

DATE: August 18, 2022

In Re:)
[REDACTED]) Claims Case No. 2022-CL-020301.2
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. 2022-CL-020301, dated April 26, 2022.

Background

The member and the claimant were married on September 6, 1987. The member retired from the Army on October 1, 1997. The member as part of his retirement processing elected Survivor Benefit Plan (SBP) coverage for the claimant and their child. On September 2, 2003, the member and the claimant divorced. The final divorce decree awarded 25% of the member's monthly disposable retired pay to the claimant under the Uniformed Services Former Spouses' Protection Act (USFSPA). The divorce decree also stated in pertinent part the following:

The Respondent [the member] has designated the Petitioner [the claimant] as the beneficiary of his Survivor Benefit Plan and is ordered to provide the appropriate military finance center retired pay office with any necessary forms or other information to accomplish this designation.

Although the member and the claimant were divorced, he continued to pay premiums for the claimant's spouse SBP coverage from his monthly retired pay. Further, the member's Retiree Account Statements (RAS) reflect that the Defense Finance and Accounting Service (DFAS) made direct payments under the USFSPA to the claimant for her portion of the member's monthly disposable retired pay.

On April 4, 2021, the member passed away. On May 18, 2021, the claimant submitted a claim for the SBP annuity. DFAS subsequently denied the claimant's claim for an SBP annuity on the basis that the member did not establish former spouse SBP coverage for the claimant, nor did the claimant request a deemed election for former spouse SBP coverage within one year of their divorce. The claimant appealed DFAS's denial of her claim for the SBP annuity to DOHA. She stated that the member continued to pay SBP premium payments for her coverage until his death. She stated that their divorce was amicable and she received spousal support. She stated that neither she nor the member were told that they had to fill out additional forms for the SBP coverage to continue. She maintained that it was the member's intention to provide her support after his death with the SBP annuity. In the appeal decision, the DOHA adjudicator sustained DFAS's denial of the claim. She further advised the claimant that she may find relief outside the purview of DOHA with the Army Board for Correction of Military Records (ABCMR).

In her request for reconsideration, the claimant states that she supported the member while on active duty and beyond, and should be paid the SBP annuity. She states that the laws and regulations for SBP are hard to find, that she received no assistance from the military and that she was never notified that the SBP coverage had to be changed from spouse to former spouse coverage within one year of the divorce. She states that the Retirement Services Offices are not disseminating the information needed to provide members with their full scope of responsibilities. Even after the member's death, she received no assistance concerning any available benefits. She maintains the denial of the SBP annuity is unjust and sets a precedent for further denial of benefits to spouses throughout the Army.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2019-CL-022108.2 (September 17, 2019).

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 his former spouse, he must notify DFAS in writing of the divorce and his intention to provide coverage for his 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 his former spouse. If he 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 member was obligated based on the divorce decree to elect the claimant as his former spouse beneficiary under the SBP. However, the member failed to establish former spouse SBP coverage and the claimant did not file a timely deemed election. Therefore, DFAS properly denied the claim for the SBP annuity.

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as advised by the adjudicator in the appeal decision, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case the ABCMR, 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 statutory authority for the ABCMR to correct or revoke an election for SBP). The ABCMR's authority under these two statutes is discretionary and outside DOHA's authority.

Finally, 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.

Conclusion

The claimant's request for relief 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: Daniel F. Crowley

Daniel F. Crowley
Member, Claims Appeals Board