

DATE: May 4, 2021

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In Re: )

[REDACTED] )

) Claims Case No. 2020-CL-081718.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law.

**DECISION**

The claimant, a former spouse of a retired member of the U.S. Air Force Reserve, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-081718, dated February 10, 2021.

**Background**

On April 9, 1987, the claimant and the member were married. In 2000 the member became eligible to receive retired pay when he reached the age of 60 years of age on March 10, 2017. On April 22, 2001, he elected Reserve Component Survivor Benefit Plan (SBP) coverage for the claimant as his spouse. On January 1, 2006, the claimant and the member were separated. On August 30, 2007, they entered into a Marital Settlement Agreement (MSA). The MSA stated in pertinent part (which was hand-written into the agreement) that the claimant would receive “her ½ of the community portion of his [the member’s] USAF retirement with right of survivorship.” On January 18, 2008, the final divorce decree, which incorporated the MSA, was issued. Also on January 18, 2008, the court issued a Domestic Relations Order (DRO). The DRO specifically awarded the claimant a portion of the member’s retired pay. On March 24, 2008, the court issued an amended final decree of divorce which stated “The Court approves the

agreement [MSA] of the parties as contained in the Final Decree of Divorce.” On July 1, 2008, the court issued an amended DRO which stated:

IT IS ORDERED that the payment of disposable retirement pay awarded in this order to [claimant] shall continue until the death of [the member] or [the claimant], [the claimant] has the option of exercising her right of survivorship.

The claimant timely submitted her request for a former spouse deemed election. In the meantime, the member remarried in 2007. Prior to his 60<sup>th</sup> birthday in 2017 he elected to cover his new spouse under the SBP. Upon becoming aware of the member’s election, the claimant contacted the Defense Finance and Accounting Service (DFAS) and advised them that she had been awarded former spouse SBP coverage. DFAS responded to the claimant advising her that the divorce decree on file did not award her former spouse SBP coverage and the member had not established such coverage for her. DFAS further advised her that an amended court order might establish former spouse SBP coverage for her. DFAS provided an address for submission of a request for coverage based on an amended order.

After considerable subsequent correspondence between the claimant and DFAS, the claimant submitted her claim to DFAS for former spouse SBP coverage. On January 17, 2019, DFAS again denied her claim on the basis that the provision in the amended DRO concerning “the option of exercising her right to survivorship” was insufficient to award her former spouse SBP coverage and the member did not voluntarily elect coverage for her. DFAS left open the possibility of allowing her claim should a court modify the terms of her divorce.

The claimant then filed a motion with the court that issued her divorce seeking a new order that would clearly direct the member to establish former spouse SBP coverage for her. On September 3, 2019, a hearing was held in which the claimant represented herself *pro se* by telephone and the member was represented in person by legal counsel. The transcript of the hearing reflects that the presiding judge denied the claimant’s motion on the grounds that he doubted that he could “clarify anything” and that issuing an order “would just be repetitive.”

On December 3, 2019, the claimant appealed DFAS’s denial of her claim. She noted that her request for the SBP former spouse deemed election had been timely. She also noted the court’s finding that the court orders in her divorce could not be made clearer.

In the appeal decision, the DOHA adjudicator upheld DFAS’s determination that the language contained in the divorce decree and the DRO was insufficient to require the member to provide former spouse SBP coverage to the claimant as set forth under 10 U.S.C. § 1450(f)(3), and the DoD Financial Management Regulation (DoDFMR). In examining the language “right of survivorship” contained in the MSA, the adjudicator referred to a U.S. Court of Federal Claims decision, *Woll v. United States*, 41 Fed. Cl. 371 (1998). In *Woll*, the Court found that the language “survivorship rights” in a divorce decree was insufficient to be considered an order to the member to establish former spouse SBP coverage, even though the government had conceded that survivorship rights “could only refer to SBP benefits.” See *Woll* at 374.

In the claimant's request for reconsideration, she states that she and the member entered into a voluntary mediated signed settlement agreement, which was approved by the court. She states that the settlement agreement was a legally binding contract in which the member was to provide her with both federal and military retirement plan benefits with the right of survivorship. She states that another branch of the federal government took no exception to the member providing her with survivor benefits from his retirement. She maintains that there is no language contained under 10 U.S.C. 1448 that requires both parties incident to a divorce to make a former spouse SBP election within one year of a court order which incorporated a voluntary settlement agreement. She states that even if there was such a requirement, DFAS failed to notify her that the agency required an election from the member. She also contends that the DOHA adjudicator incorrectly stated the ruling in the *Woll*. She states that in *Woll*, the Court found that the former spouse was not entitled to SBP benefits where neither the member nor the former spouse made the requisite election. She states that her case is distinguishable because she made a timely deemed election. However, she does quote *Woll* in support of her contention that the law does not require both parties to make the election for former spouse SBP coverage.

### **Discussion**

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 their claim by clear and convincing evidence on the written record that the United States Department of Defense is liable for the claim. *See* DoD Instruction 1340.21 (May 12, 2004) ¶ E5.7. 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). The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. *See* DOHA Claims Case No. 2011-CL101402.2 (February 9, 2012).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under 10 U.S.C. § 1448(a)(1)(B), the Reserve Component SBP is open to a reserve component member who would be eligible for retirement except for not yet being 60 years of age. Under 10 U.S.C. § 1448(a)(2)(B), a married reserve component member is automatically entered into the RCSBP upon receiving notice that the member has completed the years of service needed for reserve component retired pay (unless the member opts out of the program with the written consent of the member's spouse). Spousal coverage ends upon divorce, but the SBP includes provisions whereby a member may elect coverage for a former spouse. In recognition of the fact that coverage under the SBP could become an item of negotiation in a divorce settlement, Congress concluded that a former spouse should be able to rely on and enforce an award of survivor benefits by a divorce court by means of a deemed election. *See* 66 Comp. Gen. 687, 691 (1987), and the legislative history cited therein. As a result, statutory provisions have been included to provide that, if a member elects to provide coverage for a 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).

Although the claimant may have been awarded benefits by another federal agency, the SBP program is a separate insurance annuity, which requires an express election by the annuitant to provide a former spouse with benefits. We further note that the Court of Federal Claims made clear in *Woll* that in order for a former spouse to qualify as a former spouse SBP beneficiary, the divorce decree must have required the member to provide former spouse SBP benefits to the former spouse. The Court recognized that in the alternative, the member must have expressly designated his former spouse as his SBP beneficiary within one year of the divorce. *See Woll* at 373. The Court's decision in *Woll* is consistent with the way the SBP statute and its implementing regulation are applied to the establishment of former spouse SBP coverage.

In order for the claimant to be covered as the member's former spouse under SBP, the member must have expressly elected the claimant as his former spouse beneficiary within one year after the date of the divorce. Therefore, if the member voluntarily decided to designate the claimant as his former spouse SBP beneficiary, he could have done so within the statutory time limit. The member did not voluntarily designate her as his former spouse beneficiary.

In order for the claimant to have the statutory right to request a deemed election for former spouse SBP coverage, the divorce decree must have required the member to provide former spouse SBP coverage for her. *See* 10 U.S.C. § 1450(f). 10 U.S.C. § 1450(f)(3)(A) provides that if a member is required by a court order to elect (or to enter into an agreement to elect) to provide an annuity to a former spouse as set forth under section 1450(f)(3)(B), and the member fails or refuses to make such an election, such an election will have been deemed to have been made by the former spouse if the Secretary concerned receives a written request from the former spouse within one year of the divorce. Section B defines a member who is required to make such an election as a member who enters into an agreement to make such an election and the agreement has been incorporated into the court order or the member is required by the court order to make such an election.

The implementing regulation for SBP elections is the DoDFMR, volume 7B, chapter 43. At the time of the claimant's divorce, Paragraph 430503(C) stated in pertinent part:

Deemed elections are applicable in cases where a member enters incident to a proceeding of divorce, dissolution, or annulment, into a written agreement to elect to provide an SBP annuity to a former spouse, and such agreement has been incorporated in, or ratified or approved by, a court order, or has been filed with the court of appropriate jurisdiction in accordance with applicable State law, or in cases where the member is required by a court order to make a former spouse election. If such member then fails or refuses to make such an election, the member shall be deemed to have made such election if the Secretary of the Military Department concerned receives a written request from a former spouse or the former spouse's attorney on behalf of the former spouse. 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 annuity coverage be provided to the former spouse. The written request must be accompanied by a copy of the pertinent court order or agreement referring to the SBP coverage.

The MSA, which was incorporated into both the divorce decree and the amended divorce decree, stated that the claimant's property included "her ½ of the community portion of his USAF retirement with right of survivorship." At the time the amended DRO was issued, the member had not retired from the Air Force, and was working as a civilian employee of the Air Force. The amended DRO specifically set forth the details concerning the claimant's right to a portion of the member's retired pay. It also stated that payment of the claimant's portion of the member's disposable retired pay would continue until the death of the member or the claimant. The amended DRO then stated that the claimant "has the option of exercising her right of survivorship." The language contained in both the MSA and the amended DRO did not direct or require the member to take in any action in regard to electing former spouse SBP coverage for the claimant. There was no specific details in the amended DRO concerning the member's obligation in regard to maintaining coverage for the claimant after his death. In fact, the language only stated that the claimant had the option to exercise her right of survivorship. Accordingly, we find the amended DRO to lack the specificity required to deem an election for former spouse coverage. *See* 72 Comp. Gen. 293, 295 (1993). Under applicable statute and regulation, DFAS acted properly in refusing to accept the claimant's request for a deemed election, since there was no court order requiring the member to elect to provide the SBP annuity to his former spouse.

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2020-CL-081718, dated February 10, 2021, 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

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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