

DATE: May 6, 2022

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2020-CL-120111.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Claims against the government may be allowed only for expenses authorized by statute and regulation.

DECISION

A retired member of the U.S. Navy requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2020-CL-120111, dated December 20, 2021. In that decision, DOHA denied the member's claim for reduced Survivor Benefit Plan (SBP) base amount coverage for his former spouse.

Background

On September 22, 1990, the member married. On September 5, 2007, in anticipation of his retirement from the Navy, he completed a DD Form 2656, *Data for Payment of Retired Personnel*, electing spouse SBP coverage based on the full amount of his gross retired pay. On October 9, 2018, the member divorced. The divorce decree incorporated a marital settlement agreement (MSA). In pertinent part, the MSA stated the following:

Wife shall be designated as former spouse for the Survivor Benefit Plan ("SBP") associated with Husband's Navy Retirement Pay to the extent of her community property interest in the plan. Each party shall pay a percentage of the premium on a pro-rata basis based upon their percentage interest in the pension. Husband

shall commence paying Wife the sum of \$271.26 per month beginning July 1, 2018 as and for Wife's community property interest in this plan, until such time the Wife begins receiving her share directly.

On October 26, 2018, the member submitted a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, to the Defense Finance and Accounting Service (DFAS) requesting that SBP coverage be suspended due to his divorce. On December 11, 2018, DFAS acknowledged the member's request and advised him that his SBP coverage was adjusted from spouse to no beneficiary effective October 9, 2018.

On February 4, 2019, a stipulation order was issued regarding the division of the member's military retired pay and election under the SBP. That order provided the following concerning the SBP:

Member and Former Spouse agree that the Survivor Benefit Plan (SBP) shall be reduced to designate Wife as the former spouse beneficiary of his SBP to the extent of her community property interest in the Plan. The annuity base amount used to calculate the SBP shall be \$493.21.

In addition, the member was ordered to pay directly to his former spouse \$267.98 each month. The order stated that the \$267.98 constituted the former spouse's share of the member's monthly retired pay minus her share of the SBP monthly premium payment.

On May 13, 2019, the former spouse completed the DD Form 2656-10, *Survivor Benefit Plan (SBP) Reserve Component (RC) SBP Request for Deemed Election*, requesting a deemed election for former spouse SBP coverage on the annuity base amount of \$493.21 as required by the stipulation order. On July 18, 2019, DFAS notified the member of his former spouse's timely deemed election for SBP coverage, and advised the member that the cost of the coverage would be retroactive to October 9, 2018. Also, by letter dated July 18, 2019, DFAS informed the member that he was indebted for the retroactive payment of SBP premiums from November 1, 2018, through June 30, 2019, in the amount of \$1,484.77. DFAS also advised the member that the monthly SBP premium payment would be \$186.23. The member immediately contacted DFAS, requesting that his former spouse's SBP annuity be reduced to \$493.21 based on the stipulation order. In the member's July 22, 2019, letter to DFAS, he enclosed his Retiree Account Statement (RAS) for August 2019 and questioned why it reflected his SBP annuity base amount as \$2,865.04, instead of \$493.21. He questioned the SBP premium cost as reflected on his RAS. DFAS denied the member's claim for a reduced base amount SBP coverage for his former spouse.

On December 9, 2019, the member appealed DFAS's denial of his claim. He asserted that DFAS erred by not establishing his former spouse's SBP coverage in accordance with the terms of the stipulation order. He stated that those terms were included in the order to account for the number of years he was married to his former spouse during his military service. He stated that DFAS was prohibited from instituting the former spouse SBP coverage as set forth in the stipulation order, then DFAS should have rejected the order to afford him the opportunity to obtain a court order that complied with DFAS's requirements. DFAS issued an administrative

report dated September 3, 2020, sustaining their denial of the member's claim for a reduced base amount of SBP coverage. In the member's rebuttal to DFAS's administrative report, he stated that if DFAS interrupted the stipulation order as a former spouse election, then his previous election for spouse coverage was terminated under 10 U.S.C. § 1448(b)(3)(A)(ii), and was therefore not relevant. He also stated that DFAS has not provided any federal authority to support their position that the SBP law does not permit a change in the level of SBP coverage.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the member's claim. She found that although divorce ends spouse coverage under SBP, the member's former spouse timely deemed an election for former spouse coverage. She explained that since the SBP statute does not contain any language that expressly authorizes an election of former spouse SBP coverage at a reduced rate after having previously elected full rate spouse SBP coverage, the amount of the reduced rate in the stipulation order could not be honored. In addition, she explained that the member may have other available options outside the claims process that rest with the Board of Correction of Naval Records (BCNR).

In his reconsideration request, the member states that he now understands from DOHA's appeal decision that the law does not permit his former spouse to receive a reduced base amount of SBP. However, he states the DOHA adjudicator failed to address his claim that DFAS should have rejected the divorce decree, the stipulation judgment and his former spouse's deemed election. He states that DFAS accepted these documents without notifying the parties of DFAS's position that the documents were not in keeping with federal law. He states that in fact DFAS accepted some provisions of the divorce decree and stipulation order, but not other provisions, and never gave notice to the parties that DFAS would not follow certain provisions. He states that his former spouse is now receiving benefits in substantial excess of their divorce decree, and he is required to pay SBP premiums well in excess of what was agreed upon and incorporated in the decree and stipulation order. He cites a message from the DFAS Director dated September 2021 concerning DFAS's customer service, doing what is right for the customer and putting the customer first. He states that doing what is right and putting the customer first in these circumstances would be to grant him relief by rejecting the court orders and deemed election since they did not conform to federal law. He also requests reimbursement of the SBP premiums he has been charged since November 2018. He states that if this relief is granted, then he and his former spouse would have the ability to return to court to resolve the issue of her entitlement to full SBP coverage or no SBP coverage.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A member 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* DoD Instruction 1340.21 (Instruction) ¶ E5.7 (May 12, 2004). Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a

consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. Thus, a member must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious or contrary to law. *See* Instruction ¶ E7.3.4; and DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for 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 married member who becomes entitled to military retired pay automatically becomes a participant in SBP with the maximum spouse coverage authorized, unless he makes an affirmative election with the member's spouse's concurrence to elect to not participate in SBP, to provide an annuity for the member's spouse at less than the maximum level or to provide an annuity for a dependent child but not the member's spouse. *See* 10 U.S.C. 1448(a)(3). A member's SBP election is irrevocable if not revoked before the date on which the member first becomes entitled to retired pay. *See* 10 U.S.C. 1448(a)(4)(A). It becomes final at the time he becomes entitled to retired pay, and he may not thereafter unilaterally revoke or modify it.

SBP spouse coverage ends upon divorce. However, the SBP law includes provisions whereby a member may elect coverage for a former spouse. Under 10 U.S.C. § 1448(b)(3), a member already participating in SBP with spouse coverage may elect to provide an SBP annuity to a former spouse who was not the member's former spouse at the time the member became a participant. If a member elects to provide coverage for a former spouse, the member shall provide the Secretary concerned with a written statement setting forth whether the election is being made pursuant to a court order or to an agreement incorporated in, ratified, or approved by court order. *See* 10 U.S.C. § 1448(b)(5). If a member who is required by court order to make such an election, or has entered into such an agreement which has been incorporated in, or ratified or approved by, a court order, then refuses or fails to make the election as agreed, the former spouse may make a request to the appropriate service Secretary within a year of the court order, and the service shall then "deem" an election to have been made by the member. *See* 10 U.S.C. § 1450(f)(3).

The implementing regulations for SBP are found in Volume 7B of the Department of Defense Financial Management Regulation (DoDFMR). Chapter 43 of Volume 7B sets forth the regulations concerning a member's SBP elections and election changes. Under paragraph 4302, a member who participates in SBP must elect a base amount of maximum coverage or reduced coverage. A member's election is irrevocable. *See* ¶ 430401 of Volume 7B. Further, DoD Instruction 1332.42, *Survivor Annuity Program Administration* (June 23, 2009), in effect at the time of the member's divorce and his former spouse's deemed election, in pertinent part, provided the following in enclosure 3:

A member who elected spouse coverage upon becoming eligible to participate in the Program may elect to cover a former spouse (who was not the member's former spouse at the time the member became eligible to participate in the

Program) within 1 year after the date of decree of divorce, dissolution, or annulment. There is no option to change the level of coverage for an election under this paragraph.

A former spouse must submit the request for a deemed election pursuant to the procedures set forth under paragraph 430504 of Volume 7B of the DoDFMR. No election may be deemed to have been made which could never have been made by the member concerned. See ¶ 430504(C)(3) of Volume 7B.

In this case, the member's former spouse was covered under the SBP as the member's spouse beneficiary at the maximum level from the time he retired in 2007 until such coverage ended with their divorce in October 2018. The member had agreed to provide former spouse SBP coverage for her pursuant to the MSA which was incorporated into the divorce decree. The member's former spouse submitted a timely deemed election to DFAS. The divorce decree and stipulation order reflected that the SBP annuity base amount used to calculate the SBP would be less than the maximum, *i.e.*, the reduced base of \$493.21. However, the law does not allow for a change from full to reduced coverage, even based on a state court order. Under applicable statute and regulation, DFAS acted properly in accepting the deemed election for former spouse SBP coverage and instituting it at the level the member elected upon his participation in SBP at retirement.

As for the member's argument that DOHA do the right thing by granting him relief by rejecting the court orders and deemed election, we are bound by statute and applicable regulations, and may not grant a claim at variance to the law. We do note that although the member's election coverage at the maximum level after participation is irrevocable, he may have other available remedies as addressed by the DOHA adjudicator in the appeal decision that rest with the BCNR, and fall outside DOHA's authority. In addition, as the member suggests, he may go back to the state court that issued the court orders to seek relief under the circumstances.

Conclusion

The member's request for reconsideration is denied, and we affirm 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