

DATE: February 7, 2022

---

In Re: )

[REDACTED] )

) Claims Case No. 2021-CL-051110.2

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 retired member of the U.S. Air Force Reserve, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-05110, dated October 26, 2021.

**Background**

The member was born on November 26, 1934. The record reflects that at the time the member and the claimant married in 1957, he was a member of the Air National Guard, a reserve component of the U.S. Air Force. On January 15, 1980, the member executed a DD Form 1883, *Survivor Benefit Plan Election Certificate*, electing Survivor Benefit Plan (SBP) coverage for spouse and child for the claimant and his daughter.<sup>1</sup> On April 22, 1986, the member and the claimant divorced. On March 27, 1991, a court order relating to military retirement was issued. In that order, the claimant was awarded a portion of the member's retired pay under the

---

<sup>1</sup>The member specifically elected immediate spouse coverage (Option C) under the Reserve Component Survivor Benefit Plan (RCSBP). The RCSBP extends eligibility for SBP to Reserve Component members who would otherwise be eligible to receive retired pay except that they have not reached the required retirement age of 60.

Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. However, that order, the divorce decree and other related filings were silent on the matter of SBP.

The member retired on November 26, 1994, and began receiving retired pay. Incident to his retirement, he executed a DD Form 2656. He designated his daughter to receive 100% of the arrears of retired pay (AOP) due upon his death. His only entry concerning SBP was a large diagonal line drawn across the SBP sections. Neither the member, nor the claimant remarried. However, deductions for spouse only SBP premiums began in 1995 after his daughter lost her SBP beneficiary eligibility due to age.

The record shows that on February 22, 2007, the Defense Finance and Accounting Service (DFAS) – Garnishment Operations sent a letter to the claimant advising her that DFAS did not have the necessary documentation to issue payments to her under the USFSPA. The letter explained that the documentation may have been misplaced or lost during DFAS's transition from paper to electronic files. The claimant then submitted a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, dated April 2, 2007, to DFAS.

The member passed away on December 3, 2020. On December 16, 2020, the claimant notified DFAS of the member's passing and made a claim for the member's SBP annuity as his former spouse. On January 7, 2021, DFAS denied the claimant's claim for an SBP annuity on the basis that the member had not elected former spouse SBP coverage for the claimant, nor had the claimant requested a deemed election within one year of the date of the divorce.

In April 2021, the claimant appealed DFAS's decision. She questioned why \$99,627.90 had been deducted from the member's retired pay for SBP premiums if there had not been former spouse SBP coverage. Through her congressional representative the claimant submitted a signed statement from the member's partner dated April 5, 2021. In that statement, the member's partner stated that she had a long-term relationship with him. She stated that prior to the member's death, when he knew he was dying, she witnessed his call to DFAS's legal office. On that phone call, DFAS assured the member that his former spouse was on record as his SBP beneficiary and would receive the annuity upon his death. DFAS forwarded the appeal package to DOHA on May 6, 2021.

The DOHA appeal decision upheld DFAS's denial of the claimant's claim. In that decision, the adjudicator explained that former spouse SBP coverage could have been established by a voluntary election made by the member or an election by the member pursuant to a court order. However, the election must have been received in the Department of Defense within one year of the divorce. He further noted that there is no record of a court having ordered the member to establish former spouse SBP coverage for the claimant. In the absence of a court order requiring SBP coverage, the claimant had no right to request a deemed election for former spouse SBP coverage. He explained that since there is no valid SBP beneficiary, the spouse SBP premiums were erroneously deducted from the member's retired pay and are to be refunded to the recipient eligible under 10 U.S.C. § 2771. He further found that since the claimant was receiving a portion of the member's disposable retired pay under the USFSPA, she was underpaid her share of his retired pay. He stated that he had alerted DFAS of this error for correction. Finally, he advised the claimant that although her claim for the SBP annuity was not

payable under statute and regulations, she may find other available remedies outside the DOHA claims process that rest with the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1552 and 10 U.S.C. § 1454.

In the claimant's reconsideration request, she states that the member's intention was that she receive the SBP annuity. She states that this was part of their divorce agreement. She attaches her divorce decree and includes a dissolution agreement dated October 19, 1985. She states that the member's agreement to cover her under the SBP is the reason he never married his partner of 34 years. When the member was dying, DFAS assured him that she was his former spouse SBP beneficiary and would receive the annuity. She encloses a letter from the Air Force to the member dated August 29, 1984, forwarding a copy of the DD Form 1883, to him that he completed in 1980, and requesting that he update that form if anything had changed in regards to his SBP beneficiary election. The claimant points out that she has always been named on the member's SBP account. She requests that she be awarded the SBP annuity because this is what the member always intended her to have.

### **Discussion**

Under DoD Instruction 1340.21 (May 12, 2004), 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. Federal agencies and officials must act within the authority granted to them by statute and issuing regulations. Thus, the liability of the United States is limited to that provided by law, including implementing regulations.

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 claimant was not awarded former spouse coverage in the divorce decree or any other associated court documents. The dissolution agreement only pertains to her interest in a portion of the member's retired pay, and does not state anything about the SBP annuity. Therefore, she had no statutory right to request a deemed election. The member did not voluntarily elect former spouse coverage for the claimant, within one year of the date of the divorce. *See* DOHA Claims Case No. 2017- CL-081403.2 (January 8, 2018). Therefore, DFAS properly denied the claim for the SBP annuity.

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the adjudicator 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 AFBCMR,

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 correction or revocation of an election for SBP). The AFBCMR's authority under these two statutes is discretionary, and is outside DOHA's authority. Information on petitioning the AFBCMR is found on the Air Force's Personnel Center's website.

Finally, we do note that if 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 arrears of AOP 10 U.S.C. § 2771. In order to claim the arrears of retired pay, the member's designated beneficiary should fill out the SF 1174, *Claim for Unpaid Compensation of a Deceased Member of the Uniformed Services*, and submit it to DFAS. Further, the claimant has a right to seek the underpayment of her portion of the member's retired pay with DFAS.

### Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated October 26, 2021, disallowing the claim. In accordance with DoD 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