

DATE: October 25, 2021

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In Re: )

[REDACTED] )

) Claims Case No. 2020-CL-123004.2

Claimant )

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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.

**DECISION**

The claimant, a former spouse of a deceased 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. 2020-CL-123004, dated June 4, 2021.

**Background**

In 1980 the claimant and the member were married. In May 1986, in preparation for his retirement, the member completed a DA Form 4240, *Data for Payment of Retired Army Personnel*, noting that he was married to the claimant and had two dependent children. On that form, he elected spouse and child Survivor Benefit Plan (SBP) coverage. On November 1, 1986, the member retired. On September 29, 1997, the claimant and the member divorced. The divorce decree awarded the claimant a portion of the member's monthly retired pay. In addition, the member was required to continue to designate the claimant as his surviving spouse for his military retired pay, as set forth below:

Husband shall continue to denote Wife as surviving spouse in regard to his military pension. Husband shall continue the spouse benefit pension payments for the benefit of his Wife. The premium incurred for the SBP shall be borne by Wife. It shall be subtracted from her percentage of Husband's military pension.

The net amount payable to Wife (after subtraction of SBP premium) shall be paid by Husband to Wife by the 7<sup>th</sup> of each month.

In 1999 the member remarried. On February 21, 2020, he passed away. On April 7, 2020, the claimant submitted to the Defense Finance and Accounting Service (DFAS), a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. On April 29, 2020, DFAS denied her claim on the basis that the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a former spouse deemed election.

The claimant appealed DFAS's denial of her claim. She stated that at the time of her divorce from the member she had been married to him during most of his time in the service. She stated that in the divorce she was awarded 15.25% of his retired pay; a portion of that payment was used to pay the SBP premiums for her former spouse SBP coverage; and after payment of the SBP premiums, DFAS paid her directly the amount of \$84 per month. She further stated that her monthly portion of his retired pay remained constant, without any increases over time to account for Cost of Living Allowance (COLA) increases. She also stated that the member was 100% disabled and she cared for many of his health-related issues due to his service-connected disability during their marriage. She stated that the member was obligated under the divorce decree to complete the paperwork to provide her with SBP coverage. She believed that her attorney and the member's attorney handled all the legal issues because there was no communication between she and the member. She stated that it was unfair to hold her accountable for the member's inaction in regards to making the election for former spouse SBP coverage. Finally, she advised that she had recently contacted her divorce attorney to find out if the form was completed for former spouse SBP coverage as required pursuant to the divorce decree.

The claimant's U.S. Senator also contacted DFAS on her behalf, noting that in 1986 the member made an irrevocable election of spouse SBP coverage for the claimant. The claimant stated that the member never notified DFAS of his remarriage in 1999; never filled out any paperwork to denote his new spouse as his SBP beneficiary; that the member's divorce attorney drafted an affidavit stating that it was the member's intention to cover the claimant as his former spouse SBP beneficiary; but despite all this, the member's widow was receiving the annuity.

DFAS forwarded the claimant's appeal package to DOHA by letter dated December 4, 2020. In the DOHA appeal decision, the adjudicator upheld DFAS's denial of the claim for the SBP annuity. She found no evidence that the member notified DFAS within one year of their divorce to change the SBP coverage from spouse to former spouse. She also found nothing in the record reflecting that the claimant or the claimant's attorney requested a deemed election for former spouse SBP coverage pursuant to the divorce decree. She noted that if the claimant had been underpaid her portion of the member's retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), the claimant should contact DFAS.

In her request for reconsideration, the claimant reiterates that she believes the member never elected his new spouse as his SBP beneficiary. She states that she bore the burden of paying the SBP premiums from her portion of the member's military retired pay. She indicates

that her attorney in the divorce proceedings is currently under investigation by his bar association for negligence due to his failure to file the paperwork necessary for the deemed election. She also indicates that a petition has been filed for a correction of military records with the Army Board for Correction of Military Records (ABCMR).

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation. Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions.

SBP is an income maintenance program for the survivors of deceased members of the uniformed services. *See* 10 U.S.C. §§ 1447-1455. Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for the former spouse, the 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 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).

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time of his retirement in 1986 when he elected coverage for her and his two children, until 1997 when their divorce ended the spouse coverage for her. Under the terms of the divorce decree, the member was required to continue to denote the claimant as his surviving spouse for payment of his military retired pay. Under the SBP law, the member failed to establish former spouse SBP coverage for the claimant and the claimant did not file a deemed election. *See* DOHA Claims Case No. 2017-CL-101202.2 (April 10, 2018).

As set forth above, DOHA has no authority under the SBP law to award the claimant the SBP annuity. Any action the claimant intends to pursue against the attorney has no effect on awarding her the SBP annuity under federal law. In addition, we appreciate the fact that the claimant has filed a petition with the ABCMR under 10 U.S.C. § 1552. The ABCMR's authority to correct a military record is discretionary and broader than DOHA's authority to settle a claim. By statute the Secretary of a military department, acting through a correction board, may correct a member's record when the Secretary, in this case, the Secretary of the Army, considers it necessary to correct an error or remove an injustice.

Finally, as noted by the DOHA adjudicator, if the claimant was receiving a portion of the member's monthly disposable retired pay by direct payment under the USFSPA, she may have a claim for any resulting underpayment of her share of the member's monthly disposable retired pay.

## Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision dated June 4, 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

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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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Richard C. Ourand, Jr  
Member, Claims Appeals Board