

DATE: November 19, 2021

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-032612.2

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-032612, dated August 25, 2021.

Background

The member was serving in the Army when he married the claimant on August 13, 1980. When the member retired from the Army in 1995 he elected spouse and child Survivor Benefit Plan (SBP) coverage. On August 8, 1996, the member and the claimant divorced. The divorce decree did not award the claimant former spouse SBP coverage. In accordance with a Qualified Domestic Relations Order (QDRO) issued on December 11, 1996, the claimant was awarded \$1,139.00 of the member's disposable monthly retired pay pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA). On March 21, 1997, the claimant completed a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*. On March 27, 1997, the claimant's attorney submitted to the Defense Finance and Accounting Service (DFAS) the DD Form 2293, a certified copy of the divorce decree, the marriage certificate and the QDRO. Despite the member no longer having an eligible spouse SBP beneficiary after the divorce, DFAS continued to withhold premiums for spouse coverage from the member's retired pay.

On January 9, 2020, the member passed away. The claimant subsequently claimed the SBP annuity as the member's former spouse. The Defense Finance and Accounting Service (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 within one year of the divorce.

The claimant appealed DFAS's denial of her claim. She stated that neither she nor the member knew about the one-year requirement to request former spouse SBP coverage. She stated that the member was working in Bosnia after the divorce while she was taking care of their children and their home. When the member returned, they both believed that all the paperwork was in order for her to be covered as his SBP beneficiary. The claimant stated that had the member known that he had to file something for her so that she had former spouse SBP coverage, he would have done it, especially since he was working in a war zone in Bosnia and had two minor children to support.

In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He explained that an election for former spouse SBP coverage, whether voluntary, ordered, or deemed, had to have been received by DFAS within one year of the date of the divorce. The attorney examiner then described other available remedies outside the DOHA claims process that rest with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In the request for reconsideration, the claimant requests that the ABCMR correct an error or injustice in order to grant her the SBP annuity. She attaches a completed DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*, and supporting documentation including the member's final Retiree Account Statement (RAS), dated February 2020. The RAS reflects that premiums for spouse SBP coverage continued to be deducted from the member's retired pay, that the claimant was receiving her portion of the member's monthly retired pay under the USFSPA in the amount of \$1,139.00, and that the claimant was reflected as the member's Arrears of Pay (AOP) beneficiary.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions.

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. 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 retired in 1995 until such coverage ended with their divorce in August 1996. The claimant was not awarded former spouse SBP coverage in the divorce decree, nor in the QDRO. 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. 2020-CL-042201.2 (November 18, 2020).

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the attorney examiner in the appeal decision, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case the ABCMR, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. *See also* 10 U.S.C. § 1454 (the specific statutory authority for the ABCMR to correct or revoke an election for SBP). The ABCMR's authority under these two statutes is discretionary and outside DOHA's authority. Therefore, the claimant should submit her application for a correction of record to the ABCMR, not DOHA, since DOHA has no authority over this type of relief.

Finally, we note that since 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 AOP under 10 U.S.C. § 2771. The claimant should contact DFAS regarding the AOP.

Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision dated August 25, 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board