

DATE: May 28, 2021

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In Re: )  
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          [REDACTED] ) Claims Case No. 2020-CL-111820.2  
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**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. The claimant must prove by clear and convincing evidence on the written record that the government is liable under the law for the amount claimed.

**DECISION**

The claimant, the widow of a retired U.S. Army member, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-111820, dated March 1, 2021.

**Background**

The member retired from the Army on May 1, 1982. In preparation for his retirement, on January 5, 1982, he completed a DA Form 4240, *Data for Payment of Retired Army Personnel*, declining Survivor Benefit Plan (SBP) coverage for his then spouse, and she was fully informed and counseled concerning his election when she concurred, in writing, in the decision to decline to participate in SBP. The member's spouse passed away in December 2000. On November 20, 2004, the member married the claimant. On March 25, 2017, the member passed away.

On September 20, 2018, the Defense Finance and Accounting Service (DFAS) denied the claimant's claim for the SBP annuity as the member's spouse because the member had not elected SBP or Retired Serviceman's Family Protection Plan (RSFPP) coverage. The claimant appealed the denial to DOHA through DFAS. DFAS's administrative report dated July 31, 2020, stated that DFAS properly denied the claim under applicable laws, regulations and instructions. In the appeal

decision, dated March 1, 2021, the DOHA adjudicator sustained DFAS's denial of the claim. She explained that according to the record evidence submitted by DFAS, on March 4, 2004, the member advised DFAS of his first wife's passing. The adjudicator also found in the record provided by DFAS to DOHA that the member notified DFAS on January 26, 2005, of his marriage to the claimant and requested his records be updated. However, the adjudicator found no evidence that the member elected SBP spouse coverage.

In her request for reconsideration, the claimant states that the appeal decision dated March 1, 2021, confirms that the member notified DFAS on January 26, 2005, of their November 2004 marriage, which was well within a year of it. She questions how the member contacted DFAS, by letter or phone call. She wants to know what information her husband may have included in his notification to DFAS in order to have his records updated. She asks what other purpose would her husband have had for notifying DFAS of their marriage and updating his records than to request that she be his beneficiary for survivor benefits, including his arrears of pay (AOP). She further raises the issue of the member's capacity given the severity of his illnesses. She states that he believed that he did what he needed to do to take care of her in the event of his death.

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2020-CL-081719.2 (January 15, 2021).

The SBP program, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the dependents of deceased members of the uniformed services. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Subsection 1448(a) provides that SBP applies to a member who is married or has a dependent child at the time he becomes entitled to retired pay, unless he elects not to participate before the first day for which he becomes eligible for that pay. Such an election not to participate is irrevocable if not revoked before the date on which the member first becomes entitled to retired pay. *See* 10 U.S.C. § 1448(a)(4). Thus, SBP spouse coverage commences automatically when a married member becomes entitled to retired pay, unless the member affirmatively elects not to participate in the SBP program. In other words, once a member becomes entitled to retired pay, he is bound by his election made prior thereto. *See* 67 Comp. Gen. 561 (1988); and 53 Comp. Gen. 393 (1973). Further, a married member who elects not to participate in the SBP when he becomes eligible for retired pay is not a participant in the plan for the purpose of establishing spouse SBP coverage, if he later marries. *See* 10 U.S.C. § 1448(a)(5).

In this case, the member declined to participate in SBP. Therefore, the member was not a participant in the SBP and if he had passed away prior to his first wife's death, she would not be entitled to the SBP annuity. In addition, even if we accept the member's notification to DFAS on January 26, 2005, of his marriage to the claimant as a timely request for SBP coverage for her, under the law it could not be established because the member had declined to participate in SBP. He had to be a participant in the plan in order to provide coverage for the claimant as his new spouse. 10 U.S.C. § 1448(a)(5) specifically limits the ability for a member who remarries after retirement to elect his new spouse to a member who was not married at the time he became entitled to retired pay.

For members who are not participants in SBP, Congress has occasionally provided an open season for members to elect coverage. In the appeal decision, the adjudicator detailed the open season Congress authorized in 2004 by Pub. L. No. 108-375, § 645, 118 Stat. 1811 (2004). Under § 645 of the act, members who were not currently participating in SBP could elect to participate during the period October 1, 2005, through September 30, 2006. The manner of making an election under the act was set forth under § 645(d), which stated that the election shall be made in writing, signed by the person making the election, and received by the Secretary concerned before the end of the enrollment period. In addition, any such election shall be made subject to the same conditions as contained under the SBP law. The implementing regulations for the act are contained in the Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 43 (June 2008). Under ¶ 330904(E), a member making an open season election must have completed a DD Form 2656-9, *Survivor Benefit Plan (SBP) and Reserve Component Survivor Benefit Plan (RCSBP) Open Enrollment Election*; and such election must have been submitted to the appropriate Service point of contact, postmarked by September 30, 2006.

The record in this case reflects that on March 4, 2004, the member faxed a letter to DFAS – U.S. Retired Pay. He stated that he wanted to inform DFAS of the death of his wife. He stated that he had not yet remarried. He requested that his records be updated. Also included in the record is a letter the member sent DFAS dated January 26, 2005. In the letter, he again informed DFAS of his first wife’s death and attached her death certificate. He then notified DFAS that he married his second wife on November 20, 2004, and enclosed their marriage certificate. However, under applicable law and regulation, the member’s letter cannot be considered an open season election. It was sent to DFAS prior to the commencement of the open enrollment period, and it was not submitted in the manner required by the act and regulations.

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, the claimant may have other available remedies that rest with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. Under those statutes, the Secretary of a military department, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. DOHA no authority over the correction of records and any request for a correction of the record needs to be pursued with the ABCMR.

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2020-CL-111820, March 1, 2021, disallowing the claim. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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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Member, Claims Appeals Board