

DATE: August 23, 2021

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-040904.2

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. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-040904, dated June 16, 2021.

Background

On November 29, 1980, the claimant and the member were married. On July 7, 2000, in preparation for his retirement, the member completed his retirement application, DD Form 2656, electing not to participate in the Survivor Benefit Plan (SBP). The claimant, as the member's spouse, had to concur with the member's declination to participate in the SBP, and signed the form on July 7, 2000, before a witness. On January 1, 2001, the member retired from the Air Force. As a result of the member's election not to participate in SBP, no SBP premiums should have been withheld from his retired pay.

On July 29, 2011, the claimant and member divorced. The divorce decree awarded the claimant 50% of the member's disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), and named the claimant as the member's former spouse SBP beneficiary. On September 10, 2011, the claimant submitted a DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election*, and a copy of the divorce decree to the Defense Finance and Accounting Service (DFAS).

The member passed away on August 14, 2020. The claimant submitted a claim for the SBP annuity as the member's former spouse to DFAS. DFAS denied her claim for the SBP annuity on the basis that neither the member nor the claimant had elected former spouse coverage within one year of the divorce. The claimant then appealed to DOHA. In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim, finding that since the member did not elect spouse coverage for her at his retirement when eligible for participation in SBP, and the claimant concurred, there was no statutory basis for the subsequent award of former spouse SBP coverage.

In her reconsideration request, the claimant states that she and the member did not understand the DD Form 2656 when they signed it. She states that DFAS told her that the member's original election for SBP coverage was in October 2000. Therefore, she believed that the member must have completed another form changing his original election and electing to participate. She attaches a Retiree Account Statement (RAS) dated January 2011 that reflects that spouse SBP premiums continued to be deducted from the member's retired pay. She states that she was a devoted military wife for the member's 20-year career. She requests that DOHA reconsideration her claim for the annuity.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2020-CL-081719.2 (January 15, 2021).

The SBP, set out in 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. However, a married member may elect not to participate in the SBP, with the concurrence of his spouse. *See* 10 U.S.C. § 1448(a)(2)(A) and (3)(A)(i). An election to forgo participation in SBP under 10 U.S.C. § 1448(a)(2)(A) is irrevocable if it is not revoked before the date the member first becomes entitled to retired pay. *See* 10 U.S.C. § 1448(a)(4)(A). Further, a married member who elects not to participate in SBP at retirement is not a participant in the plan for the purpose of establishing former spouse SBP coverage, if he later divorces. *See* 10 U.S.C. § 1448(b)(3).

In this case, the member elected to not participate in SBP upon retirement and the claimant, who was his spouse at the time, concurred with that election. Although the claimant was awarded former spouse SBP coverage in their divorce, under the law it could not be established because the member had declined to participate in SBP at retirement. The member was not a participant in the plan in order to establish former spouse SBP coverage. *See* DOHA Claims Case No. 2020-CL-081719.2 *supra*; and DOHA Claims Case No. 2018-CL-051101.2 (November 29, 2018).

Finally, we do note that if SBP premiums for spouse coverage were deducted from the member's retired pay after he elected not to participate in July 2000, those costs should be refunded to the proper beneficiary as arrears of pay under 10 U.S.C. § 2771. In addition, if SBP

premiums also continued to be deducted after the divorce for the claimant's coverage, the claimant may have a claim for any resulting underpayment of her share of the member's monthly disposable retired pay under the USFSPA.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated June 16, 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