

DATE: February 27, 2020

In Re:)
[REDACTED]) Claims Case No. 2019-CL-041701.2
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. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-041701, dated December 27, 2019. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS) denial of the claimant's claim for the member's Survivor Benefit Plan (SBP) annuity.

Background

On October 26, 1963, the claimant and the member were married. On September 1, 1976, when the member retired from the Air Force, the claimant and the member were still married and had four dependent children. On June 14, 1976, as part of his retirement processing, the member completed a DD Form 1883, *Survivor Benefit Plan Election Certificate*. He elected to participate in the SBP with child only coverage. He paid for child only SBP coverage until his youngest child reached the age of majority in 1991.

On November 17, 1994, the claimant and the member divorced. The divorce decree specified a requirement to name the claimant as the irrevocable beneficiary of the member's SBP in exchange for the member being awarded as his "sole and separate property one-hundred

percent interest in his military retirement payments.” The record reflects that the member did not make a former spouse SBP election for the claimant, nor did the claimant request that a former spouse SBP deemed election be made.

On December 10, 2000, the member passed away. On January 3, 2001, the claimant notified DFAS of the member’s passing and made a claim for the member’s SBP annuity as his former spouse. On February 1, 2001, DFAS denied the claimant’s claim for an SBP annuity on the basis that the member had elected child only coverage at retirement and this coverage terminated when his youngest child reached age 22. Therefore, there was no monthly SBP annuity payable.

The claimant revived her claim in a May 2010 letter to DFAS. DFAS denied the renewed claim on the grounds that it was barred by the six-year statute of limitations. *See* 31 U.S.C. § 3702(b)(1). In 2016 the claimant appealed DFAS’s 2010 denial citing the fact that the member had died in December 2000 and she had filed her claim in January 2001. DFAS denied the 2016 claim on the basis that the member had not elected former spouse SBP coverage within a year of the divorce, nor had the claimant made a deemed election for the SBP coverage within a year of the divorce.

The claimant appealed to our Office. In forwarding the appeal to DOHA, DFAS prepared an Administrative Report dated February 5, 2019. The Administrative Report reestablished DFAS’s original basis for denial as the member never elected spouse SBP coverage at his retirement. Therefore, when he was divorced, he would not have been able to convert spouse coverage to former spouse coverage. The DOHA appeal decision upheld DFAS’s denial of the claimant’s claim.

In the claimant’s reconsideration request, she requests that the government provide proof that she was notified of the member’s election of child only SBP coverage. She asserts that the statute and regulations at the time required that she be notified of the member’s decision to not provide spouse SBP coverage and that the Department of Defense did not protect her rights. Therefore, she maintains that the member’s decision to exclude her as his spouse beneficiary is invalid.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), 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. Federal agencies and officials must act within the authority granted to them by statute and issuing regulations. Thus, the liability of the United States is limited to that provided by law, including implementing regulations.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. A married member is eligible to participate in SBP when he becomes eligible for retired pay. However, a member may elect not to participate, elect to provide less than maximum coverage or elect to provide SBP benefits to a dependent

child rather than a spouse. *See* 10 U.S.C. § 1448(a)(3)(A). Currently, the law requires spousal concurrence when a married member elects to provide an annuity for a dependent child but not for the person's spouse. *See* Pub. L. No. 99-145, title VII, § 721(a), 99 Stat. 583, 676 (1985). Prior to the enactment of Pub. L. No. 99-145, spouses merely had to be notified of the decisions not to participate or to reduce benefits.

A married member who validly elects child only SBP coverage at retirement is not a participant in the plan for the purpose of establishing former spouse SBP coverage, if he later divorces. *See* 10 U.S.C. § 1448(b)(2); and DOHA Claims Case No. 2018-CL-051101.2 (November 29, 2018).

The claimant maintains as the spouse of a retired member who elected child only coverage, the statute required that she be notified of that election. Although the SBP statute in effect at the time of the member's SBP election in 1976 required that a member's spouse be notified if the member declined to elect spouse coverage, the law provided no specifics on the type of notification or the remedy for the lack of notification. However, in *Barber v. United States*, 230 Ct.Cl. 287, 676 F.2d 651 (1982), the U.S. Court of Federal Claims held that if a spouse was not notified of the member's failure to make such an election, the spouse was entitled to an SBP annuity upon the member's death. Even assuming an error in notification occurred at the time of the member's retirement, spousal coverage ends upon divorce and 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). If a member divorces and wishes to provide SBP coverage for their former spouse, they must notify DFAS in writing of the divorce and their intention to provide coverage for their former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. If the member 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). Although the claimant was the member's spouse at the time he became eligible to participate in SBP and made his SBP child only election, she failed to remain eligible for future benefits as a former spouse following the divorce because the member did not make a voluntary election for former spouse coverage and the claimant did not make a request for a deemed election for former spouse coverage within a year of their divorce. *See Sumakeris v. United States*, 34 Fed.Cl. 246 (1995).

DOHA is bound by statute and regulation, and therefore, is unable to allow the claim for the SBP annuity. However, as explained by the DOHA adjudicator in the appeal decision, under 10 U.S.C. § 1552, the Secretary of the Air Force, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. Information on petitioning the Air Force Board for Correction of Military Records (AFBCMR) is found on the Air Force's Personnel Center's website.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2019-CL-041701, dated December 27, 2019, 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board