

DATE: July 25, 2022

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2021-CL-030103.2
)
)

**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.

DECISION

The claimant, the son 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. 2021-CL-030103, dated February 15, 2022.

Background

The member was born on May 18, 1970. The member married on August 7, 1999. His spouse already had a child who was born on January 7, 1996. The member and his spouse then had a child, the claimant, born on March 21, 2002.

The member retired from the Army on April 1, 2013. In anticipation of his retirement, he completed a DD Form 2656, *Data for Payment of Retired Personnel*, dated November 16, 2012. On that form, he indicated that he was married and listed three dependents, his spouse and his two children, but elected not to participate in the Survivor Benefit Plan (SBP). His signature was witnessed by a person identified as the Army SBP Counselor. The member's spouse also signed the form, acknowledging her concurrence with the member's election to not participate in SBP. Her signature was also witnessed by the SBP Counselor and notarized. As a result of the member's election not to participate in SBP, no SBP premiums were ever withheld from his retired pay.

The member was found dead in the family home on September 21, 2013, as a result of a suicide. The member's spouse filed a claim with the Department of Veterans Affairs (VA) on dependency and indemnity compensation (DIC), but the VA denied the claim in October 2013 on the grounds that the member's death had not been service-connected. She appealed that decision, and in May 2018 the Board of Veterans' Appeals (BVA) found that the member had post-traumatic stress disorder (PTSD), as a result of his active service rising from an improvised explosive device attack in Iraq, and that his death by suicide was therefore service-connected.

On October 2, 2019, the claimant sent a DD Form 2656-7, *Verification for Survivor Annuity*, to the Defense Finance and Accounting Service (DFAS), claiming the SBP annuity as the member's child. On October 28, 2019, DFAS denied his claim on the basis that the member did not elect SBP coverage. In his appeal of DFAS's denial, the claimant described his father's mental state following his return from Iraq and maintained that his PTSD and depression made his father incompetent to properly make a decision concerning the SBP coverage for their family.

In the DOHA appeal decision, the adjudicator upheld DFAS's denial of the claim. The adjudicator first found that the claimant's claim for the SBP annuity was untimely since the claim accrued upon the member's death and he did not file a claim for it until October 2, 2019. Therefore, the claim for the SBP annuity is subject to the six-year statute of limitations set forth under 31 U.S.C. § 3702(b). The adjudicator also found that even if it was not time-barred, the underlying claim for the SBP annuity still could not be allowed because the member elected not to participate in SBP. He further advised the claimant that although DOHA did not have the authority to award the SBP annuity under applicable statute and regulation, the claimant had another possible avenue of relief that existed with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In his reconsideration request, the claimant states that he was a minor when his father committed suicide and he now is a student in college. He attaches the BVA's order dated May 24, 2018, and states that he believes this shows clear and convincing evidence that his father's PTSD led to his suicide. He states that his father filled out the DD Form 2656 on November 16, 2012, less than a year before his suicide, which the BVA deemed to be incurred in the line of duty.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A claimant 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* Instruction ¶ E5.7. A claimant must submit a claim so that it is received by the agency concerned within the time limit allowed by statute. *See* Instruction ¶ E5.6. Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions.

Preliminarily, we will discuss the Barring Act's application to the SBP annuity claim. When the member died on September 21, 2013, all events arose which fixed the liability of the government. A claim for an SBP annuity had to be received in the Department of Defense on or before September 21, 2019. *See* 31 U.S.C. § 3702(b). The claimant's DD Form 2656-7 was submitted to the Department of Defense (DoD) eleven days after the statutory deadline, on October 2, 2019. However, as set forth below, the Barring Act does not apply to the SBP claim in this case because the claimant had no underlying entitlement to it. Therefore, even assuming the claimant made a timely claim for the SBP annuity, it would not be payable under applicable statute and regulation. *See* DOHA Claims Case No. 2021-CL-082409.2 (March 14, 2022).

The SBP, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the survivors 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)(A) and (a)(2)(A). However, a married member may elect not to participate in the SBP, with the concurrence of the member's spouse. *See* 10 U.S.C. § 1448(a)(2)(A) and (3)(A)(i). An election under section 1448(a)(2) to forgo participation in SBP is irrevocable if it is not revoked before the date on which the member first becomes entitled to retired pay. *See* DOHA Claims Case No. 2020-CL-081719.2 (January 15, 2021).

In this case, on November 16, 2012, the member elected not to participate in SBP upon retirement, and his spouse, the claimant's mother, concurred with the election. The member's election and his spouse's concurrence were witnessed and notarized. The member retired on April 1, 2013, and began receiving retired pay. Since he had elected not to participate in SBP, and did not revoke his election to forgo participation in SBP before he retired, no SBP premiums were deducted from his retired pay to pay for coverage, and his SBP election not to participate became irrevocable. The claimant acknowledges that the member declined coverage, but maintains that the member was of unsound mind when he declined to participate in the SBP. As explained above, DOHA is bound by statute and regulation, and therefore, unable to allow the claim for the SBP annuity.

Although DOHA has no authority to allow the claim, the claimant may have other available avenues of relief outside our purview. First, under 10 U.S.C. § 1454, the Secretary of the member's service may correct or revoke an SBP election when the Secretary deems it necessary to correct an administrative error. Second, under 10 U.S.C. § 1552, the Secretary, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. Any request for a correction of record should be pursued with the ABCMR.

Conclusion

The claimant's request for relief is denied. 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