

DATE: September 14, 2020

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-042702.2

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. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-042702, dated June 16, 2020.

Background

On May 22, 1986, in preparation for retirement, the member elected Survivor Benefit Plan (SBP) coverage for the claimant, his spouse at the time, and his children. He also designated the claimant as his beneficiary to receive 100% of any unpaid retired pay upon his death, commonly referred to as arrears of pay (AOP). On August 1, 1986, the member retired. On August 7, 2000, the member and the claimant divorced. In pertinent part, the divorce decree stated that in exchange for a portion of the member's retired pay, including "all survivorship pension benefits," the claimant waives her right to the member's pension from the state of Ohio.

On January 30, 2001, the claimant's attorney sent the Defense Finance and Accounting Service (DFAS) a letter stating the following:

Enclosed please find my client's Application for Former Spouse Payments from retired Pay. Please process this application at your earliest possible convenience.

The attorney enclosed a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, executed by the claimant on August 8, 2000. DFAS subsequently established direct payment to the claimant of her share of the member's retired pay under the Uniform Services Former Spouses' Protection Act (USFSPA), effective April 2001.

On August 1, 2015, the member updated his AOP beneficiary to reflect his new spouse. DFAS reports that SBP premium payments were withheld from the member's retired pay until he reached paid-up status on August 1, 2016.

On August 24, 2019, the member passed away. The claimant advised DFAS of the member's death and claimed the SBP annuity. DFAS subsequently denied the claimant's claim for a SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election. DFAS also determined that the claimant was underpaid her portion of the member's retired pay under the USFSPA for the period August 25, 2013, through July 31, 2016, and issued her a payment of \$2,163.96.

The claimant appealed DFAS's denial of her claim for the SBP annuity to DOHA. In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim. He found no record evidence that the claimant made a request for a deemed election for former spouse SBP coverage within one year of her divorce from the member.

In her reconsideration request, the claimant maintains that the DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for a Deemed Election*, was originally prepared and submitted as required by law. She states that although it took a great deal of effort to locate her divorce attorney from twenty years ago, she found him. She attaches a statement from him dated July 15, 2020. The attorney states that he represented her in regard to her divorce and demand for SBP (DD Form 2656-10). He further states that all documents were prepared, properly executed and submitted as required by law and applicable regulations. He requests approval of the claimant's application for the SBP annuity.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2016-CL-111002.2 (October 31, 2017).

The SBP, set out in 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. 2017-CL-101202.2 (April 10, 2018); and DOHA Claims Case No. 2016-CL-111002.2, *supra*. 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. The former spouse's request that the retired member shall be deemed to have made an election for former spouse SBP coverage must be submitted in writing and in the manner prescribed by the Secretary concerned. *See* 10 U.S.C. § 1450(f)(3)(A). An election for former spouse SBP coverage may not be deemed to have been made unless the Secretary concerned receives such a request from the former spouse within one year of the date of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C).

The implementing regulations for SBP elections and election changes are currently found under Chapter 43, Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures — Retired Pay. Under paragraph 430302, a former spouse or the former spouse's legal representative must request the deemed election by completing the DD Form 2656-10, and submitting it with the divorce decree. The current regulation states that effective September 27, 2008, the use of the DD Form 2656-10 to a request a deemed election became mandatory. *See* DoDFMR ¶ 430504(C) (April 2019). However, the regulation in effect at the time of the divorce in this case giving rise to the former spouse's right to request a deemed election still requires the former spouse or the former spouse's attorney to make a written request. Concerning the content of the request, the regulation also states that the request is acceptable if it refers to, or cites provisions in a court order concerning SBP former spouse coverage, or makes clear by other references to SBP that there is an intent that the coverage be provided to a former spouse; and the written request is accompanied by a copy of the court order and/or a statement from the clerk of the court. *See* DoDFMR ¶ 430503(C) (September 1999).

In this case, it appears by the terms of the divorce decree that the member was obligated to cover the claimant as his former spouse SBP beneficiary. However, the member failed to establish former spouse SBP coverage and the claimant did not file a deemed election. Although the claimant's attorney states that he represented her with regard to her divorce and demand for SBP, and submitted the appropriate documentation on her behalf, DFAS has no record of receiving the claimant's request for a deemed election. DOHA is bound by the written record and must accept the version of facts presented by the agency in absence of clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 2016-CL-090801.3 (March 30, 2017). Therefore, DFAS properly denied the claim for the SBP annuity.

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