

DATE: March 14, 2022

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-102701.2

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-102701, dated November 15, 2021.

Background

The claimant was born in January 1946. The member and the claimant were married on November 9, 1968. Their son was born in 1972, and their daughter in 1977. In preparation for his retirement, the member completed a DA Form 4240, *Data for Payment of Retired Army Personnel*, on October 15, 1986, electing spouse and child Survivor Benefit Plan (SBP) coverage. The member retired from the Army on February 1, 1987. On February 10, 1993, the member and the claimant entered into a marital settlement agreement in which they agreed that since the member was currently unemployed and the claimant was entitled to receive 50% of the member's disposable retired pay, he would continue to pay directly into the claimant's bank account a portion of his disposable retired pay for child support of their minor child until she reached her 18th birthday, legal emancipation or death. The parties also agreed that upon the expiration of the member's child support obligation, the claimant's share of his disposable retired pay would be implemented. The member also agreed to designate the claimant as his former spouse SBP beneficiary. On February 15, 1993, the member and the claimant divorced. The

divorce decree incorporated the marital settlement agreement. Specifically, in regard to the SBP annuity, the decree stated:

Survivor's Benefit Plan: The Respondent/Husband shall elect to cover the Petitioner/Wife as the survivor under his Survivor's Benefit Plan in the maximum amount permissible by law. The Respondent/Husband shall execute documents which hereafter may become necessary in order to name Petitioner/Wife beneficiary as a "former spouse" under the Plan, and the parties' children as alternate beneficiaries, and shall take no action to change said beneficiary designation thereafter. In the event that the Respondent/Husband fails to execute the necessary documents required under federal law for election of the Petitioner/Wife as a "former spouse", then this Final Judgment dissolving the marriage and adopting the terms of the Agreement shall serve as a "deemed election" of the "former spouse" as beneficiary under the Plan.

The member remarried in 1999, but was later widowed. The claimant remarried on February 24, 2001. The member's Retiree Account Statement (RAS) dated December 31, 2020, reflects that former spouse deductions under the Uniformed Services Former Spouses' Protection Act (USFSPA) were being made from his disposable retired pay in the amount of \$852.00 per month. The RAS also reflects that the member had spouse only SBP coverage for a spouse with a birthdate of January 14, 1946, the claimant's birthdate, even though they had been divorced since 1993.

On February 5, 2021, the member passed away. On February 18, 2021, the claimant submitted to the Defense Finance and Accounting Service (DFAS) a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SP annuity as the member's former spouse. On April 20, 2021, DFAS denied her claim on the basis that the member's former spouse was entitled to the SBP annuity. On June 10, 2021, the claimant appealed that denial and contacted her congressional representative. DFAS responded to the claimant's congressional representative on June 17, 2021, explaining that they mailed an incorrect SBP denial letter to the claimant on April 20, 2021, addressing the claimant as the member's surviving spouse and erroneously stating that the member's former spouse was entitled to the SBP annuity. DFAS explained that the claimant was not entitled to the SBP annuity as the member's former spouse because 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 their divorce. DFAS sent the claimant a new SBP denial letter on this basis and gave her appeal rights to DOHA.

The claimant appealed DFAS's denial of her claim. In her appeal, she submitted a letter she sent to DFAS on June 16, 2000, asking DFAS the following questions: if SBP was established in 1987; who was the beneficiary of the benefits at that time; was her daughter named as the SBP beneficiary; after the divorce in February 1993, if the necessary paperwork (the divorce decree) was filed with DFAS for the SBP benefits to be changed within the timeframe allowed; and were the beneficiaries for SBP changed by the member upon his remarriage in September 1999. She also attached another letter dated June 28, 2000, enclosing documentation that she was advised to send DFAS by telephone: her DD Form 2293, *Application for Former*

Spouse Payments from Retired Pay signed by her on June 28, 2000; her marriage license; the marital settlement agreement and final divorce decree. She also submitted a letter she received from DFAS-HAC/CL dated July 18, 2007, responding to her request for confirmation that she was listed as the eligible beneficiary on the SBP account for the member. In that letter, DFAS stated that although there was no name or marriage date listed on the SBP account, the birth date of the beneficiary is listed as January 14, 1946, which the claimant confirmed to DFAS was her birth date. On September 16, 2021, DFAS sustained their denial of her claim on the basis that neither she nor the member requested former spouse SBP coverage for her based on the divorce decree within one year of the divorce.

The claimant submitted additional information in her rebuttal to DFAS on September 16, 2021, through her congressional representative. Of note in her rebuttal, the claimant attached a letter dated February 22, 1993, from her divorce attorney to her concerning the final divorce decree. The attorney stated that she was enclosing the court-certified documents for the claimant's personal records. The attorney also stated that the next step would be to prepare for the claimant's signature a request for former spouse payments from the member's monthly retired pay to send to DFAS. The claimant also attached a letter in response to her attorney dated March 9, 1993. In that letter, the claimant stated that she could not find a copy of her marriage certificate. She requested guidance on the appropriate forms she needed to complete the filing a quit-claim deed for her house. Further, she wanted clarification on the difference between a military qualifying order and the request for former spouse payment from the member's retired pay. The claimant also attached to her rebuttal a letter from DFAS to her dated November 2, 2000, stating that DFAS had received the claimant's application for a portion of the member's retired pay. DFAS also advised the claimant of the following:

If your divorce decree specifies that you are to be designated as a former spouse beneficiary for the Survivor Benefit Plan (SBP), you must make a "deemed election" for SBP coverage within one year of the date of your divorce directly to the Retired Pay office, DFAS-CL, Attn: Code FRB, P.O. Box 99191, Cleveland, Ohio 44199-1126.

In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He explained that although the divorce decree did require the member to make a former spouse election for the claimant; that spouse SBP coverage for the claimant ended with their divorce; and the member did not elect former spouse SBP coverage for her and the claimant did not request a deemed election within one year of their divorce. He determined that the divorce decree in this case was not submitted to DFAS until June 2000, when the claimant filed her DD Form 2293, requesting payment of her share of the member's monthly disposable retired pay.

In her request for reconsideration, the claimant references the final divorce decree that includes an Income Deduction Order for child support. She attaches as evidence that DFAS received the Income Deduction Order, signed by the judge assigned to her divorce on February 16, 1993. It does list copies to the claimant, the member and her attorney, plus an address for DFAS in Indianapolis. However, there is no evidence in the record that the marital settlement or divorce decree were sent to DFAS at this time. She states that at no time was she informed by

DFAS that she had to provide additional forms and there is no evidence that the member was informed the one-year requirement to submit the correct forms. She states that her divorce decree in itself includes a statement concerning the deemed election for former spouse SBP coverage.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2021-CL-021205.2 (June 30, 2021). Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions. The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

SBP is an income maintenance program for the survivors of deceased members of the uniformed services. *See* 10 U.S.C. §§ 1447-1455. 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 covered as the member's spouse SBP beneficiary from the time he elected it for her in 1986 until 1993 when their divorce ended the coverage. There is evidence that the claimant and attorney knew about the requirement to submit the proper documentation to DFAS concerning her request for direct payment from the member's monthly disposable retirement. However, there is no evidence that the member elected former spouse SBP coverage for the claimant, or the claimant requested a deemed election within one year of their divorce. DOHA has verified with DFAS that the first time DFAS became aware of the divorce was in 2000. In addition, although the claimant has provided the Income Deduction Order for child support that lists a copy would be sent to DFAS in Indianapolis, by the state court, there is no evidence that the child support order was accompanied by the divorce decree or marital settlement agreement. In fact, the Income Deduction Order specifically states that it would not become effective until the member became delinquent with his monthly child support. Under the circumstances, the record reflects that the first time DFAS received the divorce decree and marital settlement agreement was in 2000, when the claimant requested her portion of the member's disposable retired after the member's child support obligation had expired. Therefore, DFAS properly denied the claim for the former spouse SBP annuity.

Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal dated November 15, 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