

DATE: December 5, 2022

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2021-CL-081902.3  
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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 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 and 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 specific statutes, the Defense Office of Hearings and Appeals (DOHA) must apply the appropriate statutes and regulations in the adjudication of those entitlements as set forth under 31 U.S.C. § 3702(a).

Claims settlement under 31 U.S.C. § 3702 is subject to a statute of limitations imposed by section 3702 itself. Specifically, under 31 U.S.C. § 3702(b), the Barring Act, jurisdiction to consider claims is limited to those that are filed within six years after the claim accrues. However, under 31 U.S.C. § 3702(e), upon request of the Secretary concerned, the Secretary of Defense may waive the time limits established by the Barring Act for claims involving a uniformed service member's pay, allowances, retired pay, or survivor benefits, to allow payment of the claim up to \$25,000.00.

**DECISION**

The claimant, the surviving spouse of a deceased 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. 2021-CL-081902.2, dated February 7, 2022. In that decision, DOHA denied the surviving spouse's claim for the member's Survivor Benefit Plan (SBP) annuity because it was filed more than six years after the member's death.

## Background

The member was born on August 12, 1943. In 1961, the member entered service as a non-regular component member in the Army. On June 1, 1968, the member married the claimant. In 1990, the member completed 20 years of service creditable for retirement. On February 4, 1990, the member submitted a DD Form 1883, *Survivor Benefit Plan Election Certificate*, electing Option C, full spouse only SBP coverage for the claimant. The member retired on his 60<sup>th</sup> birthday, August 12, 2003. He paid monthly premiums for spouse SBP coverage from the date he retired until his death on April 23, 2004.

On April 26, 2004, the Defense Finance and Accounting Service (DFAS) received notification from the claimant that the member passed away. The record reflects that DFAS systematically generated a condolence package that included claims forms for arrears of pay (AOP) and the SBP annuity. On May 28, 2004, DFAS received from the claimant the SF 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*, and a copy of the member's death certificate. On July 1, 2004, DFAS issued the claimant a check in the net amount of \$1,023.59, which represented the member's AOP for the period April 1, 2004, through April 23, 2004.

DFAS received nothing further from the claimant until March 11, 2020. On that date, DFAS received a letter from the claimant dated February 29, 2020, inquiring about a refund of SBP premiums the member paid prior to his death for the claimant's coverage as his spouse. DFAS did not respond to this inquiry. On July 18, 2020, DFAS received a second request from the claimant concerning a refund of SBP premiums. DFAS did not respond to this request.

On February 6, 2021, DFAS received a DD Form 2656-7, *Verification for Survivor Annuity*, with the claimant's signature date noted as July 15, 2006. On March 25, 2021, DFAS received a letter from the claimant which included a DD Form 2656-7 signed by the claimant on March 19, 2021. DFAS sent a response to the claimant dated April 21, 2021, denying her claim for the SBP annuity because it was filed more than six years after the member's death. DFAS gave the claimant appeal rights to DOHA, but also informed the claimant of her right to request waiver of the time limit through the Assistant Secretary of the Service concerned, in her case, the Assistant Secretary of the Army Financial Management and Comptroller (FM&C). The claimant appealed DFAS's denial of her claim. DFAS sustained the denial of her claim and provided her with their administrative report. On July 21, 2021, the claimant filed a rebuttal to DFAS's administrative report. In that rebuttal, she maintained that she is entitled to a portion of the member's retired pay beginning in 2021, just as other beneficiaries had been granted by Congress after the deletion of the SBP and Dependency and Indemnity Compensation (DIC) offset. She stated that after the member passed away in April 2004, she applied for the SBP annuity in July 2006, and sent all the completed forms to DFAS. She stated that when she called DFAS to ask about the status of her SBP claim, she was told that they did not have her file and that she was not eligible for the SBP annuity since she was in receipt of DIC. She stated that she accepted the information, joined Gold Star Wives, and worked hard to have the legislation changed, which was successful in 2019. She stated that she wrote to DFAS in February 2020 after Congress repealed the SBP offset enabling widows to draw both SBP and DIC concurrently. When she did not hear anything from DFAS, she contacted the member's National

Guard unit from which he had retired for assistance. She then refiled her DD Form 2656-7, which she stated she had originally filed with DFAS in July 2006. She stated that DFAS's decision denying her benefits incorrectly assumed that she was requesting retroactive payments of her husband's retired pay. She stated that she is not requesting that, only what she is entitled to receive due to the change in the law in 2019. Therefore, she maintained that the six-year statute of limitations does not apply to her claim because she is not requesting retroactive payments, just the SBP benefits due to the change in the law. In the alternative, she asserted that even if there was such a statute of limitations, she met the six-year limitation when she filed the DD Form 2656-7 with DFAS in July 2006.

On August 12, 2021, DFAS forwarded the claimant's appeal package to DOHA for adjudication. On September 10, 2021, DFAS requested that DOHA remand the case back to their office for further consideration. On October 25, 2021, DFAS amended their administrative report specifically detailing why the claim was denied pursuant to applicable law and regulation. The claimant was given an opportunity to rebut the amended administrative report. On December 15, 2021, DFAS forwarded the amended administrative report to DOHA.

In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim finding that the Barring Act, 31 U.S.C. § 3702(b), applied to bar payment of the SBP annuity. He explained that although the claimant stated that she filed a DD Form 2656-7 in July 2006 claiming the SBP, DFAS has no record of receiving it until February 2021. He also explained that the claimant had the right to request waiver of the Barring Act through the Assistant Secretary of the Army to allow payment of SBP benefits retroactive to the member's death up to the statutory maximum of \$25,000.00, as set forth under 31 U.S.C. § 3702(e). He then stated that under 10 U.S.C. § 1552, the claimant may find relief outside the purview of DOHA. Under that statute, the Secretary of a military department, acting through a correction board, in this case, Army Board for Correction of Military Records (ABCMR), may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.

In her request for reconsideration, the claimant states that DFAS never sent her a condolence package after the member passed away in 2004. She states that it was not until July 15, 2006, that she submitted the DD Form 2656-7 to DFAS. As evidence that she submitted the form at that time, she attaches an unaddressed and unsigned letter dated July 13, 2006, from DFAS-Retired and Annuity Pay. In that letter, DFAS stated that an annuity claim package was enclosed and described the process for submitting an annuity claim. DFAS further stated that they were enclosing a return envelope for convenience to return the application and completed forms. She states that she signed and returned the forms in the envelope provided to her by DFAS. Therefore, she states that she timely filed her claim for the SBP annuity, within the six-year period after the member's death.

## **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. A claimant must submit a claim so that it is received by the agency concerned within the time limit allowed by statute. *See* Instruction ¶ E5.6. 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), and DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions.

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, now codified under 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 10 U.S.C. § 1450(a), a monthly SBP annuity is payable to a retired member's surviving spouse effective as of the first day after the date of the member's death. Under 31 U.S.C. § 3702(b), a survivor has six years to file a claim for an SBP annuity. In pertinent part, section (b)(1) states the following:

A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues . . .

The official responsible for establishing the SBP annuity accounts for survivors of retired military members is the office of DFAS – U.S. Retired and Annuitant Pay. All events giving rise to the government’s liability to make SBP payments to a survivor occur at the date of the member’s death, and the survivor has six years from that date to file the claim with DFAS. Claims filed more than six years after a member’s death are barred. *See Hart v. United States*, 910 F.2d 815 (Fed. Cir. 1990); and DOHA Claims Case No. 02082608 (March 26, 2003). In *Hart*, because the claimant’s late husband was enrolled in the SBP, only one contingency remained before she became eligible to receive SBP benefits, the member’s death. The decision in *Hart* is also in accord with a recent U.S. Court of Federal Claims’ decision, *Murphy v. United States*, No. 21-1422, 2022 Fed. Cl. Westlaw 218760, which concerned our decision in DOHA Claims Case No. 2020-CL-081718.2 (May 4, 2021). In *Murphy*, the Court held that the plaintiff’s claim for the SBP annuity had not yet accrued since her former spouse, the member, had not yet died. The Court found that SBP annuity payments become effective as of the first day after the death of a service member, if the statutory requirements are met.

In this case, the member elected coverage for the claimant in 1990 when he became eligible for retirement but for the fact that he had not reached 60 years of age. SBP coverage was then established for her at that time and the member paid SBP premiums for the coverage beginning August 12, 2003. The events that fixed the liability of the government and entitled the claimant to make a claim arose at the time of the member’s death in April 2004. Although the claimant states that she sent the DD Form 2656-7 to DFAS in response to a letter she received from them on July 13, 2006, DFAS has no record of the claimant filing a DD Form 2656-7 until February 6, 2021. Therefore, the claimant failed to make a claim for the SBP annuity until over 15 years after it accrued. Absent statutory authority, federal agencies may not waive or extend the time allowed by a statute of limitations. *See United States v. Garbutt Oil Co.*, 302 U.S. 528, 534-35 (1938); and *Finn v. United States*, 123 U.S. 227, 233 (1887). The same is true of the Barring Act under 31 U.S.C. § 3702(b). *See* 70 Comp. Gen. 292(1991). Therefore, DOHA has no authority to modify the application of the Barring Act or make any exceptions to the time limitations it imposes, except as set forth under specific statutory authority. *See* DOHA Claims Case No. 08112402 (November 26, 2008); Comptroller General decisions B-260207, Nov. 6, 1995; and B-260835, May 10, 1995.

The claimant has maintained that the Barring Act does not apply to her claim for the SBP annuity because the law changed in 2020 allowing widows to draw both DIC and SBP without an offset. Prior to enactment of the National Defense Authorization Act for Fiscal Year 2020 (NDAA FY 2020), if a beneficiary under SBP was also entitled to DIC from the Department of Veterans Affairs (VA) upon the death of a member, the SBP annuity must have been reduced by the amount of the DIC. *See* Public Law No. 116-92, § 622, 133 Stat. 1198, 1427 (2019) amending 10 U.S.C. § 1450. However, until the change in the law pursuant to the NDAA FY 2020, the pertinent part of the SBP statute in question, 10 U.S.C. § 1450(c), read as follows:

(c) Offset for amount of dependency and indemnity compensation.—

(1) Required offset.—If, upon the death of a person to whom section 1448 of this title applies, the surviving spouse or former spouse of that person is also entitled to dependency and indemnity compensation under section 1311(a) of title 38, the surviving spouse or former spouse may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

(2) Effective date of offset.—A reduction in an annuity under this section required by paragraph (1) shall be effective on the date of the commencement of the period of payment of such dependency and indemnity compensation under title 38.

Therefore, the claimant's SBP annuity claim accrued at the time of the member's death. At the member's death, the statutory requirements for payment of the SBP annuity to the claimant were met. The member had elected her as his spouse SBP beneficiary and had paid for her coverage as his spouse by making monthly premium payments from his monthly retired pay until his death in 2004. If DFAS had timely received the claimant's claim for the SBP annuity, DFAS and the VA would have determined the required offset. A review of our case law as well as precedent from the Comptroller General clearly reflects that an annuitant's monthly SBP annuity payments often exceed their monthly DIC entitlement. *See* DOHA Claims Case No. 96101002 (March 11, 1997) (widow was entitled to \$903 per month in SBP annuity payments immediately upon the member's death in 1987 and \$707 per month in DIC effective January 1, 1988); 55 Comp. Gen. 1238 (1976) (widow entitled to \$847.45 per month in SBP annuity payments immediately upon the member's death in May 1973 and \$503 per month in DIC effective May 1974) and B-184649, Feb. 2, 1976 (widow was initially entitled to \$321.79 per month in SBP annuity payments immediately upon the member's death in March 1973 and \$299 per month in DIC). We further note that the commencement of DIC payments, unlike SBP annuity payments, normally does not become effective upon the member's death. Therefore, an SBP annuitant may be entitled to the full, unreduced SBP monthly annuity payments prior to the commencement of monthly DIC payments. *See* DOHA Claims Case No. 96101002, *supra*. In addition, SBP annuity payments and DIC payments may fluctuate and later result in additional entitlement to monthly SBP annuity payments. *See* 55 Comp. Gen. 1238, *supra*. We also note that if DFAS had timely received the claimant's SBP annuity claim, she would have been entitled to a refund of SBP premium payments made by the member as set forth under 10 U.S.C. § 1450(e). That section states:

(e) Refund of amounts deducted from retired pay when DIC offset is applicable.—

(1) Full refund when DIC greater than SBP annuity.—If an annuity under this section is not payable because of subsection (c), any amount deducted from the retired pay of the deceased under section 1452 of this title shall be refunded to the surviving spouse or former spouse.

(2) Partial refund when SBP annuity reduced by DIC.—If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted before the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the surviving spouse or former spouse.

As the claimant has consistently maintained, she was given erroneous information by DFAS after she called about the status of her submission of the DD Form 2656-7 that she asserts she sent to DFAS in 2006. She stated that after not hearing from DFAS when she submitted the form in 2006, she called and was told by DFAS that they did not have her SBP annuity claim and that she was not eligible for the SBP annuity since she was in receipt of DIC. However, even if the claimant was given erroneous information regarding her eligibility for SBP annuity payments, the Barring Act still applies under 31 U.S.C. § 3702(b), and there is no legal basis upon which DOHA may allow the claim to be paid. *See* DOHA Claims Case No. 96070225 (September 17, 1996). Further, the recent change in the law does not affect that SBP claims accrue immediately upon the death of a member. A change in the law does not give rise to a new claim. *See* DOHA Claims Case No. 2020-CL-101501.2 (March 16, 2021). The statute of limitations must be strictly applied under 31 U.S.C. § 3702(b), because appropriated funds are not legally available to pay claims on which the statute of limitations has run. *See* 52 Comp. Gen. 420 (1973). The claimant's claim was not timely, and she will not be granted the SBP annuity prospectively.

As explained by DFAS and DOHA, the Department of Defense has the specific statutory authority to waive the Barring Act for claims (not exceeding \$25,000.00) that it is authorized to settle under section 3702(a)(1). The claimant may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Army. Under 31 U.S.C. § 3702(e), upon request of the Assistant Secretary of the Army, the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for claims involving a uniformed service member's pay, allowances or survivor benefits. Under DoD Instruction 1340.21 ¶ E6.4 (May 12, 2004), the Director of DOHA is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. However, the claimant must file her request directly with the Assistant Secretary of the Army at the following address:

Assistant Secretary of the Army  
(Financial Management & Comptroller)  
Room 3A320  
109 Army Pentagon  
Washington DC 20310-0109

We note that under 31 U.S.C. § 3702(e), waiver of the Barring Act shall only be granted to allow payment up to a maximum of \$25,000.00, and the claimant will not be granted the SBP annuity prospectively.

We understand that the claimant may have been told in 2006 by DFAS that DFAS never received her SBP annuity application and that she was not entitled to receive an SBP annuity because she was in receipt of DIC. Therefore, the claimant may wish to also pursue the matter with the ABCMR. Similarly situated claimants who failed to apply for the SBP annuity due to the offset provision in the statute may apply to the ABCMR for equitable relief. The claimant's request for waiver of the Barring Act with the Assistant Secretary of the Army does not forfeit her right to seek redress from the ABCMR. Under 10 U.S.C. § 1552, the Secretary of a military department, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. The ABCMR's authority is much broader than DOHA's claims settlement authority, and any petition for a correction of record must be pursued with the ABCMR. Information on petitioning the ABCMR can be found on the Army Review Boards Agency's website.

### **Conclusion**

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated February 7, 2022. 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: Daniel F. Crowley

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Daniel F. Crowley  
Member, Claims Appeals Board