

DATE: May 24, 2021

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2020-CL-111607.2
)
)

**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, the widow of a deceased retired 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-111607, dated March 1, 2021.

Background

The member retired from the Air Force on July 1, 1967, and married the claimant on July 31, 1976. The Defense Finance and Accounting Service (DFAS) has no record of the member electing Survivor Benefit Plan (SBP) coverage for the claimant. On May 16, 2018, the member passed away.

DFAS denied the claim for the spouse annuity and the claimant appealed her claim to DOHA. In her appeal, the claimant stated that DFAS had not provided any documentation that the member declined SBP coverage for her. She further stated that her spouse had informed her for years that she would receive the SBP annuity if he predeceased her. The DOHA adjudicator sustained DFAS's denial of the claim finding no evidence that the member elected SBP coverage for the claimant within one year of their marriage or during any open season.

On March 22, 2021, DOHA received the claimant's request for an extension of time to file her request for reconsideration of the DOHA adjudicator's appeal decision. DOHA granted the claimant's extension to file her reconsideration request. Pursuant to Department of Defense Instruction 1340.21 (May 12, 2004) ¶ 7.14, the claimant's request for extension was granted, and she was notified that her reconsideration request was due by May 3, 2021.

In her reconsideration request, the claimant states that her SBP claim was handled negligently by the Department of Defense. She states that the continuous back and forth of correspondence by mail with the Department is not accomplishing anything and requests a hearing to present facts pertaining to her claim.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2016-CL-052003.2 (September 27, 2016).

The SBP, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the survivors of deceased members of the uniformed services. *See* DOHA Claims Case No. 2019-CL-041101.2 (September 24, 2019). Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation in the SBP is automatic for members who are married or have dependent children when they become eligible to participate in SBP, *i.e.*, when they become eligible for retired pay. *See* 10 U.S.C. § 1448(a)(1)(A) and (a)(2)(A). Members who marry or acquire a dependent child after becoming eligible for retired pay may elect to include that spouse or dependent child in the program if they provide the statutory notice. *See* 10 U.S.C. § 1448(a)(5)(A). The member's election must be in writing and received by the Secretary concerned within one year after the date on which that member marries. *See* 10 U.S.C. § 1448(a)(5)(B).

For members who do not elect SBP coverage at retirement or when they acquired dependents, Congress has occasionally provided an open season for members to elect coverage. The adjudicator detailed the three open season periods Congress enacted between 1989 and 2004 in the appeal decision. We also note that that in 1981 Congress authorized an open season by Pub. L. No. 97-35, § 212, 95 Stat. 383 (1981). Under § 212(b) of the act a member who was not a participant in the SBP at the time of its enactment could elect to participate during the period October 1, 1981, through September 30, 1982.

In this case, the member retired prior to the enactment of SBP. When he married the claimant in 1976, he had one year from the date of their marriage to elect SBP coverage for her as his spouse. There is nothing in the record reflecting that he elected to cover her within one year of the marriage or during any open season authorized by Congress. In addition, DFAS did not withhold any SBP premiums from the member's retired pay and there is no evidence that the member ever questioned why premiums were not being withheld from his monthly retired pay as reflected on his retiree account statements. *See* DOHA Claims Case No. 2019-CL-041101.2, *supra*.

Therefore, DOHA has no authority under statute or regulation to allow the claim for the SBP annuity. The claimant has asked that DOHA hold a hearing. Under DoD Instruction 1340.21 (May 12, 2004), there is no authority for DOHA to hold oral hearings.

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated March 1, 2021. 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board