

DATE: July 7, 2022

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-041616.2

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

The claimant, a former spouse of a retired member of the U.S. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-041616, dated April 13, 2022.

Background

On April 27, 1973, the claimant and the member were married. The member elected spouse and child Survivor Benefit Plan (SBP) coverage for the claimant and his dependent children effective October 30, 1979. On November 1, 1979, the member retired from the Army. DFAS continued to deduct SBP premiums from the member's retired pay until he reached paid up status on January 1, 2010. On October 5, 2010, the claimant and the member divorced. The divorce decree did not require the member to provide the claimant with former spouse SBP coverage, but did provide the following:

[Claimant] has no retirement account(s). [Member] has both a military and law enforcement pensions [sic]. [Claimant] is entitled to an equitable share of his pensions accrued during the marriage, up to the time of separation of the parties.

However, it is [Claimant's] responsibility to have a QDRO's [sic] (Qualified Domestic Relations Order) prepared to effectuate this division.

On January 3, 2012, a Qualified Domestic Relations Order (QDRO) was approved by the court. The QDRO specified "[T]his order and this relevant QRDO Equivalent Order covers only the law enforcement monthly pension under the Civil Service Retirement System ..." and that the court retained jurisdiction to address the military pension.

In 2013 the claimant contacted the Defense Finance and Accounting Service (DFAS) seeking a share of the member's retired pay per the terms of the divorce. The correspondence between the claimant and DFAS reflects DFAS denied payment of a portion of the member's retired pay on the basis that all of the member's retired pay was derived from disability through the Department of Veterans Affairs (VA).

The member passed away on March 24, 2015. On December 16, 2016, the claimant submitted a DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for a Deemed Election*, and on August 12, 2019, she made a written request for the former spouse SBP annuity. DFAS denied the request on the basis that the member did not make a request to change his election to former spouse coverage, nor was a deemed election for former spouse cover made by the claimant. The claimant appealed DFAS's denial of her claim. She stated that neither she nor the member knew that a request for a deemed election for former spouse coverage had to be filed with DFAS.

In the appeal decision, the DOHA attorney examiner upheld DFAS's determination that the claimant's request for a deemed election was untimely. He noted the divorce decree did not award her former spouse SBP coverage. He found there was no evidence a QDRO was issued by the court requiring the member elect former spouse SBP coverage and no evidence the member made a voluntary election to provide former spouse SBP coverage within one year of the divorce.

In the claimant's request for reconsideration, she attaches her original appeal dated June 2, 2020, and the QDRO Equivalent Order issued on January 3, 2012. She states that she was married to the member for 32 years and had two children. She also cites issues of domestic abuse by the member and his substance abuse as a basis for reconsideration.

Discussion

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 their claim by clear and convincing evidence on the written record that the United States Department of Defense is liable for the claim. *See* DoD Instruction 1340.21 (May 12, 2004) ¶ E5.7. 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 SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under 10 U.S.C. § 1448(a)(1)(A), SBP is open to a member who is eligible for retired pay. Spousal coverage ends upon divorce, but the SBP includes provisions to allow a member to elect coverage for a former spouse. If a member elects to provide coverage for a former spouse, he must notify DFAS in writing of the divorce and his intention to provide coverage for his former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. Former spouse coverage must be established within one year from the date of the divorce, dissolution, or annulment. *See* 10 U.S.C. §1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to his former spouse. If he fails to do so, the former spouse has one year from the date of the divorce to request a deemed election. *See* 10 U.S.C. § 1450(f)(3). Under 10 U.S.C. § 1450(f)(3), the former spouse's request that the retired member shall be deemed to have made an election for former spouse SBP coverage must be submitted in writing. *See* 10 U.S.C. § 1450(f)(3)(A). Under 10 U.S.C. § 1450(f)(3)(C), the former spouse's written request for a deemed election must also include a copy of the court order requiring such an election.

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired in 1979 until such coverage ended with divorce in October 2010. In order for the claimant to be covered as the member's former spouse under the SBP after the issuance of the divorce decree, the member must have expressly elected the claimant as his former spouse beneficiary within one year after the date of the divorce. Therefore, if the member voluntarily decided to designate the claimant as his former spouse SBP beneficiary, he could have done so within the statutory time limit. The member failed to establish former spouse SBP coverage for the claimant.

The claimant was not awarded former spouse SBP coverage in the divorce decree, nor the QDRO issued on January 3, 2012. In fact, the QDRO only addressed the member's law enforcement pension as a federal government retired employee, and did not address SBP. Although the court stated that it would retain jurisdiction to address the member's military pension, there is no evidence that a subsequent court order was issued concerning the SBP annuity. Therefore, the claimant had no statutory right to request a deemed election for former spouse SBP coverage. *See* DOHA Claims Case No. 2021-CL-032612.2 (November 19, 2021).

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-041616, dated April 13, 2022, 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: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board