

DATE: August 30, 2022

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2021-CL-021904.2  
)  
)

**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, the surviving spouse of a deceased member of the U.S. Navy, on behalf of her daughter, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-021904, dated March 11, 2022. In that decision, DOHA sustained the Defense Finance and Accounting Service's denial of the claim for the child Survivor Benefit Plan (SBP) annuity of the deceased member.

**Background**

On June 8, 2010, the claimant's daughter was born. On July 21, 2011, the member's son was born. On May 8, 2014, the claimant and the member were married. On December 3, 2015, the member died in the line of duty on active duty. The DD Form 1300, *Report of Casualty*, prepared on February 23, 2016, listed under the Interested Persons/Remarks section the member's wife (the claimant), his son, and his father and mother. Following the member's death, the Secretary of the Navy, in consultation with the claimant, the member's surviving

spouse, determined that it was appropriate to provide an SBP annuity to the dependent child(ren) of the member. The claimant, as the member's surviving spouse, was in receipt of Dependency and Indemnity Compensation (DIC) which would have offset her spouse SBP annuity in its entirety.

On April 26, 2016, the Defense Finance and Accounting Service (DFAS) received from the mother of the member's son, a DD Form 2656-7, *Verification of Survivor Annuity*, claiming the SBP annuity. That form was accompanied by a completed DD Form 2790, *Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces*. The DD Form 2790's purpose is to identify the custodian of an unmarried minor child(ren), incapacitated child or child at least 18 but under 22 who is attending school and is a child of a deceased military member. DFAS requires this information to pay or release SBP funds and arrears of retired pay for the benefit of the children. On May 19, 2016, DFAS established a child SBP annuity for the member's son effective December 4, 2015.

DFAS received a DD Form 2656-7 completed by the claimant on behalf of her daughter dated September 27, 2018, claiming the child SBP annuity of the deceased member. That form was accompanied by a DD Form 2790. On the DD Form 2790, the claimant certified that her daughter was the member's stepdaughter, that she was her "mother/guardian," and that her daughter was in her custody. The claimant further certified to the following:

I further certify that no legal fiduciary appointment is contemplated on behalf of the child(ren) listed above and that all funds received will be used for their care and benefit. Also, I will immediately notify Defense Finance and Accounting Service, US Military Annuitant Pay, 8899 E. 56<sup>th</sup> Street, Indianapolis, IN 46249-1300, if the status of (any of) the child(ren) is terminated for any reason whatsoever.

The claimant also sent DFAS a corrected DD Form 1300, prepared on September 13, 2018, listing the claimant's daughter as the member's stepdaughter under the Interested Persons/Remarks section.

On January 28, 2019, DFAS established an SBP annuity for the claimant's daughter proportionally reducing the annuity share of the member's son, retroactive to January 1, 2016. DFAS also notified the mother of the member's son that a debt had been established against him for the overpayment of his share of the SBP annuity since he had previously been receiving 100% of the available annuity payments. In 2019 DFAS reviewed its determination after receiving inquiries from the mother of the member's son and her congressman. The Navy provided DFAS with a notarized statement from the biological father of the claimant's daughter. In that statement, the father wrote that in August 2013 he was contacted by the state of California advising him that his daughter had been placed in foster care for abuse and neglect, and that he needed to come get her. He stated that his daughter had been in his sole custody in Virginia since July 2014 when he removed her from foster care in California. On December 1, 2019, DFAS suspended the claimant's daughter's SBP coverage.

On March 16, 2020, DFAS requested additional information from the claimant regarding where her daughter resided, who had custody of her and who claimed her for income tax purposes. Specifically, DFAS asked the following:

Did the child reside with [the member] on a full-time basis from May 18, 2014 until December 3, 2015? If so, please provide supporting documentation such as school enrollment records, documentation regarding ongoing medical treatment from the child's physician in California, child care receipts, or other relevant documents.

Who had care, custody, and control of the child from May 18, 2014 until December 3, 2015? Please provide a copy of any applicable divorce, custody, or other relevant court orders.

Who currently has care, custody, and control of the child and where does the child reside? Please provide supporting documentation.

Did you or [the member] claim the child as a dependent for income tax purposes in 2014 or 2015? If so, please provide a copy of the applicable tax documents.

After receiving no response, DFAS sent the claimant another letter on April 29, 2020, asking the same questions, but again received no response. On June 8, 2020, DFAS sent the claimant a letter denying the child SBP annuity claim for her daughter. DFAS explained that in order for a stepchild to qualify as a dependent child of a member for purposes of receiving an SBP annuity, the child must have lived with the member in a regular parent-child relationship. DFAS stated that there was no clear and convincing evidence on the written record reflecting the existence of a parent-child relationship in the case. On June 18, 2020, DFAS established a debt for the erroneous SBP annuity payments sent to the claimant on behalf of her daughter. On July 5, 2020, the claimant appealed the claim asserting that because her daughter was the member's stepdaughter, she is considered a dependent child, and nothing in the regulations states that a stepchild must live with a member in a parent-child relationship on a full-time basis.

On August 1, 2020, DFAS reinstated the full SBP child annuity for the member's son. DFAS also issued the member's son a credit for the additional annuity payments withheld from January 1, 2016, through June 30, 2020.

In response to the claimant's appeal, DFAS issued an administrative report dated November 13, 2020, sustaining the denial of the SBP claim. DFAS found no evidence that the claimant's daughter ever resided in the member's household or that the member provided financial support to her. DFAS further found no evidence that the claimant had legal custody of her daughter when the member was alive. Therefore, DFAS concluded that the claimant's daughter did not qualify as a dependent child for purposes of receiving the SBP annuity because she did not live with the member in a regular parent-child relationship as required under 10 U.S.C. § 1447(11). DFAS also noted as an ancillary matter, that the claimant and her daughter are not the only parties with a financial interest in the claim. DFAS stated that when there are two qualified child SBP beneficiaries, the annuity is paid in equal shares on behalf of each child.

DFAS concluded that the member's son should receive the full SBP annuity. DFAS noted that there is no procedural mechanism within the Department of Defense Instruction 1340.21 (May 12, 2004) in which a party, whose right to an annuity may be adversely impacted due to another claimant's claim, is able to intervene within the claims adjudication process.

On December 2, 2020, the claimant submitted a rebuttal to DFAS's administrative report. In her rebuttal, she stated that her daughter did have a parent-child relationship with the member, that she lived in the same home, and the member provided financial support to her. The claimant attached her most current custody agreement, which she maintained shows that she has joint custody and shared parenting time, and the custody agreement from the divorce, which she stated reflects that she had joint legal custody. She stated that these documents reflect that she had legal custody of her daughter at the time the member passed away. She also attached a list of financial transactions from her bank for 2015 and a lease dated May 25, 2012. She stated that the member's son was born out of wedlock, making him a natural born child, but he did not live with the member.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim. He found that although the Custody Order-Juvenile-Final Judgment (CO-J Final Judgment) dated June 2, 2015, incorporated a family court services report recommending legal custody of the claimant's daughter be shared by the claimant and her ex-husband, physical custody would primarily reside with her ex-husband. He found that the CO-J Final Judgment superseded the 2011 parenting plan.

In her reconsideration request, the claimant focuses on the language contained under 10 U.S.C. § 1447(11)(a)(iii):

(iii) is the child of a person to whom the Plan applies, including (I) an adopted child, and (II) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

The claimant states that the DOHA attorney examiner erred in interpreting the language to mean that a dependent child must live with the member "in a regular parent-child relationship." She asserts that the attorney examiner also erred by adding the language "full-time" to living with the member as a requirement for qualifying as his dependent child for SBP purposes. She states that the beginning of 10 U.S.C. § 1447(11)(a)(iii) specifically states that a dependent child is the child of a person to whom the Plan applies. She asserts that at its core the statute's key words are those that come before "including." She cites to a Supreme Court decision for support, maintaining that the term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle. *See Fed'l Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). She asserts that in identifying a stepchild, foster child, or recognized natural child who lived with the member in a parent-child relationship, the statute is simply illustrating examples of the types of parent-child relationships which might qualify the child as an eligible "child of a person to whom the Plan applies." She states this language highlights that both natural and non-natural born children can be eligible SBP beneficiaries, and that it does not require all eligible children to have lived with the member receiving the benefits in a regular parent-child relationship. She attacks the statements made by the member's ex-wife and her ex-

husband. She states that the member's ex-wife stands to gain significantly if she collects the entire amount of the SBP annuity. She also suggests that her ex-husband had motivation to submit his statement after their bitter divorce and custody battle. Therefore, she contends that DFAS and DOHA must recognize and correct this leap to the wrong conclusion by awarding her daughter the child SBP annuity.

## 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 SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 10 U.S.C. § 1448(d)(2)(B), an SBP annuity may be paid to the dependent children of a deceased member who dies in the line of duty on active duty. Specifically, under 10 U.S.C. § 1448(d)(2)(B), in the case of a member who dies on active duty with a surviving spouse, the Secretary concerned, in consultation with the surviving spouse, may pay an SBP annuity pursuant to 10 U.S.C. § 1450(a)(3) to the member's dependent children instead of an SBP annuity for the surviving spouse. Section 1447(11)(A) defines a dependent child as one who:

- (i) is unmarried;
- (ii) is (I) under 18 years of age, . . . , and;
- (iii) is the child of a person to whom the Plan applies, including (I) an adopted child, and (II) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

The language in this case involves subsection (A)(iii)(II). That subsection clearly states that a stepchild, foster child, or recognized natural child must have lived with the member in a regular parent-child relationship. We note that at the time the SBP statute was enacted, the Civil Service Retirement Act (CSRA), 5 U.S.C. § 8341(a), defined "child" in the civilian employees' survivor annuity system similarly, *i.e.*, a stepchild, foster child or recognized natural child had to have lived with the employee in a regular parent-child relationship. In January 1980, after several court rulings concerning the "lived with" requirement for a "recognized natural child" under the CSRA, Congress removed the requirement from the civilian survivor annuity program. *See* Pub. L. No. 96-179, 93 Stat. 1299 (1980). However, Congress left the "lived with" requirement in the CSRA for a stepchild. Specifically, 5 U.S.C. § 8341(a)(4)(A) defines child as an unmarried dependent child under 18 years of age, including:

- (i) an adopted child, and (ii) **a stepchild but only if the stepchild lived with the employee or member in a regular parent-child relationship**, and (iii) a recognized natural child, and (iv) a child who lived with and for whom a petition of adoption was filed by an employee or member, and who is adopted by the surviving spouse of the employee or member after his death. (emphasis added).

DOHA does agree that the language of the SBP statute under 10 U.S.C. § 1447 does not require the child in issue to reside full-time in the member's residence. We understand that sometimes that is just not possible, given a service member's duty obligations and deployments which often prevent a member from living with the member's family. As the Comptroller General decided before, we view the language in the statute as contemplating that the child live in the household of the member as part of the family unit, and the parent-child relationship requirement is then met if the child lives in the household, even when the member is away from the household as a result of a military assignment. *See* 70 Compt. Gen. 25 (1990). However, there is no clear evidence in this case that the child in question lived with the member in a parent-child relationship. The claimant divorced her first spouse, the father of her daughter, in June 2011, in the state of Florida. The divorce decree stated that at that time, the claimant was a member of the Navy stationed in Florida, but awaiting orders to California. Her ex-husband resided in Virginia. The divorce decree incorporated a parenting plan that gave shared parental responsibility between the parties. On May 8, 2014, the claimant and the member were married. The only evidence in the file that the claimant's daughter ever resided with the member is a lease agreement commencing June 1, 2012, in California. While the member's name is listed underneath the claimant's as a resident responsible for the lease, and the claimant's daughter is listed as an occupant, the lease predates the claimant's and the member's marriage. The record evidence reflects that the claimant's daughter lived in a separate household, and never with the member. *Cf.* B-258764, March 17, 1995 (the Comptroller General held that an illegitimate child, who was recognized by the member as his natural child and lived with the member in a regular parent-child relationship for a period of time during the member's life, was entitled to the child SBP annuity). In this case, DFAS properly determined that the claimant's daughter was not an eligible child SBP beneficiary, and the member's son was the only child eligible to receive the SBP annuity.

## Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated March 11, 2022. In accordance with Department of Defense Instruction 1340.21 ¶ E7.11, 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: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

SIGNED: Daniel F. Crowley

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Daniel F. Crowley  
Member, Claims Appeals Board