

DATE: January 25, 2021

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2020-CL-110201.2
)
)

**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, a former spouse of a deceased member of the U.S. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-110201, dated November 20, 2020.

Background

On February 5, 1965, the claimant and the member were married. On April 1, 1987, the member retired from the Army and elected spouse Survivor Benefit Plan (SBP) coverage for the claimant. On November 21, 1988, the claimant and the member divorced. The divorce decree awarded the claimant a portion of the member's retired pay and specified how SBP premiums would be paid from the member's retired pay, as follows:

[Former spouse] shall be awarded 38.5% of [Member's] gross retired military entitlement and 38.5% of any cost of living adjustment thereto occurring after the entry of the Decree of Dissolution; provided, however, that [Former spouse] shall be responsible for the premiums due for the Survivor Benefit Plan annuity and said sum shall be deducted from [Former spouse's] 38.5% allotment. [Former spouse] shall have any increase in the premiums due for the Survivor Benefit Plan annuity deducted from the amount to her under this award. Monies due to

[Former spouse] under this award shall not be paid directly to [Former spouse] under the provisions of the Former Spouse Protection Act.

After the divorce, premiums continued to be withheld from the member's retired pay for spouse SBP coverage until the member reached a paid-up status on April 1, 2017. On April 25, 2017, the member designated his two sons as beneficiaries to any arrears of retired pay (AOP) payable upon his death.

The member passed away on March 13, 2020. On March 26, 2020, the member's sister notified the Defense Finance and Accounting Service (DFAS) of the member's death. At that time, DFAS was first advised of the member's divorce from the claimant in 1988. On May 7, 2020, the claimant submitted her claim to DFAS for the SBP annuity as the member's former spouse.

On May 14, 2020, DFAS denied the claimant's claim for an SBP annuity. On appeal, the DOHA attorney examiner upheld DFAS's denial of the SBP claim, finding no evidence that the member elected former spouse SBP coverage. The attorney examiner advised the claimant that she may find relief outside the purview of DOHA with the Army Board for Correction of Military Records (ABCMR). He further explained that since spouse SBP premiums were erroneously deducted from the member's retired pay from the date of his divorce until he reached paid-up status in 2017, he was due a refund for the resulting underpayment of his retired pay. This amount is payable as AOP to the member's named beneficiaries.

In her reconsideration request, the claimant states that she was married to the member for over 20 years. She states that she continued to receive a portion of the member's retired pay, lifelong medical coverage, as well as base privileges. She states that the member told her that she was covered under the SBP, and the member continued to pay spouse SBP premiums. Therefore, she never knew she had to inform the military that she was no longer married to the member in order to maintain her SBP coverage. She requests that DFAS produce the correspondence that they sent to her advising her that she needed to provide them with the divorce decree. She also requests clarification concerning the refund of SBP premiums payable as AOP to her sons. She questions whether this means that her sons will receive the SBP annuity.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2019-CL-022202.2 (August 27, 2019).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. *See* DOHA Claims Case No. 2018-CL-090703.2 (June 19, 2019); and DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018). 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 language in the divorce decree mentions SBP, but only in relation to how the claimant's portion of the member's retired pay would be calculated. The decree required the claimant to pay SBP premiums from her portion of the member's retired pay. Since the terms of the decree did not explicitly award the claimant former spouse coverage, she had no statutory right to request a deemed election. Further, even if the divorce decree had awarded claimant SBP coverage, the member did not voluntarily elect former spouse coverage for the claimant, nor did the claimant request a deemed election within one year of the divorce decree, as required by law. *See* DOHA Claims Case No. 2019-CL-022202.2, *supra*. Therefore, DFAS properly denied the claim for the SBP annuity.

DOHA has no authority under statute or regulation to allow the claim. However, as explained by the attorney examiner in the appeal decision, the claimant may have other available remedies that rest with the ABCMR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. These remedies are outside DOHA's authority and any request for a correction of the record needs to be pursued with the ABCMR.

Finally, DFAS was not notified of the member's divorce until after his death. Since the member continued to erroneously pay for spouse SBP coverage from his retired pay when he did not have an eligible spouse beneficiary, the member was underpaid retired pay after his divorce. Thus, this underpayment of retired pay is payable as AOP to the member's designated beneficiaries. However, there is no SBP annuity payable in this case since the member had no eligible SBP beneficiary upon his death.

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated November 20, 2020. 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board