

DATE: June 24, 2021

In Re:)
 [REDACTED]) Claims Case No. 2020-CL-120205.2
)
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. 2020-CL-120205, dated April 19, 2021.

Background

On July 19, 1980, the claimant and the member were married. On August 1, 1997, the member retired from the Air Force, and elected spouse Survivor Benefit Plan (SBP) coverage for the claimant. On August 7, 2006, the claimant and the member were divorced. The divorce decree awarded the claimant 50% of the member’s disposable retired pay under the Uniformed Services Former Spouses’ Protection Act (USFSPA). However, there was no language in the divorce decree pertaining to the SBP annuity of the member. On November 1, 2006, the Defense Finance and Accounting Service (DFAS) – Garnishment Operations Directorate sent the claimant a letter acknowledging receipt of her application for payment of a portion of the member’s retired pay under the USFSPA. In that letter, DFAS also advised the claimant that if the divorce decree awarded her former spouse SBP coverage, she must request a “deemed election” for SBP within one year of the date of her divorce directly to DFAS – U.S. Military Retirement Pay, London, Kentucky.

On February 16, 2007, the divorce decree was amended. In pertinent part, the amended decree addressed SBP and stated the following:

Furthermore, plaintiff shall be entitled, at her election, to be designated as a former spouse beneficiary for the Survivor Benefit Plan (SBP) associated with the defendant's United States Air Force retirement.

On July 28, 2010, the member remarried. On March 12, 2012, the member completed a DD Form 2656-6, *Survivor Benefit Plan Election Form Change Certificate*, noting that his current SBP coverage was spouse only and requesting that his SBP coverage be suspended. On June 19, 2012, DFAS notified the member that it had adjusted the member's coverage to reflect his change from spouse coverage to no beneficiary coverage to spouse coverage with an effective date of August 7, 2006, and that these changes would be reflected on his June 2012 retired pay check. On November 24, 2017, the member passed away, and the claimant submitted a claim for the SBP annuity.

DFAS subsequently denied the claimant's claim for the SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election. The claimant appealed DFAS's denial of her claim for annuity to DOHA. In her appeal, the claimant stated that she did make a request for a deemed election in 2007 after her divorce became final. She stated that the divorce decree was binding and she should receive the SBP annuity. In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim finding no evidence that within one year of the amended divorce decree, the member elected former spouse SBP coverage for the claimant or the claimant requested a deemed election as the member's former spouse SBP beneficiary.

In her reconsideration request, the claimant states that she was married to the member for over 25 years. She attaches the final amended divorce decree dated February 16, 2007. She states that the divorce decree has never been vacated or amended, and should stand as written. She states that although the member may have filed a request in 2012 to terminate SBP coverage for her, his request does not vacate or take precedent over the court's order. She further states that her divorce from the member did not end her SBP coverage. She states that the fact the member filed for a change in election in 2012 validates that she filed a timely deemed election for SBP. She questions why he would request the change in coverage if he had not elected SBP coverage for her in the first place.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2018-CL-090705.2 (June 3, 2019). Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Spousal coverage ends upon divorce. If a

member divorces and wishes to provide SBP coverage for a former spouse, the service member must notify DFAS in writing of the divorce and the intention to provide coverage for the 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 the former spouse. If the service member 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). Under 10 U.S.C. § 1450(f)(3)(A) through (C), a former spouse's deemed election request must be in writing with a copy of the court order or other official statement which requires such an election, and be submitted within one year of the date of the court order or filing involved, in such a manner as prescribed by the Secretary concerned's implementing regulations.

The implementing regulations for SBP elections and election changes are found under Chapter 43, Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay. The regulation in effect at the time of the claimant's divorce required the former spouse or the former spouse's attorney to make a written request. The written request must refer to or cite provisions in a court order concerning SBP former spouse coverage, or make clear by other references to SBP that there is an intent that the coverage be provided to a former spouse; and the written request must be accompanied by a copy of the court order and/or a statement from the clerk of the court. *See* DoDFMR ¶ 430503(C) (September 1999).

In this case, the member elected spouse SBP coverage for the claimant when he retired from the Air Force. The claimant was covered under the SBP as the member's spouse at that time until such coverage ended with their divorce. The original divorce did not address SBP coverage. The claimant obtained an amended divorce decree awarding her former spouse SBP coverage. However, the member failed to establish former spouse SBP coverage and the claimant did not file a deemed election within one year of the date of the court order. As discussed by the adjudicator in the DOHA appeal decision, the claimant received a letter from DFAS in November 2006 acknowledging her application for direct payment of her portion of the member's retired pay under the USFSPA. In that letter, DFAS explained that if she had been awarded former spouse SBP coverage in the divorce decree, she must request a "deemed election" for SBP within one year of the date of her divorce directly to DFAS – U.S. Military Retirement Pay, London, Kentucky. The SBP annuity was not raised until the issuance of the amended divorce decree in February 2007. There is no evidence that after the divorce decree was amended the claimant sent a written request to DFAS – U.S. Military Retirement Pay in London, Kentucky, requesting a former spouse SBP deemed election. In fact, at the time the member requested a change in coverage in 2012, he was still paying for spouse SBP coverage, not former spouse SBP coverage. Under applicable statute and regulation, DFAS properly denied the claim for the SBP annuity.

Conclusion

The claimant's request for relief is denied and we uphold the appeal decision dated April 19, 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board