

DATE: August 30, 2022

In Re:)

[REDACTED])

) Claims Case No. 2021-CL-070604.2

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 government is liable under the law for the amount claimed. Payment of a claim may only be made for an expense authorized by statute or regulation. When the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action.

DECISION

The claimant requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-070604, dated April 21, 2022. In that decision, DOHA denied the claimant's claim for a Survivor Benefit Program (SBP) annuity of a deceased retired member of the U.S. Air Force.

Background

The member was born on February 21, 1933. The record reflects that the Air Force instituted spouse SBP coverage for the member when he retired on November 1, 1972. SBP premiums were deducted from the member's monthly retired pay until he reached paid-up status on October 1, 2008. The member passed away on July 21, 2017, in Wisconsin. The member's death certificate listed his marital status as divorced, and noted that he was not part of a domestic partnership recognized by the state of Wisconsin.

On October 30, 2020, the claimant's friend wrote to the Defense Finance and Accounting Service (DFAS) on her behalf. In that letter, the claimant's friend stated that the member and the

claimant lived together as life partners from 1982 until his death in 2017; that the member added the claimant as his 100% beneficiary for the SBP annuity in 2002; and that he continued to pay SBP premiums through 2008. Further, she stated that although a DFAS customer service representative told the claimant by phone that the member did not elect to participate in 1972, the claimant does not believe that to be true since the member told her many times over the years that she was his designated beneficiary. She attached documentation that she asserted to be evidence that the member designated her as his SBP beneficiary on January 23, 2002. On November 12, 2020, DFAS responded to the claimant's friend requesting a General Power of Attorney. DFAS explained that legal documentation was needed to reflect that the claimant authorized her friend to act on her behalf before releasing any information. On November 30, 2020, the claimant responded that she had not granted a General Power of Attorney to anyone. She explained that she could handle her own affairs but just needed help from her friend because of issues with her vision. She stated that she believed that she was the beneficiary of the member's SBP annuity, and referenced the documentation that had previously been submitted on her behalf by her friend. On January 28, 2021, the claimant submitted to DFAS a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's insurable interest beneficiary. On March 3, 2021, DFAS denied her claim for the SBP annuity on the basis that the member did not designate the claimant as his insurable interest beneficiary at the time of his retirement. On March 18, 2021, the claimant appealed DFAS's denial of her claim. She explained that the member believed he had done everything necessary to cover her as his SBP beneficiary. She stated that had he realized that she would not qualify for the benefit, he would have taken other measures to support her in the event of his death.

In the appeal decision, the DOHA attorney examiner explained that at the time of the member's retirement in 1972, he was married and elected spouse SBP coverage, and that election became irrevocable once the member began receiving retired pay. He found no evidence that the claimant was the member's spouse or that she met any statutory qualifications to be an eligible SBP beneficiary. He further advised the claimant that the record reflected the member designated her as his arrears of pay (AOP) beneficiary on January 23, 2002. Therefore, if the member overpaid SBP premiums for coverage when he did not have an eligible SBP beneficiary, that would be reimbursed to the member's AOP beneficiary. He explained that a claim for AOP is a separate claim from SBP.

In her request for reconsideration, the claimant requests that the Department of Defense perform a more thorough investigation into her claim and the paperwork on file with DFAS. She states that when she spoke to a DFAS Customer Service representative, she was told at first that there was no record of the member having paid SBP premiums, but then later in the conversation, the representative told her that he had paid into the program but did not have an eligible SBP beneficiary. She states that she and the member were living as life partners for 35 years. She met him in 1982 and they moved in together to be near his family in Minnesota. She states that they moved to Wisconsin to her father's home which she had inherited. Later, they moved back to Minnesota to be near his family, but, after some time, she resumed living in the home she had inherited in Wisconsin, when the member had to be placed in a nursing home, for the last three months of his life, before he passed away in July 2017. She submits testimonials from people who knew them as a couple, and who attest to the fact that she and the member were life partners in a domestic relationship. She states that if this documentation is not enough to

establish her status for purposes of receiving the SBP annuity, she requests more time to obtain the needed information. She also encloses a copy of her recent bank statement that still includes the member's name. She states that the member made many phone calls to make sure she was his designated SBP beneficiary, and he took notes of those calls. She states that they discussed marriage, just for the purpose of covering her as his SBP beneficiary, but the member was told that it was not necessary because she was his life partner. She states that the member and his ex-wife were divorced shortly before he retired from the Air Force. She states that the member was told at retirement that it was not possible to stop paying into the SBP even though he was divorced and that spouse coverage would remain in effect. She attaches a letter from the Air Force Accounting and Finance Center (AFAFC) dated November 15, 1972, to the member attaching a new SBP program fact sheet applicable to newly retired personnel. AFAFC explained that the law required that the Air Force establish maximum spouse coverage at his retirement unless he elected otherwise. The claimant attaches the death certificate of the person she states was the member's ex-wife, who died on April 2, 2001. She states that after the member's ex-wife passed away, he called DFAS and took steps to add the claimant as his SBP beneficiary. She attaches his Retiree Account Statements (RASs) for the period December 7, 2000, through February 19, 2002. She notes that the RAS for February 19, 2002, reflects the change in beneficiary for AOP from the member's daughter to her. That RAS lists the claimant as the member's 100% beneficiary for AOP and their relationship is listed as "Other." She states that it took her some time to claim the SBP annuity because she was having trouble with her eyesight when the member died and is legally blind. She states that her friend then helped her to fill out the claims for both the SBP and AOP. She states that it was the member's intention that she receive the SBP and she needs the financial support.

Discussion

The fundamental rule in adjudicating a claim is that payment may be made only for an expense authorized by statute or regulation. Moreover, it is a rule of statutory construction that when the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2021-CL-110801.2 (March 14, 2022). 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. *See* DOHA Claims Case No. 2016-CL-092101.3 (November 11, 2017).

The SBP was enacted by Congress in 1972 to provide benefits to survivors of deceased retired members. *See* Public Law 92-425, 86 Stat. 706, September 21, 1972, which is codified, as amended, at 10 U.S.C. §§ 1447-1455. 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. Once a member has made an election to participate in SBP, participation is irrevocable and cannot be waived by the member.

At the time of the member's retirement in this case, November 1, 1972, SBP was new law, and the pertinent version of the law set forth under 10 U.S.C. § 1448, applicable to the member stated the following:

§ 1448. Application of the plan

- (a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he was eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. However, a person who is not married when he becomes entitled to retired or retainer pay but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child. Such an election may not be revoked. His election is effective as of the first day of the month after his election is received by the Secretary concerned.

- (b) A person who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural born person with insurable interest in that person.

Therefore, only a member who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person. A member who is married cannot legally elect an insurable interest. *See* Comptroller General Decision B-190833, Mar. 9, 1978.

In this case, although the claimant maintains that the member was divorced prior to his retirement, the record shows that the Air Force established spouse only SBP coverage for the member based on their records reflecting a prior marriage, and then sent him a letter dated November 15, 1972, explaining that if he wanted to make changes, he should fill out a DD Form 1882 specifying his desires under the SBP program. Even if the member was divorced prior to his retirement, and therefore, was unmarried and had no dependent children, he did not elect to provide the claimant with an insurable interest annuity when he became eligible for retired pay. In fact, the claimant acknowledges that she did not meet the member until 1982, ten years later. In any event, since the record reflects that the member was participating in SBP with spouse only coverage at retirement, when he then divorced that spouse after retirement, and thereby no longer had an eligible spouse beneficiary, he still was unable to cover the claimant as an insurable interest beneficiary since he was a participant in SBP with spouse coverage. That is because an election to participate in SBP generally continues even where there is no currently eligible beneficiary. *See* 53 Com. Gen. 470, 474 (1974) (The Comptroller General, in examining the legislative history of the SBP, determined that once a member becomes entitled to retired pay, the member is bound by his SBP election made prior thereto, unless he falls within specific exceptions provided in the law providing for changes when a member acquires a spouse or dependent child after retirement). If the member and the claimant had married, spouse SBP

coverage would have attached under 10 U.S.C. § 1448(a)(6), since spouse SBP coverage was in effect but for the fact that the member had no eligible spouse beneficiary. *See* DOHA Claims Case No. 2020-CL-052603.2 (September 21, 2021); and DOHA Claims Case NO. 2016-CL-111002.2 (October 31, 2017).

The claimant asserts recognition as the member's life partner for over 35 years in order to be granted the SBP annuity. However, there is no recognition under the SBP for life partners or domestic partnerships. We appreciate the fact that the claimant and the member were together for so many years in a loving relationship that has been attested to by friends. We are bound by the statute and regulation in the allowance of the claim. If claimant is now contending that she and the member were married under the common law of Minnesota or Wisconsin, we note that common law marriages in both of those states have been abolished for quite some time.

As set forth above, DOHA has no authority under the SBP law to allow the annuity 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 statutory authority for the correction or revocation of an election for SBP). The AFBCMR's authority under these two statutes is discretionary, and is outside DOHA's authority. Information on petitioning the AFBCMR is found on the Air Force's Personnel Center's website.

As for the member's AOP payable upon his death, DFAS has advised DOHA that the claimant is the member's designated AOP beneficiary, and was paid \$1,300.60 in AOP on November 2, 2020. As noted above, the member has continuously paid spouse SBP premiums from November 1, 1972, until October 1, 2008. If during that time the member had no eligible spouse beneficiary, then those costs should be refunded to the claimant as AOP under 10 U.S.C. § 2771. The claimant should contact DFAS concerning this matter.

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated April 21, 2022. In accordance with Department of Defense Instruction 1340.21 ¶ E7.15, 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