

DATE: January 31, 2022

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-051108.2

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. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-051108, dated September 7, 2021.

Background

On December 5, 1975, the member and the claimant were married. On June 5, 1993, the member elected spouse and child Survivor Benefit Plan (SBP) coverage. On August 1, 1993, the member retired from the Navy. On April 11, 1994, the member and the claimant divorced. The divorce decree awarded the claimant a portion of the member's monthly retired pay and former spouse SBP coverage. The record reflects in an undated letter to the Defense Finance and Accounting Serviced (DFAS), the claimant explained that the member was required under the divorce decree to designate her as his former spouse SBP beneficiary and that she had recently received a letter alerting her to the fact that an Open Season was available to cover her under the SBP. On May 9, 2013, the claimant sent a letter to DFAS inquiring why she had not received court-ordered child support from 1998 to 2001. She also asked why she was not designated the member's former spouse SBP beneficiary. On June 6, 2013, DFAS advised the claimant that former spouse SBP coverage must have been established within one year of her April 1994 divorce, and DFAS had no record of either the member or the claimant requesting it.

On October 1, 2016, the member passed away, and on May 5, 2019, the claimant claimed the SBP annuity as the member's former spouse. 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.

The claimant appealed DFAS's denial of her claim. In the DOHA appeal decision, the adjudicator upheld DFAS's denial of the claim for the SBP annuity. She explained that an election for former spouse SBP coverage had to have been received by DFAS within one year of the date of the divorce. She noted that the claimant may find further relief outside the purview of DOHA by petitioning the Board for Correction of Naval Records (BCNR) under 10 U.S.C. § 1552.

In her request for reconsideration, the claimant requests that her case be reconsidered under the 10/10 Rule under 10 U.S.C. §1408(d)(2) for military service member's former spouses and direct deposit of her portion of the member's retired pay by DFAS. She states that the member told the judge in their divorce proceedings that he would take care of the paperwork to provide her with the SBP annuity.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. Therefore, DOHA must render decision 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 member's 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 member was obligated, based on the divorce decree, to cover the claimant as his former spouse under the SBP. However, the member failed to establish former spouse SBP coverage and the claimant did not file a timely deemed election. Therefore, DFAS properly denied the claim for the SBP annuity.

The 10/10 Rule raised by the claimant applies to the direct payment of a portion of a member's retired pay under 10 U.S.C. 1408(d)(2), the Uniformed Services Former Spouses' Protection Act (USFSPA). As reflected in the divorce decree, the claimant was entitled to receive monthly payments of a portion of the member's retired pay. However, the USFSPA is a separate statute from the SBP law, and both set forth separate entitlements. As explained above,

the SBP annuity is not payable to the claimant by statute. However, if the claimant believes that she was underpaid a portion of the court-ordered payments under the USFSPA, she should contact DFAS.

Finally, as explained in the appeal decision, the claimant may have another avenue of relief that rests with the BCNR under 10 U.S.C. § 1552. Any relief available under that statute is outside of DOHA's authority and any request for a correction of record needs to be pursued with the BCNR.

Conclusion

The claimant's request for relief is denied and we uphold the DOHA appeal decision dated September 7, 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board