

DATE: January 27, 2021

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-072214.2

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

A claimant, the surviving spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-072214, dated October 13, 2020.

Background

The member and the claimant were married in 1956. On March 11, 1977, the member received his retirement orders from the Air Force. These orders reflected that the member would be relieved from active duty on August 31, 1977, and retired on September 1, 1977, with over 20 years of active service. His highest rank held was the rank of a Master Sergeant. On June 13, 1977, in preparation for his retirement, the member completed the *Survivor Benefit Plan Election Certificate*, DD Form 1883 (June 1973). On that form, he noted that he was married and had dependent children, but he elected not participate in the SBP. Below his election not to participate in SBP, was the following statement:

IMPORTANT: The decision you make with respect to participation in this Survivor Benefit Plan is a permanent irrevocable decision. Please consider your decision and its effect very carefully.

On July 7, 1977, the member completed the *Data for Payment of Retired and Armed Forces Personnel*, DD Form 418, in order for the Air Force to establish his retired pay account. He noted on this form that he elected not to participate in the SBP. The Air Force Accounting and Finance Center (AFAFC) received the member's forms and necessary information to establish the member's retired pay account effective September 1, 1977. This is evidenced by the AFAFC Form 0-419, reflecting the transactions completed to establish the member's retired pay. In addition, this action is reflected on the AFAFC's Retired Pay Accounts Maintenance Actions (Worksheet).

Since the member declined participation in SBP, no SBP premiums were withheld from his retired pay. The member did not choose to later elect SBP during either of the two one-year open enrollment periods enacted by special law.

On February 19, 2019, the member passed away. The claimant filed a claim for the SBP annuity with the Defense Finance and Accounting Service (DFAS) on April 11, 2019. On May 24, 2019, DFAS denied her claim on the basis that the member had declined to participate in SBP at retirement and he had not elected to participate in SBP during subsequent open seasons. The claimant appealed on the basis that she had not been notified or counseled that the member had declined SBP coverage. In support of her claim, she submitted a sworn affidavit stating that she was not notified of the member's choice to decline SBP. DFAS advised DOHA that it had no records reflecting whether the claimant was notified in 1977 that the member had declined to participate in SBP. In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim for SBP. In her decision, she noted that the burden of proving the claim was on the claimant. She explained that DOHA was bound by the applicable statutes and regulations in the allowance of a claim. She found that since the member declined SBP coverage at retirement for the claimant, she was not an eligible SBP beneficiary. She then found no evidence that the member subsequently elected SBP coverage for the claimant during an Open Season. Therefore, she concluded that since SBP participation is based on applicable statutes and regulations, there is no legal basis to award the claimant the SBP annuity. The adjudicator addressed the claimant's assertion that she was not notified that the member declined SBP coverage. She advised the claimant that spousal concurrence for an SBP declination was not required by statute until nine years after the member retired. She further advised that although DOHA did not have the authority to award the SBP annuity under applicable statute and regulation, the claimant had another possible avenue of relief that existed with the Air Force Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In her request for reconsideration, made through her attorney, the claimant requests that the DOHA Claims Appeals Board review the U.S. Court of Federal Claims' decision *Barber v. United States*, 230 Ct. Cl. 287, 676 F.2d 651 (1982), which was subsequently upheld in *Trone v. United States*, 230 Ct. Cl. 904 (1982), and *Kelly v. United States*, 826 F.2d 1049 (1987). Further, the claimant cites DoD General Counsel Opinion: DoD/GC #97-3 (March 11, 1997), applying and upholding the decision in *Barber*. The claimant states that the Department of Defense has long recognized the failure to document spousal notification at the time the member declines SBP coverage results in the automatic entitlement to the SBP. The claimant states that the DOHA appeal decision merely mentions the *Barber* decisions, but does not discuss the application of the law to the facts concerning the claimant's SBP claim.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), 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. Federal agencies and officials must act within the authority granted to them by statute and issuing regulations. Thus, the liability of the United States is limited to that provided by law, including implementing regulations.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. A married member is eligible to participate in SBP when he becomes eligible for retired pay. *See* 10 U.S.C. § 1448(a)(2)(A). However, a member may elect not to participate, elect to provide less than maximum coverage, or elect to provide SBP benefits to a dependent child rather than a spouse. *See* 10 U.S.C. § 1448(a)(3)(A). At the time of enactment, the law stated that if a member who is married does not elect to participate in the SBP to provide coverage at less than the maximum level, or elects to provide an annuity for a dependent child but not for the spouse, the member's spouse "shall be notified of that election." *See* Pub. L. No. 95-397, title II, § 202(a), 92 Stat. 844 (1978), amending 10 U.S.C. § 1448(a)(3)(A) and (B). Currently, the law requires spousal written concurrence when a married member elects not to participate in SBP. *See* Pub. L. No. 99-145, title VII, § 721(a), 99 Stat. 583, 676 (1985). An election to forgo participation in SBP under 10 U.S.C. § 1448(a)(2)(A) is irrevocable if it is not revoked before the date the member first becomes entitled to retired pay. *See* 10 U.S.C. § 1448(a)(4)(A).

In 1977, when the member elected to not participate in the SBP he was married and had dependent children. The statute in effect at the time merely required that the spouse be notified of the member's decision not to participate, but provided no specifics on the type of notification or the remedy for lack of notification. However, in *Barber v. United States*, *supra*, the U.S. Court of Federal Claims held that if a spouse was not notified of the member's failure to make such an election, the spouse was entitled to an SBP annuity upon the member's death.

The record evidence in this case reflects that at the time of the member's election, the AFAFAC processed his paperwork and established his retired pay account. We note that the military services financing offices performed this function, as well as other financially-related services for members, prior to the consolidation of the function with the creation of DFAS in 1991. During the processing of the claimant's SBP claim, DFAS obtained certain records in the establishment of the member's retired pay account from the Air Force. Although those records detail that the member did fill out the appropriate documentation to establish his retired pay account, and that the AFAFAC received those documents in order to process his application for retired pay, DFAS acknowledges that the record does not include any correspondence or notification to the claimant regarding the member's SBP declination.

The Air Force Board for Correction of Military Records (AFBCMR), is the authority responsible for deciding whether an administrative error occurred in notifying a member's spouse and can properly correct a member's election if they find an administrative error occurred. The SBP provides a means whereby the Secretary of the Military Department concerned may correct or revoke an election. Under 10 U.S.C. § 1454, the SBP provides that the Secretary of the Military

Department concerned may correct or revoke an otherwise valid election in certain circumstances. *See* DOHA Claims Case No. 2019-CL-041701.2 (February 27, 2020); and Comptroller General decisions 55 Comp. Gen. 158 (1975) and 53 Comp. Gen. 393 (1973). As explained by the DOHA adjudicator in the appeal decision, the Secretary of the Air Force exercises that authority, acting through its correction board, the AFBCMR. In fact, in analyzing the *Barber* cases and the DoD General Counsel opinion cited by the claimant, all four cases were decided after action by a correction board, either the AFBCMR or the Army Board for Correction of Military Records (ABCMR), as the authority responsible for deciding whether an administrative error occurred in notifying a member's spouse. DOHA is unable to allow this claim for the SBP annuity because we are bound by statute and regulation, and the written record as submitted to us by the agency and the claimant. The appropriate authority to seek relief if an error existed at the time the member made his SBP decision, is the AFBCMR.

Information on petitioning the AFBCMR can be found on the Air Force's Personnel Center's website. In addition, published decisions by the AFBCMR considered under *Barber* are posted on the AFBCMR's webpage on the Military Departments' Boards of Review Reading Rooms.

Conclusion

The claimant's request for reconsideration is granted, and we set aside the appeal decision in DOHA Claim No. 2020-CL-072214 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board