

DATE: March 14, 2022

In Re:

[REDACTED]

Claimant

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Claims Case No. 2021-CL-082409.2

**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. 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.

DECISION

The claimant, a surviving 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-082409, dated November 15, 2021.

Background

The member was born on June 1, 1960. He joined the Air Force Reserve in 1980. Effective November 2000 the member had 20 years of qualifying reserve service towards retirement and subsequently received his *Notification of Eligibility for Retired Pay at Age 60* (NOE). On June 6, 2001, the member elected participation in the Reserve Component Survivor Benefit Plan (RCSBP), selecting Option C, immediate spouse and child coverage. However, at that time, the member was unmarried and had no dependent children. On August 31, 2001, the member and the claimant married. On December 18, 2005, the member passed away. At the time of the member's death, he had not yet turned 60 years old and was not in receipt of retired pay.

On August 31, 2020, the claimant filed a DD Form 2656-7, *Verification of Survivor Annuity*, applying for the member's RCSBP annuity as his surviving spouse. On September 16, 2020, the Defense Finance and Accounting Service (DFAS) denied her claim for the RCSBP annuity on the basis that she filed her claim more than six years from the date the claim accrued, *i.e.*, the date of the member's death. Therefore, DFAS found that under the 31 U.S.C. § 3702(b), her claim for the annuity was barred. DFAS advised her that she had the right to request waiver of the six-year time limitation established by that statute through the Assistant Secretary of the Air Force (Financial Management and Comptroller) in order to receive up to \$25,000.00.

The claimant appealed DFAS's denial of her claim. In her appeal she referenced the Air Force's Reserve Order published on September 2, 2020, which noted that the member's RCSBP election was made on June 6, 2001, for spouse and child coverage, and identified her as the member's spouse. She requested that her claim to the RCSBP annuity be allowed in order to honor the member's original election. She stated that she was under the assumption that she did not have to apply for the annuity until the member would have reached the age of 60 years old. In DFAS's administrative report responding to the claimant's appeal, DFAS determined that the underlying claim for the RCSBP annuity was not payable because the member's election was invalid since he was not married to the claimant at the time he made it. In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim. He explained that since the member was not married to the claimant at the time he filed his election, as his later acquired spouse, he had to have elected RCSBP coverage for her within one year of their marriage. He further noted that on November 3, 2021, the Air Force issued a subsequent Reserve Order rescinding the order issued on September 2, 2020, because it was issued due to an administrative error since the claimant was not the member's spouse at the time of his election. The attorney examiner also explained that the six-year statute of limitations did not apply because the underlying claim for the annuity was not payable in the first place. Finally, the attorney examiner explained that although DOHA was limited by statute and regulation in the allowance of a claim, the claimant may find possible relief with the Air Force Board for Correction of Military Records (AFBCMR).

In her request for reconsideration, the claimant submits documentation that she states reflects that this is not the first time she contacted DFAS or other appropriate agencies concerning the RCSBP annuity. She states that her first contact concerning the annuity was in 2006, well within the statute of limitations. She attaches an *Application for Correction of Military Record*, DD Form 149, that she filed with the AFBCMR in December 2006. In that application, she stated that the member was never informed that he had to change his marital status from single to married in order to cover her under the RCSBP. She stated that after his election in June 2006, they married two months later and the member was unaware he had to report their marriage. The AFBCMR acknowledged receipt of her application in January 2007, but it appears that the claimant requested it be withdrawn in March 2007. It is unclear if the AFBCMR ever made a decision in her petition for a correction of record. The claimant also encloses in her reconsideration request reflecting that she requested in August 2010 all records concerning the member's retirement account.

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. *See* DOHA Claims Case No. 2021-CL-041302.2 (August 31, 2021).

The SBP program, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the dependents of deceased members of the uniformed services. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation in the SBP is automatic for members who are married or have dependent children when they become eligible to participate in SBP, *i.e.*, when they become eligible for retired pay. *See* 10 U.S.C. § 1448(a)(1) and (a)(2). A reserve-component member is an eligible participant when he becomes eligible for reserve-component retired pay but for the fact that he is under 60 years of age. *See* 10 U.S.C. § 1448(a)(1)(B) and (a)(2)(B). Members who marry or acquire a dependent child after becoming eligible for retired pay may elect to include that spouse or dependent child in the program if they provide the statutory notice. *See* 10 U.S.C. § 1448(a)(5)(A). The member's election must be in writing and received by the Secretary concerned within one year after the date on which that member marries or acquires a dependent child. *See* 10 U.S.C. § 1448(a)(5)(B).

The member was eligible for reserve-component retired pay in November 2000 but for the fact that he was not yet 60 years old. After receiving his NOE, he elected RCSBP, Option C, for immediate coverage for spouse and child(ren). However, he was not married and did not have dependent children. The claimant was not married to the member at the time he became eligible to participate. Therefore, as set forth above, when the member married the claimant, he was able to elect coverage for her as a newly acquired spouse, but had to make such an election within one year after the date of the marriage. *See* 10 U.S.C. § 1448(a)(5)(B).

The claimant asserts that she has been in contact with DFAS and other appropriate agencies since 2006 concerning the RCSBP annuity, which was well within the six-year statute of limitations. However, as explained by both DFAS in their administrative report and by the attorney examiner in the DOHA appeal decision, the statute of limitations under 31 U.S.C. § 3702(b) does not apply to her claim because she had no underlying entitlement to the RCSBP annuity. Therefore, even assuming she made a timely claim for the RCSBP annuity, it would not be payable under applicable statute and regulation. Therefore, DFAS properly denied her claim for the RCSBP annuity.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated November 15, 2021. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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