

DATE: August 31, 2021

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2021-CL-041302.2
)
)

**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. 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.

DECISION

The claimant, a surviving spouse of a deceased retired 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-041302, dated April 26, 2021.

Background

The member was born on July 18, 1963. He joined the Army National Guard in 1983. On March 3, 2005, the member received a *Notification of Eligibility for Retired Pay at Age 60* (NOE), notifying him that he had 20 years of qualifying reserve service towards retirement. At the time the member received his NOE, he was unmarried but had two dependent children. There is no record of the member electing participation in the Reserve Component Survivor Benefit Plan (RCSBP). On August 4, 2015, the member digitally signed a DD Form 93, *Record of Emergency Data*. On the DD Form 93, the member indicated that he was divorced and listed the claimant as his beneficiary for the death gratuity and any unpaid pay and allowances (AOP) upon his death. Under the member's relationship to the claimant on the form, "No Rltship Rcd" was typed. However, in the remarks section on the form, the member characterized the claimant

as his long-term girlfriend. In addition, it was typed that the member had been counseled about his designations and it was noted that the member had selected an unusual beneficiary to receive the death gratuity.

On November 2, 2015, the member married the claimant in Tennessee. On January 21, 2016, the member completed a DD Form 2656-5, *Reserve Component Survivor Benefit Plan (RCSBP) Election Certificate*. He selected Option A, declining to make an SBP election until he reached the age of 60. Under type of coverage, the member checked the box for spouse only SBP coverage, and noted the level of coverage as based on his full retired pay. The member also completed the section for insurable interest SBP coverage, filling in information about the claimant as his insurable interest beneficiary despite having listed her as his spouse on the form. In the comments section, the member wrote:

We had tried to get married several times. Due to my illness that became terminal we could not. Together since April 2010. Engaged April 2014. I was very ill in October 2014 following her mother's death. The VA knew I had cancer but didn't tell me until January. [Claimant] had to quit her job to care for me. We are on our way to the hospital now.

The member and the claimant both signed the DD Form 2656-5. The claimant signed indicating her spousal concurrence regarding the member's election.

On January 26, 2016, the member passed away. At the time of the member's death, he had not yet turned 60 years old and was not in receipt of retired pay.

In August 2018 DFAS received a packet of documentation from the Army Human Resources Command (HRC) in support of the claimant's claim for the spouse SBP annuity. The Army HRC's cover sheet erroneously indicated that the member's death was in the line of duty. In the packet was a letter dated August 24, 2018, from the Chief of the Army Reserve Component Retirements Branch to the claimant stating that the claimant's application for the SBP annuity was approved and that it was being forwarded to DFAS for processing; a *Reserve Component Survivor Benefit Plan for the United States Retired Armed Forces* template completed by the Army Retirements Branch indicating that the member was enrolled in RCSBP coverage under Option C, electing to provide an immediate annuity for the claimant beginning on the day after the date of his death; a DD Form 2656-7, *Verification of Survivor Annuity*, signed by the claimant applying for the member's RCSBP annuity as his surviving spouse; a copy of the member's death certificate; copies of the direct deposit form and Form W-4, *Employee's Withholding Allowance Certificate*, completed by the claimant; a copy of the member's NOE letter; the member's DD Form 2656-5 completed by the member in January 2016; the DA Form 5016, *Chronological Statement of Retirement Points*, for the member dated August 23, 2018; *Durable Power of Attorney for Property* signed by the member on June 21, 2015, appointing the claimant, his "friend," as his attorney-in-fact; and an opinion from the Merit Systems Protection Board (MSPB) reversing a prior decision of the Office of Personnel Management (OPM) that denied the claimant's claim for the member's civilian survivor annuity benefits by finding that the claimant and the member were in a common-law marriage under

South Carolina law for more than nine months prior to their ceremonial marriage in Tennessee on November 2, 2015.¹

Upon receipt of the packet from the Army HRC, DFAS established an RCSBP spouse annuity for the claimant.

On October 16, 2019, DFAS was notified by the Army HRC that the SBP annuity for the claimant should have been denied because the member was actually enrolled in Option A, declining to make an election until he turned 60, instead of Option C, an immediate annuity for the claimant as the member's spouse upon his death. DFAS requested additional information from the Army HRC concerning any election the member had made after receiving his NOE in 2005. The Army HRC responded that the only election was the one made by the member under Option A, declining to make an election until he reached the age of 60, as elected by the member on January 21, 2016.

Effective October 1, 2019, DFAS retroactively terminated the claimant's SBP annuity. DFAS established a debt against the claimant for the erroneous payment of the SBP annuity. DFAS also sent the claimant a letter denying her claim for the SBP annuity because she had not been married to the member for a full year prior to his death.

On December 24, 2019, the claimant's attorney submitted her appeal to DFAS demanding reinstatement of the SBP annuity. Her attorney referenced the decision of the MSPB which found that the claimant and the member were in a common-law marriage under South Carolina law for more than nine months prior to their ceremonial marriage in Tennessee on November 2, 2015. The Office of General Counsel for DFAS subsequently responded to the claimant's attorney, explaining that MSPB's decisions are not binding on the Department of Defense (DoD). DFAS General Counsel also noted that DFAS was not privy to the documentation considered by the MSPB. DFAS told the claimant's attorney that if he wished that documentation to be considered in the claimant's appeal, he should send copies of it to DFAS.

On July 8, 2020, DFAS received additional documentation from the claimant's attorney. Such documentation included an affidavit of the claimant wherein she states that she was in a common-law marriage to the member prior to their marriage in November 2015. She states that after the member died, an Army HRC employee requested money from her on more than one occasion and after she initially sent him funds, she refused a follow-up request for additional funds and her benefits were later ceased. Also included in the documentation were bank account statements of the member and the claimant for the time period February 20, 2015, through April 21, 2015, and two opinions from the MSPB, one granting the claimant the member's civilian survivor annuity benefits and the other allowing her attorney's fees.

The Army informed DFAS that an Army HRC employee solicited \$800.00 from the claimant, calling her after hours on his private cell phone. He allegedly told the claimant that the

¹In its decision to deny the claim for survivor benefits, OPM applied the law of Tennessee, the state of the member's domicile at the time of the member's death, and found that Tennessee did not recognize common-law marriage.

money was to assist another widow awaiting benefits. After the employee failed to pay back the money and attempted to solicit an additional \$3,200.00 from the claimant, the claimant made a formal complaint against the employee to the Army HRC. The Army HRC advised the claimant that she should contact law enforcement.

DFAS received a congressional inquiry on the claimant's behalf. The inquiry stated that the claimant feels that the denial of her SBP annuity was made as a result of her reporting the Army HRC employee for inappropriate contact. After more correspondence between DFAS General Counsel and the claimant's attorney, the claimant's attorney provided DFAS a copy of the record from the MSBP in her case.

On February 25, 2021, DFAS issued an administrative report upholding the original denial of the SBP annuity claim. DFAS determined that the member never made a valid RCSBP election for the claimant. DFAS explained that in 2005 when the member received his NOE, he was not married but had two dependent children. DFAS and the Army have no record of the member making an election within 90 days of receipt of his NOE. However, under 10 U.S.C. § 1448(a)(2)(B), the member was automatically a participant in the RCSBP for child only coverage under Option C for the immediate coverage of his children upon his death. Therefore, there was not and could never have been automatic spouse SBP coverage in 2005 since the member was not married. DFAS further determined that under 10 U.S.C. § 1448(5)(a), even if the member and the claimant were in a valid common-law marriage beginning in 2014, the member did not make an election for spouse RCSCP coverage for the claimant within one year of that marriage. DFAS noted that the assertion of a valid common-law marriage existed at all is severely weakened by the member's statements on the DD Form 93. On that form signed by the member on August 4, 2015, he stated that the claimant was his long-term girlfriend. DFAS found that the only effort the member made to cover the claimant under the RCSBP was his completion of the DD Form 2656-5 on January 21, 2016, four days before his death. DFAS determined that although the member submitted this form within one year of their ceremony marriage, the claimant had not been married to the member for at least one year immediately prior to his death as required by 10 U.S.C. § 1447(7). DFAS also noted all the inconsistencies on the DD Form 2656-5 completed by the member. On that form, he expressly declined RCSBP coverage, opting instead to defer his election until age 60, yet he also indicated he wished to elect spouse only coverage. The claimant, as the member's spouse, concurred in his election to decline coverage. Finally, the member also listed the claimant's information under insurable interest beneficiary coverage. DFAS found that all these ambiguities on the form made it impossible to discern not only what type of election the member was seeking to make, or even if he was seeking an RCSBP election at all.

On March 19, 2021, the claimant's attorney filed a rebuttal to DFAS's administrative report. He argued that since DFAS originally denied the claim on the basis that the claimant was not married to member for at least one year before his death, DFAS should be prohibited from raising another statutory basis for denial after the claimant's appeal. He further asserted that if the basis for DFAS's affirmance of the denial is now because the ambiguities on the member's DD Form 2656-5 made it impossible to discern what the member's election was, then it was incumbent upon DFAS and the Army, as fiduciaries under the annuity plan, to clarify the member's intent rather than leave a state of confusion for his widow at a time when he was

facing imminent death. He further stated that DFAS's administrative report did not explain why the common-law marriage that existed between the member and claimant did not satisfy the requirement that the claimant be married to the member for at least a year before his death.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim. He acknowledged that another federal agency, the MSPB, had ruled that the claimant and the member were in a common-law marriage under South Carolina law for more than nine months before their ceremonial marriage in Tennessee on November 2, 2015. He noted that while OPM's conclusion allowed her claim for various civilian Federal benefits, the DoD is not bound by OPM's determination. He stated that the OPM's ruling as to the claimant's entitlement to her husband's death benefits arising out of his civilian employment is not conclusive on her claim for the SBP annuity arising out of his military service. He found that under South Carolina law a common-law marriage is formed when the parties contract to be married, either expressly or impliedly by circumstance. He determined that the key element in discerning whether parties are common-law married is mutual assent; each party must intend to be married to the other and understand the other's intent. He then applied the law to the facts in the claimant's case, specifically detailing the member's statements on various forms concerning his view of his relationship with the claimant, and found those statements made after 2014 led him to the conclusion that the member did not believe he was in a common-law marriage under South Carolina law. Citing applicable statute and regulation, the attorney examiner found that even if DOHA accepted that the member and the claimant were in a valid common-law marriage under South Carolina law beginning in October 2014, the member did not elect spouse SBP coverage for her within one year of that marriage. Finally, he explained that on January 21, 2016, the member elected Option A on the DD Form 2656-5, declining to make an election until age 60, which means he did not make an election to provide spouse coverage for the claimant.

In the request for reconsideration, the claimant's attorney disagrees that the OPM's decision is not at least persuasive, if not binding on the DoD. He asserts that since OPM and DoD are both part of the Federal government and the issues are the same, the normal rules of *res judicata* would apply. He further states that while OPM considered all evidence in reaching its decision, DoD only considered the paperwork. He disagrees with the attorney examiner's opinion that even if a common-law marriage existed, the member did not fill out the appropriate paperwork to effectuate a spouse election for the annuity. He states that no evidence offered through in-person testimony was used to justify the attorney examiner's opinion. He states that the only involvement in the completion of paperwork were DoD personnel who apparently provided incorrect advice. Finally, he states that although he has tendered all relevant evidence that would lead DoD to a different conclusion, in the alternative, he requests that the claimant be relieved of any reimbursement obligation concerning the collection of the overpaid annuity payments on the basis that she was a victim of fraud.

Discussion

Under 31 U.S.C § 3702(a), DOHA has the authority to consider appeals of denials of military member pay and allowances claims, including retired pay and survivor benefits claims, such as the claim for the RCSBP annuity in this instance. This authority once rested with the

U.S.C. General Accounting Office (GAO) and was transferred to DOHA in 1996 pursuant to Public Law No. 108-316, October 19, 1996. Thus, for the purposes of DOHA's appellate authority to settle claims, DOHA succeeded to the functions of the Comptroller General (who heads the GAO) and used the GAO's established case precedent. The implementing regulation for 31 U.S.C. § 3702(a), is Department of Defense Instruction 1340.21 (May 12, 2004). Under Instruction ¶ E5.7, 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. When considering an appeal, DOHA must base its decision on the written record, including the recommendation and administrative report and any rebuttal by the claimant. *See* Instruction ¶ E7.9.

The fundamental rule in adjudicating a claim is that payment may be made only for an expense authorized by statute or regulation. Moreover, it is a rule of statutory construction that when the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2012-CL-061105.2 (September 27, 2012).

The SBP program, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the dependents of deceased members of the uniformed services. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation in the SBP is automatic for members who are married or have dependent children when they become eligible to participate in SBP, *i.e.*, when they become eligible for retired pay. *See* 10 U.S.C. § 1448(a)(1) and (a)(2). A reserve-component member is an eligible participant when he becomes eligible for reserve-component retired pay but for the fact that he is under 60 years of age. *See* 10 U.S.C. § 1448(a)(1)(B) and (a)(2)(B). Members who marry or acquire a dependent child after becoming eligible for retired pay may elect to include that spouse or dependent child in the program if they provide the statutory notice. *See* 10 U.S.C. § 1448(a)(5)(A). The member's election must be in writing and received by the Secretary concerned within one year after the date on which that member marries or acquires a dependent child. *See* 10 U.S.C. § 1448(a)(5)(B). The effective date of the member's election is the first day of the first calendar month following the month in which the election is received by the Secretary concerned. *See* 10 U.S.C. § 1448(a)(5)(D). The Service Secretaries have delegated their authority under the SBP law to DFAS.

Under U.S.C. § 1450(a)(1), a spousal annuity is to be paid to a member's widow as defined in 10 U.S.C. § 1447(7). Section 1447(7) states:

(7) Widow.- - The term "widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired pay- -

(A) was married to him for at least one year immediately before his death; or

(B) is the mother of issue by that marriage.

In 2005 the member was eligible for reserve-component retired pay but for the fact that he was not yet 60 years old. At that time, he was not married but had dependent children.

Although neither DFAS nor the Army have a record of the member making an election within 90 days of receipt of his NOE, he was automatically a participant in the RCSBP for child only coverage pursuant to 10 U.S.C. § 1448(a)(2)(B). The claimant was not married to the member at the time he became eligible to participate. Therefore, as set forth above, when the member married the claimant, he was able to elect coverage for her as a newly acquired spouse, but had to make such an election within one year after the date of the marriage. *See* 10 U.S.C. § 1448(a)(5)(B). In addition, the claimant and the member had to have been married for at least one year before his death in order for her to be paid the spousal annuity. *See* 10 U.S.C. § 1447(7)(A).

The claimant asserts that she and the member were married over the one-year statutory limitation under the common law, and requests that DOHA acknowledge their marriage under the common law in South Carolina commencing in October 2014, as ruled by OPM.

Preliminarily, as set forth in the written record, we note as clarification that on September 21, 2017, OPM initially denied the claimant's claim for a survivor annuity under the Civil Service Retirement System on the basis that she was not married to her husband, a federal employee, for at least nine months before his death. On October 18, 2017, the claimant requested reconsideration of OPM's initial decision, asserting that she and her husband were married under the common law since 2014. On January 8, 2018, OPM upheld the initial determination explaining that the claimant and her husband were married on November 2, 2015, and he died while federally employed on January 25, 2016. OPM determined that they were married two months and 23 days, and based on the applicable law, the claimant did not meet the nine-month marriage requirement to be eligible for survivor annuity benefits. OPM then responded to her claim that they were married under the common law. OPM, citing applicable law in the Code of Federal Regulations, found that since her husband died in Tennessee, that state had the most significant interest in his marital status. OPM found that under the law of Tennessee, common-law marriages are not recognized as valid. The claimant then appealed OPM's denial of her claim to the MSPB, and the MSPB held an oral hearing on the matter. On April 23, 2018, the MSPB reversed OPM's decision, allowing her claim as a widow of a federal civilian employee for the survivor benefit annuity under the Civil Service Retirement System. The MSPB found that a common-law marriage was established under South Carolina law by the parties for more than nine months prior to their ceremony marriage in November 2015.

As set forth in the DOHA appeal decision, OPM's rulings and the MSPB's ultimate decision to allow the claimant's Civil Service Retirement System annuity claim are not binding on the DoD. Laws relating to civilian benefits are separate and distinct from the laws relating to the entitlement to a deceased military member's SBP annuity. *See* Comptroller General decisions B-155453, June 13, 1996; and B-154689, Oct. 26, 1994. Therefore, DOHA is only bound by the SBP law, as set forth under pertinent statute and regulation.

The Secretary of Defense has issued implementing regulations under the authority of 10 U.S.C. § 1455, regarding this matter. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 54 sets forth the regulations for the RCSBP including eligible beneficiaries, the member's election to participate and election changes, and the required election data. Paragraph 540301, *Spouse (Including the Spouse of a Common-Law*

Marriage), states that an eligible spouse beneficiary who married the member after the date the member became eligible to participate in the RCSBP must have been married to the member for at least one year after the date the member became eligible to participate; the member's election to provide spouse coverage must have been received within one year of the marriage; and the spouse must have been married to the member when the member died. We note that common-law marriage is defined in volume 7B as "a marriage recognized by state law that is not solemnized by religious or civil ceremony as defined in pertinent state law." See DoDFMR, volume 7B, *Definitions*.

In this case, the written record reflects that the member did not consider the claimant his spouse until their ceremonial marriage in November 2015. In any event, we do not need to reach a determination on whether the claimant and the member were married under common law prior to their solemnized civil ceremony on November 2, 2015. That is because as pertinent statute and regulation make clear, the member had to have elected spouse coverage for the claimant within one year of their marriage. As stated in the appeal decision, even if we accept there was a common-law marriage in 2014, which would then then satisfy the statutory one-year marriage requirement prior to the member's death, there is no record evidence that the member made an SBP election within one year of his common law marriage. See B-203903, Feb. 11, 1985. In fact, the record is devoid of any evidence that the member made a valid spouse SBP election for the claimant before he died. Prior to his death, he elected Option A, to decline coverage until he reached age 60. Under Option A, there is no coverage for the years until the member reaches the age when he becomes entitled to retired pay. The claimant signed her concurrence to the member choice to decline coverage until that time. He died before reaching the age of 60, and the commencement of payment of his retired pay. Therefore, he never made an election to provide spouse coverage. Finally, his attempt to cover the claimant on this form as an insurable interest beneficiary fails because she was his spouse. See 10 U.S.C. § 1448(b)(1)(A) (specifically prohibiting the election by a member of his spouse as his insurable interest beneficiary).

Since DFAS erroneously established an SBP annuity for the claimant upon the member's death and began paying her an annuity, she is now indebted for the overpayments. As set forth under 10 U.S.C. § 1453, recovery of an amount erroneously paid to a beneficiary under the SBP is not required if the Secretary concerned determines that there is no fault by the annuitant to whom the amount was erroneously paid, and recovery of such amount would be contrary to the purposes of the law or against equity and good conscience. As previously stated, the Service Secretaries have delegated their authority under the SBP law to DFAS. Therefore, the claimant should submit her request for waiver of the indebtedness resulting from the erroneous paid annuity payments to DFAS. She may make this request by submitting a DD Form 2789, *Waiver/Remission of Indebtedness Application*, to DFAS.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision dated April 26, 2021. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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