

DATE: June 28, 2021

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-021901.2

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. 2021-CL-021901, dated April 5, 2021.

Background

The claimant was born on January 3, 1958. On March 27, 1984, the claimant and the member were married. On July 24, 1992, in preparation for his retirement, the member elected Survivor Benefit Plan (SBP) coverage for the claimant, his spouse at the time, and his children. On July 14, 2000, the member and the claimant divorced. Pursuant to the divorce decree, the claimant was entitled to receive direct payment of a portion of the member's monthly disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), and the member was required to continue to provide her with an SBP annuity as his former spouse.

On September 13, 2000, the claimant filed an application with the Defense Finance and Accounting Service (DFAS) to be paid her portion of the member's retired pay under the USFSPA. However, DFAS has no record of receiving within a year of the divorce either an SBP former spouse election from the member or a request for a deemed election for former spouse SBP coverage from the claimant.

On January 15, 2008, the member married again. On October 5, 2009, the claimant contacted DFAS and was told that she was not on record for being the member's SBP beneficiary. On November 12, 2009, the claimant also married again when she was 51 years old. On May 26, 2010, the member contacted DFAS, notifying them of his marriage and the claimant's marriage, and requesting that SBP coverage be given to his current spouse. On May 31, 2010, the member passed away.

On July 2, 2018, the claimant wrote to DFAS, explaining that she was awarded former spouse SBP coverage in her divorce from the member in July 2000. She stated that she remarried in November 2009, but was going through a divorce. She stated that the member passed away in 2010 and she was told that she would be eligible for the SBP annuity once her divorce was finalized. On November 21, 2019, DFAS denied her claim for the SBP annuity as the member's former spouse on the basis that her claim was not submitted within 6 years of the member's death. Therefore, DFAS found that her claim was completely barred under 31 U.S.C. § 3702(b), the Barring Act. The claimant sent two more letters to DFAS in January and February 2020, providing DFAS with the divorce decree and noting the mandatory language directing the member to elect former spouse SBP coverage for her. On October 29, 2020, DFAS advised the claimant that they had discovered an overpayment of her portion of the member's retired pay resulting from a payment being issued to her in the amount of \$508.94 after the member's death. DFAS then processed the claimant's appeal of the denial of her claim for the SBP annuity, upholding the initial denial of the claim based on the Barring Act.

In the DOHA appeal decision, the attorney examiner explained that although the claimant did not submit her claim within 6 years of the member's death, the underlying claim for the SBP annuity was not payable because DFAS did not receive within one year of the divorce either a former spouse SBP election from the member or a request for a deemed election for former spouse SBP coverage from the claimant. In the claimant's reconsideration request, she states that she was unaware of all the steps she needed to take to receive the SBP annuity, and she was led to believe that she was entitled to it.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2016-CL-111002.2 (October 31, 2017).

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. *See* DOHA Claims Case No. 2017-CL-101202.2 (April 10, 2018); and DOHA Claims Case No. 2016-CL-111002.2, *supra*. 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). 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. The former spouse's request that the retired member shall be deemed to have made an election for former spouse SBP coverage must be submitted in writing and in the manner prescribed by the Secretary concerned. *See* 10 U.S.C. § 1450(f)(3)(A). An election for former spouse SBP coverage may not be deemed to have been made unless the Secretary concerned receives such a request from the former spouse within one year of the date of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C).

In this case, by the terms of the divorce decree the member was obligated to cover the claimant as his former spouse SBP beneficiary. However, the member failed to establish former spouse SBP coverage and the claimant did not file a deemed election. DOHA is bound by the written record and must accept the version of facts presented by the agency in absence of clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 2016-CL-090801.3 (March 30, 2017). Therefore, DFAS properly denied the claim for the SBP annuity.

Conclusion

The claimant's request for relief is denied and we uphold the DOHA appeal decision in DOHA Claims Case No. 2021-CL-021901, dated April 5, 2021. 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