

DATE: July 21, 2022

In Re:)
[REDACTED]) Claims Case No. 2020-CL-120115.2
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. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-120115, dated January 25, 2022.

Background

The claimant and the member were married on July 22, 1978. On March 1, 1998, the member retired from the Army. At that time, he elected spouse only SBP coverage at a reduced base amount of \$700.00. On November 1, 2017, the claimant and the member divorced in the State of North Carolina. The Absolute Divorce Judgment did not award the claimant former spouse Survivor Benefit Plan (SBP) coverage, but stated in pertinent part the following:

All other pending claims and counterclaims, the issues of post separation support, alimony, attorney's fees and equitable distribution of marital property should be severed for a separate hearing.

The record reflects that on June 1, 2018, the attorney representing the member in the divorce sent the claimant's attorney a letter. In that letter, the member's attorney stated the following:

He is willing to do the \$1100.00 per month combined alimony and pension and keep her as SBP beneficiary. The parties are now divorced so I am not sure if she needs to do a deemed election as the former spouse once the order is done to protect those benefits. [The member] has not changed anything regarding the SBP since their divorce. He is willing to waive his interest in her retirement.

The attorney also stated that the member's health had taken a turn for the worse, and therefore she was submitting her client's final offer to the claimant's attorney.

On June 4, 2018, the member passed away. The claimant claimed the SBP annuity as the member's former spouse. On October 9, 2018, the Defense Finance and Accounting Service (DFAS) denied the claim on the basis that the member did not make a request to change his election to former spouse, nor did the claimant make a deemed election for former spouse coverage. On October 30, 2018, the claimant appealed DFAS's denial. In her appeal she stated that she has a year from the date of the divorce to finalize matters and attached the last offer by the member's attorney, the letter dated June 1, 2018.

In response to the claimant's appeal, DFAS sent the claimant an administrative report dated September 9, 2020, stating that after considering the claimant's arguments, DFAS concludes that it properly followed applicable laws, regulations, and instructions.

In the DOHA appeal decision, the attorney examiner sustained DFAS's denial of the claim. He explained that prior to the member's death, he did not elect former spouse coverage for the claimant. He also explained that the claimant would have had the right to request a deemed election within one year of the divorce so that she was eligible for the SBP annuity if the divorce decree awarded her former spouse SBP coverage. He stated that although DOHA had no authority to award the claimant the SBP annuity under statute and regulation, she may find relief outside the purview of DOHA with the Army Board for Correction of Military Records (ABCMR).

In the claimant's reconsideration request, she states that she gave up everything to follow him during his military career. When the member retired, they decided together to participate in SBP as an added protection for her. She states that DOHA is missing one important fact and that is that North Carolina is a "no fault" divorce state, meaning the divorce goes through unless it is contested. She states that contesting a divorce just brings more attorneys' fees; therefore, the divorce is always granted but there is no settlement of property. She states that at the time of his death the member was paying her half of his retired pay and other monthly alimony. She states that their final court date to settle property and finances was scheduled in July 2017, and she attaches the trial notice for the hearing. She asserts that she is entitled to the SBP. They just were not able to finalize the property issues and put them in writing before the member's death.

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.

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 the Secretary concerned 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). 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 an 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 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). 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.

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired on March 1, 1998, then until such coverage ended with divorce on November 1, 2017. Prior to his death, the member did not elect former spouse SBP coverage for the claimant. The divorce decree did not award the claimant former spouse SBP coverage. Although we understand that the member passed away before the property settlement agreement had been finalized through the court, without the claimant being awarded former spouse SBP coverage,

she has no statutory right to request a deemed election. Accordingly, we find that the claimant is not entitled to the SBP annuity as the member's former spouse. *See* DOHA Claims Case No. 2020-CL-020301.2 (April 26, 2021).

As explained by the DOHA attorney examiner in the appeal decision, the claimant may have other available remedies that rest with the ABCMR 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 ABCMR.

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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board