

DATE: February 7, 2021

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-041617.2

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, the surviving 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-041617, dated August 24, 2021.

Background

On August 5, 1982, the member married. Two children were born of the marriage: one child in 1984 and the other in 1987. In October 1999 the member and his spouse separated. On July 18, 2001, the member and his spouse entered into a property settlement agreement. Pursuant to that agreement, upon the member's retirement from the Army, the member's spouse was to receive a portion of his retired pay and the member was obligated to designate her as his beneficiary under the Survivor Benefit Plan (SBP).

On June 26, 2003, in preparation for his retirement, the member completed a DD Form 2656, *Data for Retired Personnel*. On that form, the member elected former spouse and child SBP coverage. He also filled out a DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, on June 26, 2003, in support of his election. On July 9, 2003, the final divorce decree was issued incorporating the previous property settlement agreement. On July 28, 2003, the member married the claimant. On August 1, 2003, the member retired from the Army. In September 2003 the member's former spouse provided the

Defense Finance and Accounting Service (DFAS) with the divorce decree and DFAS established former spouse and child SBP coverage.

The member and the claimant divorced on January 8, 2009, but subsequently remarried on July 2, 2010. The member's former spouse died on January 14, 2020, and the member subsequently notified DFAS of her death requesting that the deduction for former spouse SBP premium payments from his retired pay terminate. On July 28, 2020, the member passed away.

The claimant submitted to DFAS a DD Form 2656-7, *Verification of Survivor Annuity*, dated August 12, 2020, claiming the SBP annuity as the member's surviving spouse. DFAS denied the claim on the basis that the member did not elect spouse SBP coverage for the claimant after his former spouse's death. DFAS explained that the member had a year from the date of his former spouse's death to make that election for the claimant.

The claimant appealed DFAS's denial of her claim. In her appeal, the claimant stated that if her husband had lived, he would have elected spouse SBP coverage for her. However, she noted that when her husband alerted DFAS to his former spouse's death, he was not provided any information from DFAS concerning the ability to make an election for spouse SBP coverage. The claimant also stated that she submitted her claim and her appeal to DFAS well within the one-year period her husband had to elect spouse SBP coverage for her, and therefore, her request for coverage should be considered timely.

In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim. He explained that under the National Defense Authorization Act for Fiscal Year 2016 (NDAA for FY 2016), the member had one year from the date of his former spouse's death to elect spouse coverage for the claimant. Since the member failed to do so, under applicable statute and regulation, the claim was not payable. He further advised the claimant that although DOHA did not have the authority to allow the SBP annuity claim, she may find other avenues of relief through the Army Board for Correction of Military Records (ABCMR).

In her reconsideration request, the claimant reiterates the fact that her husband was not advised of the option to elect spouse SBP coverage for her when he contacted DFAS upon his former spouse's death. She states that as his widow, she was still within the timeframe to make the election for spouse SBP coverage for him.

Discussion

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.

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. Under 10 U.S.C. § 1448(b)(2) and (3), a member may elect SBP coverage for a former spouse.

Under the NDAA for FY 2016, Public Law 114-92, 129 Stat. 726, Section 641, Congress amended 10 U.S.C. § 1448(b) by adding subsection (7) to allow a member who had made an election to provide former spouse SBP coverage, the ability to cover a subsequent spouse if the former spouse dies. Subsection (7) of 10 U.S.C. § 1448(b) reads in pertinent part as follows:

(7) Effect of death of former spouse beneficiary.--

(A) Termination of participation in Plan.--A person who elects to provide an annuity to a former spouse under paragraph (2) or (3) and whose former spouse subsequently dies is no longer a participant in the Plan, effective on the date of death of the former spouse.

(B) Authority for election of new spouse beneficiary.--If a person's participation in the Plan is discontinued by reason of the death of a former spouse beneficiary, the person may elect to resume participation in the Plan and to elect a new spouse beneficiary as follows:

(i) Married on the date of death of former spouse.--A person who is married at the time of the death of the former spouse beneficiary may elect to provide coverage to that person's spouse. Such an election must be received by the Secretary concerned within one year after the date of death of the former spouse beneficiary.

(ii) Marriage after death of former spouse beneficiary.--A person who is not married at the time of the death of the former spouse beneficiary and who later marries may elect to provide spouse coverage. Such an election must be received by the Secretary concerned within one year after the date on which that person marries.

The implementing regulations for this section of the SBP law are contained under the Department of Defense Finance Management Regulation (DoDFMR), Volume 7B, Chapter 43. Under DoDFMR ¶ 430404(D), a member who is married on the date of the death for the former spouse may elect to provide coverage for that spouse if the election is received by DFAS within one year after the date of the death of the former spouse beneficiary. There is no exception for a member who does not make such an election and dies during the one-year period after the date of the death of the former spouse beneficiary.

In this case, former spouse SBP coverage was established in 2003 pursuant the member's election which was based on a court-ordered agreement. Therefore, when the member's former spouse died, the member had one year from the date of his former spouse's death to elect spouse SBP coverage for the claimant. Although the member notified DFAS of his former spouse's death, he only requested that DFAS terminate former spouse SBP premium payments and made no attempt to elect spouse coverage for the claimant. Therefore, under applicable statute and regulation, the claim for the SBP annuity must be denied.

As detailed by the attorney examiner in the appeal decision, the claimant may have other available remedies based on equity that rest outside of DOHA's purview. Under 10 U.S.C § 1454, the Secretary concerned may correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error. Further, under 10 U.S.C.

§ 1552(a)(1) the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Either type of action is made through a civilian board, in this case the ABCMR. Please note that DOHA has no role in the correction of military records, and the discretion to act upon a petition for a request for correction rests in the sole discretion of the ABCMR.

Conclusion

The claimant's request for relief is denied and we uphold the DOHA appeal decision in DOHA Claims Case No. 2021-CL-041617, dated August 24, 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