

DATE: July 6, 2021

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-042301.2

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

A retired 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. 2021-CL-042301, dated April 29, 2021. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS's) denial of the member's request to cover his spouse as his beneficiary under the Survivor Benefit Plan (SBP).

Background

The member retired from the Army in October 2001. Prior to his retirement, the member submitted a DD Form 2656, *Data for Payment of Retired Pay*, noting that he was not married and had no dependent children. Therefore, he elected not to participate in SBP. On May 3, 2019, the member married. On May 11, 2020, the member submitted a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, electing SBP coverage for his spouse.

On August 20, 2020, DFAS notified the member that he could not add his spouse as his SBP beneficiary because more than one year had passed since the date of his marriage. The member appealed DFAS's denial of his request to DOHA. He explained the impact of COVID on the timely submission of his SBP application. He detailed how he was unable to contact the

SBP counselors at his servicing Retirement Services Office (RSO), and therefore was unable to obtain his SBP counselor's certification for the DD Form 2656-6. He stated that he was unable to contact DFAS Retired Pay Customer Assistance until May 11, 2020. At that time he was told that the SBP counselor's certification and notary requirements had been waived due to the impact of COVID. The member stated that the submission of his SBP spousal coverage application was thus delayed through no fault of his own, but due to systemic problems attributed to COVID. In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the member's request to cover his spouse under SBP. The adjudicator explained that under statute and regulation, DOHA had no authority to allow the SBP coverage. However, she advised the member that he may find other available relief outside the purview of DOHA by petitioning the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In the member's reconsideration request, he states that although the DOHA appeal decision notes all his efforts to obtain his RSO's assistance, it did not concede that there were systemic problems with the RSO's availability because of COVID disruptions. He states that he was unable to get the necessary professional advice in order to make an informed decision on his SBP election prior to the one-year deadline. He states that it is unfair to hold the service member accountable when the system was disrupted due to COVID.

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A married member or a member with a dependent child may elect to participate in SBP when the member becomes eligible for retired pay. *See* 10 U.S.C. § 1448(a)(2)(A). A member who is not married upon becoming eligible to participate in the plan but who later marries may elect to establish coverage for the spouse pursuant to 10 U.S.C. § 1448(a)(5). That section requires a written election, signed by the member, and received by the Secretary concerned within one year of the marriage. *See Flynn v. United States*, 46 Fed. Cl. 414 (2000); DOHA Claims Case No. 2021-CL-031602.2 (June 28, 2021); DOHA Claims Case No. 2019-CL-031402.2 (September 24, 2019); and Comptroller General decisions B-258328, Feb. 15, 1995, and B-203903, Feb. 11, 1985. The Service Secretaries have delegated their authority under the SBP law to DFAS.

The Secretary of Defense has issued implementing regulations under the authority of 10 U.S.C. § 1455. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 43, contains the regulations concerning member SBP elections. Paragraph 430601 states that a member who had no eligible beneficiaries at retirement and acquires a new spouse after retirement must make an election within one year of the marriage. Under paragraph 4305, the DD Form 2656-6, *Survivor Benefit Plan Change Election Certificate*, is recommended for a member making such an election to provide SBP coverage for the first spouse acquired after retirement. However, if not using that form, the member's election must be in writing, signed by the member and contain all necessary information for establishing the coverage. Under paragraph 430606, the Secretary concerned (or designee) may correct any election or any change or revocation of an election when the Secretary considers it necessary to correct an

administrative error. *See also* Department of Defense Instruction (DoDI) 1332.42, *Survivor Benefit Plan* (December 30, 2020).

In this case, when the member retired in 2001 he had no eligible spouse beneficiary. Therefore, he had a year from the date of his marriage on May 3, 2019, to designate his spouse as his SBP beneficiary. Since he failed to make the election within one year of the date of his marriage, DFAS properly denied his request to cover his spouse as his SBP beneficiary.

DOHA acknowledges that under the circumstances the member was unable to receive the SBP counseling and information he needed due to the Pandemic. We appreciate the member's arguments that based on equity that the time limit for establishing spouse SBP coverage should be waived. However, DOHA is bound by statute and regulation, and therefore, is unable to grant the SBP coverage for the member's spouse. As set forth in the appeal decision, the member may have other available remedies that exist outside DOHA's authority. Under 10 U.S.C § 1454(a), the Secretary concerned may correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error. Further, 10 U.S.C. § 1552(a)(1) states that the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Either type of action is made through a civilian board, in this case the ABCMR. Information on petitioning the ABCMR is found online at: <https://arba.army.pentagon.mil/abcmr-overview.html>. We note that a search of the ABCMR's decisions on their Reading Room website at https://boards.law.af.mil/ARMY_BCMR.htm resulted in quite a few cases involving the same issue.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-042301, dated April 29, 2021. 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

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board