

DATE: September 9, 2020

In Re:)
)

[REDACTED])

) Claims Case No. 2020-CL-031203.2
)
)

**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.

DECISION

The claimant, the surviving spouse of a deceased member of the U.S. Army Reserve, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-031203, dated June 16, 2020. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS's) denial of the claim for the member's Reserve Component Survivor Benefit Plan (SBP) annuity because the member, unmarried at the time he became eligible for retired pay and a participant in the Plan but having elected to participate with child only coverage, failed thereafter to elect spouse coverage within one year of the date of his marriage to the claimant.

Background

On January 9, 1980, the member elected child only SBP coverage when he met the requisite years of service in the Army Reserve to be eligible to receive retired pay at age 60. On September 13, 1980, the member married the claimant.

On April 15, 1993, the member executed a DA Form 4240, *Data for Payment of Retired Army Personnel*, requesting SBP spouse coverage for the claimant. He also completed a *Supplemental Survivor Benefit Plan (SSBP) Election for Spouse/Former Spouse*, on April 14, 1993, and attached it to the DA Form 4240. On September 29, 1993, the member turned 60

years old and began receiving retired pay. His Retiree Account Statements (RASs) reflected that child only SBP premiums were being withheld from his retired pay.

On October 10, 2019, the member passed away. The claimant claimed the SBP annuity as the widow of the member. On November 5, 2019, DFAS denied the claim because the member had not elected spouse SBP coverage within one year of the marriage. In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim. He further explained that the claimant may have other available remedies. First, under 10 U.S.C. § 1454, the Secretary of the member's service may correct or revoke an SBP election when the Secretary deems it necessary to correct an administrative error. Second, under 10 U.S.C. § 1552, the Secretary, 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.

In her reconsideration request, the claimant attached all relevant documentation she had to reflect that it was the member's intent for her to be covered under the SBP. She stated that the appeal decision concentrated on missing documentation from 1980-81. She believes that her husband did submit the appropriate documentation, but it was either lost or thrown out in error by the National Guard or the Army Reserve. She also cites to language contained in the DA Form 4240, and maintains that her husband made an irrevocable designation of spouse only SBP coverage in April 1993, six months prior to the date he retired. She states that since the government will not accept the member's designation in 1993, she requests a review of records under the Freedom of Information Act (FOIA).

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A married reservist or reservist with a dependent child may elect to participate in SBP when he is notified that he has completed the years of service required for eligibility for reserve-component retired pay. *See* 10 U.S.C. § 1448(a)(2)(B). A member who is not married upon becoming eligible to participate in the plan but who later marries may elect to establish coverage for his spouse pursuant to 10 U.S.C. § 1448(a)(5). That section requires a written election, signed by the member, and received by the Secretary concerned within one year of the marriage. *See* DOHA Claims Case No. 2019-CL-031402.2 (September 24, 2019); and Comptroller General decision B-258328, Feb. 15, 1995.

In January 1980 when the member met the requisite number of years of service required for reserve-component retired pay, he was eligible to participate in SBP. He was unmarried at that time and elected child only SBP coverage. In September 1980 he married the claimant. He had one year from the date of his marriage to the claimant to designate her as his spouse SBP beneficiary. There is no record of an election for spouse SBP coverage during the period September 1980 through September 1981. The only evidence is the member's attempt to elect spouse SBP coverage in 1993, when he became eligible to receive retired pay at age 60.

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 attorney examiner in the appeal decision,

the claimant may have other available remedies that rest with the Army Board for Correction of Military Records (ABCMR) 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 record needs to be pursued with the ABCMR.

Finally, the claimant should submit her FOIA request to DFAS. DOHA must base its decisions on the written record provided to it by DFAS and the claimant. DOHA has no authority to perform investigations of records held by DFAS.

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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board