

DATE: July 28, 2022

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-100403.2

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

A 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-100403, dated January 31, 2022. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS's) denial of the member's request to cover his spouse as his beneficiary under the Survivor Benefit Plan (SBP).

Background

The member was born on April 28, 1960. He entered service in the Naval Reserve (now the Navy Reserve) on August 20, 1979. On August 7, 2004, the member completed the form, NRPC 1772/3, *Reserve Component Survivor Benefit Plan*, when he met the requisite years of service in the Navy Reserve to be eligible to receive retired pay at age 60. On that form, the member elected Option C, immediate SBP coverage for his dependent children. On June 11, 2005, the member married.

On January 21, 2020, in anticipation of his 60th birthday, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*, applying for military retired pay. On that form, the member also requested SBP coverage for his spouse. On April 28, 2020, the member's

60th birthday, the Navy approved the member's application for retired pay for non-regular service, and advised him that his retired pay would be based on 22 years and 9 months of qualifying service. The member began receiving military retired pay. On July 14, 2020, the member contacted DFAS and requested that his military retired pay account be updated to reflect his spouse as his SBP beneficiary. He also completed a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, requesting to resume the existing level of SBP coverage for his spouse.

On November 18, 2020, DFAS notified the member that he could not add his spouse as his SBP beneficiary because more than one year had passed since the date of his marriage. The member, through his attorney, appealed DFAS's denial of his request to add his spouse as his SBP beneficiary to DOHA. The member explained that following his marriage, he and his spouse visited the Naval Reserve Station in St. Louis in order to update his information in the Defense Enrollment Eligibility Reporting System (DEERS) and obtain a dependent identification card for his spouse. He stated that it was during that visit in July 2005 that government officials advised him that he would be able to designate his spouse as his SBP beneficiary when he applied for military retired pay.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the member's request to cover his spouse under SBP. The adjudicator explained that under statute and regulation, DOHA had no authority to allow the SBP coverage. However, she advised the member that he may find other available relief outside the purview of DOHA by petitioning the Board for Correction of Naval Records (BCNR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In the member's reconsideration request, he states that although the DOHA appeal decision notes multiple errors made by DFAS, the adjudicator determined that the plain meaning of the statute would be followed in his case. He states that the Navy was informed of his marriage in a timely manner and their marriage predated his retirement in April 28, 2020. He states that while the long-standing rule is that the government is not bound by the erroneous advice of its officers or employees, the Navy as an organization should be responsible for clear and consistent communications to its members. He asserts that there must be a relevant statute about affirming knowledge, timely communications, and fiduciary duty.

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A married reservist or reservist with a dependent child may elect to participate in SBP when he is notified under 10 U.S.C. § 12731(d) that he has completed the years of service required for eligibility for reserve-component retired pay. *See* 10 U.S.C. § 1448(a)(2)(B). A member who is not married upon becoming eligible to participate in the plan but who later marries may elect to establish coverage for his spouse pursuant to 10 U.S.C. § 1448(a)(5). That section requires a written election, signed by the member, and received by the Secretary concerned within one year of the marriage. *See Flynn v. United States*, 46 Fed. Cl. 414 (2000); DOHA Claims Case No. 2020-CL-031203.2 (September 9, 2020); and DOHA Claims Case No. 2019-CL-031402.2 (September 24, 2019).

In August 2004 when the member met the requisite number of years of service required for reserve-component retired pay, he was eligible to participate in SBP. He was unmarried at that time and elected Option C, immediate child only SBP coverage. On June 11, 2005, he married. He had one year from the date of his marriage to designate his new spouse as his SBP beneficiary. There is no record of an election for spouse SBP coverage during the period June 2005 through June 2006. Since he failed to make the election within one year of the date of his marriage, DFAS properly denied his request to cover his spouse as his SBP beneficiary.

We appreciate the fact that the member was given incorrect information by the Navy. However, DOHA is bound by statute and regulation, and therefore, is unable to grant the SBP coverage for the member's spouse. As set forth in the appeal decision, the member may have other available remedies that exist outside DOHA's authority. Under 10 U.S.C § 1454(a), the Secretary concerned may correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error. Further, 10 U.S.C. § 1552(a)(1) states that the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Either type of action is made through a civilian board, in this case the BCNR. These remedies are outside DOHA's authority and any request for a correction of record needs to be pursued with the BCNR.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-100403, dated January 31, 2022. 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