

DATE: October 17, 2019

In Re:)
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 [REDACTED])
Claimant)
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Claims Case No. 2019-CL-032006.2

**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. Navy member, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-032006, dated August 30, 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

On September 1, 1992, the member retired from the U.S. Navy Reserve, and began receiving retired pay on his 60th birthday, March 14, 1998. As part of the paperwork to receive retired pay, the member submitted a DD Form 2656, *Data for the Payment of Retired Personnel*, dated June 2, 1997. He marked that he was single and had no dependent children in the appropriate boxes.

On December 20, 2012, the member married the claimant. On January 4, 2016, the member passed away. On October 31, 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. On November 14, 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.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the SBP claim. The adjudicator concluded that under the SBP law, the member was required to file the SBP election with DFAS within one year of the date of his marriage to the claimant. The attorney examiner also pointed out that there was no record of SBP premiums being withheld from the member's retired pay. The attorney examiner also found that although the member may have believed that once he added his spouse to his TRICARE coverage she was covered as his SBP beneficiary, the statutory language in the SBP law required that DFAS actually receive the member's SBP election within one year of his marriage. Since DOHA is limited to the applicable statutes and regulations regarding a claim, the attorney examiner directed the claimant to another avenue of relief under 10 U.S.C. § 1552, with the Board for Correction of Naval Records (BCNR).

In her request for reconsideration, the claimant raises the issue of the member's capacity given the severity of the illnesses that afflicted him during the time period in which he was eligible to elect SBP coverage. She also continues to assert that when the member signed her up for TRICARE, they believed that he also established SBP coverage for her.

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. 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. 2019-CL-041101.2 (September 24, 2019).

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). A reserve-component member is an eligible participant when he becomes eligible for reserve-component retired pay but for the fact that he is under 60 years of age. *See* 10 U.S.C. § 1448(a)(1)(B) and (a)(2)(B). 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).

In this case, the member retired from the Navy Reserve in 1992 and was eligible for reserve-component retired pay but for the fact that he was not yet 60 years old. At the time of his retirement, and when he turned 60 years old and began receiving retired pay, the member was not married and had no dependent children. In December 2012 the member married the claimant. Although the

member may have intended to cover the claimant as his spouse SBP beneficiary, DFAS has no record of receiving the member's election. 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.

Our office only has jurisdiction to adjudicate claims based on statutes and regulations. As set forth in the appeal decision, the claimant may seek relief with the BCNR under 10 U.S.C. § 1552. This remedy is outside DOHA's authority and any request for a correction of the record needs to be pursued with the BCNR.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2019-CL-032006, dated August 30, 2019, disallowing the claim. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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: Ray T. Blank, Jr.

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

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board