

DATE: January 15, 2021

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-081719.2

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

The claimant, a former spouse of a deceased member of the U.S. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-081719, dated November 23, 2020.

Background

On May 30, 1984, the claimant and the member were married. On August 13, 1996, in preparation for his retirement, the member completed his retirement application, DD Form 2656, electing not to participate in the Survivor Benefit Plan (SBP). On August 13, 1996, the claimant, as the member's spouse, concurred with the member's declination to participate in the SBP. On December 1, 1996, the member retired. As a result of the member's election not to participate in SBP, no SBP premiums were ever withheld from his retired pay.

On April 16, 2012, the claimant and member separated. On November 14, 2013, an Order for the Division of Military Retired Pay was issued by a Superior Court Judge in the state of California, which awarded the claimant a percentage of the member's disposable monthly retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA). On February 28, 2014, the claimant and the member divorced. The claimant received her portion of the member's monthly retired pay until his death. On March 23, 2019, the member passed away.

On May 3, 2019, the Defense Finance and Accounting Service (DFAS) – Garnishment and Law Directorate notified the claimant that they were terminating her monthly former spouse payments from the member’s retired under the USFSPA because of the member’s death. On May 14, 2019, the claimant submitted a claim for the SBP annuity as the member’s former spouse to DFAS. She attached to her claim a Judgment of Dissolution dated February 28, 2014, which awarded her former spouse SBP coverage.

On August 19, 2019, DFAS denied her claim for the SBP annuity because the member declined to participate in SBP. She appealed DFAS’s denial stating that the member had her sign the SBP spousal concurrence to his declination of participation in SBP under duress. She stated the member told her that the SBP was too expensive and they would lose their home if he participated. She also stated that she was never given a letter from DFAS stating that she had a right to refuse to sign the concurrence. She further alleged that DFAS erred in denying her claim because they did not enforce the Judgment of Dissolution awarding her the SBP annuity.

In the appeal decision, the DOHA adjudicator upheld DFAS’s denial of the claim. In her reconsideration request, the claimant states that she always believed that the member could enroll her as his SBP beneficiary. She states that if she lacked the knowledge that he could not do so, it was not due to negligence, but due to overwhelming family needs. During the time of their divorce, the claimant had to take care of her granddaughter, who she eventually adopted. She submits her granddaughter’s birth certificate and civil court minutes from 2014 and 2015 concerning the circumstances that led to her care and eventual adoption of her granddaughter. She again maintains that DFAS failed to follow the Judgment of Dissolution awarding her the SBP. She states that DFAS also failed to honor the Judgment by allowing the member to cancel his Veterans’ Group Life Insurance (VGLI).

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2019-CL-041701.2 (February 27, 2020); DOHA Claims Case No. 2019-CL-031806.2 (October 28, 2019); and DOHA Claims Case No. 2018-CL-051101.2 (November 29, 2018).

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. A married member is eligible to participate in SBP when he becomes eligible for retired pay. However, a married member may elect not to participate in the SBP, with the concurrence of his spouse. *See* 10 U.S.C. § 1448(a)(2)(A) and (3)(A)(i). 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). Further, a married member who elects not to participate in SBP at retirement is not a participant in the plan for the purpose of establishing former spouse SBP coverage, if he later divorces. *See* 10 U.S.C. § 1448(b)(3).

In this case, the member elected to not participate in SBP upon retirement and the claimant, who was his spouse at the time, concurred with that election. Although the claimant

was awarded former spouse SBP coverage in the Judgment of Dissolution dated February 28, 2014, under the law it could not be established because the member had declined to participate in SBP at retirement. The member was not a participant in the plan in order to establish former spouse SBP coverage. *See* DOHA Claims Case No. 2018-CL-051101.2, *supra*.

As for the claimant's concern that the member was allowed to terminate his VGLI, we note that the agency authorized to administer that insurance program is the Department of Veterans Affairs (VA), not the Department of Defense. Therefore, she may wish to contact the VA concerning the member's VGLI.

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated November 23, 2020. In accordance with the Department of Defense 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