

DATE: March 16, 2021

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In Re: )  
          [REDACTED] )     Claims Case No. 2019-CL-050704.2  
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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. The claimant must prove by clear and convincing evidence on the written record that the government is liable under the law for the amount claimed. Payment of a claim may only be made for an expense authorized by statute or regulation. When the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action.

**DECISION**

The claimant, the widow of a retired U.S. Army Reserve member, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-050704, dated August 18, 2020. In that decision, DOHA denied the claimant’s claim for a Survivor Benefit Program (SBP) annuity after the member’s earlier election of her as the insurable interest beneficiary prior to their marriage, and after the member chose to terminate SBP participation before he began to receive retired pay upon reaching the age of 60 years.

**Background**

The member was born August 5, 1951. As a member of the Army Reserve, in 2004 he achieved all the necessary requirements for reserve component service to receive retired pay upon his 60<sup>th</sup> birthday. In 2004 he also became eligible to enter the Reserve Component SBP (RCSBP) under 10 U.S.C. § 1448(a)(1)(B). On February 23, 2004, the member executed a DD Form 2656-5, *Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate*, noting that he was single and had no dependent children, but electing RCSBP coverage for the claimant, as a person with an insurable interest in him.

On December 31, 2004, the claimant and the member were married. The SBP, including the RCSBP, is administered by the Defense Finance and Accounting Service (DFAS), and the member did not advise DFAS of the marriage at that time. DFAS continued to deduct RCSBP premiums from the member's retired pay on the basis of his having an insurable interest in the claimant as his beneficiary.

The member turned 60 years old on August 5, 2011, and became eligible for reserve component retired pay. Prior to receiving retired pay, he executed a DD Form 2656, *Data for Payment of Retired Personnel*, and designated the claimant as his beneficiary for arrears of unpaid retired pay (AOP) upon his death, but did not make any entries concerning his RCSBP beneficiary. DFAS received the DD Form 2656 on May 12, 2011; and DFAS reports that this was the first notification of the member and claimant's marriage.

On August 25, 2011, the member executed a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*. On the form, he identified his current SBP coverage as insurable interest, and elected to suspend coverage. On August 26, 2011, DFAS received the form and implemented the member's request effective September 1, 2011.

On July 18, 2017, the member passed away. The claimant advised DFAS of the member's death, and claimed the RCSBP annuity as his surviving spouse. On March 14, 2018, DFAS denied the claim on the grounds that the member did not establish RCSBP coverage for the claimant within one year of their marriage.

On April 9, 2018, the claimant appealed DFAS's denial of her claim. She maintained that she started living with the member in 1992 in the state of Georgia; bought a home with the member in 1993 in Georgia; lived with the member in that same home until his death in 2017; and filed joint income tax returns starting in 1993. She argued that these actions established a common law marriage, which was possible in the state the couple was living in prior to 1997. She further stated that a married member must decline SBP coverage at retirement or discontinue existing spouse SBP coverage. She argued that since she had not been given written notice for either of the member's actions, she is entitled to the annuity. In the alternative, she argued that a beneficiary covered as an insurable interest person under the RCSBP must be notified when a member terminates coverage. She argued that since she had not been notified of the termination of the insurable interest coverage, it was still valid and she was entitled to the annuity. Thus, the claimant maintains that she is entitled to the annuity as the member's surviving spouse or as his insurable interest beneficiary.

In the appeal decision, the DOHA adjudicator concluded that since the member did not elect spouse SBP coverage within one year of the date of the marriage, the claimant was not entitled to the annuity as the member's spouse. The adjudicator then examined the claimant's argument that the member and she established a common law marriage beginning in 1992, and therefore, since she did not decline SBP coverage in 1992, she was automatically covered. The adjudicator examined the law of Georgia and determined that the record did not include sufficient documentation to determine whether a common law marriage existed; and that such a determination is best made by a Georgia court of competent jurisdiction. Therefore, the adjudicator concluded that in the absence of such a court finding, the claim for an SBP annuity

on the basis of a putative common law marriage that existed prior to the member's eligibility to participate in SBP is denied. The adjudicator then explained that the claimant was also not entitled to the SBP annuity as an insurable interest person since the member elected to suspend coverage on the DD Form 2656-6. In addition, there is no requirement in statute or regulation that the claimant should have been notified that the member elected to suspend coverage for her, since he never elected SBP coverage or SBP child coverage. Finally, the adjudicator explained that although DOHA was limited by statute and regulation in the allowance of a claim, there were two other possible remedies the claimant may wish to pursue with the Army Board for Correction of Military Records (ABCMR).

In her request for reconsideration, the claimant states that the DOHA appeal decision lacked the proper analysis under relevant law and included explanations that showed a lack of deeper knowledge of the SBP law or a lack of concern for applying this deeper knowledge. She states that the legislative history of the SBP law clearly reflects that Congress intended a spouse should be notified when a member elects less than the full amount of SBP coverage or no coverage at all. She states that the member's election for insurable interest coverage continued to be valid for her after their marriage. She contends that the member's election to terminate SBP coverage for her as an insurable interest person was contrary to law because she was not notified of the action. Therefore, the DD Form 2656-6 the member signed was invalid. She maintains that the member only intended to suspend SBP insurable interest coverage for her, not terminate it. She further states that the facts in her case are unique and she is unable to find analogous case law concerning a current spouse covered as an insurable interest to support her claim for SBP. However, she does cite Comptroller General decision B-205173, June 9, 1992, a case involving a former spouse with an insurable interest, and requests that the DOHA Claims Appeals Board consider it and think "outside the box," in its application to her case.

### **Discussion**

Two rules of claims adjudication are (1) that payment may be made only for an expense authorized by statute or regulation and (2) that when the language of a statute is clear on its face, the plain meaning of that statute will be followed and that the plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2017-CL-062708.2 (December 11, 2017). 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. *See* DOHA Claims Case No. 2016-CL-092101.3 (November 11, 2017).

The SBP was enacted by Congress in 1972 to provide benefits to survivors of deceased retired members. *See* Public Law 92-425, 86 Stat. 706, September 21, 1972, which is codified, as amended, at 10 U.S.C. §§ 1447-1455. A member who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person. *See* 10 U.S.C. § 1448(b)(1)(A). However, a member who is married cannot legally elect an insurable interest. *See* DOHA Claims Case No. 2016-CL-092101.3, *supra*; and B-190833, Mar. 9, 1978.

Under 10 U.S.C. § 1450(f)(1), a member who elects to provide an annuity to a person as an insurable interest under 10 U.S.C. § 1448(b), is statutorily authorized to make a change in election of that insurable interest in favor of a spouse or dependent child. Any such change of election is subject to the statutory requirements with respect to execution, revocation and effectiveness set forth under 10 U.S.C. § 1448(a)(5). In pertinent part, under 10 U.S.C. § 1448(a)(5)(B), the election to change from insurable interest coverage to spouse coverage must be written, signed by the member making the election, and received by the Secretary concerned within one year after the date on which that member marries. In addition, an election of SBP insurable interest coverage for a beneficiary who is not the member's former spouse may be terminated under 10 U.S.C. § 1448(b)(1)(B). The request for termination must be in the form established by regulations and submitted to the Secretary concerned. Participation in the plan shall discontinue effective on the first day of the first month following the month in which the request is received by the Secretary concerned. Once participation is discontinued, benefits may not be paid in conjunction with the earlier participation in the SBP.

The record shows that on February 23, 2004, the member was not married and had no dependent children, and initially elected to participate in the SBP, for the claimant, as a person with an insurable interest in him under the authority of 10 U.S.C. § 1448(b)(1)(A). On December 31, 2004, the member then married the claimant. The member had one year from the date of his marriage to the claimant to make a change in election from insurable interest to provide an annuity to her as his spouse. He failed to do so, and therefore, the claimant is not eligible for the SBP annuity as the member's spouse beneficiary. *See* DOHA Claims Case No. 2019-CL-031806.2 (October 28, 2019).

On August 25, 2011, the member executed a DD Form 2656-6, identifying his coverage as insurable interest person for SBP, and electing to suspend coverage. DFAS received the form and implemented the member's request by terminating his insurable interest coverage for the claimant effective September 1, 2011, under 10 U.S.C. § 1448(b)(1)(B). There is no evidence in the record reflecting that the member made any attempt to reestablish SBP insurable interest coverage. The pertinent statutory law thereby renders the claim unpayable.

As for the Comptroller General decision cited by the claimant and her request that the Board think outside the box to allow her claim, as previously discussed, we have no authority to allow a claim contrary to statute and regulation. However, as the DOHA adjudicator advised in the appeal decision, the claimant may have other available remedies that rest with the 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.

## Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated July 17, 2020. In accordance with Department of Defense Instruction 1340.21 ¶ E7.15, 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: Gregg A. Cervi

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Member, Claims Appeals Board