

DATE: November 18, 2020

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2020-CL-060106.3
)
)

**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-060106.2, dated August 12, 2020.

Background

On October 1, 1977, the claimant and the member married. On July 31, 1994, the member retired from the Navy. At the time of his retirement, he elected Survivor Benefit Plan (SBP) spouse coverage for the claimant at the reduced base amount of \$400.00. He also named the claimant as his beneficiary for any arrears of retired pay (AOP) payable upon his death. On February 1, 1995, the member and the claimant divorced. The divorce decree granted the claimant 50% of the member's military retired pay, and awarded her "a former spouse survivor annuity under the Federal Employees Retirement System."

On July 1, 2004, the claimant submitted a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, to the Defense Finance and Accounting Service (DFAS) - Garnishment Operations in Cleveland, Ohio. On that form, she requested her 50% share of the member's retired pay and attached their divorce decree. On July 26, 2004, DFAS - Garnishments Operations acknowledged receipt of her application for a portion of the member's

retired pay and sent a direct deposit form to her to file with DFAS. In addition, DFAS notified the claimant that if her divorce decree specified that she was to be designated as a former spouse beneficiary for the SBP annuity, she must make a 'deemed election' for SBP coverage within one year of the date of her divorce directly to DFAS – U.S. Military Retired Pay in London, Kentucky. The record reflects that the claimant submitted her direct deposit form with DFAS in order to receive her portion of the member's retired pay and payment began in September 2004.

On February 14, 2016, the member passed away. DFAS was notified of his passing by his sister. On February 23, 2016, the claimant submitted to DFAS a DD Form 2656-10, *Survivor Benefit Plan (SBP/Reserve Component (RC) SBP Request for Deemed Election*. On April 20, 2016, she claimed the SBP annuity as the member's former spouse.

On May 23, 2016, DFAS denied the claimant's claim for the 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 within one year of the divorce.

The claimant appealed DFAS's denial of her claim for the SBP. In her appeal, she acknowledged that she did not know she had to submit a deemed election for former spouse SBP coverage within one year of her divorce until she filed her application for her portion of the member's retired pay. She stated that due to the member's failure and lack of responsibility, he never submitted the necessary documentation concerning their divorce to the Navy or DFAS, and as a result, DFAS still considered them to be married until his death.

In response to the claimant's appeal, DFAS sent her an administrative report further detailing their reasons for the denial of her claim for the SBP. DFAS explained that the divorce decree did not award the claimant former spouse SBP. The language in the decree specifically awarded the claimant the member's annuity under the Federal Employees Retirement System (FERS), not his SBP annuity based on his military retirement. Therefore, she had no right to request a deemed election within one year of the divorce. However, DFAS did explain that the member had the right to voluntarily elect former spouse SBP for her but he failed to do so.

In DOHA's appeal decision, the attorney examiner upheld DFAS's denial of the claim. He explained that although the claimant was not entitled to the SBP annuity, she was the member's AOP beneficiary. He explained that although DFAS paid her a portion of the AOP, she may still be entitled to more and should pursue that claim with DFAS.

In her reconsideration request, the claimant states that the member clearly intended that she be his SBP beneficiary because he elected it for her in 1994 when he retired and the divorce decree's language stated that she was awarded his FERS annuity.

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 the survivors of deceased members of the uniformed services. *See* 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)(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, DFAS found that the divorce decree did not award the claimant former spouse SBP coverage; and therefore, she had no statutory right to request a deemed election. For the sake of argument, even if the language contained in the decree was considered sufficient to award her former spouse coverage, she did not request a deemed election within one year of the date of the divorce. Even though the member may have intended for the claimant to be covered, he did not elect former spouse SBP coverage for her. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2019-CL-022202.2 (August 27, 2019); DOHA Claims Case No. 2018-CL-090703.2 (June 19, 2019); and DOHA Claims Case No. 2017-CL-081403.2, *supra*.

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, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case the Board for Correction of Naval Records (BCNR), may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. This equitable remedy is a discretionary action that rests with the BCNR, and is outside DOHA's authority.

Finally, DFAS has advised DOHA that the claimant is the member's AOP beneficiary, and since the member continued to erroneously pay spouse SBP coverage from his retired pay when he did not have a spouse beneficiary, the member was underpaid retired pay after his divorce. Thus, this underpayment of retired pay is payable as AOP. The claimant should contact DFAS for a calculation and resulting payment of any further amount owed to her as AOP.

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated August 12, 2020. 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board