

DATE: January 12, 2023

In Re:

[REDACTED]

Claimant

)
)
)
)
)

Claims Case No. 2021-CL-072001.2

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

DECISION

The claimant, the surviving 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. 2021-CL-072001, dated July 5, 2022.

Background

The member served in both the US. Army and the U.S. Navy. In 1967, the member married his first wife, and their child was born on May 24, 1968. In 1970, the member divorced his first wife but later remarried her. However, on January 9, 1981, the member divorced his first wife again. When the member retired from the U.S. Navy on March 1, 1986, he was not married, but had a dependent child who was automatically enrolled in the member's Survivor Benefit Plan (SBP) as his child beneficiary. The Navy erroneously enrolled the member in spouse SBP coverage because of his failure to notify the service of his divorce in 1981. On May 24, 1986, the member's child turned 18, and her child SBP coverage ended. However, the member erroneously paid monthly premiums for spouse SBP coverage from the date he retired until March 1, 2016, when he had completed 360 monthly SBP payments. On July 17, 1999, the claimant and the member married. The member passed away on April 3, 2020. The Defense

Finance and Accounting Service (DFAS) did not learn of the member's marriage to the claimant until she notified DFAS of the member's death.

On November 15, 2020, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS claiming the SBP annuity as the member's surviving spouse. DFAS subsequently denied her claim the member had not elected spouse coverage for her within one year of their marriage. The claimant appealed DFAS's denial of her claim. In her appeal, she stated that she was married to the member for 22 years before his death, and during their marriage, he continued to pay for spouse SBP coverage. She stated that it was an oversight on the member's part that he did not elect to cover her as his spouse under the SBP.

In the appeal decision, the DOHA attorney examiner noted that claimant was not the spouse when the member retired on March 1, 1986. He explained that the member could have elected spouse SBP coverage for the claimant if he had filed the appropriate paperwork within one year of their marriage as required by statute. He further advised the claimant that under 10 U.S.C. § 1552, she 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, Board of Correction of Naval Records (BCNR), 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 requests that the BCNR correct an error or injustice in order to grant her the SBP annuity. She attaches a completed DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*, and supporting documents including her military identification card. On the DD Form 149, she states that she was married to the member for 21 years and that he paid premiums for spouse SBP coverage during their marriage.

Discussion

The fundamental rule in adjudicating a claim is that payment may be made only for an expense authorized by statute or regulation. Therefore, DOHA must render decisions based on applicable statutes, regulations and our prior administrative decisions. *See* DOHA Claims Case No. 2021-CL-032618.2 (February 7, 2022).

The SBP program, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of deceased members of the uniformed services. A married member or a member with a dependent child is automatically eligible to participate in SBP when the member becomes eligible for retired pay. *See* 10 U.S.C. § 1448(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 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 after the date on which the member marries.

In this case, at the time of his retirement, March 1, 1986, the member was not married, but had a dependent daughter who, by statute, was automatically granted child SBP coverage, and this coverage lasted until his dependent child turned 18 on May 24, 1986. When the member married the claimant on July 17, 1999, he had one year to elect spouse SBP coverage for the claimant as a later-acquired spouse. Since he failed to make that designation, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2019-CL-031402.2 (September 24, 2019).

As set forth above, DOHA has no authority under statute or regulation to allow the claim for the SBP annuity. However, as explained by the attorney examiner in the appeal decision, the claimant may have other available remedies that rest with the BCNR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454 (the specific authority for the BCNR to correct or revoke an election for SBP). The BCNR has the discretionary authority to correct the record when it considers it necessary to correct an error or remove an injustice. The BCNR's authority is broader than DOHA's authority to settle a claim, and is beyond DOHA's purview. Therefore, the claimant should submit the completed DD Form 149 to the BCNR, not DOHA, since DOHA has not authority over this type of relief. Information on petitioning the BCNR is located online at <https://www.secnav.navy.mil/mra/bcnr>.

DFAS has determined that SBP premiums for spouse coverage were erroneously deducted from the member's retired pay from June 1, 1986, through March 1, 2016, due to the fact he did not have an eligible spouse beneficiary. These costs could be refunded to the appropriate beneficiary as arrears of pay (AOP) under 10 U.S.C. § 2771. The claimant should contact DFAS regarding the AOP.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated July 5, 2022. In accordance with Department of Defense Instruction 1340.21 ¶ E.7.15.2, 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