

DATE: October 25, 2022

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In Re: )

[REDACTED] )

Claimant )

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Claims Case No. 2021-CL-030920.2 )

**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 United States Department of Defense is liable under the law for the amount claimed. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). Since military pay entitlements, including survivor benefits, are governed by statute, the Defense Office of Hearings and Appeals (DOHA) must apply the appropriate statutes without regard to equitable considerations.

**DECISION**

The claimant, the widow of a retired member of the U.S. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-030920, dated April 13, 2022. In that decision, DOHA denied the claim for a Survivor Benefit Plan (SBP) annuity because the member did not elect SBP coverage for his spouse within one year of their marriage.

**Background**

The member divorced his first spouse on September 19, 1988. On September 1, 2000, the member retired from the Navy. At the time he retired, he was not married, but was erroneously auto-enrolled in SBP with spouse coverage. On November 11, 2000, the member married the claimant. On December 10, 2017, the member passed away.

On May 30, 2018, the claimant submitted to the Defense Finance and Accounting Service (DFAS) a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the surviving spouse of the member. On June 25, 2018, DFAS sent the claimant a letter advising her that they had all the necessary documentation to establish her SBP annuity account.<sup>1</sup> However, on October 28, 2019, DFAS sent the claimant another letter responding to her claim for the member's arrears of pay (AOP). In that letter, DFAS explained that the claimant was only entitled to a refund of AOP on the member's account because SBP premium deductions were erroneously made from his retired pay during the period of September 1, 2000, until his death on December 10, 2017. DFAS also explained that a portion of the AOP claim was subject to the Barring Act, the six-year statute of limitations set forth under 31 U.S.C. § 3702(b). DFAS then detailed the process available to the claimant for requesting waiver of the Barring Act.

On March 4, 2019, the claimant appealed DFAS's denial of her claim for the SBP annuity. In her appeal, the claimant stated that the member paid monthly spouse SBP premiums from September 1, 2000, until his death. She stated that she married the member two months after he retired, and he was not aware of the necessary paperwork that needed to be submitted within one year of their marriage in order for her to be covered as his spouse SBP beneficiary. She maintained that the fact that he continued to pay for spouse SBP coverage and never cancelled it, indicates that he believed she was covered as his spouse beneficiary. In November 2020, DFAS issued an administrative report denying her claim for the SBP annuity based on the fact that the member did not elect spouse SBP coverage for her within one year of their marriage. DFAS also raised the Barring Act and its effect on stale claims, presumably to address the application of the six-year statute of limitations to the AOP resulting from the member's overpayment of spouse SBP premiums when he did not have an eligible spouse beneficiary. On December 30, 2020, the claimant responded to DFAS's administrative report. She stated that she never claimed AOP back to 2000. She stated that she did send an inquiry related to the letter she received from DFAS on June 25, 2018, informing her that her SBP annuity would begin and that she would be paid \$9,212.51 for the months of December 2017 through June 2018. She stated that she did get the payment in December 2018. She stated that she knew the member had been married before, but had no idea when he was married, who he married, and when he was divorced. She explained the financial hardship she had endured since the member's death and requested reinstatement of the SBP annuity.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the SBP claim. He concluded that under the SBP law, the member was required to file the SBP election with DFAS within one year of the date of his marriage to the claimant. He explained that while DFAS did send the claimant a letter advising her that they had everything to establish her SBP annuity account, that information was incorrect. He then advised the claimant to contact DFAS concerning any AOP due as a result of the member erroneously paying for spouse SBP coverage from his monthly retired pay. He also directed her to another possible avenue of relief under 10 U.S.C. § 1552, that rests with the Board for Correction of Naval Records (BCNR).

In her request for reconsideration, the claimant, through her attorney, asserts that since the member was auto-enrolled as a participant in SBP with spouse only coverage at retirement, he had no

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<sup>1</sup>The record reflects that DFAS initially started the claimant's SBP annuity payments. However, upon further review, DFAS determined that she was not eligible for the annuity, stopped her payments and established a debt for those payments.

reason to request spouse SBP coverage for the claimant within a year of their marriage. She states that DOHA's reasoning defies logic, common sense and all notions of equity. She states that both DFAS and DOHA acknowledge that the member's auto-enrollment in SBP was due to an administrative error. She states that the member's retirement and auto-enrollment in SBP came two months prior to their marriage. Therefore, the member believed he had satisfied all requirements for covering the claimant as his spouse SBP beneficiary, as evidenced by the fact that he paid SBP premiums for her coverage. She asserts that the member detrimentally relied on the assurances given to him by DFAS when they accepted his monthly spouse SBP premium payments. She maintains that because the government's error in auto-enrolling him in SBP at retirement prevented him from making an informed election and submitting it in compliance with 10 U.S.C. § 1448, equity requires that she be granted the SBP annuity. In the alternative, she states that if she is deemed ineligible for the SBP annuity, the total cost of all SBP premiums paid by the member from his retired pay should be refunded to her as AOP. However, she states that DFAS barred a portion of the refund of the SBP premiums. She states that at no time did the member know he was erroneously paying SBP premiums for coverage that the claimant did not have. Had he been aware that he had not properly elected spouse SBP coverage, he would not have continued to pay for it. She also argues that the claim for the member's AOP accrued on either December 10, 2017, when the member passed away, or on October 28, 2019, when DFAS notified the claimant that they had conducted an audit and determined a refund of SBP premiums were due as the member's AOP. Therefore, she states that DFAS erred in determining that the AOP claim accrued on September 1, 2000, when the member retired. Thus, she asserts that no portion of the refund should be time-barred from payment under 31 U.S.C. § 3702(b), and barring any amount would unjustly enrich DFAS for an error they made. Finally, if she is found ineligible for the SBP annuity, she requests waiver of her debt in the amount of \$25,746.38 for the overpayment of SBP annuity payments that DFAS now deems to be erroneous.

### **Discussion**

In 1996, Congress transferred the authority once held by the Comptroller General of the United States (General Accounting Office, now the Government Accountability Office or (GAO)), to settle claims for military pay and allowances, including retired pay and survivor benefits under 31 U.S.C. § 3702(a)(1)(A), to the Director of the Office of Management and Budget (OMB). *See* Section 211 of Public Law No. 104-53, 109 Stat. 514, 535, November 19, 1995. The Director of OMB delegated his authority to the Secretary of Defense effective June 30, 1996. The authority of the Secretary of Defense in this regard was later codified in Section 202(n) of Public Law No. 104-316, 110 Stat. 3826, October 9, 1996. DOHA exercises the authority transferred and delegated to the Secretary of Defense. Under 31 U.S.C. § 3702(a)(1), DOHA's authority to decide cases such as this is derived from the same authority that provided the Comptroller General the authority to decide such claims. Specifically, under 31 U.S.C. § 3702(a)(1)(A), DOHA settles claims involving uniformed service members' pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivor benefits. The implementing regulation for DOHA's authority is set forth in Department of Defense Instruction 1340.21 (May 12, 2004).

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 their claim by clear and convincing evidence on the written record that the United States Department of Defense is liable for the claim. *See* Instruction

¶ E5.7. Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations).

In the adjudication of cognizable claims under 31 U.S.C. § 3702, it is a well-established rule that a claim may only be allowed for an expense authorized by statute or regulation. *See* DOHA Claims Case No. 2016-CL-052003.2 (September 27, 2016). 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. 2016-CL-112901.2 (February 2, 2017). Statutory provisions with unambiguous and specific directions may not be interpreted in any manner that will alter or extend their meaning. *See* 71 Comp. Gen. 125 (1991); and 56 Comp. Gen. 943 (1977). The interpretation of a statutory provision and its implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. *See* DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012). The rights of individuals to receive benefits under Federal statutes are by virtue of the language of the statute and subject to the conditions and limitations contained therein. *See* B-203903, Feb. 11, 1985.

The SBP program, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for survivors of retired military members. 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)(A) and (a)(2)(A). A member who is not married upon becoming eligible to participate in the plan but who later marries may elect to establish coverage for the member's spouse pursuant to 10 U.S.C. § 1448(a)(5). That section requires a written election, signed by the member, and received by the Secretary concerned within one year of the marriage. *See* DOHA Claims Case No. 2021-CL-032618.2 (February 7, 2022). The Service Secretaries have delegated their authority under the SBP law to DFAS.

In this case, the member retired from the Navy on September 1, 2000, and began receiving retired pay. At that time, the member was not married and had no dependent children, but was erroneously auto-enrolled in SBP with spouse coverage. On November 11, 2000, the member married the claimant. Although the member believed that he had covered the claimant as his spouse SBP beneficiary, DFAS has no record of receiving the member's election. The applicable statutory law renders the claim unpayable.

In her reconsideration request, the claimant has raised equitable arguments. She states that the member acted in detrimental reliance on DFAS's erroneous auto-enrollment of his participation in SBP for spouse coverage at retirement and DFAS's collection of the premiums to pay for such coverage. Our office only has jurisdiction to adjudicate claims based on statutes and regulations, and cannot be bound or held liable based on the erroneous advice or actions made by agency officials. *See* B-227469, Oct. 17, 1988. However, as set forth in the appeal decision, the claimant may seek relief with the BCNR under 10 U.S.C. § 1552. Under that statute, the BCNR's authority to correct a military record is discretionary and broader than DOHA's authority to settle a claim. Under 10 U.S.C. § 1552(a)(1), the Secretary of a military department, acting through a correction board, may

correct a member's record when the Secretary, in this case, the Secretary of the Navy, considers it necessary to correct an error or remove an injustice. This remedy is outside DOHA's authority and any request for a correction of the record needs to be pursued with the BCNR.

As for the AOP, the claim accrued at the time the member began receiving retired pay. Since DFAS improperly established spouse SBP coverage when the member retired, erroneous deductions of SBP premiums were withheld from the member's retired pay account resulting in an underpayment of retired pay. DFAS erroneously began deducting premiums from the member's retired pay beginning on September 1, 2000. DFAS barred payment of the portion of the claim for the underpaid retired pay starting at the member's retirement, through December 10, 2011, in the amount of \$15,368.29. In this regard, under 31 U.S.C. § 3702(b), jurisdiction to consider claims is limited to those that are filed within six years after they accrue. *See* DOHA Claims Case No. 2018-CL-051101.2 (November 29, 2018). As for the claimant's argument that DFAS is being unjustly enriched by barring refund of the overpaid premiums, the fact that the government may reap a benefit as a result of the statutory bar from payment of a portion of the AOP does not negate the rule. *See* DOHA Claims Case No. 04020503 (February 18, 2004); B-181788, Nov. 11, 1974; and B-126485 (May 7, 1956). However, as DFAS previously advised the claimant, she may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Navy. Under 31 U.S.C. § 3702(e), upon the request of the Assistant Secretary of the Navy, the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for claims involving a member's pay, allowances or survivor benefits. Under DoD Instruction 1340.21 ¶ E6.4, the Director of DOHA is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. Requests for waiver should be submitted to the Assistant Secretary of the Navy at the following address:

Assistant Secretary of the Navy  
(Financial Management & Comptroller)  
720 Kennon Street SE, Bldg. 36, Room 118  
Washington Navy Yard, DC 20374

Since DFAS erroneously established an SBP annuity for the claimant upon the member's death and began paying her an annuity, she is now indebted for the overpayments. As set forth under 10 U.S.C. § 1453, recovery of an amount erroneously paid to a beneficiary under the SBP is not required if the Secretary concerned determines that there is no fault by the annuitant to whom the amount was erroneously paid, and recovery of such amount would be contrary to the purposes of the law or against equity and good conscience. As previously stated, the Service Secretaries have delegated their authority under the SBP law to DFAS. Therefore, the claimant should submit her request for waiver of the indebtedness resulting from the erroneously paid annuity payments to DFAS. She may make this request by submitting a DD Form 2789, *Waiver/Remission of Indebtedness Application*, to DFAS.

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-030920, dated April 13, 2022, disallowing the claim. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ E7.15.2, 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: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

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Gregg A. Cervi  
Member, Claims Appeals Board