

DATE: September 15, 2022

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-120211.2

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, a former spouse of a deceased retired 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. 2020-CL-120211, dated March 22, 2022.

Background

The claimant and the member were married on May 29, 1993, in the state of Kentucky. On July 1, 2006, the member retired from the Army. At that time, he elected Survivor Benefit Plan (SBP) coverage for the claimant and their two sons. The record reflects that the member petitioned for divorce in the state of Kansas. Pursuant to the divorce proceedings, on July 3, 2018, the claimant signed a property settlement agreement, and her signature was witnessed and notarized. The agreement was silent with regard to SBP benefits. However, the member agreed to pay the claimant alimony in the amount of \$1,600.00 per month. On August 6, 2018, the claimant and the member divorced. The divorce decree incorporated the property settlement agreement but did not award SBP benefits to the claimant.

The member passed away on September 10, 2018, in Kansas. On his death certificate, his marital status is listed as divorced. The claimant claimed the SBP annuity as the member's former spouse. On February 6, 2019, the Defense Finance and Accounting Service (DFAS) denied the claim on the basis that the member did not make a request to change his election to former spouse within one year of the divorce. On March 5, 2019, the claimant appealed DFAS's

denial of her claim. In her appeal, she stated that it was the member's intent to elect former spouse SBP coverage for her but, because he died 35 days after their divorce, he was not able to do so.

In response to the claimant's appeal, DFAS sent the claimant an administrative report, dated September 24, 2020, stating that after considering the claimant's arguments, DFAS concluded that it properly followed applicable laws, regulations, and instructions. The claimant sent a rebuttal to DFAS's administrative report on October 19, 2020. In her rebuttal, she stated that she was an Italian citizen and does not understand U.S. laws and regulations. She stated that the Department of Veterans' Affairs (VA) denied her claim for Dependency and Indemnity Compensation (DIC) because she was not the member's surviving spouse. She asserted that she and the member were still considered married under Italian law.

In the DOHA appeal decision, the adjudicator sustained DFAS's denial of the claim. The adjudicator explained that prior to the member's death, he did not elect former spouse coverage for the claimant. The adjudicator also explained that the claimant would have had the right to request a deemed election, within one year of the divorce so that she was eligible for the SBP annuity, if the divorce decree awarded her former spouse SBP coverage. The adjudicator noted that the member did elect spouse and child SBP coverage at his retirement. The adjudicator explained the portion of the SBP statute concerning child SBP annuities, including the definition of "dependent child" under 10 U.S.C. § 1447(11). The adjudicator stated that if the claimant wished to file a claim for a child SBP annuity, she should contact DFAS. Finally, the adjudicator stated that although DOHA had no authority to award the claimant the SBP annuity under statute and regulation, she may find relief outside the purview of DOHA with the Army Board for Correction of Military Records (ABCMR).

In the claimant's reconsideration request, she states that, after further research, she found the divorce in Kansas has no validity under Italian law. Therefore, she is still considered the member's surviving spouse and should be entitled to the spouse SBP annuity. She cites to Italian law and The Hague and Brussels Convention on Jurisdiction and Enforcement of Judgments. She attaches a July 2019 Italian registry of matrimony reflecting that she is still married to the member. She further states that the member was paying for her SBP coverage up until his death. She also points out that her son was 20 years old and a full-time student at the time of his father's death. Therefore, she states that her son is missing two years of benefits that DFAS failed to pay. She attaches a written statement signed by both of her sons reflecting their outrage over DFAS's denial of her claim for the SBP annuity of their father. The claimant also states that her claim for DIC has yet to be finalized by the VA and has been remanded twice. She attaches the most recent remand decision by the U.S. Court of Appeals for Veterans Claims dated August 24, 2021. That decision reflects that the Board of Veterans' Appeals issued a decision on July 23, 2020, denying the claimant recognition as the surviving spouse of the member for entitlement to DIC, nonservice-connected death pension benefits and other accrued benefits. The Court of Appeals for Veterans Claims found that the Board of Veterans' Appeals erred in failing to consider the claimant's arguments that her divorce was not valid especially without a divorce decree in the record. The Court of Appeals for Veterans Claims remanded her case to Board of Veterans' Appeals to address all her reasonably raised arguments.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions. Under Department of Defense Instruction 1340.21 (May 12, 2004), the claimant has the burden of proving the existence of a valid claim against the government. 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.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for a former spouse, the member must notify the Secretary concerned in writing of the divorce and the member's intention to provide coverage for the former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. Former spouse coverage must be established within one year from the date of the divorce. *See* 10 U.S.C. § 1448(b)(3)(A). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to the former spouse. If the member fails to do so, 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). Under 10 U.S.C. § 1450(f)(3)(A), the former spouse may request a deemed election for former spouse SBP coverage by providing the Secretary concerned with a written request and a copy of the court order, regular on its face, which requires such an election or incorporates, ratifies or approves the written agreement by the member.

Under 10 U.S.C. § 1447(12), the term "court" has the meaning given that term by 10 U.S.C. § 1408(a). Under that section, a court means:

- (A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;
- (B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;
- (C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and
- (D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

Under 10 U.S.C. § 1447(13), "court order" means a court's final decree of divorce, dissolution, or annulment or court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or of a court ordered, ratified, or approved

property settlement agreement incident to such previously issued decree). An election for former spouse SBP coverage may not be deemed to have been made unless the Secretary concerned receives such a request from the former spouse within one year of the date of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C). The Service Secretaries have delegated their authority under the SBP law to DFAS.

The Secretary of Defense has issued implementing regulations for the SBP law pursuant to 10 U.S.C. § 1455. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 43, contains the regulations concerning SBP elections and election changes. Under ¶ 430504(B)(1), a member with spouse SBP coverage following retirement may, within one year of the date of the divorce decree, change that election to provide an annuity to a former spouse. Paragraph 430504(C) states that deemed elections are applicable in cases where a member enters, incident to a proceeding of divorce, dissolution, or annulment, into a written agreement to elect to provide an SBP annuity to a former spouse, and such agreement has been incorporated in, or ratified or approved by a court order, or has been filed with the court of appropriate jurisdiction in accordance with applicable State law, or in cases where the member is required by a court order to make a former spouse election. The former spouse must submit a copy of the court order, along with the written request for a deemed election, to DFAS within one year of the date of the court order or filing involved. No election may be deemed to have been made which could never have been made by the member. Paragraph 430504(C)(4) states:

4. If a member dies before making an election, a former spouse's request, which is otherwise qualified, must be honored even if the date of the request is after the date of the member's death. However, if the request for a court order was initiated with the court after the member's death, the order will not be honored.

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired on July 1, 2006, until such coverage ended with their divorce on August 6, 2018. Prior to his death, the member did not elect former spouse SBP coverage for the claimant. The property settlement agreement did not mention SBP, and the divorce decree did not award the claimant former spouse SBP coverage. We understand that the member passed away shortly after the divorce. However, without the claimant being awarded former spouse SBP coverage pursuant to a court order, she has no statutory right to request a deemed election. Accordingly, we find that the claimant is not entitled to the SBP annuity as the member's former spouse. *See* DOHA Claims Case No. 2020-CL-020301.2 (April 26, 2021).

The claimant now is challenging the validity of the divorce in Kansas and maintains that she is recognized as the member's surviving spouse under Italian law. The claimant's argument that international and foreign law invalidate the Kansas divorce judgment fails for the following reasons. First, our authority in this matter is limited to a consideration of the liability of the United States for the monetary claim for the SBP annuity of a retired, deceased U.S. military member. Under applicable statute and regulation, the claimant does not meet the definition of the term widow under 10 U.S.C. § 1447(7), because at the time of the member's death, she was not his surviving spouse. *See* 10 U.S.C. § 1450(a)(1). A divorce decree in this case was issued by a court of competent jurisdiction in the United States on August 6, 2018, dissolving the

marriage between the claimant and the member. In the divorce decree, the court stated that it had both jurisdiction and venue, and the power to grant a divorce on the basis that the member was a resident of Kansas. There is no indication that the court's decree was issued without proper legal authority. The state court clearly had jurisdiction over both the parties and the subject matter. We find the divorce decree was regular on its face and valid for establishing that the member was not married to the claimant at the time of his death. Second, The Hague Divorce Convention and the Brussels Convention have primarily been ratified between European countries and the United States has not ratified either of these conventions. In any event, DOHA, like the Comptroller General held before us, looks to the state law to determine the identity of a member's widow. *See* DOHA Claims Case No. 99031607 (April 27, 1999). As previously stated, the record contains a facially valid divorce decree issued by a state court in Kansas. Although the claimant submitted the July 2019 Italian registry of matrimony reflecting that she is still married to the member, it does not account for the divorce that occurred in August 2018. In addition, the member's death certificate issued by the Kansas Department of Health reflects that he was divorced at the time he passed away. Also, the record contains a decree of final settlement of the estate of the member issued by a state court in Kansas on August 11, 2020. That decree reflects that the claimant appeared at the hearing in the matter on July 27, 2020, and was recognized as the member's former spouse for the purposes of gaining the status as a creditor of his estate. The decree also cites to the claimant's and the member's divorce decree dated August 6, 2018, in order to establish her status as the member's former spouse for awarding her accrued alimony from the date of the divorce until the date of the member's death. Therefore, the state of Kansas has conclusively determined that the claimant is not the member's widow.

Although the VA is a separate agency from the Department of Defense, and adjudicates different entitlements upon a member's death under different statutory authority, the DOHA Claims Appeals Board, like the Comptroller General before us, gives weight to a VA determination of a widow's entitlement to VA benefits. However, in this case, as the claimant notes, the VA has not made a final determination on her claim for DIC. Furthermore, the remand decision by the Court of Appeals for Veterans Claims reflects that the VA's initial decision denying her benefits because she was not the member's widow was made in a vacuum, without the Kansas divorce decree or other relevant information that DOHA has in our record.

As explained by the DOHA adjudicator in the appeal decision, the claimant may have other available remedies that rest with the ABCMR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. These remedies are outside of DOHA's authority and any request for a correction of record needs to be pursued with the ABCMR. Finally, if the claimant wishes to pursue a claim for a child SBP annuity for her son, she should contact DFAS.

Conclusion

The claimant's request for reconsideration 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Daniel F. Crowley

Daniel F. Crowley
Member, Claims Appeals Board