverage must be established within one year from the date of the divorce. *See* 10 U.S.C. §1448(b)(3)(A). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to his former spouse. If he fails to do so, the former spouse has one year from the date of the divorce to request a deemed election. *See* 10 U.S.C. § 1450(f)(3).

In this case, the member was obligated under the terms of the divorce decree to cover the claimant as his former spouse SBP beneficiary. However, the member failed to establish former spouse SBP coverage and the claimant did not file a deemed election. Although the claimant states the uncertainty of DFAS notifying her of her right to a deemed election, we note that DFAS's letter dated August 10, 2004, advising her of that right was sent to the same address as her attorney's letter to her dated November 8, 2005. In addition, the RAS provided by the claimant specifically lists "spouse SBP" coverage, not "former spouse SBP" coverage. Therefore, DFAS properly denied the claim for the SBP annuity.

As for the claimant's concern about the Barring Act being applied to her SBP claim, since she is not entitled to the SBP annuity, we agree that it would not apply to her claim for it. However, since DFAS improperly withheld spouse SBP premiums from the member's retired pay when he was divorced and did not have a spouse, the claimant, as the named AOP beneficiary, is entitled to reimbursement of the member's overpaid SBP premiums for the period DFAS erroneously withheld them from his retired pay. The claimant should contact DFAS regarding this matter, if she has not already filed a claim for the AOP. Information on filing a claim for the AOP is found online at https://www.dfas.mil/retiredmilitary/provide/aop.html.

Conclusion

The claimant's request for relief is denied. In accordance with the Department of Defense Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

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

SIGNED: Gregg A. Cervi

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Gregg A. Cervi
Member, Claims Appeals Board