

DATE: January 13, 2021

In Re:)

[REDACTED])

) Claims Case No. 2019-CL-102102.2

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. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-102102, dated August 26, 2020.

Background

On November 27, 1993, the claimant and the member were married. On November 1, 2006, the member retired from the Air Force and elected Survivor Benefit Plan (SBP) coverage for his spouse, the claimant, at that time, and his children. On June 3, 2009, the claimant and the member were divorced. The divorce decree did not award the claimant former spouse SBP coverage. Further, the member did not elect former spouse SBP for the claimant. On May 13, 2016, the member passed away. On August 9, 2018, the claimant claimed the SBP annuity as the member's former spouse.

The Defense Finance and Accounting Service (DFAS) subsequently denied the claimant's claim for an SBP annuity because the claimant's coverage ended with her divorce and that within one year of that divorce, the member did not make a SBP former spouse election, nor did the claimant request an SBP former spouse deemed election.

The claimant appealed DFAS's denial of her claim. She explained that the member began suffering from post-traumatic stress disorder (PTSD) in 2005 and was receiving counseling through the Department of Veterans Affairs (VA). She further explained that her husband's mental state took a toll on their marriage; his condition contributed to the loss of their home in 2006. These circumstances led to the claimant's filing for divorce. Although the divorce decree did not award her former spouse SBP coverage, she stated that the member continued to pay SBP premiums from his retired pay. She also pointed out that the decree did award her 50% of the member's monthly retired pay. She then stated that the member's physical health later went into further decline when he was diagnosed with lung cancer in 2011 and brain cancer in 2013. The member subsequently lost his mobility, and the claimant stated that she and the member resumed cohabitation so that she could be his caregiver.

Upon submission of her appeal, DFAS reconsidered the matter and denied it on the basis that the divorce decree did not award her former spouse SBP coverage, the member was not required to establish it, nor did he voluntarily establish such coverage.

In the DOHA appeal decision, the adjudicator upheld DFAS's denial of the claim for SBP. The adjudicator also considered the extenuating circumstances from which the claim arose, especially the services the claimant rendered to the member in his final years of life. However, the adjudicator explained that DOHA was bound by applicable statutes and regulations, and was not able to decide cases on the basis of equitable considerations. The adjudicator then described other available remedies outside the DOHA claims process that rest with the Air Force Board of Correction of Military Records (AFBCMR) under 10 U.S.C. § 1454, and 10 U.S.C. § 1552.

At the end of September 2020 the claimant requested reconsideration of the DOHA appeal decision. She thanked DOHA for explaining other possible avenues of relief in her case, but requested an extension of time to file her reconsideration request so that she could retain counsel. DOHA granted her request and gave her until November 10, 2020, to file anything further in support of her reconsideration. DOHA has not received anything further from the claimant since her September 2020 request.

Discussion

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* Department of Defense Instruction 1340.21 (May 12, 2004) ¶ E5.7. Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2018-CL-090703.2 (June 19, 2019).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for his 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).

In this case, the claimant was not awarded former spouse coverage in the divorce decree. Therefore, she had no statutory right to request a deemed election. The member did not voluntarily elect former spouse coverage for the claimant, within one year of the date of the divorce. *See* DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018); and DOHA Claims Case No. 2016-CL-090801.3 (March 30, 2017). Therefore, DFAS properly denied the claim for the SBP annuity.

Finally, as set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the adjudicator in the appeal decision, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case the AFBCMR, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. *See also* 10 U.S.C. § 1454 (the specific statutory authority for the AFBCMR to correct or revoke an election for SBP). The AFBCMR's authority under these two statutes is discretionary, and is outside DOHA's authority.

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated August 26, 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