

DATE: June 15, 2021

In Re:)
 [REDACTED]) Claims Case No. 2020-CL-081702.2
)
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. Army, through her attorney, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-081702, dated January 12, 2021.

Background

On October 31, 1962, the claimant and the member were married. They subsequently had two children. In 1977 the member was selected by the Army for discharge on the grounds of “too much time and not enough grade.” The member appealed the decision and by memorandum dated November 1, 1977, the Army granted the member’s appeal. On July 1, 1980, the member retired from the Army. The record reflects that although the member was married at retirement, he declined Survivor Benefit Plan (SBP) coverage for the claimant and his children. In addition, no SBP premiums were withheld from his retired pay for coverage for the claimant or their children.

On August 30, 1984, the claimant and the member divorced. The divorce decree specifically divided the parties’ estate. After giving due regard for the rights of each party, and noting that each party had signed his or her name indicating agreement to the decree’s terms and

provisions, the court awarded the claimant a percentage of the member's retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA). The decree also addressed the Survivor Benefit Plan (SBP), as follows:

That, to the extent permitted by law, Respondent, [member], does, by signing below, hereby enter his irrevocable election to provide such 42.5% under a survivor benefit plan to [claimant] such that the direct payments of the share of the military retirement pay herein provided to [claimant], Petitioner, shall continue so long as she is living, and shall not terminate on the death of [member].

Respondent, [member], agrees to, and is ordered to, immediately in event Congress should allow same, enter election for [claimant] to receive her benefits under the Survivor Benefit Plan, at such further time as Congress may permit such election.

The record reflects that the U.S. Army Finance and Accounting Center (USAFAC) received a USAFAC Form 0-1767, *Application for Direct Payments from a Member's U.S. Army Retired Pay Pursuant to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. Sec. 1408*, and payments were made to the claimant.

In 1991 USAFAC was combined with the other Armed Services finance centers to form the Defense Finance and Accounting Service (DFAS).

On November 29, 2018, the member passed away. On January 15, 2019, the claimant's attorney advised DFAS of the member's passing and presented the claimant's claim for the SBP annuity as the member's former spouse. The attorney noted that the final divorce decree required the member to establish former spouse SBP coverage for the claimant, that the claimant was married to the member during his Army career, and that the claimant never remarried. On June 21, 2019, DFAS denied the SBP claim on the basis that the member did not elect to participate in the SBP upon his retirement.

On July 9, 2019, the claimant appealed DFAS's denial of her claim. She enclosed the divorce decree and noted the language concerning her coverage under SBP. She stated that she qualified under the 1984 DoD Authorization Act liberalizing SBP coverage. On August 13, 2019, the claimant's attorney sent a letter to DFAS reiterating that the divorce decree required the member to establish SBP coverage for the claimant and that the claimant was awarded USFSPA payments. He also argued that she had substantially complied with the requirements for establishing former spouse SBP coverage because the divorce decree awarded her coverage and the clerk of the court timely sent a copy of the divorce decree by certified mail to the USAFAC. In support of the claim for SBP, the attorney cited *Holt v. United States*, 64 Fed. Cl. 215 (2005).

DFAS reconsidered the claim in their administrative report dated June 16, 2020. DFAS denied the claim on the basis that the member elected not to participate in the SBP. On July 9, 2020, the claimant's attorney rebutted DFAS's administrative report. He pointed out that DFAS

cited several statutes, but failed to apply them and denied the claim on unstated grounds. He maintained that there was no evidence that the member declined to participate in SBP at retirement or that the claimant had been notified of his decision not to participate. He also asserted that the member made an SBP former spouse election through the divorce decree and the claimant's request for a deemed election was made when the clerk of the court forwarded a copy of the divorce decree and a USAFAC Form 0-1765 to DFAS. He again cited *Holt* in support of the claim.

In the appeal decision, the DOHA adjudicator upheld the denial of the claim. He examined the written record and concluded from the available information in the record that the member was not a participant in the SBP at retirement as required by the statute for former spouse SBP coverage. However, he cited the U.S. Court of Federal Claims' decision, *Barber v. United States*, 230 Ct. Cl. 287, 676 F.2d 651 (1982), and explained that if the USAFAC or one of its counterparts had failed to notify the claimant as the member's spouse of the member's election to not participate in the SBP at retirement, then SBP coverage would be established for the claimant. He further found that even if the member had been an SBP participant, there was another problem with the claim for the former spouse SBP annuity. He found no evidence that the member elected former spouse SBP coverage within a year of the divorce, nor that the claimant requested a deemed election for the coverage within a year of the divorce. He further explained that the claimant may have other avenues of relief that rest with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In the claimant's reconsideration request, the claimant's attorney states that the Army did not inform the claimant that the member had not provided her with SBP coverage. The attorney states that the divorce decree required the member to provide her with former spouse SBP coverage. He states that the USAFAC was provided a copy of both the USAFAC Form 0-1767 and the USAFAC Form 0-1765 within one year of the divorce. He attaches both forms to the reconsideration request. He states that the Form 0-1765 was provided to DFAS in the claimant's appeal. However, the DOHA adjudicator stated in the appeal decision that no Form 0-1765 was provided. He notes that the Form 0-1765 states that the enclosed order/decreed shows an election by the member to provide an irrevocable survivor benefit plan to the claimant such that her share of the member's military benefits would continue to be paid directly to her after the member's death. He requests the appeal decision be reversed and the claimant be awarded the SBP. Finally, he requests information on the petitioning the Secretary of the Army under 10 U.S.C. § 1454, as the adjudicator mentioned in the appeal decision.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed. Federal agencies and officials must act within the authority granted to them by statute and issuing regulations. Thus, the liability of the United States is limited to that provided by law, including implementing regulations.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. A married member is eligible to participate in SBP when he becomes eligible for retired pay. SBP spouse coverage ends upon divorce.

Under the original SBP law, there was no authority for coverage of a former spouse and upon a divorce, a retired member's former spouse lost coverage. In 1982 the SBP law was amended by the USFSPA to allow a member to make a voluntary election to provide an annuity for a former spouse at the time he became eligible to participate in SBP. *See* Pub. L. No. 97-252, title X, 96 Stat. 718 (1982). The SBP law was again amended in 1983 to allow a member who elected into the SBP for his spouse when he became eligible to participate and later divorced the spouse, to elect to designate her as his former spouse beneficiary. *See* Pub. L. No. 98-94, § 941, 97 Stat. 614, 652 (1983). The election would have to be made within one year of the effective date of the Act (or within one year of the divorce if the divorce took place after the passage of the Act). To make such an election the member must provide the appropriate Secretary with a voluntary written election. *See* B-226563, March 2, 1990. In 1984 Congress addressed the concern that under the current SBP law a member could agree to designate a former spouse, permit a court to incorporate that agreement into a court order, and then the member could subvert the law by refusing to sign the actual documentation to make the former spouse SBP election. *See* S.Rep. No. 500, 98th Cong., 2d Sess. 222 (1984). Congress enacted Pub. L. No. 98-525, § 644, 98 Stat. 2492, 2548, in October 1984 to provide that in such a situation the former spouse could make an appropriate request of the Secretary concerned within one year of the amendment's passage or the date of the court order, whichever was later, and the Secretary concerned would "deem" an election to have been made by the member. This amendment was codified under 10 U.S.C. §1450(f)(3), but was later moved to subsection (f)(4). Congress amended 10 U.S.C. § 1450(f) in November 1986 to give state courts in divorce proceedings the authority to require a person to elect former spouse SBP coverage regardless of whether the member agrees to do so. *See* Pub. L. No. 99-661, § 641, 100 Stat. 3816, 3885 (1986).

In the appeal decision, the DOHA adjudicator found the threshold issue in this case was whether or not the member was a participant in SBP for the purposes of establishing former spouse SBP coverage upon his divorce from the claimant in 1984. The record reflects that the Army could not produce the pertinent source documentation to show that the member declined to participate in SBP. DFAS states its electronic records reflect that the member declined participation in SBP and therefore, he never paid SBP premiums, nor were SBP premiums deducted from his retired pay. However, DFAS acknowledges that copies of the documents the member completed in 1980 concerning his SBP election do not exist at DFAS. When DOHA requested DFAS again verify their records, DFAS found the microfiche that reflects the member did not participate in SBP when his retired pay started. The record does not include any correspondence or notification to the claimant regarding the member's participation in SBP. In *Barber*, the U.S. Court of Federal Claims held that if a spouse was not notified of the member's failure to make such an election, the spouse was entitled to an SBP annuity upon the member's death. However, in the case before us, even assuming that the claimant was not notified of the member's declination to participate in SBP, that fact is not dispositive of the outcome in this case.

Even if the Army did not notify the claimant of the member's failure to make such an SBP election, the claimant has another problem. At the time of the member's and the claimant's divorce in August of 1984, the court ordered him to provide her with former spouse SBP coverage, but the SBP law only provided for the member to have the option to voluntarily elect coverage for her as his former spouse within one year of their divorce. There was no authority for the claimant to request a deemed election based on such a court order. This is because it was not until November 1986 that the law allowed a former spouse to deem an election even when the member did not agree to it. *See* 66 Comp. Gen. 687 (1987). The SBP law's implementing regulations contained in the DoD Financial Management Regulation (DoDFMR) reflect that a court order which requires a member to elect (or enter into an agreement to elect) SBP for a former spouse must have been issued on or after November 14, 1986, in order for the former spouse to have the right to request a deemed election. If a member was ordered by a court to elect former spouse coverage before November 14, 1986, a second court order, issued on or after November 14, 1986, enforcing the original order which requires a former spouse election, would constitute a modification of the previous order and establish a one-year period during which a request for a deemed election may be filed. *See* DoDFMR Volume 7B, Chapter 43, paragraph 430503(C)(1) (September 1999 Version).

In this case, although the member was ordered to provide SBP coverage for the claimant in the original divorce decree, he failed to do so. As noted in the DoDFMR, on or after November 14, 1986, the claimant could have sought a second court order enforcing the original divorce decree requiring the member to make a former spouse election. This action would have constituted a modification of the previous order and established a new one-year period during which a request for a deemed election could have been filed. We note that the USAFAC Form 0-1765 submitted in August 1984, which the claimant's attorney submits on reconsideration, appears to have been sent to USAFAC for the purpose of alerting the Army to the fact that the enclosed court order reflected the member's election to provide the claimant with an SBP annuity. However, as noted above, it was a requirement that the claimant file a second court order in order for her to deem her election. Based on the discussion above, this notification in August 1984 had no legal effect.

As set forth in the appeal decision, the claimant may have other available avenues of relief that rest with the ABCMR under 10 U.S.C. § 1454 and 10 U.S.C. § 1552. These remedies are outside of DOHA's purview and any request for a correction of record must be made with the ABCMR.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2020-CL-081702, dated January 12, 2021, disallowing the claim. 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board