

DATE: January 5, 2023

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2021-CL-051109.2  
)  
)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The unborn child of a member who dies on active duty, in the line of duty, is entitled to receive a Survivor Benefit Plan (SBP) annuity. The claim for the child SBP annuity is considered filed when the member's widow and the unborn child's mother submits the *Active Duty Death Statement of Desired SBP Election*, with the accompanying supporting documentation to the Service concerned electing child(ren) only – spouse excluded SBP coverage and the Service determines it is appropriate to provide the annuity for the member's eligible dependent children.

**DECISION**

The claimant, the surviving spouse of a deceased member of the U.S. Air Force, on behalf of their daughter, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-051109, dated March 29, 2022. In that decision, DOHA sustained the Defense Finance and Accounting Service's denial of the claim for the child Survivor Benefit Plan (SBP) annuity of the deceased member.

**Background**

On June 18, 2001, the member and the claimant were married. On August 2, 2001, the member enlisted in the Air Force Reserve, and was discharged on October 8, 2001. On October 9, 2001, he enlisted in the Regular Air Force, and served on active duty until his release on April 2, 2004. On May 11, 2002, the member and the claimant's first child, a son, was born. On May 18, 2005, the member returned to active duty in the rank of Senior Airman and was assigned to a

unit at Barksdale Air Force Base (AFB), Louisiana. On October 2, 2005, the member died in the line of duty on active duty. At the time of the member's death, the claimant was seven and one-half months pregnant with his second child. On November 4, 2005, after receiving in-depth, personal counseling, the claimant signed an *Active Duty Death Statement of Desired SBP Election*, selecting the option of child only SBP coverage. Specifically, she elected:

**Child only – Spouse Excluded.** I desire the Air Force to make this SBP election on my behalf. I understand that this election authorizes all my military spouse's eligible children to receive an equal share of the SBP annuity. Eligible children will receive the annuity until age 18 if a full-time student, or for the lifetime of a child who is incapable of self support. Marriage at any age permanently terminates the child's eligibility. When the last child loses eligibility, the SBP annuity payments terminate. I understand SBP coverage for the child(ren) cannot be transferred to SBP spouse coverage.

The claimant's election was signed and witnessed by the SBP counselor at Barksdale AFB. On the same date, November 4, 2005, the claimant also completed and signed a DD Form 2790, *Custodianship Certificate to Support Claim on Behalf of Minor Children of December Members of the Armed Forces*. The DD Form 2790's purpose is to identify the custodian of an unmarried minor child(ren), incapacitated child or child at least 18 but under 22 who is attending school and is a child of a deceased military member. On that form, the claimant certified that she was the custodian of the member's son. However, in Item 6, the Remarks section, the following was written:

[The claimant] is the mother of [redacted] (son) and is sole legal guardian of said child. [The claimant] is currently pregnant with 2<sup>nd</sup> child and is expected full-term delivery January 2006.

That form was also accompanied by a DD Form 2656-7, *Verification of Survivor Annuity*, signed by the claimant on November 4, 2005, claiming the child SBP annuity for the member's son.

On December 28, 2005, the claimant gave birth to the member's second child, a daughter. The claimant gave all the necessary paperwork including her daughter's birth certificate and social security number to the SBP counselor at Barksdale AFB, and was advised that all documentation would be filed on her behalf to manage the SBP annuity for her children.

The final DD Form 1300, *Report of Casualty*, was prepared on June 2, 2006. That form listed under the Interested Persons/Remarks section the member's wife (the claimant), his son, and his father and mother. The record reflects that on June 13, 2006, the whole package including the *Active Duty Death Statement of Desired SBP Election* form, the DD Form 2790, the DD Form 2656-7, and the DD Form 1300 were sent by fax to the Air Force Personnel Center (AFPC). The fax coversheet for the documentation was labelled "Active Duty Death SBP Cases." On June 13, 2006, the AFPC issued a memorandum to the Defense Finance and Accounting Service (DFAS) Retired Pay Annuity Branch (RPAB) titled "Survivor Benefit Plan (SBP) Coverage for Death Occurring on Active Duty." In that memorandum, the AFPC advised DFAS that the member's widow made an election for child only SBP coverage on behalf of the

member's children under 10 U.S.C. § 1448(d). The AFPC recommended that DFAS establish child only SBP coverage on behalf of the member's eligible children. In July 2006, DFAS established a child SBP annuity for the member's son effective October 3, 2005.

In early 2020 the claimant was advised that due to an administrative error, her daughter was never registered as an SBP beneficiary of the member. On February 6, 2020, the claimant submitted a DD Form 2656-7 on behalf of her daughter claiming the child SBP annuity of the deceased member. On March 5, 2020, DFAS denied the claim on the grounds that it was received more than six years after the claim accrued and thus was barred by the statute of limitations (the Barring Act) under 31 U.S.C. § 3702(b).

The claimant appealed DFAS's denial of the claim describing the extenuating circumstances that led to her submission of the DD Form 2656-7 in 2020. She explained that she was advised that the SBP annuity would be paid to her son until he lost his eligibility due to age, and then would be transferred to her daughter. She also explained that she had no reason to question her daughter's eligibility for the annuity since she held a Department of Defense (DoD) identification card and was listed on various other DoD accounts, as well as her VA DIC account.

In response to the claimant's appeal, DFAS issued an administrative report dated March 15, 2021, sustaining the denial of the SBP claim. DFAS found that the claim would be allowed except that it was untimely under 31 U.S.C. § 3702(b). However, DFAS advised the claimant that effective January 1, 2023, SBP annuities will be restored to surviving spouses who opted for child only SBP coverage. In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim based on the Barring Act. He found that the claim accrued for the SBP annuity upon the member's death and that the claimant failed to submit a claim within the 6-year statute of limitations. He advised the claimant that she may have other available avenues of relief that rest with either the Air Force Board for Correction of Military Records (AFBCMR) or the Assistant Secretary of the Air Force (Financial Management and Comptroller).

In her request for reconsideration, the claimant again describes the extenuating circumstances that led to her submission of the DD Form 2656-7 on behalf of her daughter in 2020.

### **Discussion**

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 10 U.S.C. § 1448(d)(2), an SBP annuity may be paid to the dependent children of a deceased member who dies in the line of duty on active duty. Under 10 U.S.C. § 1448(d)(2)(B), in the case of a member who dies on active duty with a surviving spouse, the Secretary concerned, in consultation with the surviving spouse, may pay an SBP annuity pursuant to 10 U.S.C. § 1450(a)(3) to the member's dependent children instead of an SBP annuity for the surviving spouse. Specifically, 10 U.S.C. § 1448(d)(2)(B) states that following:

(B) Optional annuity when there is an eligible surviving spouse.—In the case of a member described in paragraph (1) who dies after November 23, 2003, and for whom there is a surviving spouse eligible for an annuity under paragraph (1), the Secretary may pay an annuity under this subchapter to the member's dependent children under section 1450(a)(3) of this title, if applicable, instead of paying an annuity to the surviving spouse under paragraph (1), if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children under this paragraph instead of an annuity for the surviving spouse under paragraph (1).

Although the definition of “dependent child” under 10 U.S.C. § 1447(11) does not mention the situation of a posthumous child, in accordance with case precedent recognized by the Department, the fact that a child was not yet born at the time of a member’s death does not alter the child’s legal entitlement to SBP benefits after the child’s birth. *See* B-239434, March 27, 1991.

In this case, the claimant was the surviving spouse of the member at the time of his death which occurred on active duty in the line of duty. In November 2005, the claimant waived her entitlement to the SBP annuity and requested that the Air Force approve an SBP election of child only for the member’s children. At that time, although her daughter was not yet born, the daughter was noted as the member’s unborn child on the paperwork submitted to the SBP counselor. All paperwork was submitted by the SBP counselor to the AFPC. The AFPC, acting for the Service Secretary, determined it was appropriate to provide the SBP annuity to the member’s dependent children instead of paying the annuity to the claimant, as the member’s surviving spouse, and forwarded all necessary paperwork to DFAS to establish the annuity for the member’s eligible children.

DFAS does not dispute that the member’s unborn daughter would have been entitled to the SBP annuity. DFAS denied the claim based on the Barring Act, finding that the claim was not filed until the claimant submitted the DD Form 2656-7 on behalf of her daughter in 2020, more than six years after the claim accrued. The DOHA Claims Appeals Board disagrees with DFAS’s application of the Barring Act to the claim under the specific circumstances presented in this case. We find that the claim was timely filed in 2006 when the claimant submitted the *Active Duty Death Statement of Desired SBP Election*, with the accompanying supporting documentation to the Service concerned electing child only – spouse excluded SBP coverage, and the Service determined it was appropriate to provide the annuity for the dependent children. Therefore, the claimant’s submission at that time tolls the six-year statute of limitations. *See also* B-188452, Nov. 25, 1988 (the Comptroller General held that a widow’s request for waiver of SBP annuity overpayments based on a second marriage, tolled the six-year statute of limitations).

Finally, we note that pursuant to the National Defense Authorization Act for Fiscal Year 2020 (NDAA FY 2020), 10 U.S.C. § 1448 was amended to restore the SBP annuity to any eligible surviving spouse who, in consultation with the Secretary concerned, previously elected to transfer payment of the SBP annuity to a surviving child or children under the provisions of 10 U.S.C. § 1448(d)(2)(B). *See* Public Law No. 116-92, § 622, 133 Stat. 1198, 1427 (2019). Such

restoration of eligibility to the surviving spouse is effective January 1, 2023. Information on the process of restoring the surviving spouse SBP annuity may be found on DFAS's website at: <https://www.dfas.mil/retiredmilitary/survivors/sbp-2023-optinal-child-annuity-reversion/>

### **Conclusion**

The claimant's request for relief is granted. In accordance with Department of Defense Instruction 1340.21 ¶ E7.11, 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  
Chairperson, 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