

DATE: November 29, 2022

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In Re: )

[REDACTED] )

) Claims Case No. 2021-CL-061511.2

Claimant )

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**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 is liable to the claimant for the amount claimed.

**DECISION**

The claimant, a former spouse of a deceased retired member of the U.S. Marine Corps, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2021-CL-061511, dated June 28, 2022.

**Background**

The member was born on September 9, 1960. On September 24, 1983, the member married the claimant. The claimant had one child prior to the marriage and three children were born during the marriage. As part of his retirement planning process, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*, electing spouse and children Survivor Benefit Plan (SBP) coverage at the maximum amount. In Section V (*Designation of Beneficiaries for Unpaid Retired Pay*), block 13, of that form, the member named the claimant as his beneficiary for 100% of his unpaid retired pay, which became his arrears of pay (AOP). The member retired from the Marine Corps on July 1, 2001. On March 18, 2013, the claimant and the member divorced. The divorce decree provided, in pertinent part, the following:

The [claimant] will continue to receive the following military benefits: . . . and the survivor benefit plan if [the member] predeces [the claimant] in death.

On May 16, 2015, the member married again. He paid monthly premiums for spouse SBP coverage from the date he retired until his death on June 22, 2020. The claimant notified the Defense Finance and Accounting Service (DFAS) of the member's death. On August 7, 2020, DFAS received from the claimant the SF 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*. DFAS paid the claimant as AOP the amount of \$2,660.90, which represented the amount of erroneously collected SBP premiums from the member's retired pay during the period June 23, 2014, through May 30, 2016. DFAS added the member's new spouse as his eligible spouse beneficiary effective June 1, 2016. However, DFAS applied the Barring Act to the portion of the erroneously collected SBP premiums from the member's retired pay during the period April 1, 2013, through June 22, 2014, in the amount of \$1,649.82.

On July 19, 2020, DFAS received a DD Form 2656-7, *Verification for Survivor Annuity*, signed by the claimant on July 10, 2020. On August 31, 2020, DFAS received the divorce decree dated March 18, 2013, from the claimant. On September 23, 2020, DFAS denied her claim for the SBP annuity because the member had not elected former spouse coverage for the claimant nor had the claimant filed a request for a deemed election for former spouse coverage within one year of the divorce. In October 2020, DFAS gave the claimant appeal rights to DOHA, and also informed her of the right to request waiver of the six-year statute of limitations, the Barring Act, to allow payment of the barred AOP in the amount of \$1,649.82, through the Assistant Secretary of the Service concerned, in her case, the Assistant Secretary of the Navy Financial Management and Comptroller. The claimant appealed both the denial of her SBP claim and the denial of her AOP claim through DFAS to DOHA.

In the DOHA appeal decision, the adjudicator upheld DFAS's denial of both claims. He explained that the claimant, as the member's spouse, was the beneficiary for SBP spouse coverage when the member retired on July 1, 2001, but that her spouse SBP coverage ended, by statute, when they divorced on March 18, 2013. He further noted that the member could have elected former spouse SBP coverage for the claimant or the claimant could have deemed her election for former spouse SBP coverage, if the appropriate paperwork had been submitted, within one year of their divorce. He then explained that since the member continued to pay for SBP spouse coverage for the claimant after their divorce, the amount erroneously deducted for the claimant's SBP coverage should be refunded as AOP. He addressed the matter of the barred portion of the AOP claim finding that the Barring Act, 31 U.S.C. 3702(b), applied to bar a portion of the AOP payments. He also explained that the claimant had the right to request waiver of the Barring Act through the Assistant Secretary of the Navy to allow payment of the barred AOP, as set forth under 31 U.S.C. § 3702(e).

In her request for reconsideration, the claimant states she was the member's spouse when he retired, not his former spouse. DFAS never told her or the member that they needed to file any additional paperwork to change the SBP to former spouse after their divorce. She states that she is the member's only beneficiary for SBP listed on his final retirement paperwork, and she is his sole beneficiary as set forth in his last will and testament.

## Discussion

Claims against the government may be allowed only for an expense authorized by statute or regulation. *See* DOHA Claims Case No. 2021-CL-121403.2 (August 22, 2022).

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 the former spouse, the member must notify DFAS in writing of the divorce and his/her intention to provide coverage for the former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. The member must establish former spouse coverage within one year of the divorce decree, or pertinent court order. *See* 10 U.S.C. §1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a court order to provide SBP coverage to a former spouse. If the member fails to do so, the former spouse has one year of the date of the court order or filing involved to file a request for a deemed election. *See* 10 U.S.C. § 1450(f)(3)(C).

In this case, the claimant had coverage under the SBP as the member's spouse beneficiary from the time he retired from the Marine Corps in July 2001, until spouse coverage ended with their divorce on March 18, 2013. Although the member may have believed that the language in the divorce decree was sufficient to continue coverage for the claimant after their divorce, he failed to establish former spouse SBP coverage for her within one year of the divorce as required by statute. In addition, the claimant did not make a request for a deemed election for the coverage within one year of the date of the divorce decree. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2021-CL-121403.2, *supra*; DOHA Claims Case No. 2021-CL-083107.2 (April 22, 2022); and DOHA Claims Case No. 2017-CL-101202.2 (April 10, 2018). Additionally, as noted by the DOHA adjudicator, the member's new spouse (after the claimant), became entitled to spouse SBP coverage one year after their marriage in 2015.

We realize that the claimant may have been listed as the member's only beneficiary in his last will and testament. However, members may not dispose of SBP annuities by will or other testamentary instrument, since no provision in the SBP law authorizes them to do so. *See* DOHA Claims Case No. 2020-CL-102611.2 (August 2, 2022); and Comptroller General decision B-230824, Nov. 14, 1988. As for the barred AOP payments, DFAS has determined that SBP premiums for spouse coverage were erroneously deducted from the member's retired pay, when SBP coverage went into a suspended status, due to the fact he no longer had an eligible spouse beneficiary. DFAS paid the claimant the unbarred refund of the overpaid SBP premiums as AOP. However, the claimant must request waiver of the barred portion of the AOP in the amount of \$1,649.82 through the Assistant Secretary of the Navy.

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated June 28, 2022. In accordance with DoD Instruction 1340.21 ¶ 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: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board