

DATE: May 24, 2021

In Re:)

[REDACTED])

) Claims Case No. 2017-CL-072101.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The burden of proving the existence of 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 United States is liable to the claimant for the amount claimed.

DECISION

The widow of a deceased former service member of the U.S. Air Force, through her attorney, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2017-CL-072101, dated August 8, 2019. In that decision, DOHA disallowed the claim for the balance of the Voluntary Separation Incentive (VSI) payments still owed to the deceased member.

Background

On June 30, 1995, the member separated from the U.S. Air Force under the VSI program, and elected to receive VSI payments in installments from the Defense Finance and Accounting Service (DFAS), the agency responsible for administering the program, until 2030.

On March 16, 1996, the member married the claimant, a citizen of another country. The member had a son from a previous marriage. On March 18, 2003, the member completed a DFAS-CL 1900/2, *Voluntary Separation Incentive (VSI) Beneficiary Designation*, designating his son as his 75% beneficiary and the claimant as his 25% beneficiary of the VSI payments still owed him in the event of his death. On September 5, 2007, the member subsequently designated

his son as his 100% beneficiary of the VSI payments. On August 13, 2010, the member then designated the claimant as his 100% beneficiary of the payments.

On October 30, 2010, a domestic dispute erupted in the member and the claimant's home. There were three 911 telephone calls involving the emergency center that night. In the first call, the claimant called to report that she had been assaulted by the member. In the second call, the emergency center called their home to follow-up and the member answered. He reported to the caller that the claimant gave him a bloody nose and had shot him. On the 911 recording to this call, the claimant could be heard saying "You're goddamn right I shot at him. I'm fucking finished." in the background. The member also stated that he had control over the gun involved. The 911 operator urged him to stay on the line, but he stated that he was hanging up so that he could keep the claimant from obtaining another firearm. The third call came from the emergency center and was answered by the member, but the call ended abruptly. When the officers from the sheriff's office arrived at the home, they found the claimant bloodied and outside the house in her bedclothes. Inside the house, they found the member seated in a chair in the living room with a chest wound and a bloody nose. He was dead.

After an investigation, the sheriff's office determined that two firearms were used during the dispute, both pistols, a .22 and a .357 Magnum. Both pistols had blood on their grips. The .22 had been fired once and its bullet was found in the floor of the house. The shell casing from the .22 shot was found nearby. The .357 Magnum had been fired twice. One shot struck an interior door and the other shot struck the member in the chest. Gunpowder burn and residue on the member's shirt indicated that the .357 Magnum's muzzle had been pressed against him when it was fired. The claimant's DNA was found on the .357 Magnum and she had gunshot residue on her hands. Antidepressant pills that were prescribed to the claimant were found in the member's pocket. Thousands of pornographic images of children were found on the member's computers.

The member's body was autopsied by the Office of the Chief Medical Examiner. The Certificate of Death issued on January 6, 2011, reported that he died from a gunshot wound to his chest, that the manner of death was a homicide and that he was shot.

The claimant was charged with causing the member's death in a criminal case. She went to trial in November 2011 and was faced with eight charges: 1. Murder in the first degree; 2. Murder in the second degree; 3. Manslaughter under duress; 4. Manslaughter under hot-blooded response to a legally adequate provocation; 5. Attempted murder in the first degree; 6. Attempted murder in the second degree; 7. Assault in the first degree; and 8. Use of a handgun in the commission of a felony or violent crime.

The prosecution alleged that the altercation between the claimant and the member began when he seized the antidepressant pills from her to keep her from overdosing and ended when she deliberately shot and killed him. The defense maintained that the member physically assaulted her after she told him that she was reporting his possession of child pornography to the authorities and he shot himself to avoid the consequences of his possession.

The jury found the claimant not guilty of murder, manslaughter, and attempted first-degree murder. However, the jury found her guilty of two charges: attempted second-degree murder, a felony; and the use of a handgun in the commission of a felony or violent crime, a misdemeanor. The guilty verdict on the charge of attempted second-degree murder precluded the jury from considering the charge of assault in the first degree.

On February 28, 2012, the sentencing hearing was held. In her remarks, the presiding judge professed bewilderment over the jury's verdicts: (1) stated her personal belief that the claimant had not intended to kill the member; and (2) expressed her opinion that the claimant was not a criminal. Those sentiments were reflected in the sentences that the judge imposed: five years each for the two guilty verdicts to run consecutively and the total suspension of the five-year sentence for the second-degree attempted murder conviction. The claimant was remanded to the state correctional services to serve her five-year sentence for the use of a handgun in the commission of a felony or violent crime. She appealed her conviction.

The member's life had been insured by a private insurance policy. The member's estate (the claimant), through the attorney who represented her in the criminal trial, filed an accidental death claim in regards to the death of the member on the policy. On July 25, 2012, the insurance company denied the claim on the basis that the member died by suicide, which voided the policy. In reaching this conclusion, among other factors, the insurance company relied on the trial testimony of the Assistant Medical Examiner who performed the member's autopsy. She apparently testified that the fatal gunshot wound was consistent with an accident, homicide or suicide. She stated that she ruled the member's death a homicide based on the information provided to her by the investigators from the sheriff's office.

In February 2013 the prosecutors dropped the charge against the claimant for the use of a handgun and the claimant dropped the appeal of her conviction on that charge. As a result, the claimant was released from incarceration and deported to her country of origin. The prosecutor stated that it was in the state's interest to have her leave and finally put the case to rest. The judge who released her reportedly stated that her release was not a declaration of innocence.

Due to the member's employment, after his separation from the Air Force, as a civilian employee of the Department of the Army, there were federal benefits payable incident to his death. Both the claimant and the member's son filed competing claims with the Office of Personnel Management (OPM) for the benefits. Initially, the claimant's claim was denied. However, in a brief letter dated January 24, 2014, OPM stated that her claim had been allowed upon reconsideration. In their letter to the member's son, OPM denied his claim on the basis that the claimant was found not guilty in a criminal proceeding of intentionally or unintentionally murdering the member and that her conviction of attempted second-degree murder in her criminal trial did not show that she was the "criminal agent" that ultimately caused the member's death.

DFAS had suspended the member's VSI payments with his death. The claimant filed a claim for them from the time of his death until their scheduled end in 2030. On November 12, 2014, the sheriff's office advised DFAS that the claimant had been the only suspect charged in the member's death and that she had been convicted after a jury trial in November 2011.

Through her attorney, the claimant sought congressional assistance. Her attorney forwarded copies of the verdict sheet and the committal record to her congressman. On November 17, 2015, in a memorandum to DFAS, the claimant's attorney argued that the "Slayer's Rule" did not apply to her VSI claim because "it had been established conclusively under law" that the claimant did not kill the member.

On May 4, 2016, DFAS responded to the claim. DFAS relied on several decisions of the Comptroller General in its denial of the claim. DFAS noted that VSI is a federal benefit and that the disposition of unpaid VSI installments due upon a member's death is a matter of federal law, not state law. DFAS cited the rule that it is against public policy to make a federal payment incident to a person's death if the beneficiary feloniously or wrongfully participated in the death of the decedent and that any indication of felonious or wrongful participation of the beneficiary in the death bars payment, even if the beneficiary is convicted of a misdemeanor, acquitted or not even prosecuted. DFAS stated that the record must show that the beneficiary acted without felonious intent in the decedent's death. DFAS further noted that the claimant was convicted of second-degree attempted murder in the matter of the decedent's death and that under the pertinent state law, "attempt" means "specific intent to commit a particular offense" and "some overt act in furtherance of the intent that goes beyond mere preparation," and second-degree murder means "a specific intent to kill." DFAS averred that the government must obtain good acquittance before a payment is made. DFAS stated the claimant's conviction showed that she had intended to kill the member and carried out an overt act in furtherance of that intent.

The claimant's attorney responded to DFAS's denial of the claim. He argued that DFAS cited only "prior custom" in its denial, not statutes, federal cases or administrative rules. He maintained that the Comptroller General decisions cited by DFAS are flawed in that they shift the burden of proving a claim onto the beneficiary. He also cited the presiding judge's remarks about the claimant's character at the sentencing, along with the determinations made by the private insurer and OPM.

On May 11, 2017, DFAS issued its administrative report which again set forth its reasons for denying the claim based on the written record and the applicable statutes, regulations and case law. DFAS pointed out that the interpretation of statutes and regulations by agencies charged with their implementation will be sustained unless shown to be arbitrary, capricious and contrary to law. DFAS stated that the claimant's convictions are clear indications of felonious or wrongful intent. DFAS found that under the pertinent state law, if a crime has been committed, a person may be acquitted of that crime, but may still be convicted of attempting it. Given the state law concerning "specific intent" and "overt act," DFAS found that both were established by the claimant's convictions, reflecting her felonious intent and thus disqualifying her as the beneficiary of the member's VSI payments.

In his rebuttal to DFAS's administrative report, the claimant's attorney argued that the incident began with the member attacking the claimant and argued that he must have killed himself because he had gained control over both pistols.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim. The adjudicator explained that DOHA adjudicates claims for the pay of deceased members of the uniformed services under the authority of 31 U.S.C. § 3702(a). Prior to July 1, 1996, that function was exercised by the Comptroller General. He explained that under the implementing regulation for 31 U.S.C. § 3702(a), it is the claimant's burden to prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the claimed amount. He further explained that when the facts are in dispute between a claimant and agency concerned, DOHA will accept the account furnished by the agency concerned in the absence of clear and convincing evidence to the contrary. He then cited the Comptroller General's in B-187743, July 7, 1977. In that decision, the Comptroller General held that it is against public policy to permit payment by the government to a beneficiary who feloniously or wrongfully participates in the death of a person; and an indication of felonious or wrongful intent by the beneficiary bars payment, even if the beneficiary is found guilty of only a misdemeanor, is acquitted or not even prosecuted in state criminal proceedings relating to the homicide. The adjudicator then found that the words "participates" and "relating" mean that the rule applies if the beneficiary was feloniously and wrongfully involved in the death of the person at issue, but did not directly deliver the fatal wound. He stated that for a claim to be allowed by a beneficiary who participated in the death of the decedent, the beneficiary must show with reasonable clarity that they did not act with felonious or wrongful intent. Therefore, the burden of proving the absence of felonious or wrongful intent falls on the beneficiary. The adjudicator explained that the rules are not merely prior custom, but were interpretations of 31 U.S.C. § 3702(a) made by the official charged with their implementation, the Comptroller General, and were consistently followed by that official's agency when the claims settlement function was vested with the General Accounting Office, now the Government Accountability Office (GAO). As the successor to GAO in the claims settlement function, DOHA continues to follow the rules and case precedent issued by the Comptroller General. The adjudicator then applied the pertinent law to the facts in the written record, and found that the claimant feloniously and wrongfully participated in the death of the member.

In the request for reconsideration submitted by the claimant's attorney, he does not submit any new evidence for consideration. He states that the government accurately states the facts but misapplies the law to those facts. He states that the government appears to take the position that the claimant is not directly involved in the death of the member, yet somehow is indirectly involved in his death. He maintains that the facts suggest her only involvement is being present when the member shot himself as a result of his fear of being prosecuted for possession of child pornography. He states the facts support the member committed suicide: the gun powder burns and residue on his shirt; both guns being in possession of the member; and the medical examiner testifying at trial that the residue on the member's shirt suggested that the .357 Magnum was directly touching his shirt when the trigger was pulled. He states that nothing in the DOHA appeal decision suggests that the government believes the claimant pulled the trigger. He argues that the government has not produced any evidence to suggest that the claimant participated or took any action relating to the member's suicide. He states that the claimant was not convicted of any crimes relating to, or in participating in the member's death. She was found guilty of attempted second-degree murder and use of a handgun in the commission of a felony. He argues that those crimes have nothing to do with the member's actual death. He states that the claimant's crime was committed and complete once she fired the .22 at the member, and that

shot had nothing to do with the member's decision to commit suicide. The attorney cites the Judge's remarks during claimant's sentencing, stating that it was her belief that the claimant had no intent of killing the member because the claimant was experienced in using a handgun and at point blank range, if she wanted to kill the member, she could have killed him. He states that both the jury and the Judge believed that the member committed suicide because the claimant was about to report him for possession of child pornography and he would spend the rest of his life incarcerated in federal prison. He states that the claimant immediately reported to the officers when they arrived at the house on the night of the member's death, that he shot himself. He states that there is no evidence suggesting that the claimant was either an accessory before or after the fact, or had any involvement relating to the member's death.

Discussion

The VSI program is codified under 10 U.S.C. § 1175, and provides a variable-length annuity to members separating from active duty. The member has the right to designate whomever he wishes as beneficiaries to receive the balance of the VSI payments still due him on death. *See* 10 U.S.C. 1175(f).

Under 31 U.S.C § 3702(a), DOHA has the authority to consider appeals of denials of military member pay and allowances claims, including retired pay and survivor benefits claims, such as the claim for VSI payments in this instance. This authority once rested with the U.S. General Accounting Office (GAO) and was transferred to DOHA in 1996 pursuant to Public Law No. 104-316, October 19, 1996. Thus, for the purposes of settling claims under 31 U.S.C. § 3702, DOHA succeeded to the functions of the Comptroller General (who heads the GAO) and uses the GAO's established case precedent. The implementing regulation for 31 U.S.C. § 3702(a), is Department of Defense Instruction 1340.21 (May 12, 2004). Under Instruction ¶ E5.7, 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. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered.

Under Instruction ¶ E7.14, the content of a claimant's request for reconsideration is the same as the content for an appeal under ¶ E7.3. Following the guidelines of ¶ E7.3, a request for reconsideration, among other things, must identify: specific errors or omissions of material and relevant facts, legal considerations that were overlooked or misapplied, and conclusions that were arbitrary, capricious, or an abuse of discretion. The request must present evidence of correct or additional fact alleged, explain the reasons why the findings or conclusions should be reversed or modified, and include supporting documents. When considering an appeal, DOHA must base its decision on the written record, including the recommendation and administrative report and any rebuttal by the claimant. *See* Instruction ¶ E7.11. When considering an appeal or a request for reconsideration, DOHA may take administrative notice of matters that are generally known or are capable of confirmation by resort to sources whose accuracy cannot reasonably be questioned. *See* Instruction ¶ E7.16.1. In addition, DOHA may remand a matter to the

Component concerned, DFAS, with instructions to provide additional information. See Instruction ¶ E7.16.1.

Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations and case precedent). The interpretation of a statutory provision and implementing regulation by an agency charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious or contrary to law.

It is a well-established general principle of law that a person may not profit from their own wrongful acts. See Comptroller General decision B-215304, July 23, 1984, citing *New York Mutual Life Insurance Co. v. Armstrong*, 117 U.S. 591, 600 (1886). Accordingly, the Comptroller General has uniformly held that it is against public policy to permit payment by the government of arrears of pay, compensation or other such benefits to an heir or beneficiary who feloniously kills the person upon whose death such payments hinge. This principle is also set forth in the Department of Defense Financial Management Regulation (DoDFMR) 7000.14-R under Volume 7B, Chapter 44, Paragraph 440208, in connection with eligible beneficiaries for such payments. Paragraph 440208 bars payment to a beneficiary responsible for the death of a member unless evidence is received which clearly absolves the beneficiary of any felonious intent. In addition, the Comptroller General has declined to authorize payment to the person involved in the death, even in cases where that person has not been convicted of criminal charges, if all the facts do not reasonably establish lack of felonious intent on that person's part. See B-191953, July 3, 1978. Thus, in considering claims by a beneficiary who is involved in the death of the member, we must determine if there is evidence of felonious intent.

In this case, the member's death occurred in October 2010 during an altercation with the claimant. The transcripts from the 911 calls reflect that the member reported being assaulted by the claimant causing him to have a bloody nose and that she also had shot him. The claimant is also recorded on the phone call admitting that she shot at him and that she was finished and "it's all done now." This evidence reflects her state of mind, at the time, and that she was agitated and willing to kill her husband. The member managed to take the .22 away from her but after being urged to remain on the line, he hung up abruptly because he was worried that she would obtain another weapon. The .22 was fired once and the .357 Magnum was fired twice. The claimant's DNA was found on both the .22 and the .357 Magnum, the pistol that fired the fatal shot. Gunshot residue was on her hands. There is no explanation in the trial transcript provided by the claimant's attorney on how her DNA was found on the .357 Magnum. Therefore, under the circumstances, the inference is that she touched the pistol that fired the fatal shot during the argument. The member died as a result of a gunshot wound to his chest from the .357 Magnum, and his death was determined to be the result of a homicide. The official death certificate states that the death was a result of homicide. The claimant was the only suspect in the case. She was charged with murder in the first degree and was tried by a jury in November 2011. The jury found the claimant not guilty of murder, manslaughter and attempted first-degree murder. However, the jury found her guilty of two charges: attempted second-degree murder, a felony, and the use of a handgun in the commission of a felony or violent crime, a misdemeanor.

Although the jury found the claimant not guilty of the member's murder, the rules of evidence, practice and procedure in a criminal proceeding differ from those of a civil action, so that adjudication in one case is not decisive in the other. In a criminal proceeding, guilt must be proved beyond a reasonable doubt. In a civil action, the issue is decided by a preponderance of evidence. Therefore, we have long held that the disposition of criminal liability does not determine civil liability. *See* DOHA Claims Case No. 2019-CL-031403.2 (October 29, 2019); and DOHA Claims Case No. 2012-CL-121902.2 (April 30, 2013). Further, as explained above, the Comptroller General declined to authorize payment to a person involved in the death, even in cases where that person has not been convicted of criminal charges.

Here, the DOHA adjudicator concluded that the record as a whole contained sufficient evidence that the member's death was not a suicide and the claimant was feloniously and wrongfully involved in his death. Both DFAS and DOHA did not agree with the claimant's assertion that her piecemeal presentation of trial testimony and resulting jury verdict clearly indicated that she had no involvement in the member's death.

The Board has carefully considered the entire record evidence *de novo*. This decision, like all our decisions, is based upon the underlying factual circumstances and the applicable precedents. Our decisions are made independently of the arguments or recommendations of the administrative agency that has transmitted the case to us. Here, the record evidence includes the portions of the criminal trial transcript presented by the claimant. We also find that the claimant was implicated in the member's death, and that there is substantial and direct evidence in the record of her involvement. As set forth in the portion of the trial transcript provided by the claimant's attorney, even the defense's own expert witness testified that although his opinion of the manner of death was suicide, he could not put a number on how certain he was with that opinion. The expert also testified that he took into consideration the 911 recordings of both of the "participants." In pertinent part, he stated:

We also have some information from the – from the 911 calls where at various times both of them are recorded on the line and he describes having – well, they both – both mention that she took a shot at him, and didn't hit him. He mentions that he took the gun away from her, the one that apparently she used to shoot at him, and so we have a circumstance where we have some recording of both of the participants there, not just the – the one who survived, they both indicate that she took a shot that didn't strike him.

On cross-examination from the Maryland State's Attorney, the defense's expert testified that blood was found on both the grips of the .22 and the .357 Magnum. He testified that if the member had the bloody nose, had touched his bloody nose, and took the .22 from the claimant, that would explain the blood on the .22. He also agreed that if the member and the claimant were struggling over the .357 Magnum (the pistol that fired the fatal shot), that might also explain the reason there was blood on the grip of that gun. He testified that he was aware that the claimant's DNA was on the .357 Magnum and gunshot residue was on her hands. He stated that the gunshot residue on her hands resulted from her firing a gun. He explained that one cannot relate the gunshot residue to one particular gun or one particular shot. However, as pointed out by the State's Attorney, the defense's expert could not exclude her from firing the

.357 Magnum. When asked about the whether the DNA would certainly show that she touched the .357 Magnum at some point in time, the defense's expert stated, "That's exactly right, at some point in time."

In addition, the record before us is devoid of any evidence establishing the claimant's lack of felonious intent since she was convicted of attempted second-degree murder of the member. We find that both DFAS's and DOHA's review of the record evidence and their ultimate conclusions are reasonable interpretations, and should be sustained. In this case, the claimant has failed to provide proof of entitlement to the VSI payments, and we have no alternative but to disallow the claim.

After carefully considering the entire record, we find that the claimant was implicated in the member's death, and that there is substantial and direct evidence in the record of her involvement. Therefore, the member's death was incurred under circumstances that preclude payment of the VSIP to the claimant based on that death.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2017-CL-072101, dated August 8, 2019, disallowing the claim. 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

Separate Opinion of Member, Charles C. Hale

I concur in the decision to deny claimant's request for reconsideration; however I respectfully dissent from the Board's analysis and would remand to DFAS and/or the DOHA adjudicator to make detailed findings on participation. The salient questions that must be answered in the record extracts before us, are whether claimant demonstrated felonious intent or whether she participated in the member's death. Based on the conviction in state court and the record provided by the claimant there is sufficient evidence to conclude claimant had felonious intent and she intended for her husband to die. I therefore concur in the majority's ultimate

holding. However, the question of participation should also be analyzed, given the finding, Guilty of Attempted Second Degree Murder.

The claimant's conviction for attempted murder does not determine whether, or not, she participated in the member's death for purposes of the current claim. The criminal jury did not find her guilty of Murder in the first degree; Murder in the second degree; Manslaughter under duress; or Manslaughter under hot-blooded response to a legally adequate provocation. "Disposition of criminal liability does not determine civil liability." See B- 151027 Mar. 26, 1963, citing *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 548 (1943) and *Helvering v. Mitchell*, 303 U.S. 391 (1938). DFAS and the DOHA adjudicator relied upon the attempted murder conviction, a death certificate, and a memorandum from the investigating law enforcement agency, which is at best an overly broad factual statement of the situation and at its worst is a grossly misleading statement of the factual situation. I believe an analysis of the facts as to whether the claimant participated in the member's death should also have been performed by DFAS and the DOHA adjudicator. I would require DFAS and/or the DOHA adjudicator to address the facts concerning the question of the claimant's participation.¹ While I would require DFAS and/or the DOHA adjudicator to address the facts concerning the question of the claimant's participation, the claimant's request for reconsideration, along with her specific error of law, and her submission of select facts are sufficient to reach a conclusion different from the claimant's theory. Therefore this Board may use what is in the administrative record before us and is not bound to just consider the claimant's theory of the case on appeal.

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

¹In B- 215304, July 23, 1984, the Comptroller General explained the case law. Citing 55 Comp. Gen. 1033 (1976), the Comptroller General explained that payment to the person involved in the death, even in cases where that person has not been convicted of criminal charges, would be declined if all the facts do not reasonably establish a lack of felonious intent on that person's part. However, citing B-172014, March 11, 1971, the Comptroller General stated that where there has been an acquittal on criminal charges, barring other strong evidence that the killing was not accidental, not in self-defense, and not otherwise excusable or justifiable, payment may be allowed.