

DATE: January 10, 2023

In Re:)

[REDACTED])

) Claims Case No. 2020-CL-081720.3

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. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2020-CL-081720, dated September 29, 2020.

Background

The claimant and the member, who served on active duty in the U.S. Navy, were married on August 14, 1982. On August 7, 1998, the member elected Survivor Benefit Plan (SBP) coverage for the claimant as his spouse, and his children. The member retired from the Navy on November 1, 1998. On July 10, 2003, the claimant and member divorced. The divorce decree provided the following regarding the SBP:

ORDERED, that by agreement of the parties the Defendant be entitled to receive the survivor benefits associated with the Plaintiff's military retirement . . .

On September 8, 2003, the court issued a Constituted Pension Order (CPO), signed by the member but not signed by the claimant. The CPO awarded the claimant a portion of the member's monthly disposable retired pay. In addition, regarding the SBP, the CPO stated the following:

The Member shall elect under 10 U.S.C. Chapter 1447 *et seq.*, to provide a full survivor benefit annuity to his Former Spouse to the extent she is eligible under the law and shall elect as the base amount the full amount of the Member's monthly retired pay. The filing of this Order with the Defense Service Financing Center (the "Service") servicing the Member by the Former Spouse shall be treated as a deemed election of full benefits under the Survivor Benefit Plan.

On September 30, 2003, the Defense Finance and Accounting Service (DFAS) received a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, signed by the claimant on September 23, 2003, sent to DFAS from the claimant along with the divorce decree and the CPO. On October 17, 2003, DFAS sent the claimant a letter acknowledging receipt of the DD Form 2293. In that letter, DFAS informed the claimant of the following:

If your divorce decree specifies that you are to be designated as a former spouse beneficiary for the Survivor Benefit Plan (SBP), you must make a 'deemed election' for SBP coverage within one year of the date of your divorce directly to the Retired Pay office; DFAS, US Military Retirement Pay, PO Box 7130, London, KY 20742-7130. If you have any questions regarding SBP coverage, you may call the Retired Pay Office at 1-800-321-1080.

DFAS processed the CPO and the claimant received 50% of member's monthly military retired pay pursuant to the CPO, as his former spouse.

On October 18, 2019, the member passed away. On November 12, 2019, the claimant completed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. By letter dated December 3, 2019, DFAS responded to the claimant and denied her claim because DFAS had no record of the member requesting to change his SBP election to former spouse coverage nor the claimant making a request for a deemed election within one year of the divorce. The letter noted that a divorce decree alone does not constitute a deemed election.

On December 30, 2019, the claimant resubmitted her claim with additional supporting documentation, including the divorce decree, the CPO, and a copy of the court file management log. That log reflected that the court sent copies of the CPO to the member's attorney, the claimant, and DFAS at their P.O. Box in Cleveland, Ohio.

On May 12, 2020, the claimant appealed DFAS's decision to DOHA. On June 17, 2020, in response to the claimant's appeal, DFAS sent her their administrative report dated May 15, 2020. In that report, DFAS explained that the claimant was not entitled to SBP annuity because the member failed to request continued SBP coverage for the claimant as his former spouse within one year of the divorce decree; and that the claimant also failed to deem an election for former spouse SBP coverage within that year.

On September 29, 2020, a DOHA attorney examiner sustained DFAS's denial of the claim on appeal. He determined that there is no other indication DFAS was properly notified of the deemed election and that the claimant did not comply with the Department of Defense

Financial Management Regulation (DoDFMR) ¶ 430504(C) (version April 2019), which required a written request be submitted to DFAS within one year of the original divorce decree. He further advised the claimant that she may find relief outside the purview of DOHA by petitioning the Board for Correction of Naval Records (BCNR).

In the claimant's reconsideration request, through her attorney, she states that the evidence establishes that DFAS was aware that the member and claimant had divorced because she had been receiving a fifty percent share of the member's military pension since their divorce in 2003. She maintains that the CPO, signed by the member, and submitted to DFAS, satisfies the requirements of a member's timely election of former spouse SBP coverage. She attaches a signed affidavit dated August 7, 2020, from the member's attorney who represented him in the divorce. In that affidavit, the attorney attests to the fact that it was always her expectation and her client's intention that the filing of the CPO with DFAS by the court was to be treated as the member's election for former spouse SBP coverage. The claimant further states that in 2003, the DoDFMR did not require notification of DFAS on any specific form and that the timely submission of the CPO, which on its face stated the deemed election, was sufficient to meet the requirements in effect at that time.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2020-CL-042702.2 (September 14, 2020). 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 DFAS 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)(iii). Under 10 U.S.C. § 1448(b)(5), a written statement signed by the member and the member's former spouse is required when the member submits an election for former spouse SBP coverage. Specifically, under section 1448(b)(5), the member must provide the Secretary concerned with a written statement (in a form prescribed by the Secretary and signed by the member and the member's former spouse) setting forth the following:

(A) whether the election is being made pursuant to the requirements of a court order; or

(B) whether the election is being made pursuant to a written agreement previously entered into voluntarily by such person as part of, or incident to, a proceeding of divorce, dissolution, or annulment and (if so) whether such voluntary written agreement has been incorporated in, or ratified or approved by, a court order.

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 DoDFMR, volume 7B, chapter 43, contains the regulations concerning SBP elections and election changes. In this case, the implementing regulation in effect at the time of the member's divorce concerning a member's election of former spouse coverage was set forth in DoDFMR ¶ 430301. Paragraph 430301 (version September 1999), entitled *Elections by Member*, recommended the use by the member of the DD Form 1881 (SBP Election Certificate by Existing Retiree), the DD Form 1882 (SBP Election Change), the DD Form 1883 (SBP Election Certificate), and the DD Form 2618 (SBP Open Enrollment Election), when available. However, DoDFMR ¶ 430301 also required the following:

Elections in writing, signed by the member, which contain information necessary for establishing or declining coverage are acceptable . . . If the former spouse election form does not include an election statement signed by the member and the former spouse, a separate election statement is required. In the election statement, the member attests as to whether the former spouse election is pursuant to a court order or a voluntary written agreement.

Information concerning content of the written statement and the proper court order for a member's election of former spouse coverage appeared in DoDFMR ¶ 430503 (September 1999):

When a member elects former spouse coverage, the member and the former spouse must complete an election statement indicating whether the election is being made pursuant to the requirements of a court order or by a voluntary written agreement. If the member entered into a voluntary written agreement as a part of, or incident to, a proceeding of divorce, dissolution or annulment, the member must indicate on the written statement whether the agreement has been incorporated in, or ratified or approved by, a court order . . .

If a member is required by a court order pursuant to divorce proceedings to provide SBP coverage to the former spouse, the former spouse has one year from the date of the court order or filing involved to request a deemed election. *See* 10 U.S.C. § 1450(f)(3). A former spouse's request may not be deemed to have been made unless the Secretary concerned receives a request from the former spouse in writing and in the manner prescribed by the Secretary concerned. *See* 10 U.S.C. § 1450(f)(3)(A). Specifically, under section 1450(f)(3)(A), the Secretary concerned must receive the following:

(i) Requests from former spouse. – A written request, in such manner as the Secretary shall prescribe, from the former spouse concerned requesting that such an election be deemed to have been made.

- (ii) Copy of court order or other official statement.- Either-
 - (I) a copy of the court order, regular on its face, which requires such election or incorporates, ratifies, or approves the written agreement of such person; or
 - (II) a statement from the clerk of the court (or other appropriate official) that such agreement has been filed with the court in accordance with applicable State law.

As for the regulation concerning the requirements for a former spouse's request for a deemed election, under the current DoDFMR ¶ 430404, a former spouse or the former spouse's legal representative must request the deemed election by completing the DD Form 2656-10, and submitting it with the divorce decree within one year of the divorce. Effective September 27, 2008, the use of the DD Form 2656-10 to a request a deemed election became mandatory. However, the regulation, in effect at the time of the divorce in this case, giving rise to the former spouse's right to request a deemed election, while not mandating a specific form, still required the former spouse or the former spouse's attorney to make a written request. The regulation also stated that the request was acceptable if it referred to, or cited provisions in a court order, concerning SBP former spouse coverage, or made clear by other references to the SBP, that there was an intent that the coverage be provided to a former spouse, and that the written request was accompanied by a copy of the court order and/or a statement from the clerk of the court. The regulation stated that the former spouse's deemed election must be received by DFAS within one year of the date of the court order or filing involved, whichever was later. *See* DoDFMR ¶ 430503(C)(2) (version September 1999).

In this case, the member was obligated to cover the claimant as his former spouse under the SBP after their divorce, based upon the divorce decree and CPO. DFAS was in possession of the CPO by the end of September 2003, the same month the court issued the CPO. The court's submission of the CPO to DFAS did not satisfy the requirements of the pertinent statute or regulation for a member's election for former spouse SBP, because the member did not notify DFAS in writing of his intention to provide coverage for his former spouse by submitting a written statement signed by both the member and the member's former spouse. Although the member may have believed that the language in the CPO was sufficient to continue coverage for the claimant after their divorce, he failed to establish former spouse SBP coverage for her as required by statute and the DoDFMR's implementing regulations. In addition, the claimant did not make a written request for a deemed election for the coverage within one year of the date of the CPO. While the CPO indicated it was to be considered her deemed election, a separate written request by the claimant was required by regulation. Therefore, DFAS properly denied the claim for the SBP annuity.

The claimant argues that DFAS was aware of her divorce from the member in 2003 as evidenced by her receipt of fifty percent of the member's monthly military retired pay under 10 U.S.C. § 1408(d)(2), the Uniformed Services Former Spouses' Protection Act (USFSPA). However, the USFSPA is a separate statute from the SBP law, and both set forth different entitlements.

As explained by the DOHA attorney examiner in the appeal decision, the claimant may have another avenue of relief that rests with the BCNR under 10 U.S.C. § 1552. Any relief

available under that statute is outside of DOHA's authority and any request for a correction of records needs to be pursued with the BCNR.

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
Chairperson, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board