

DATE: July 18, 2022

In Re:)
[REDACTED]) Claims Case No. 2020-CL-102613.2
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 deceased retired member of the U.S. Navy Reserve, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-102613, dated March 9, 2022.

Background

The claimant and the member were married on September 18, 1975. In 1977 the member entered active duty in the Naval Reserve (now the Navy Reserve). In 1986 the member left active duty but remained in the Naval Reserve. On June 16, 1995, he elected Survivor Benefit Plan (SBP) coverage for the claimant as his spouse and his children. The member retired from the Navy Reserve in 2011, and his participation in SBP was for spouse only coverage for the claimant because his children lost their eligibility due to age.

In 2017 the claimant filed for divorce. On August 10, 2018, the claimant and the member filed a separation agreement which stated:

Each party will retain his/her own retirement plan (Wife – State of Florida; Husband – United States Navy) and the other party will sign any necessary

paperwork to perfect the intent of this paragraph. However, both parties agree to keep the other party with sole rights of survivorship on their respective retirement account(s).

On August 24, 2018, the final divorce decree, which incorporated the parties' separation agreement, was issued.

On September 14, 2018, the member passed away. In a letter to the Defense Finance and Accounting Service (DFAS) dated December 4, 2018, the claimant enclosed a copy of the member's death certificate and requested the forms necessary for claiming the SBP annuity and life insurance payable upon his death. On October 15, 2019, the claimant completed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. By letter dated November 7, 2019, DFAS responded to the claimant and requested a copy of the divorce decree. On December 30, 2019, the claimant responded to DFAS, noting that the member had paid 86 months of SBP premiums for her coverage. She also provided the divorce decree. On February 5, 2020, DFAS responded to the claimant. DFAS explained that divorce terminates SBP spouse coverage and that a member can elect SBP former spouse coverage, but must do so within a year of the divorce. DFAS further explained that a court order can require a member to establish SBP former spouse coverage, and that the former spouse can request a former spouse SBP deemed election based on that order, but that the deemed election request must also be submitted within a year of the divorce. DFAS stated that within one year of the divorce, they did not receive the member's SBP former spouse election nor the claimant's request for a former spouse deemed election. DFAS therefore denied the claim for the former spouse SBP annuity.

On February 19, 2020, the claimant appealed DFAS's denial. In her appeal, she described the extenuating circumstances of her claim. She stated that the member took his own life on September 25, 2018. Although he was ordered to provide her with the SBP annuity based on the divorce decree, he did not do what was necessary for her to receive the benefit. She stated that he may not have been aware that he had to change her coverage from spouse to former spouse since he had already named her as his spouse beneficiary at his first opportunity and continued to make SBP premium payments for her coverage. She also explained that after the member's death, her son became ill and passed away on April 9, 2019. She stated that she has moved twice since both of their deaths and was consumed by their affairs. She stated that she informed the military of the member's death but was not told of the one-year requirement for requesting a deemed election. In her appeal she attached a copy of the letter she sent to DFAS dated December 4, 2018, requesting guidance on how to file a claim for survivor benefits.

In July 2020, in response to the claimant's appeal, DFAS sent her their administrative report. In that report, DFAS maintained that the separation agreement and final divorce decree did not specifically order the member to provide SBP former spouse coverage for the claimant, one of the statutory requirements to allow a former spouse SBP deemed election request. DFAS also found that the member did not voluntarily elect former spouse SBP coverage, within one year of their divorce. As a result, DFAS sustained their denial of the claim.

The claimant filed a rebuttal to DFAS's administrative report. In her rebuttal, she attached a letter dated September 1, 2020, from her attorney confirming that the separation agreement obligated both parties to maintain "sole rights of survivorship" for the other. She also enclosed a letter from the member's brother stating that it was the member's intention to support her after his death.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim. He found that the language in the separation agreement was too vague to be considered an order to the member to establish former spouse SBP coverage for the claimant. He explained that even if the language in the separation agreement and divorce decree had not been too vague, the member did not submit an election for former spouse SBP coverage and DFAS had no record of receiving the claimant's request for a deemed election within one year of the date of divorce. The adjudicator further advised the claimant that she may find relief outside the purview of DOHA with the Board for Correction of Naval Records (BCNR).

In the claimant's reconsideration request, she states that the adjudicator ignored the fact that she submitted two written communications in which she claimed the SBP annuity. She references a "live chat" that she had with Military OneSource online on November 29, 2018, in which she advised Military OneSource that she was divorced. She also references her letter to DFAS dated December 4, 2018, in which she provided DFAS with the member's death certificate and requested the appropriate forms necessary to claim the SBP annuity. She states that he also ignored compelling case precedent from the U.S. Court of Federal Claims holding that less explicit written requests satisfy the former spouse's deemed election request. Finally, she states that the adjudicator erroneously attributed her loss of one-third of her Florida State pension to the death of her son when, in fact, that portion of her state retirement was given to the member in the divorce decree in exchange for his obligation to secure her right to the SBP annuity.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions. Under Department of Defense Instruction 1340.21 (May 12, 2004), the claimant has the burden of proving the existence of a valid claim against the government. 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. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered. *See* Instruction ¶ E5.7.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for a former spouse, the member must notify DFAS in writing of the divorce and the member's intention to provide coverage for the 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. *See* 10 U.S.C. §1448(b)(3)(A). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to the former spouse. If the member 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). The former spouse's request that the retired member shall be deemed to have made such an election if the Secretary concerned receives an election for former spouse SBP coverage in writing and in the manner prescribed by the Secretary concerned. *See* 10 U.S.C. § 1450(f)(3)(A). An election for former spouse SBP coverage may not be deemed to have been made unless the Secretary concerned receives such a request from the former spouse within one year of the date of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C). The Service Secretaries have delegated their authority under the SBP law to DFAS.

The Secretary of Defense has issued implementing regulations for the SBP law pursuant to 10 U.S.C. § 1455. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 43, contains the regulations concerning SBP elections and election changes. Paragraph 430504(C)(4) of the DoDFMR (Version April 2017) states:

4. If a member dies before making an election, a former spouse's request, which is otherwise qualified, must be honored even if the date of the request is after the date of the member's death. However, if the request for a court order was initiated with the court after the member's death, the order will not be honored.

However, in order to be qualified, the former spouse deemed election request must be submitted using a DD Form 2656-10 with a copy of the court order or agreement referring to SBP. This must be submitted to DFAS within one year of the date of the court order or filing. *See* Paragraphs 430504(C) and 430504(C)(2).

Paragraph 430404(C) states the following in pertinent part:

If such member fails or refuses to make such election, the member is deemed to have made such election if the Secretary concerned receives a completed DD 2656-10 from a former spouse or the former spouse's attorney on behalf of the former spouse. A copy of the pertinent court order or agreement referring to the SBP coverage must accompany the DD 2656-10. *See* subparagraph 430504.C.1. Effective September 27, 2008, use of the DD 2656-10 to make a deemed election is mandatory.

Paragraph 430504(C)(2) states:

The Secretary concerned must receive the request from the former spouse within 1 year of the date of the court order or filing involved. If an election of former spouse coverage was agreed to or ordered by an earlier court order, a subsequent order or modification that merely restates the previous provision and imposes no new obligation on the member does not begin a new 1-year period. A subsequent court order holding a member in contempt of court for failing to fulfill the prior agreement is not the type of court order that can be used to begin a new 1-year period to deem an election.

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he elected it in 1995 through his retirement in 2011, and then until such coverage ended with divorce in August 24, 2018. It is unfortunate that the member died less than a month after the divorce without making a former spouse SBP election for the claimant. However, even if the language of the divorce decree can be interpreted to require the member to elect former spouse SBP coverage for the claimant (giving her the statutory right to request a deemed election), she still had to submit a DD Form 2656-10 with the divorce decree within one year of the date of the divorce. Since she failed to do so, the SBP annuity is not payable to her.

While we appreciate the fact that the claimant may have agreed to relinquish a part of her retirement from the State of Florida in order for the member to name her as his former spouse SBP beneficiary, we have no authority under applicable statute and regulation to allow her the SBP annuity. As explained by the DOHA adjudicator in the appeal decision, the claimant may have other available remedies that rest with the BCNR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. These remedies are outside of DOHA's authority and any request for a correction of record needs to be pursued with the BCNR.

Conclusion

The claimant's request for reconsideration is denied. In accordance with the Department of Defense 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board