

DATE: August 23, 2021

In Re:)
 [REDACTED]) Claims Case No. 2021-CL-040214.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Pursuant to a divorce decree, a member was required to provide his former spouse with a Survivor Benefit Plan (SBP) annuity. Although the member failed to make an election for his former spouse, she made a timely request for a deemed election for former spouse SBP coverage. Therefore, his surviving spouse's claim for the SBP annuity must be denied.

DECISION

The surviving spouse (hereinafter claimant) 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. 2021-CL-040214, dated May 28, 2021. In that case, DOHA denied the claimant's claim for the member's SBP annuity because his former spouse made a timely and proper deemed election.

Background

In 1989 the member retired from the Air Force. At that time, he was married and elected SBP coverage for his spouse. On September 10, 1990, the member divorced. The record reflects that pursuant to the divorce decree, the member was required to provide her with a former spouse SBP annuity. On July 12, 1991, the member's former spouse filed a timely deemed election for former spouse SBP coverage. On August 28, 1997, the member married the claimant.

On May 8, 2020, the member passed away. On May 24, 2020, the claimant filed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the spouse of the

member. On June 25, 2020, DFAS denied the claim on the basis that the member's former spouse requested a timely deemed election and was entitled to the SBP annuity. On July 8, 2020, the claimant appealed DFAS's denial of her claim. The claimant stated that the member's former spouse remarried before reaching the age of 55.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the SBP annuity claim. He explained that the record contained evidence that the member's former spouse, through her attorney, properly deemed the former spouse SBP election within one year of the divorce. He also advised the claimant that while the former spouse may have remarried prior to reaching the age of 55, her marriage did not end her eligibility for the SBP annuity.

In her request for reconsideration, the claimant appears to be questioning the appropriateness of a portion of her late husband's monthly retired pay being directly paid to his former spouse since she remarried before she turned 55. She states that she was married to the member for over 22 years until his death and should be entitled to those payments.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2018-CL-080208.2 (August 29, 2019); and DOHA Claims Case No 2017-CL-041103.2 (August 31, 2017). Regulations that are promulgated pursuant to an express statutory authority have the force and effect of law, and our DOHA cannot issue a determination at variance with such regulations. *See* DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A member may elect coverage for a former spouse. *See* 10 U.S.C. § 1448(b)(3). 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. If the member is required under the terms of a divorce decree to provide SBP coverage for the former spouse and fails or refuses to do so, the former spouse has one year from the date of the divorce to request a deemed election pursuant to 10 U.S.C. § 1450(f)(3).

In this case, the member at retirement in 1989 elected spouse SBP coverage and this coverage as the member's spouse beneficiary ended with his divorce in September 1990. The record reflects that their divorce decree designated her as the beneficiary of the member's SBP. The former spouse timely submitted her request for a deemed election to DFAS. If the member subsequently acquires a spouse, a former spouse election prevents an annuity to that spouse. *See* DOHA Claims Case No. 2020-CL-120203.2 (June 21, 2021).

We believe that the claimant may be confusing the marital award of a portion of the member's disposable monthly retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA) to his former spouse with the former spouse's deemed election request for SBP coverage. Apparently, the divorce decree, in addition to awarding the former spouse SBP coverage, awarded her a portion of the member's monthly disposable retired pay. There is

no such provision in the law that terminates a former spouse's payment of a portion of the member's monthly retired pay because she remarries before the age of 55. However, payments under the USFSPA end upon the death of the member. As explained by the attorney examiner in the appeal decision, the effect of the member's former spouse marrying before age 55 in this case does not end her eligibility for the SBP annuity, but merely suspends it until that marriage is terminated by divorce, annulment or death. *See* 10 U.S.C. § 1450(b).

Under the facts in this case, since the member's former spouse timely deemed the election for SBP coverage, DFAS and DOHA properly denied the surviving spouse's claim for the SBP annuity.

Conclusion

The claimant's request for reconsideration is denied and we affirm the appeal decision dated May 28, 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