

DATE: August 23, 2021

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-040207.2

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, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-040207, dated June 4, 2021.

Background

On July 18, 1970, the claimant and the member were married. In 1989 the member received his Notification of Eligibility (NOE) for retired pay at age 60, notifying him that he was eligible to make an election under the Reserve Component Survivor Benefit Plan (SBP). The Reserve Component SBP extends eligibility for SBP to Reserve Component members who would otherwise be eligible to receive retired pay except that they have not reached the required retirement age of 60. On June 20, 1989, the member completed the DD Form 1883, *Survivor Benefit Plan Election Certificate*, electing Option C, to provide immediate coverage for his spouse and their two dependent children. On October 18, 1996, the claimant and the member divorced. The divorce decree did not award the claimant former spouse SBP coverage, and the member did not voluntarily elect coverage for her.

On March 9, 2006, the member submitted DD Form 2656, *Data for Payment of Retired Personnel*, reporting that he was not married and electing not to participate in SBP. On December 1, 2006, the member retired from the Army and began receiving retired pay.

On October 30, 2019, the member passed away. On January 16, 2020, the claimant submitted to the Defense Finance and Accounting Service (DFAS) a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SP annuity as the member's former spouse. On May 13, 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 her ex-husband assured her that she would be eligible for the SBP annuity under the 20/20/20 rule for military spouse. She was married to the member for 20 years; the member had 20 years of creditable service for retired pay; and those 20 years of marriage overlapped with his military service. He never remarried and paid for her to be covered as his SBP beneficiary. She stated that he passed away certain that she would be covered as his SBP beneficiary. In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He explained that the divorce decree did not require the member to make a former spouse election for the claimant; that spouse SBP coverage for the claimant ended with their divorce; and the member did not elect former spouse SBP coverage for her. He also explained that the 20/20/20 rule is not applicable to SBP coverage and is relevant to another federal law known as the Uniformed Services Former Spouses' Protection Act (USFSPA).

In her request for reconsideration, the claimant reiterates that her ex-husband assured her she would be eligible for the SBP annuity and that there was no further action needed on her part to secure the annuity. She states that he elected spouse coverage for her and explicitly told her that the only paperwork that she needed was his Retiree Account Statement (RAS), which she attaches to her reconsideration request. We note that the member's RAS for 2019 reflects that he was paying for spouse only SBP coverage. The RAS also notes his spouse's date of birth as the claimant's date of birth.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2021-CL-021205.2 (June 30, 2021). 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 he elected Option C coverage for her in 1989 until 1996 when their divorce ended the coverage. The claimant was not awarded former spouse SBP coverage in the divorce decree. Therefore, she had no statutory right to request a deemed election. Further, although the member may have intended that his former spouse be covered under the SBP, he failed to establish former spouse SBP coverage within one year of their divorce. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2021-CL-021205.2, *supra*; and DOHA Claims Case No. 2020-CL-042201.2 (November 18, 2020).

Finally, we do note that if SBP premiums for spouse coverage were deducted from the member's retired pay when he no longer had an eligible spouse beneficiary, those costs should be refunded to the proper beneficiary as arrears of retired pay under 10 U.S.C. § 2771.

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

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board