

DATE: April 18, 2022

In Re:)
))
 [REDACTED]) Claims Case No. 2021-CL-071504.2
))
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

A claimant, the surviving spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-71504, dated December 20, 2021.

Background

The member was born on December 26, 1935. He enlisted in the Air Force on July 7, 1954. On January 28, 1974, the member received his retirement orders from the Air Force. These orders reflected that the member would be relieved from active duty on July 31, 1974, and retired on August 1, 1974, with over 20 years of active service. His highest rank held was the rank of a Technical Sergeant. On July 9, 1974, in preparation for his retirement, the member completed the *Survivor Benefit Plan Election Certificate*, DD Form 1883 (Sept. 72). On that form, he noted that he was married and had dependent children, but he elected not participate in the SBP. Below his election not to participate in SBP, was the following statement:

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

The member's election not to participate was witnessed, and the Air Force hand-wrote the code "D" on the top of the election certificate. On July 9, 1974, the member completed the *Data for Payment of Retired Armed Forces Personnel*, DD Form 418 (Feb. 63), in order for the Air Force to establish his retired pay account. He noted on this form that an election under the Retired Serviceman's Family Protection Plan (RSFPP) did not apply to him. The Air Force Accounting and Finance Center (AFAFC) received the member's forms and necessary information to establish the member's retired pay account effective August 1, 1974. This is evidenced by the AFAFC Form 0-419, *Retired Pay Transactions*, reflecting the transactions completed to establish the member's retired pay. Noted on the line concerning survivor benefits is the code "D" which corresponds to the code on the DD Form 1883. In addition, the actions contained on the 0-419 are reflected on the AFAFC's Retired Pay Accounts Maintenance Actions (Worksheet).

Since the member declined participation in SBP, no SBP premiums were withheld from his retired pay. The member did not choose to later elect SBP during either of the two one-year open enrollment periods enacted by special law.

On September 6, 2020, the member passed away. The claimant submitted a claim for the SBP annuity with the Defense Finance and Accounting Service (DFAS) on March 4, 2021. In that claim, she alleged that her claim for benefits was originally approved, but then denied. On March 25, 2021, DFAS denied her claim on the basis that the member did not elect SBP or RSFPP coverage for the claimant.

The claimant appealed DFAS's denial of her claim. In her appeal, she stated that she was married to the member for 64 years. She stated that she was 83 years old and although she was in good health, she lives alone and her only income is the social security she receives each month. By letter dated April 26, 2021, DFAS upheld the denial of her claim for the SBP and mailed her their administrative report. The claimant submitted a rebuttal to DFAS's administrative report. In her rebuttal, she stated that she raised six children and protected them while their father went to Vietnam and other places in the world where he served without the ability of his family to accompany him.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim for SBP. In her decision, she explained that DOHA was bound by the applicable statutes and regulations in the allowance of a claim. She found that since the member declined SBP coverage at retirement for the claimant, she was not an eligible SBP beneficiary. She then found no evidence that the member subsequently elected SBP coverage for the claimant during an open season. Therefore, she concluded that since SBP participation is based on applicable statutes and regulations, there is no legal basis to award the claimant the SBP annuity. She further advised the claimant that although DOHA did not have the authority to award the SBP annuity under applicable statute and regulation, the claimant had another possible avenue of relief that existed with the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In her request for reconsideration, the claimant states that she was never notified of the member's decision to decline SBP participation. She again states that she really needs the annuity to make ends meet.

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, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. A married member is eligible to participate in SBP when he becomes eligible for retired pay. *See* 10 U.S.C. § 1448(a)(2)(A). However, a member may elect not to participate, elect to provide less than maximum coverage, or elect to provide SBP benefits to a dependent child rather than a spouse. *See* 10 U.S.C. § 1448(a)(3)(A). At the time of enactment, the law stated that if a member who is married elects not to participate in the SBP at the maximum level, that member's spouse shall be notified of the decision, and that an election not to participate in SBP is irrevocable if not revoked before the date on which the member first become entitled to retired pay. *See* Pub. L. No. 92-425, § 1(3), Sept. 21, 1972, 86 Stat. 707 (1972). Currently, the law requires spousal written concurrence when a married member elects not to participate in SBP. *See* Pub. L. No. 99-145, title VII, § 721(a), 99 Stat. 583, 676 (1985).

The record reflects that in 1974 when the member elected to not participate in the SBP he was married and had dependent children. The statute in effect at the time merely required that the spouse be notified of the member's decision not to participate, but provided no specifics on the type of notification or the remedy for lack of notification. However, in *Barber v. United States*, 230 Ct. Cl. 287, 676 F.2d 651 (1982), the U.S. Court of Federal Claims held that if a spouse was not notified of the member's failure to make such an election, the spouse was entitled to an SBP annuity upon the member's death.

The record evidence in this case reflects that at the time of the member's election, the AFAFAC processed his paperwork and established his retired pay account. We note that the military services financing offices performed this function, as well as other financially-related services for members, prior to the consolidation of the function with the creation of DFAS in 1991. During the appeals process concerning the claimant's SBP claim, DFAS received certain Air Force records regarding the establishment of the member's retired pay account. Although those records detail that the member did fill out the appropriate documentation to establish his retired pay account, and that the AFAFAC received those documents in order to process his application for retired pay, the record does not include any correspondence or notification to the claimant regarding the member's SBP declination.

The AFBCMR is the authority responsible for deciding whether an administrative error occurred in notifying a member's spouse and can properly correct a member's election if they find an administrative error occurred. The SBP provides a means whereby the Secretary of the Military Department concerned may correct or revoke an election. Under 10 U.S.C. § 1454, the SBP LAW provides that the Secretary of the Military Department concerned may correct or revoke an otherwise valid election in certain circumstances. *See* DOHA Claims Case No. 2020-CL-072214.2

(January 27, 2021); and DOHA Claims Case No. 2019-CL-041701.2 (February 27, 2020); and Comptroller General decisions 55 Comp. Gen. 158 (1975) and 53 Comp. Gen. 393 (1973). As explained by the DOHA adjudicator in the appeal decision, the Secretary of the Air Force exercises that authority, acting through its correction board, the AFBCMR. In fact, in the *Barber* case and subsequent case precedent, all SBP claims were first considered after a correction board's action, as the authority responsible for deciding whether an administrative error occurred in notifying a member's spouse. DOHA is unable to allow this claim for the SBP annuity because we are bound by statute and regulation, and the written record as submitted to us by the agency and the claimant. The appropriate authority to seek relief if an error existed at the time the member made his SBP decision is the AFBCMR.

Information on petitioning the AFBCMR can be found on the Air Force's Personnel Center's website. In addition, published decisions by the AFBCMR considered under *Barber* are posted on the AFBCMR's webpage on the Military Departments' Boards of Review Reading Rooms website.

Conclusion

The claimant's request for reconsideration is denied, and we uphold the appeal decision dated December 20, 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