

DATE: May 23, 2022

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2021-CL-071405.2
)
)

**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 former spouse of a deceased 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. 2021-CL-071405, dated November 15, 2021.

Background

The record reflects that the member was born on November 28, 1964. On March 16, 1985, the member and the claimant were married. In 2004 the claimant initiated divorce proceedings and on March 8, 2006, a Retired Pay Court Order (RPCO) was issued pursuant to the divorce action. In that order the claimant was granted a portion of the member's retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA). Specifically, the RPCO stated that it was intended as a Domestic Relations Order (DRO) under the USFSPA. The RPCO also awarded Survivor Benefit Plan (SBP) coverage to the claimant. In regard to SBP, the order stated the following:

10. Survivor Benefit Plan (SBP): Alternate Payee [claimant] shall be awarded the maximum possible Survivor Benefit Plan Annuity under the Military Retirement System Plan. Participant [member] agrees to take all necessary steps to elect Alternative Payee [claimant] as the designated beneficiary for purposes of establishing and sustaining such surviving spouse coverage for Alternate Payee [claimant].

In the RPCO, the court stated it maintained jurisdiction to amend the order as might be necessary to establish or maintain its status. The RPCO was signed by the member's attorney on his behalf, the claimant and the presiding judge. On May 3, 2006, the member and the claimant were divorced. The divorce decree was signed by the same presiding judge who signed the RPCO. It stated the following:

The Court retains jurisdiction of the following claims which have been raised of record in this action for which a final Order has yet been entered:

None. The parties have arrived at a full and complete settlement of all other issues by virtue of sworn testimony before the court-appointed Master, at proceedings conducted on September 9, 2005, with the original transcript already being filed by the Master with his report on November 7, 2005. It is specifically Ordered and Decreed that the said Agreement of the parties is hereby approved and all terms and provisions thereof are made a part of this Order of the Court, said Order of Court intended to be incorporated into and merged into this Decree and to be binding upon the parties, their heirs and assigns, as thoroughly and fully as though the same had actually been Ordered and Decreed by this Court after full hearing, all of which is according to the rules and law as provided in such cases.

On October 7, 2006, the member remarried. On March 30, 2007, the claimant's attorney submitted a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, to the Defense Finance and Accounting Service (DFAS) in Cleveland, Ohio, requesting direct payment of a portion of the member's monthly disposable retired pay be made to the claimant. By letter dated April 13, 2007, a paralegal specialist from DFAS – Garnishment Operations in Cleveland (DFAS Cleveland) advised the claimant, not the claimant's attorney, that DFAS had received the claimant's application for direct payment under the USFSPA. DFAS's letter also advised the claimant that if her divorce decree designated her as the member's former spouse SBP beneficiary, she must make a deemed election for SBP coverage within one year of the divorce directly to DFAS – U.S. Military Retirement Pay in London, Kentucky (DFAS London). On April 2, 2008, the claimant submitted an email inquiry to DFAS. In her inquiry she sought verification of the following:

Verification of division of retirement pay and SBP as per divorce decree. We were married 3-16-85 and divorced 5-12-05. As per divorce decree there is a division of his retirement and SBP that I want to check to make sure is in effect. I believe the retirement pay is attached, however I am unsure if he has made any provisions as per the SBP. I would also like to know what his status in the service is – how many years he has in and when he will retire.

In March 2013 the member received his *Retirement Order and Transfer Authorization to Retired Reserve Status* effective April 1, 2013. The member passed away on November 13, 2017.

On November 17, 2017, the claimant wrote to DFAS – Garnishment Operations to update her address and request information concerning the calculation of the amount of the member’s retired pay that she is entitled to receive as his former spouse and when she would begin receiving it. She also requested that DFAS provide her with the member’s selection of her as his payee for Servicemembers’ Group Life Insurance (SGLI) for the maximum benefit as it was awarded to her by court order. On January 3, 2018, DFAS acknowledged receipt of the claimant’s application for a portion of the member’s retired pay under the USFSPA, 10 U.S.C. § 1408. DFAS advised her that she was not due any payments from the member’s retired pay because he was deceased.

On January 29, 2018, the claimant filed a DD Form 2656-7, *Verification of Survivor Annuity*, applying for the member’s SBP annuity as his former spouse. On February 3, 2018, DFAS acknowledged receipt of her correspondence regarding the member’s SBP. DFAS informed her that their records indicated he died prior to retiring from the military and was not in receipt of retired pay at the time of his death. DFAS also erroneously addressed the claimant as the member’s surviving spouse and instructed her to contact the member’s branch of service regarding her entitlement to the SBP annuity as his widow.

On February 28, 2020, the claimant submitted another DD Form 2656-7 to DFAS. On April 8, 2020, the claimant’s divorce attorney wrote to DFAS – Garnishment Operations concerning the claimant’s claim for a portion of the member’s retired pay under the USFSPA. The attorney enclosed the member’s death certificate, the divorce decree, the RPCO, the DD Form 2656-7 signed by the claimant on January 29, 2018, and DFAS’s letter to the claimant dated January 3, 2018, denying her claim for a portion of the member’s retired pay under the USFSPA. The attorney stated that the claimant bargained and contracted with the member concerning the retired pay funds and believes that she is entitled to receive them. The attorney requested an explanation from DFAS on the availability of the funds.

On September 4, 2020, the claimant wrote to DFAS at the “Appeal Process Department.” In her letter to DFAS, she referenced a phone conversation with someone in DFAS’s Retired Pay Department. The person she spoke to told her that: (1) DFAS’s file only went back to 2008 and anything prior to that period had been archived; (2) the member was retired and had been receiving retired pay at the time of his death; and (3) his widow was receiving his SBP annuity. The claimant enclosed a copy of the RPCO, but stated it had been damaged by water. She stated that she has the acceptance of the order from DFAS Cleveland regarding her portion of the member’s retired pay but had to ask her attorney for the letter from DFAS London regarding the SBP. She stated that the attorney handled both letters for her at the same time. She stated that she wished to appeal the denial of payment of her portion of the member’s retired pay. She stated that she was never notified of his retirement and it was not until she read his obituary that she found out he was retired. On October 13, 2020, DFAS denied her claim for the SBP annuity on the basis that the member did not elect former spouse SBP coverage for the claimant, nor did

the claimant submit a request for a deemed election for former spouse SBP coverage, within one year of the divorce. On October 20, 2020, the claimant appealed DFAS's denial of her claim. In her appeal, she stated that her attorney took the necessary steps within one year of the date of the divorce to ensure her eligibility for the SBP annuity. She enclosed the following documents: (1) RPCO dated March 8, 2006, which she noted both she and the member signed; (2) her attorney's letter dated March 30, 2006, to DFAS requesting former spouse payments from the member's retired pay; (3) a copy of her attorney's letter dated April 12, 2007, addressed to DFAS – U.S. Military Retirement Pay, London, Kentucky, which references a certified Order by the court and requests that it be treated as claimant's deemed election for former spouse SBP coverage; (4) DFAS's letter dated April 13, 2007, sent to the claimant stating that they received her application for direct payment of the member's retired pay and directing her where to file her deemed election request; and (5) the final divorce decree dated May 3, 2006.

In their administrative report dated January 15, 2021, DFAS upheld the denial of the claim for the SBP annuity. DFAS incorrectly listed March 8, 2006, as the date of the divorce between the member and the claimant, and stated that under 10 U.S.C. § 1450(f)(3)(B), an election may not be deemed to have been made in the case of any member unless the Secretary concerned receives a request from the former spouse within one year of the date of the court order or filing involved. DFAS concluded that they had properly followed the applicable laws, regulations and instructions. On June 25, 2021, the claimant subsequently filed a rebuttal to DFAS's administrative report. In her submission, the claimant corrected the date of divorce, which was May 3, 2006, not March 8, 2006. She questioned why DFAS sent her a letter stating that the member passed away prior to his receipt of retired pay. She stated that the member received a letter in November 2012 that stated he had 28 years of commissioned service. She stated that he was approved for transfer to retired reserve status effective April 1, 2013, and was issued a certificate of retirement. She states that he was also informed that he was eligible to receive retired pay prior to his 60th birthday. She reiterated that her attorney requested a deemed election within one year of the divorce decree.

In October 2021 DFAS wrote to the claimant's congressional representative explaining that DFAS never received communication from the member or the claimant within one year of the divorce to elect or deem the former spouse SBP coverage. DFAS advised the congressman that although the claimant's letter requesting a deemed election is dated April 2007, DFAS did not receive it.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim for the SBP annuity. She also explained that following review of the case file, DOHA contacted DFAS to confirm the member's status. DFAS advised DOHA that there was no record reflecting that the member elected SBP coverage for the claimant, and that prior to his death, he was not in receipt of military retired pay. DFAS explained that since the member was not in receipt of military retired pay, he did not have a retired pay account from which DFAS could have sent the claimant the court-ordered former spouse payments under the USFSPA. The adjudicator then determined that since the RPCO which required the member to elect former spouse SBP coverage for the claimant was issued on March 8, 2006, the claimant's request for a deemed election had to be received by DFAS within one year of that order. Since the copy of the claimant's attorney's letter requesting the deemed election was dated April 12, 2007, the

adjudicator found that it was not received by DFAS within one year of the date of the RPCO, and was therefore, untimely. Finally, the adjudicator explained that although DOHA was limited by statute and regulation in the allowance of a claim, the claimant may find possible relief with the Board for Correction of Naval Records (BCNR).

In her request for reconsideration, the claimant states that the RPCO was agreed upon and signed prior to the date of her actual divorce. She and the member agreed that she would receive the SBP annuity. She did everything to ensure she was covered as the member's SBP beneficiary. She trusted that her deemed election had properly been submitted to institute her entitlement to the SBP annuity. In support of her reconsideration, she attaches a statement dated October 25, 2021, from the attorney who represented her during her divorce. The attorney states that on March 30, 2007, the attorney's paralegal at her direction, submitted the RPCO to DFAS Cleveland. The attorney states that on April 12, 2007, she sent a letter to DFAS London specifically requesting SBP coverage for her client. The claimant states that she is aware that the member remarried and understands that he wanted his current spouse to be covered under the SBP. However, she states that the member was fully aware of their agreement and in designating SBP coverage for his new spouse, blatantly disregarded that agreement.

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-012516.3 (August 20, 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).

A member who has a former spouse upon becoming eligible to participate in the SBP may elect to provide an annuity to that former spouse. *See* 10 U.S.C. § 1448(b)(2)(A). The requirements for making such an election are found under 10 U.S.C. § 1448(b)(5). These include a written statement signed by the member and the former spouse setting forth whether the election is being made pursuant to the requirements of a court order, or pursuant to the conditions of a voluntary agreement as part of or incident to a divorce proceeding. In recognition of the fact that coverage under the SBP could become an item of negotiation in a divorce settlement, Congress concluded that a former spouse should be able to rely on and enforce an award of survivor benefits by a divorce court by means of a deemed election.

Therefore, statutory provisions were enacted to provide that in certain circumstances, former spouse SBP coverage can be established without the member's active participation. *See* Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 644, 98 Stat. 2492, 2548 (1984) (amending 10 U.S.C. § 1450(f) (1982)). Under 10 U.S.C. § 1450(f)(3)(A), the former spouse may request a deemed election for former spouse SBP coverage by providing the Secretary concerned with a written request and a copy of the court order, regular on its face, which requires such election or incorporates, ratifies or approves the written agreement by the member.

Under 10 U.S.C. § 1447(13), the term "court order" means a court's final decree of divorce, dissolution, or annulment or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or of a court ordered, ratified, or approved property settlement agreement incident to such previously issued decree). The former spouse's deemed election request must be received by DFAS within one year of the date of the court order. *See* 10 U.S.C. § 1450(f)(3)(C). Pursuant to the deemed election, once the former spouse is designated the beneficiary under the SBP, a subsequent change can only be made following submission of a modifying court order to the Secretary concerned which permits such a change of election. *See* 10 U.S.C. § 1450(f)(2)(A).

In this case, the record reflects that the member was eligible for reserve-component retired pay in 2013 but for the fact he was not yet 60 years old. He was divorced from the claimant on May 3, 2006, prior to becoming eligible to participate in the SBP. He was required by the terms of the RCPO to provide her with former spouse SBP coverage. However, he failed to designate her as his former spouse SBP beneficiary at the time he became eligible to participate in SBP.

In order for the claimant to request a deemed election for former spouse SBP coverage, the divorce decree must have required the member to provide former spouse coverage for her. *See* 10 U.S.C. § 1450(f)(3)(C). The RPCO, requiring the member to elect former spouse SBP coverage for the claimant, was issued on March 8, 2006. The divorce decree issued on May 3, 2006, incorporated the parties' prior agreements and stated there were no further claims left for the court to consider. Therefore, the claimant had one year from the date of the divorce decree, one year from May 3, 2006, to submit her deemed election request with the accompanying court order to DFAS. The claimant submits a copy of a letter dated April 12, 2007, that her attorney submitted to DFAS – U.S. Military Retirement Pay, in London, Kentucky, containing a certified copy of the RPCO and requesting it be treated as claimant's deemed election. However, DFAS has no record of receiving this letter until the claimant submitted it after the member's death.

The timeliness of the deemed election under 10 U.S.C. § 1450(f)(3) depends on the date DFAS actually receives the request, not the date the former spouse makes or mails the request. Although the copy of the attorney's letter dated April 12, 2007, to DFAS London reflects that she enclosed a "certified Order" with the letter, there is no evidence that DFAS received the letter with the "certified Order" and the divorce decree within one year of the divorce decree. In fact, DFAS has no record of receiving the final divorce decree until 2020 after the member's death. Therefore, in the absence of any proof of receipt by DFAS of the deemed election

request, such as a certified mail receipt, dated within one year of the date of the divorce decree, we uphold DFAS's denial of the claim for the former spouse SBP annuity. *See* 2020-CL-042702.2 (September 14, 2020).

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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board