

DATE: August 2, 2022

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In Re: )  
[REDACTED] ) Claims Case No. 2020-CL-102611.2  
Claimant )

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**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 member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-102611, dated January 25, 2022.

**Background**

On December 1, 1990, the member retired from the Air Force. Upon retirement, the member elected spouse Survivor Benefit Plan (SBP) coverage for the claimant. On March 19, 2001, the member and the claimant divorced. The divorce decree awarded the claimant 19% of the member's disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA) (10 U.S.C. § 1408). However, it did not require the member to provide the claimant with former spouse SBP coverage.

On July 8, 2018, the member passed away. On July 16, 2018, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS, claiming the SBP annuity as the member's former spouse. On August 17, 2018, DFAS denied her claim for the SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election. On September 17, 2018, the claimant appealed

DFAS's denial of her claim. She stated that after their divorce, she and the member went to Fairchild Air Force Base to request that SBP coverage continue for her. She stated that they brought their divorce decree and filled out paperwork to secure the SBP coverage. She stated that they were assured that SBP premium deductions would continue to be made from the member's retired pay, and she noted that premiums continued to be deducted. On August 21, 2020, in response to the claimant's appeal, DFAS issued an administrative report sustaining their denial of the claim. DFAS explained that the first time they were notified of the member's divorce was after his death. DFAS stated that the divorce decree did not award the claimant former spouse SBP coverage, and the member did not make a request to change his election to former spouse coverage. On September 14, 2020, the claimant filed a rebuttal to DFAS's administrative report. In her rebuttal, she submitted a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, and a DD Form 2762, *Direct Deposit Authorization*, signed by the member on March 9, 2001. She stated that these were the documents that they brought with them to Fairchild Air Force Base. She further stated that in early 2018 the member was having health issues and gave her power of attorney over his health and finance decisions. He also appointed her as his personal representative in his last will and testament. After she got this authority, she went to the Department of Veterans (VA) medical center to inquire about the member's VA benefits as they related to his medical issues. At that time, a VA representative told her that their records indicated that she was still married to the member. She stated that the government made a mistake because they submitted the application and forms in 2001 at Fairchild Air Force Base. She further stated that after their divorce, she and the member had many discussions about the fact that he continued to pay SBP premiums for her coverage since during his military career, she gave up her nursing career to support him.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim finding no evidence that the member elected former spouse SBP coverage for the claimant.

In the claimant's request for reconsideration, she states that she has requested congressional assistance and attaches her request for help from her congresswoman. In her congressional assistance request, she explains that prior to the member's death, he gave her power of attorney and appointed her his personal representative of his will. She states that the member retired after 26 years of service with the Air Force and that they were divorced in 2001. She maintains that she and the member timely filed the proper paperwork to continue SBP coverage for her after their divorce. She states that the member's intent that she be covered under the SBP is evidenced by the fact that he continued to pay the monthly premiums for that coverage from his retired pay.

## **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. 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 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, 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 a 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).

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired in 1990 until such coverage ended with their divorce in March 2001. The claimant was not awarded former spouse SBP coverage in the divorce decree. Therefore, she had no statutory right to request a deemed election. Although the member intended that she be covered as his former spouse SBP beneficiary, he failed to establish SBP coverage for her within one year of the divorce. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2021-CL-030918.2 (November 19, 2021).

Although the claimant states that both she and the member filled out the appropriate paperwork at Fairchild Air Force Base after their divorce in March 2001, DFAS reports that they had no record of the member's divorce until after his death. DFAS did not receive the DD Form 2293 from the claimant until she filed her rebuttal to their administrative report in September 2020. DFAS further reports that no portion of the member's retired pay was ever sent to the claimant under the USFSPA. DFAS has advised DOHA that the member erroneously continued to pay SBP premiums for the claimant as his spouse after the divorce. We note that since SBP premiums for spouse coverage were deducted from the member's retired pay when he no longer had an eligible spouse beneficiary, those costs should be refunded to the proper beneficiary as arrears of pay (AOP) under 10 U.S.C. § 2771.

We realize that the record reflects the member bequeathed his entire estate to the claimant in his will dated March 5, 2018. However, members may not dispose of SBP annuities by will or other testamentary instrument, since no provision in the SBP law authorizes them to do so. *See* Comptroller General decision B-230824, Nov. 14, 1988. As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case, the Air Force Board for Correction of Military Records (AFBCMR), may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. *See also* 10 U.S.C. § 1454 (the specific authority for the AFBCMR to correct or revoke an election for SBP). The AFBCMR's authority under these two statutes is discretionary, and is outside of DOHA's authority.

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2020-CL-102611, dated January 25, 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

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board

SIGNED: Daniel F. Crowley

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Member, Claims Appeals Board