

DATE: April 18, 2022

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2021-CL-070805.2  
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)

**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 widow of a deceased retired member of the U.S. Marine Corps, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-070805, dated November 15, 2021.

**Background**

The record reflects that the member and the claimant were married on March 4, 1972. On May 8, 1990, in preparation for the member's retirement from the Marine Corps, he completed a DD Form 1883 (Dec 76), *Survivor Benefit Plan Election Certificate*. On that form he noted that he was married and had dependent children. He declined to participate in the Survivor Benefit Plan (SBP). Directly below his decision not to participate, a statement advised the following:

**IMPORTANT:** The decision you make with respect to participation in this Survivor Benefit Plain is a permanent irrevocable decision. Please consider your decision and its effect very carefully.

Under Section III – Family Information on the form, the member listed the claimant as his spouse and three adopted children. The member signed the form and the claimant concurred in

the member's decision to not elect SBP coverage for his spouse or children. Their signatures were witnessed and notarized. On August 1, 1990, the member retired from the Marine Corps. On August 25, 1990, the member passed away.

On November 22, 2016, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to the Defense Finance and Accounting Service (DFAS). DFAS denied the claim for the spouse annuity on the basis that the member did not elect SBP coverage. On December 15, 2020, the claimant appealed DFAS's denial of her claim for the SBP annuity. She stated that as early as 1990 she asked if the SBP had a grace period to award benefits to a widow who loses her husband within 25 days or a month following his retirement. She stated that her husband never mailed a letter declining participation in SBP. She stated that her husband's records were destroyed in 1990. She stated that she sent the DD Form 1883 to either DFAS or the Marine Corps when the form was not found. She asserted that she was automatically covered under the SBP since the form was not sent to either DFAS or the Marine Corps. DFAS sustained the denial of the claim in its administrative report. The claimant submitted a rebuttal to DFAS's administrative report. In her rebuttal she stated that the U.S. Court of Appeals for Veterans Claims' Brief of the Appellee Secretary of Veterans Affairs states that her husband's records had been destroyed and were incomplete, and that when a member's records are destroyed, the benefit of the doubt goes to the member. She acknowledged that her husband declined SBP coverage with her concurrence but she continued to assert the possibility that if his election to decline coverage was never sent to DFAS or received by DFAS, she was entitled to the SBP annuity. On June 30, 2021, DFAS forwarded the appeal package to DOHA. The record sent to DOHA did not contain the DD Form 1883 executed by the member and the claimant on May 8, 1990.

On July 16, 2021, the DOHA attorney examiner requested that DFAS provide the member's written declination of SBP coverage. After multiple attempts to obtain the requested documentation from DFAS, the attorney examiner issued his decision on November 15, 2021. The attorney examiner found that the claimant was automatically enrolled in the spouse SBP program because she was married to the member at the time of his retirement and his death, and DFAS failed to provide documentation that the member declined to participate in the SBP with the claimant's spousal concurrence. However, the attorney examiner further found that the claimant's claim for the SBP annuity was untimely since her claim accrued upon the member's death and she did not file a claim for it until November 22, 2016. Therefore, the claim for the SBP annuity is subject to the six-year statute of limitations set forth under 31 U.S.C. § 3702(b). The attorney examiner then advised the claimant that although DOHA did not have the authority to grant her request for the SBP annuity, she may have an alternative by petitioning the Assistant Secretary of the Navy (Financial Management & Comptroller) under 31 U.S.C. § 3702(e) to request waiver of the time limitations to allow payment up to a maximum of \$25,000.00.

In her reconsideration request, the claimant states that she is seeking the full amount of the SBP annuity. She notes the difference between her initial claim for a grace period for receipt of SBP since her husband died 25 days after his retirement. She states that her pursuit of the argument of a grace period was predicated on her false belief that the completed DD Form 1883 had been received by the Government. She states that she has continuously contacted the

Government concerning her entitlement to the SBP annuity. She attaches letters she sent to the Government in March 2003, April 2005, July 2007 and November 2011. She also attaches the completed DD Form 1883, in which the member elected not to participate in SBP with her concurrence. She states that at the time of her husband's death in 1990 she had more than one telephone conversation with military personnel in which she explained that her husband had declined SBP. However, it never occurred to her that the record of his declination was never received by DFAS.

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation. In relevant part, our Office, the Defense Office of Hearings and Appeals (DOHA), has the authority to consider administrative claims for military member pay and allowances, including travel and transportation, retired pay and survivor benefits, under title 31, United States Code, Section 3702(a)(1) (31 U.S.C. § 3702(a)(1)). The implementing regulation for DOHA's claims authority is set forth in DoD Instruction 1340.21 (May 12, 2004), which is codified in the Code of Federal Regulations at 32 C.F.R. § 282. The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A claimant must prove by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. *See* Instruction ¶ E5.7. A claimant must submit a claim so that it is received by the agency concerned within the time limit allowed by statute. *See* Instruction ¶ E5.6. Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions.

The SBP, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the survivors 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)(A) and (a)(2)(A). However, a married member may elect not to participate in the SBP, with the concurrence of the member's spouse. *See* 10 U.S.C. § 1448(a)(2)(A) and (3)(A)(i). An election under section 1448(a)(2) to forgo participation in SBP is irrevocable if it is not revoked before the date on which the member first becomes entitled to retired pay. *See* DOHA Claims Case No. 2020-CL-081719.2 (January 15, 2021).

In this case, the record evidence reflects that the member elected not to participate in SBP upon retirement, and the claimant, who was the spouse at the time, concurred with the election. The claimant acknowledges that the member declined coverage with her concurrence on May 8, 1990. However, she has consistently argued that since the member died on August 25, 1990 (25 days after he retired and became eligible for retired pay), that there should be some type of grace period for her to receive the SBP annuity. As explained above, we must apply the appropriate statutes without regard to equitable considerations. DOHA is bound by statute and regulation, and therefore, unable to allow the claim for the SBP annuity.

Claims such as this are cognizable under 31 U.S.C. § 3702(a)(1)(A), and subject to a six-year statute of limitations, commonly known as the Barring Act. Under 31 U.S.C. § 3702(b), claims must be received within six years of the date the claim accrued. A claim for an SBP annuity accrues at the time of the member's death, *i.e.*, the date when all the events giving rise to the government's liability to make SBP payments to the member's SBP beneficiary became fixed. *See* DOHA Claims Case No. 2019-CL-042603.2 (May 6, 2020); and DOHA Claims Case No. 96070225 (September 17, 1996). In 1996 an amendment to 31 U.S.C. § 3702 was enacted that authorizes the Secretary of Defense, under certain conditions, to waive the time limitations prescribed in subsection 3702(b) upon the request of the Secretary of the service concerned.<sup>1</sup> However, in this case, since the underlying claim for the SBP annuity is not payable because the member declined SBP participation with the claimant's concurrence, the claimant has no right to seek waiver of the Barring Act to allow payment of up to \$25,000 under 31 U.S.C. § 3702(e).

Although DOHA has no authority to allow the claim, the claimant may have other available avenues of relief outside our purview. First, under 10 U.S.C. 1454, the Secretary of the member's service may correct or revoke an SBP election when the Secretary deems it necessary to correct an administrative error. Second, under 10 U.S.C. 1552, the Secretary, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. Here, any request for a correction of record should be pursued with the Board for Correction of Naval Records (BCNR).

### Conclusion

The claimant's request for relief is denied. 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

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board

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<sup>1</sup>See Pub. L. No. 104-201, § 608, 110 Stat. 2542, Sept. 23, 1996, adding subsection (e) to 31 U.S.C. § 3702.