

DATE: August 11, 2022

In Re:)
 [REDACTED]) Claims Case No. 2022-CL-011805.2
)
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. 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.

DECISION

The claimant, the surviving spouse of a deceased 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-011805, dated March 7, 2022.

Background

On March 1, 1996, the member retired from the Army. At that time, he was married and elected SBP coverage for his spouse. On June 19, 1996, the member divorced. Pursuant to an agreement incorporated into the divorce decree, the member agreed to elect to provide his former spouse with Survivor Benefit Plan (SBP) coverage. The member's former spouse submitted to the Defense Finance and Accounting Service (DFAS) a timely deemed election for SBP coverage. DFAS subsequently established SBP coverage for the member's former spouse. On January 18, 1997, the member married the claimant. On January 2, 2002, the member designated the claimant as his arrears of pay (AOP) beneficiary to receive any retired pay due upon his death.

On April 26, 2003, the member's former spouse remarried. By letter dated April 30, 2003, the member notified the DFAS of his former spouse's marriage, which occurred prior to her 55th birthday. The member requested DFAS's assistance in terminating his former spouse's SBP coverage. On July 14, 2003, DFAS advised the member that his request to terminate his former spouse's SBP coverage could not be processed because DFAS was missing a copy of the former spouse's death certificate. On August 29, 2003, the member responded to DFAS stating that his former spouse had not passed away, but had remarried before age 55. He again requested that his SBP premium payments for former spouse coverage cease based on that remarriage. He also requested a refund of former spouse SBP premiums paid retroactive to her marriage on April 26, 2003.

On February 26, 2016, DFAS notified the member that the National Defense Authorization Act (NDAA) for Fiscal Year 2016, Public Law No. 114-92, § 641, amended the SBP statute to provide a member who made an election to provide SBP coverage for a former spouse the ability to cover a subsequent spouse if the former spouse dies. DFAS provided the member information on how to make such an election to cover his spouse if his former spouse was deceased.

On May 16, 2020, the member passed away. On July 11, 2021, the claimant filed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the spouse of the member. On July 20, 2021, DFAS denied the claim on the basis that the member's former spouse requested a timely deemed election and was entitled to the SBP annuity. On July 26, 2021, the claimant appealed DFAS's denial of her claim. The claimant stated that the member's former spouse remarried multiple times since their divorce in 2003. She stated that the member contacted DFAS in 2003 to request that former spouse SBP coverage cease and that the claimant be covered as his spouse SBP beneficiary.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the SBP annuity claim. She explained that once the member's former spouse deemed the SBP election, it became irrevocable under 10 U.S.C. § 1448(b)(3)(C), unless revoked in accordance with 10 U.S.C. § 1450(f). She further explained that section 1450(f) requires that once former spouse SBP coverage is established pursuant to a divorce decree or a written agreement entered into due to a divorce, the member must furnish DFAS with a certified copy of a court order that modified the previous order requiring former spouse coverage. The adjudicator found no indication that the member provided DFAS with a copy of a court order allowing him to terminate former spouse coverage. Therefore, the former spouse remained the member's SBP beneficiary even though she remarried prior to reaching age 55.

In her request for reconsideration dated April 4, 2022, the claimant states that when the member contacted DFAS about his former spouse's remarriage, he was never advised to seek a modified court order that would enable him to terminate the former spouse coverage. Instead, DFAS contacted him in 2016 about the amendment to the SBP law to allow a member to cover a subsequent spouse upon the death of a former spouse. She states that if the member had been informed that a court order was required to terminate the former spouse coverage, he would have obtained one. She states that the member's former spouse has been married three times since their divorce. She recognizes that the member and his former spouse were married while they

were young and he was in the military. However, she states that after her marriage to the member, he was diagnosed with Parkinson Disease in 2010. She had to sell her business to stay home and care for him. She states that they believed that they would grow old together, and he was an outstanding soldier and wonderful husband. She states that because of COVID-19, she was not able to be by his side in the hospital when he died. Her husband wanted her to be covered as his SBP beneficiary and tried multiple times to terminate his former spouse's coverage. She appears to be questioning the appropriateness of a portion of her late husband's monthly retired pay being directly paid to his former spouse since she remarried before she turned 55. She states that she was married to the member for over 22 years until his death and should be entitled to those payments. By letter dated April 7, 2022, the claimant notified DOHA that the member's former spouse passed away on April 6, 2022.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. Regulations that are promulgated pursuant to an express statutory authority have the force and effect of law, and DOHA cannot issue a determination at variance with such regulations. *See* DOHA Claims Case No. 2020-CL-120203.2 (June 21, 2021).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A member may elect coverage for a former spouse. *See* 10 U.S.C. § 1448(b)(3). 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. If the member is required under the terms of a divorce decree to provide SBP coverage for the former spouse and fails or refuses to do so, the former spouse has one year from the date of the divorce to request a deemed election pursuant to 10 U.S.C. § 1450(f)(3). Pursuant to a deemed election, once the former spouse is designated as the former spouse beneficiary under the SBP, a subsequent change can only be made following submission of a modifying court order which permits such a change of election. *See* 10 U.S.C. § 1450(f)(2)(A).

In this case, the member, at retirement in March 1996, elected spouse SBP coverage and this coverage, as the member's spouse beneficiary, ended with his divorce in June 1996. The record reflects that the divorce decree designated his former spouse as the beneficiary of the member's SBP. The former spouse timely submitted her request for a deemed election to DFAS. If the member subsequently acquires a new spouse, a former spouse election prevents an annuity to the new spouse. *See* Department of Defense Financial Management Regulation (DoDFMR) Volume 7B, Chapter 43, paragraph 430503 (September 1999 version).

As explained by the adjudicator in the appeal decision, the effect of the member's former spouse marrying before age 55 does not end her eligibility for the SBP annuity, but merely suspends it until that marriage is terminated by divorce, annulment, or death. *See* 10 U.S.C. § 1450(b). Under the facts in this case, since the member's former spouse timely deemed the election for SBP coverage, DFAS and DOHA properly denied the surviving spouse's claim for the SBP annuity.

Although the former spouse may have now passed away, there is nothing in statute or regulation allowing for the transfer of the SBP annuity from a former spouse annuitant to a member's surviving spouse, if the member predeceases the former spouse. We note that under the NDAA for FY 2016, Congress amended 10 U.S.C. § 1448(b) by adding subsection (7) to allow a member who had made an election to provide former spouse SBP coverage, the ability to cover a subsequent spouse, if the former spouse dies. However, the member must be alive to make such an election as set forth under 10 U.S.C. § 1448(b)(7)(B)(i). In this case, the member predeceased his former spouse, and his former spouse's SBP annuity claim accrued upon his death. While it is unfortunate that the member did not know about pursuing a modifying court order when he was alive, DOHA is bound by statute and regulation in the settlement of claims.

Conclusion

The claimant's request for reconsideration is denied and we affirm the appeal decision dated March 7, 2022. 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