

DATE: September 12, 2022

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2022-CL-040802.2
)
)

**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.

DECISION

The claimant, a former spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-040802, dated May 23, 2022.

Background

The member and the claimant divorced on October 21, 2003. Neither the judgment on dissolution of the marriage dated October 21, 2003, nor the stipulated judgment referenced the Survivor Benefit Plan (SBP). On January 14, 2008, the member, a reservist, completed his 20 years of service, and would have been eligible to participate in SBP at that time. However, there is no record that the member elected former spouse SBP in 2008. The member submitted his request for retired pay on December 30, 2017, his 60th birthday. As part of the process to receive retired pay, he completed a DD Form 2656, *Data for Payment of Retired Personnel*, dated December 29, 2017. In the SBP beneficiary portion on the DD Form 2656, he elected spouse only SBP coverage for his wife and listed June 26, 2003, as their marriage date. The member passed away on March 22, 2021, and his death certificate lists his marital status as married and identifies his wife as the same person he listed on his DD Form 2656. On June 28, 2021, the claimant submitted a DD Form 2656-7, *Verification of Survivor Annuity*, to the Defense Finance and Accounting Service (DFAS) claiming the SBP annuity as the member's former spouse.

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 make a request for a deemed election within one year of the divorce.

On July 29, 2021, the claimant appealed DFAS's denial of her claim to DOHA. In her appeal she focused her argument on the legitimacy of the member's 2003 marriage. She stated that the member remarried prior to his divorce from her. She also stated that she was unaware of the process to request former spouse SBP coverage. On April 8, 2022, DFAS issued an administrative report responding to the claimant's appeal. In that report, DFAS stated that it properly followed applicable laws, regulations and instructions. In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim. The adjudicator explained that at the time the member became eligible to participate in SBP, the claimant and the member were divorced, and the member did not elect former spouse SBP coverage for the claimant. Therefore, under applicable statute and regulation, there was no basis to award the claimant the SBP annuity.

In her request for reconsideration, the claimant continues to contest the legitimacy of the member's 2003 marriage and requests that DOHA investigate whether the member's 2003 marriage was legal. She states that she sent documentation to both DFAS and DOHA reflecting that the member remarried prior to their divorce. Therefore, she states that the woman the member married, prior to her divorce from the member, was never legally the spouse of the member and should not receive the SBP annuity as the member's surviving spouse.

Discussion

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* Department of Defense Instruction 1340.21 (May 12, 2004) ¶ E5.7. Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2019-CL-102102.2 (January 13, 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. 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, *i.e.*, when they become eligible for retired pay. *See* 10 U.S.C. § 1448(a)(1) and (a)(2). A reserve-component member is an eligible participant when the member becomes eligible for reserve-component retired pay but for the fact that the member is under 60 years of age. *See* 10 U.S.C. § 1448(a)(1)(B) and (a)(2)(B).

A member who has a former spouse upon becoming eligible to participate in the SBP may elect to provide an annuity to that former spouse. *See* 10 U.S.C. § 1448(b)(2)(A). The requirements for making such an election are found under 10 U.S.C. § 1448(b)(5). These

include a written statement signed by the member and the former spouse setting forth whether the election is being made pursuant to the requirements of a court order, or pursuant to the conditions of a voluntary agreement as part of or incident to a divorce proceeding. In the case in which a member is required to provide a reserve-component annuity for a former spouse, the member must also make a designation under 10 U.S.C. § 1448(e). Under that subsection, the member shall designate whether, in the event he dies before becoming 60 years of age, the annuity provided shall become effective on either: (1) the date of his death; or (2) the 60th anniversary of his birth. In addition, if a member is required under the terms of a divorce decree to provide SBP coverage to the former spouse, 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 claimant was not awarded former spouse coverage in the divorce decree or any other associated court documents in the record. Therefore, she had no statutory right to request a deemed election for former spouse SBP coverage. *See* DOHA Claims Case No. 2019-CL-102102.2, *supra*. The member did not voluntarily elect former spouse SBP coverage for the claimant when he received notice of his eligibility for retired pay in 2008, nor when he applied for retired pay in 2017. *See* DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018). DOHA is bound by statute and regulation, and therefore, is unable to allow the claim for the SBP annuity. *See* DOHA Claims Case No. 2020-CL-031203.2 (September 9, 2020).

As for the claimant's continued claims concerning the validity of the member's marriage in June 2003, we see no conflicting claim in this case between the claimant and the woman the member purportedly married before the divorce. That is because the issue of legitimacy of the member's 2003 marriage is not relevant to the determination of whether the claimant's former spouse SBP claim is authorized by statute or regulation. Further, even if the member's marriage in June 2003 was a nullity based on the fact that he was still legally married to the claimant, the claimant lost eligibility for the spouse SBP annuity upon her divorce.

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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board