

DATE: August 20, 2021

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-012516.3

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 retired member of the U.S. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-012516.2, dated May 24, 2021.

Background

The claimant and the member were married on May 9, 1987. The member retired from the Navy on July 1, 1998. In preparation for his retirement, the member elected spouse and child Survivor Benefit Plan (SBP) coverage for the claimant and his two children. On June 17, 2002, the claimant and the member were divorced. The divorce decree incorporated a property settlement agreement which awarded the claimant a portion of the member's monthly retired pay and also, continuance of her SBP coverage.

On February 20, 2017, the member passed away. In three separate letters sent to the Defense Finance and Accounting Service (DFAS) during the period April 2018 through May 2019, the claimant requested information concerning the member's SBP annuity. By letter dated July 19, 2019, DFAS notified the claimant that she was not entitled to receive the SBP annuity because the member did not establish former spouse SBP coverage for her, nor did she make a

request for a deemed election within one year of their divorce. On August 12, 2019, the claimant appealed DFAS's denial of her claim for the SBP annuity. She stated that she did notify DFAS in a timely manner that she was entitled to receive the SBP annuity. She attached a copy of a letter she wrote to DFAS dated May 5, 2003, in which she advised DFAS that she was entitled to the SBP annuity as set forth in her divorce decree. The letter dated May 5, 2003, that she attached is addressed to DFAS at 8898 E. 56th Street, Indianapolis, Indiana 46249.

The claimant appealed DFAS's denial of her claim for the SBP annuity to DOHA. In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim, explaining that DFAS had no record of receiving the claimant's request for a deemed election within one year of the date of divorce.

In the claimant's reconsideration request, she maintains that DFAS erred, because she did file a timely deemed election. She also states that DOHA erred in upholding the denial of her claim. She relies on the Common Law Mailbox Rule, asserting that she mailed the letter and that unless a specific statute overrides that rule, DFAS must rebut the presumption of her mailing with direct and affirmative evidence that the mailing was not received. She believes that DFAS cannot just state that they did not receive the letter. She attaches her sworn affidavit dated June 15, 2021, stating that she did in fact mail the letter dated May 5, 2003, to DFAS requesting a self-election into SBP if her ex-husband failed to comply with the divorce decree's requirement to elect the coverage for her.

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. Under Department of Defense Instruction 1340.21 (May 12, 2004), the claimant has the burden of proving the existence of a valid claim against the government. 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. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered. *See* Instruction ¶ E5.7.

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 member must notify DFAS in writing of the divorce and the member's 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). The former spouse's request that the retired member shall be deemed to

have made such an election if the Secretary concerned receives an election for former spouse SBP coverage 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). The Service Secretaries have delegated their authority under the SBP law to DFAS.

The Secretary of Defense has issued implementing regulations for the SBP law pursuant to 10 U.S.C. § 1455. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 43, contains the regulations concerning SBP elections and election changes. Under paragraph 430404, concerning the time and manner of a former spouse deemed election, a former spouse or the former spouse's legal representative must request the deemed election by completing the DD Form 2656-10, and submitting it with the divorce decree within one year of the divorce. The current regulation states that effective September 27, 2008, the use of the DD Form 2656-10 to a request a deemed election became mandatory. *See* DoDFMR ¶ 430502. However, the regulation in effect at the time of the divorce in this case giving rise to the former spouse's right to request a deemed election still required the former spouse or the former spouse's attorney to make a written request. Concerning the content of the request, the regulation also states that the request is acceptable if it refers to, or cites provisions in a court order concerning SBP former spouse coverage, or makes clear by other references to SBP that there is an intent that the coverage be provided to a former spouse; and the written request is accompanied by a copy of the court order and/or a statement from the clerk of the court. Concerning the statutory time limit for submitting the request, the regulation states that the former spouse's deemed election must be received by DFAS within one year of the date of the divorce. *See* DoDFMR ¶ 430503(C) (September 1999).

In this case, the member was obligated based on the divorce decree to cover the claimant as his former spouse under the SBP. However, the member failed to establish former spouse SBP coverage and DFAS did not receive the claimant's request for a deemed election within one year of the divorce. Although the claimant maintains that she sent her request to DFAS in May 2003, we note that the address reflected on the letter was not the proper address for requesting a former spouse deemed election. At the time of her divorce and date she sent the letter, she was required to mail it to DFAS – U.S. Military Retirement Pay in London, Kentucky. Further, in 2003 any correspondence regarding the award of a portion of the member's monthly retired pay should have been sent to DFAS – Garnishment Operations Directorate in Cleveland, Ohio. *See* DOHA Claims Case No. 2020-CL-120205.2 (June 24, 2021); and DOHA Claims Case No. 2019-CL-090503.3 (December 9, 2020). Therefore, DOHA is unclear where the claimant sent her letter in May 2003, and without a certified mail receipt reflecting where within DFAS she sent her letter, there is no proof of receipt of a timely deemed election as required by statute and regulation. 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. 2020-CL-042702.2 (September 14, 2020); and 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 reconsideration is denied. 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