

DATE: December 7, 2020

In Re:)
[REDACTED]) Claims Case No. 2019-CL-060401.2
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 retired member of the U.S. Air Force (USAF), requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-060401, dated July 17, 2020.

Background

The member retired from the Air Force on November 1, 1991. The member as part of his retirement processing elected Survivor Benefit Plan (SBP) coverage for the claimant and his children. On August 27, 2004, the member and the claimant divorced. The final divorce decree awarded the claimant 25% of the total gross monthly payment of the member's military retired pay. In addition, the claimant was awarded former spouse SBP coverage. The court issued an Order for Division on September 15, 2004, executing the terms of the final divorce decree. In the order, the member was directed by the court to do all things necessary to immediately designate the claimant as his SBP beneficiary.

On September 27, 2004, the claimant's attorney submitted to the Defense Finance and Accounting Service (DFAS), the executed DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, along with the divorce decree and Order of Division. In his letter,

the claimant's attorney requested his client's share of the member's retired pay, but did not mention SBP coverage. On October 18, 2004, DFAS acknowledged receipt of the claimant's application for a portion of the member's retired pay. 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's Retired Pay office. The letter provided the mailing address and 1-800 number to DFAS's Retired Pay office. However, DFAS has no record that the member made a former spouse SBP election within one year of the date of the divorce, nor any record that the claimant made a request for a deemed election within one year of the date of divorce. On August 28, 2018, 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 on the basis that the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election. The claimant appealed DFAS's denial of her claim for the SBP annuity to DOHA. In the appeal decision, the DOHA adjudicator sustained DFAS's denial of the claim. He further advised the claimant that she may find relief outside the purview of DOHA with the Army Board for Correction of Military Records (ABCMR).

In her request for reconsideration, the claimant states that the divorce decree contained specific language stating that she was entitled to the SBP annuity of the member and that the member was to provide all necessary actions to accomplish the coverage for her. She states that she wishes to pursue a correction of military record with the ABCMR and attaches a completed DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*. She also states that she is confused by the fact that she was issued a check from DFAS for \$9,807.03 associated with the member's retired pay account if she was not entitled to his SBP annuity.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2019-CL-022108.2 (September 17, 2019).

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. 2019-CL-022108.2, *supra*; and DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018). 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 based on the divorce decree to cover the claimant as his former spouse under the SBP. However, the member failed to establish former spouse SBP coverage and the claimant did not file a timely deemed election. Therefore, DFAS properly denied the claim for the SBP annuity.

DFAS has advised us that the claimant is the member's arrears of pay beneficiary (AOP). Since the member continued to erroneously pay for spouse SBP coverage from his retired pay when he did not have a spouse beneficiary, the claimant is entitled to the overpaid SBP premiums for the period DFAS erroneously withheld them from his retired pay. DFAS has further verified that they sent the claimant a check for a portion of the AOP. However, DFAS has also stated that the claimant may be entitled to additional payment of AOP. She should contact DFAS in this regard.

Finally, the claimant should submit her application for a record correction to the ABCMR, not DOHA, since DOHA has no authority over this type of relief.

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

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board