

DATE: October 28, 2019

In Re:)
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 [REDACTED])

Claims Case No. 2019-CL-032007.2
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**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 in the written record that the government is liable under the law for the amount claimed.

DECISION

The claimant, a former spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-032007, dated September 30, 2019.

Background

On September 24, 1960, the claimant and the member were married. In December 1983 the member elected Reserve Component Survivor Benefit Plan (SBP) coverage for the claimant as his spouse at a reduced portion of his retired pay. The Reserve Component SBP extends eligibility for SBP to Reserve Component members who would otherwise be eligible to receive retired pay except that they have not reached the required retirement age of 60. The member chose Option C, which provided immediate coverage for his spouse. On April 7, 1986, the claimant and the member divorced. The divorce decree incorporated a prior agreement by the parties dated February 11, 1986. That agreement, in pertinent part, stated the following:

The Husband shall cause to be paid unto the wife one-half (1/2) of his pre-arranged Air Reserve Retirement Survivor Benefit Plan.

The amount paid the wife shall be determined on a month to month or year to year basis depending upon the amount of money the husband is entitled to for such plan. This amount shall be paid unto the wife regardless of whether she remarries or enters into a meretricious relationship with a third party and same shall be enforceable as alimony and nondischargeable in bankruptcy.

On February 14, 1996, the member submitted his DD Form 2656, *Data for Payment of Retired Personnel*, and reported that he was not married. On March 23, 1996, the member began receiving retired pay on his 60th birthday. On August 16, 2006, the member notified the Defense Finance and Accounting Service (DFAS) of his divorce and requested that his spouse SBP coverage be changed to former spouse SBP coverage by submitting a DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, dated August 8, 2006. On the DD Form 2656-1, the member indicated that his election for former spouse SBP coverage was being made pursuant to a court order. The member also included a copy of his divorce decree, his original December 1983 SBP election for spouse coverage and his Retiree Account Statement (RAS) dated December 2, 2004, which reflected he was paying monthly SBP premiums for spouse coverage for the claimant.

On September 30, 2014, the member passed away. On July 28, 2017, the claimant submitted to DFAS a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. On September 27, 2017, DFAS denied her claim for the SBP annuity. Although DFAS acknowledged that the member elected her as his spouse SBP beneficiary when he became retirement eligible in December 1983, DFAS found that upon their divorce, the member did not request the SBP coverage change from spouse to former spouse within one year of their divorce. DFAS further advised that if the member and the former spouse sign an agreement to continue SBP with former spouse coverage, and that agreement is incorporated into the final divorce decree, the former spouse has the ability to request a deemed election for former spouse coverage if the member fails to do so. However, the request for the deemed former spouse election must be received within one year of the divorce.

The claimant appealed DFAS's denial of her SBP claim. In DFAS's Administrative Report, DFAS determined that the divorce decree did not require the member to continue to provide SBP coverage for his former spouse because the prior agreement dated February 11, 1986, did not contain the necessary language to award it. Therefore, since the member did not make a voluntary election for SBP coverage for his former spouse within one year of their divorce, the claimant was not the former spouse beneficiary of his SBP.

In the appeal decision, the DOHA attorney examiner disagreed with DFAS's determination that the prior agreement did not award former spouse SBP coverage for the claimant. However, he explained that although the claimant was awarded former spouse SBP coverage in the divorce proceedings, she failed to request a deemed election for SBP coverage within one year of the divorce. Therefore, he upheld DFAS's denial of the SBP claim, finding no evidence that the member elected former spouse SBP within one year of their divorce. He further advised the claimant that she may find relief outside the purview of DOHA by petitioning for a correction of military records under 10 U.S.C. § 1552 and 10 U.S.C. § 1454.

In her reconsideration request, the claimant states that she was married to the member for 26 years, but was his companion for a total of 58 years. She cared for him with the help of their two children for eight years after his stroke until his death. She points to the record evidence that she has provided to show that he always intended for her to receive the SBP annuity upon his death. He originally elected it for her as his spouse in 1983; the prior agreement which was incorporated into the divorce decree provided for the coverage as his former spouse; he paid SBP premiums from his retired pay as reflected on his RAS; and in August 2006, he sent DFAS the DD Form 2656-1, clarifying that she be covered after their divorce. Finally, the claimant requests that DOHA send the information she has provided to the proper military correction board for action under 10 U.S.C. § 1552 and 10 U.S.C. § 1454.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2018-CL-080201.2 (January 3, 2019).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of deceased members of the uniformed services. 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)(iii). 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's former spouse was covered under the SBP as the member's spouse beneficiary from the time he became eligible to receive retired pay in 1983, except that he had not reached the required retirement age of 60, until such coverage ended with their divorce in April 1986. Although the record evidence indicates that the member intended that his former spouse be covered under the SBP, he failed to establish former spouse SBP coverage within one year of their divorce. We need not address the question of whether the language in the prior agreement which was incorporated into the divorce decree required the member to establish former spouse SBP coverage. Even if we conclude that it did, the facts are that the member did not elect it within one year and the former spouse did not make a request for it within one year. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018); and DOHA Claims Case No. 2018-CL-080201.2 (January 3, 2019).

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the attorney examiner in the appeal decision, the claimant may have other available remedies that rest with the Air Force Board for Correction of Military Records (AFCMR) 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 AFBCMR.

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated September 30, 2019. 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: Ray T. Blank, Jr.

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

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board