

DATE: August 31, 2022

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-041901.2

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, 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-041901, dated June 1, 2022.

Background

On March 28, 1968, the claimant and the member were married. On January 20, 1993, in preparation for his retirement, the member completed his retirement application, DA Form 4240, electing not to participate in the Survivor Benefit Plan (SBP). The claimant, as the member's spouse, had to concur with the member's declination to participate in the SBP, and signed the DA Form 4240 on January 20, 1993, before a witness, the Retirement Services Officer. On May 1, 1993, the member retired from the Army, and began receiving retired pay.

The member passed away on October 4, 2021. The claimant submitted a claim for the SBP annuity as the member's spouse to the Defense Finance and Accounting Service (DFAS). DFAS denied her claim for the SBP annuity on the basis that the member did not elect to participate in SBP.

In her appeal of DFAS's denial of her claim, the claimant stated that she and the member did not understand the DA Form 4240 and did not "intelligently and knowingly" waive the right for her to receive the SBP coverage. The claimant explained that she and the member had discussed her receiving the survivor benefit pension and "any discussions, counseling, or explanations" related to declining SBP and obtaining her waiver occurred outside her presence. She stated that she was led into a room and told to sign a space on a form, without any explanation or counseling of the consequences of her action. She stated that her signature was guided by the staff present at the time and her due process rights were violated. She noted that the processes now in place to counsel family members on SBP and reflected how little support was provided to family members 30 years ago. She was a devoted military wife for the member's 28-year career, and cared for him in the final four years of their 53-year marriage as his health failed due to a service connected disability.

In the DOHA appeal decision, the attorney examiner found the member had declined SBP coverage, and that the claimant concurred in writing, and thus there was no statutory basis to award spouse SBP coverage. He explained that DOHA was bound by the applicable statute and regulation in the allowance of a claim. He further advised the claimant that although DOHA did not have the authority to award the SBP annuity under applicable statute and regulation, the claimant may have other possible avenues of relief that existed with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In her reconsideration request, the claimant incorporates the arguments from her original appeal. The claimant states that DFAS and DOHA have ignored the totality of the circumstances in her case. She was given no instructions at the time she signed the form in January 1993. She wishes to exhaust her administrative remedies so that she can proceed to federal court. She further states that she has petitioned the ABCMR for relief, and plans to forward any documentation received from the ABCMR to DOHA.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2020-CL-081719.2 (January 15, 2021).

The SBP, set out in 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. A married member is eligible to participate in SBP when he becomes eligible for retired pay. However, a married member may elect not to participate in the SBP, with the concurrence of his spouse. *See* 10 U.S.C. § 1448(a)(2)(A) and (3)(A)(i). An election to forgo participation in SBP under 10 U.S.C. § 1448(a)(2)(A) is irrevocable if it is not revoked before the date the member first becomes entitled to retired pay. *See* 10 U.S.C. § 1448(a)(4)(A).

In this case, the member elected not to participate in SBP upon retirement and the claimant, as his spouse, concurred with that election. As required by law, the spousal written concurrence was obtained when a married member elects not to participate in SBP. *See* DOHA Claims Case No. 2021-CL-030103.2 (July 25, 2022).

DOHA is unable to allow this claim for the SBP annuity because we are bound by statute and regulation, and the written record as submitted to us by the agency and the claimant. As explained by the DOHA attorney examiner in the appeal decision, the appropriate authority to seek relief if an error existed at the time the member made his SBP election is the ABCMR. Under 10 U.S.C. § 1454, the Secretary concerned, in this case the Army, may correct or revoke any election when the Secretary considers it necessary to correct an administrative error, and under 10 U.S.C. § 1552, the Secretary of the Army, acting through the ABCMR, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. The ABCMR's authority in this matter is broader than DOHA's authority to settle a claim, and is beyond DOHA's purview.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated June 1, 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Daniel F. Crowley

Daniel F. Crowley
Member, Claims Appeals Board