

DATE: April 26, 2021

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In Re: )

[REDACTED] )

) Claims Case No. 2020-CL-020301.2

Claimant )

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**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. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-020301, dated December 15, 2020.

**Background**

On February 26, 1983, the claimant and the member were married. In 1984 their first child was born. On February 23, 1998, in preparation for retirement, the member elected Survivor Benefit Plan (SBP) coverage for the claimant, his spouse at the time, and his child. 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 June 30, 1998, the member retired. On March 25, 2005, the claimant and the member's second child was born. On November 13, 2005, the couple separated, and the claimant subsequently filed for divorce. On July 17, 2007, the attorneys for both claimant and the member signed a Stipulated Judgment Rule that included the following paragraph:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be mutual restraining orders issued, without bond, preventing either party from disposing of, alienating or encumbering any property of a community nature, including all bank accounts owned jointly by petitioner and defendant.

On November 15, 2007, the Petition for Divorce was filed with the court and included the following paragraph:

Plaintiff fears that during the pendency of these proceedings that the defendant, unless restrained from doing so, will alienate, encumber or dispose of property of a community nature acquired during the marriage. Since irreparable injury, loss or damage may otherwise result; to protect petitioner's interest in the community property, plaintiff further prays that a temporary restraining order be issued immediately, without bond, in the form or substance of a preliminary will of injunction preventing the defendant from disposing of, alienating or encumbering any property of a community nature, including all bank accountants owned jointly by petitioner and defendant, and more specifically, any and all life insurance policies, survivor benefit plans, etc.

In that petition, the claimant's attorney also requested that the court issue a rule *nisi* ordering the member to show cause as to why a temporary restraining order should not be issued immediately.

In an order dated November 21, 2007, the court issued a temporary restraining order against the member in the form of a preliminary writ of injunction, preventing him from disposing of, alienating or encumbering any property of a community nature, including any and all life insurance plans and survivor benefits plans. The court also ordered the member to appear in front of it on November 29, 2007, to show cause as to why the temporary restraining order should not be issued.

On October 1, 2009, the claimant and the member's marriage was dissolved through a judgment of divorce. The judgment incorporated the Stipulated Judgment Rule dated July 17, 2007.

On August 6, 2010, the member was found dead in his home. The claimant sought assistance from her U.S. congressional representative. In her letter to the congressman, she wrote that the member stated in front of her attorney that he wanted to maintain SBP coverage for her after the divorce. However, she stated that when she contacted Retirement Services at the local Army base, she was told that she was not eligible for the SBP annuity. On September 9, 2010, the claimant's congressional representative forwarded her letter and her claim for the SBP annuity to the Defense Finance and Accounting Service (DFAS).

On September 30, 2010, the claimant's attorney filed with the court a Petition for Judicial Partition of Community Property. In that petition, the attorney requested that the court award the SBP annuity to the claimant. On October 1, 2010, the court appointed an attorney to represent the member's estate and ordered him to show cause on November 22, 2010, why the claimant was not entitled to the SBP annuity. The record does not reflect any outcome of the hearing on November 22, 2010.

On October 13, 2010, DFAS responded to the claimant's congressional representative. DFAS advised him that it was unaware of the claimant's divorce from the member until after his

death. DFAS explained that the claimant was not entitled to the SBP annuity because the member had not made a former spouse SBP election, nor had the claimant requested a former spouse SBP deemed election within one year of the divorce. DFAS suggested that the claimant pursue a record correction under 10 U.S.C. § 1552, with the Army Board for Correction of Military Records (ABCMR). DFAS further noted that the claimant and member's dependent son was still covered under the SBP. DFAS also reported that the claimant had been paid the member's AOP in the amount of \$457.85.

On November 19, 2013, the claimant's congressional representative again contacted DFAS concerning her SBP claim. In January 2014 DFAS responded to the congressman, reiterating that she was not entitled to the SBP annuity due to the lack of a timely former spouse SBP election or a timely SBP former spouse deemed election request. DFAS noted that an SBP annuity for the member's minor son had been established on October 25, 2010, and was being paid to the claimant on his behalf.

On June 3, 2016, the claimant revived her divorce case and a hearing was held. As a result of the hearing, a judgment was entered on November 8, 2018. In pertinent part, the judgement stated that the claimant was entitled the survivor benefits of the deceased member. On November 16, 2018, the claimant submitted a DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, to DFAS. DFAS denied the SBP claim. DFAS explained that SBP coverage ended with the claimant's divorce, and in order to establish former spouse SBP coverage, within one year of the divorce either the member must elect former spouse SBP coverage or the former spouse must request a deemed election for it.

On February 26, 2019, the claimant appealed the denial of her claim. She maintained that the member was ordered by the court to not dispose of his participation in SBP; he never remarried; he continued to pay SBP premiums after the divorce; the court recognized her entitlement to the SBP in its judgment issued in 2018; the member did not fail to elect former spouse SBP, he just died before he could make the election; and the claimant was unaware of the requirement for a former spouse SBP election or request for a deemed election until she received DFAS's letter in October 2010, more than a year after the divorce.

In November 2019 DFAS reconsidered the SBP claim. DFAS wrote that the claim consisted of two issues: 1) whether the claimant was entitled to the SBP annuity upon the member's death; and 2) whether the claimant was entitled to the annuity upon the court's issuance of the judgment in 2018.

The claimant retained an attorney to represent her in her appeal to DOHA. The attorney maintained that the member intended for the claimant to have former spouse SBP coverage. He stated that various court documents obligated the member to establish coverage for the claimant and that the claimant filed a deemed election for the coverage. He also submitted a copy of the Stipulated Judgment Rule, dated July 17, 2007.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim. He found nothing in the record to reflect that the member elected SBP coverage for the claimant, either voluntarily or pursuant to a court order, within a year of the divorce. He determined that

neither the judgment issued in 2018, nor the Petition for Judicial Partition of Community Property, dated September 30, 2010, could have been the basis for an SBP deemed election because both were issued after the member's death. The adjudicator examined the 2007 court issuances and found that neither could have been a basis for a former spouse SBP deemed election. He explained that the claimant may have other available remedies that rest with the ABCMR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454.

In her reconsideration request, the claimant states that the court's order dated November 8, 2018, granted her the right to request a deemed election, and that she timely submitted it to DFAS within one year of the date it was signed. She states that she could not have requested a deemed election within one year of her divorce until the court ordered her the entitlement to the SBP in 2018.

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation. The burden of proving the existence of a valid claim is on the person asserting the claim. The claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant. *See* Department of Defense Instruction 1340.21 (May 12, 2004) ¶ E5.7.

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. Spousal coverage ends upon divorce. *See* DOHA Claims Case No. 2019-CL-022202.2 (August 27, 2019); and DOHA Claims Case No. 2017-CL-101202.2 (April 10, 2018). 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. At the time of the claimant's divorce and the member death, DoDFMR ¶ 430302 stated that a former spouse or the former spouse's legal representative's deemed election request must be accompanied by a court order or a statement from the clerk of the court. 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) (June 2008). Under DoDFMR ¶ 430503(C)(3), no election shall be deemed to have been made which could never had been made by the member concerned. Further, if a member dies before making an election, then a former spouse's request, which is otherwise qualified, shall be honored even if the date of the request is after the date of the member's death. *See* DoDFMR ¶ 430503(C)(4).

In this case, the judgment of divorce was issued on October 1, 2009. Although it did incorporate the Stipulated Judgment Rule dated July 17, 2007, there is no specific language awarding the claimant former spouse SBP coverage. When the member passed away in August 2010 he had not made a voluntary election for former spouse SBP coverage for the claimant. Even though the claimant submitted a claim to DFAS for the SBP annuity within a year of the divorce decree, her claim for the SBP did not qualify as a deemed election for former spouse coverage. At the time she submitted her claim, there was no court order in existence requiring or providing that the member make a former spouse SBP election. It was not until November 8, 2018, when the court issued an order stating that the claimant was entitled to the SBP annuity. Since the member died in 2010, he could never have made the election required by the court order in 2018. In addition, the version of the DoDFMR which was in effect at the time of the November 2018 court order provides that if the former spouse's request for a court order was initiated with the court after the member's death, the order will not be honored. *See* DoDFMR ¶ 430504(C)(4) (April 2017). Accordingly, we find that the claimant is not entitled to the SBP annuity as the member's former spouse.

Although we have no authority under statute or regulation to allow the claim for the SBP annuity, as explained by DFAS and the DOHA adjudicator, the claimant may wish to pursue a record correction with the ABCMR. DOHA has no authority over such a petition and any request must be made to the ABCMR.

## Conclusion

The claimant's request for relief is denied. In accordance with the 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

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board