

DATE: August 23, 2021

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In Re:

[REDACTED]

Claimant

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Claims Case No. 2021-CL-043002.2

**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.

**DECISION**

The claimant, the surviving spouse of a deceased retired member of the U.S. Air Force, requests reconsideration of the appeal decision issued by the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-043002, dated June 22, 2021.

**Background**

On July 21, 1951, the claimant and the member were married. On March 1, 1971, the member retired from the Air Force. The Survivor Benefit Plan (SBP) was not enacted until 1972. Congress provided an 18-month open season from 1972 through 1974 for members who retired prior to the law's enactment to participate in the Plan.

The claimant and the member were married from 1951 until his death in October 2018. On April 15, 2019, the claimant submitted a DD Form 2656-7, *Verification of Survivor Annuity*, claiming the SBP annuity as the member's spouse to the Defense Finance and Accounting Service (DFAS). On May 24, 2019, DFAS denied her claim. On June 11, 2019, the claimant appealed DFAS's denial. She stated that it was her understanding that DFAS denied her claim for the SBP annuity because her husband had elected to withdraw from the SBP when he retired

in 1971. She never concurred in his election to withdraw from SBP and therefore, she requested that the full benefits be given to her.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim. The attorney examiner found that since the member retired prior to the enactment of the SBP law, he had until March 20, 1974, to make an election to participate in the Plan. The attorney examiner found no evidence in the record that the member made such an election.

In her request for reconsideration, the claimant states that she has received no proof that her husband did not elect spouse SBP coverage for her. She was married to the member for his full career and travelled overseas for the Air Force during their lives together. She believes that the decision to deny her the SBP annuity is unfair. She requests evidence that he did not elect coverage for her. She and the member spoke about the fact that she would be covered under the SBP upon his death.

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation.

Pursuant to Public Law 92-425, 86 Stat. 706, September 21, 1972, Congress enacted the SBP, which is currently codified at 10 U.S.C. §§ 1447-1455, as an income maintenance program for the survivors of deceased members of the uniformed services. Members retiring after enactment of the law are automatically covered under the SBP unless they specifically decline to participate. Members who retired prior to the effective date of the SBP were provided an opportunity to elect participation in SBP under subsection 3(b) of Public Law 92-425. These members were required to make an affirmative election if they wished to participate.

In this case, the member retired from the Air Force in 1971. There is no evidence he elected to participate in Retired Serviceman's Family Protection Plan (RSFPP). The RSFPP was the Department of Defense survivor program in effect prior to September 21, 1972 when it was replaced by SBP. RSFPP coverage could not be established after September 20, 1972. During the SBP initial enrollment period (September 21, 1972, to March 20, 1974), members with RSFPP coverage could terminate that coverage and elect SBP coverage, or keep the RSFPP coverage in addition to electing SBP coverage. Thus, he was required to make an affirmative election if he wished to participate in the SBP. As explained by the attorney examiner in the appeal decision, there is no evidence that would indicate the member elected to participate in the SBP during the statutory period September 21, 1971, through March 20, 1974.

DOHA is bound by statute and regulation, and therefore, is unable to allow the claim for the SBP annuity. However, the claimant may have another avenue of relief that rests with the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1552. This remedy rests outside DOHA's purview and any request for a correction of military record must be pursued with the AFBCMR.

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated June 22, 2021. In accordance with Department of Defense Instruction 1340.21 ¶ E7.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board