

DATE: February 23, 2023

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In Re: )  
[REDACTED] ) Claims Case No. 2021-CL-100605.2  
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.

**DECISION**

The claimant, a former spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-100605, dated August 9, 2022.

**Background**

On June 26, 1977, the member and the claimant were married, and went on to have three children. When the member retired from the Air Force in April 1982, he elected spouse and child Survivor Benefit Plan (SBP) coverage. On October 6, 2003, the member and the claimant divorced. The divorce decree awarded the claimant child support and spousal payments but did not mention the matter of SBP coverage. On August 21, 2006, an order was issued in the member and the claimant's divorce action, but none of the provisions in that order concerned the SBP. The record reflects that the member continued to pay SBP premiums for spouse coverage from his monthly retired pay until he reached paid-up status, *i.e.*, he had paid SBP premiums for 360 months as of December 2013.

On December 8, 2020, the member passed away. On January 28, 2021, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to the Defense Finance and

Accounting Service (DFAS), claiming the SBP annuity as the member's former spouse. On April 8, 2021, DFAS denied her claim for the SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election. On May 4, 2021, the claimant, through her attorney, appealed DFAS's denial of her claim. She stated that the member intended for her to have SBP coverage after their divorce. She included an affidavit incident to their divorce in which the member stated the following:

[The claimant's] Benefit Plan payments of \$116.59 per month are presently being deducted from my retired pay and will continued to be.

The claimant also cited an email sent by the member to their son dated February 13, 2014, in which the member wrote the following:

A couple of months ago, after 30+ years I finally paid off the SBP account. It is "Paid Up" insurance. Your mother is the beneficiary. If I predecease her she must file for it. That is why I send the attached image.

The attached image to the email was a copy of an article about SBP in the December 2013 edition of *Afterburner*, a newsletter for retired Air Force members. The claimant also cited the member's Retiree Account Statements (RAS) that listed her as the member's SBP beneficiary and reflected that he continued to pay SBP premiums for her coverage after their divorce. The claimant also cited two U.S. Court of Federal Claims decisions in support of her claim, *Holmes v. United States*, 98 Fed. Cl. 767 (2011), and *Holt v. United States*, 64 Fed. Cl. 215 (2005). The claimant further stated that the member never remarried, and therefore, there is no competing claim for the SBP annuity. She stated that if the claim was denied, no one would receive the benefit of the SBP annuity, a program that the member had continued to pay into after the divorce.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim finding no evidence that the member elected former spouse SBP coverage for the claimant. He further explained that since neither the divorce decree nor the subsequent order required the member to elect former spouse SBP coverage for the claimant, the claimant had no statutory right to request a deemed election for former spouse SBP coverage under 10 U.S.C. § 1450(f)(3). The adjudicator then distinguished the *Holt* decision by pointing out that the divorce decree in that case clearly ordered the member to establish former spouse SBP coverage. The adjudicator then explained that in the *Holmes* decision the Court of Federal Claims assumed, without deciding, that the divorce decree included an obligation that the member elect former spouse SBP coverage. The adjudicator explained that DOHA is prohibited from making a similar assumption in the absence of a court order reflecting that the member establish former spouse SBP coverage for the claimant. The adjudicator recognized that the record reflected that the member did intend to cover the claimant as his SBP beneficiary. However, the adjudicator explained that DOHA had no authority under statute or regulation to allow the claim. The adjudicator then described other available remedies outside the DOHA claims process that rest with the Air Force Board of Correction of Military Records (AFBCMR) under 10 U.S.C. § 1454, and 10 U.S.C. § 1552.

In the claimant's request for reconsideration, through her attorney, she states that she has petitioned the AFBCMR to correct the member's record to reflect that a timely former spouse SBP election was made. She suggests staying the reconsideration process in front of DOHA pending the outcome of the application to the AFBCMR. As the basis for her request for reconsideration, she states that although the DOHA adjudicator distinguished the *Holt* decision based on the facts of the case, that distinction does not overcome the basis for the *Holt* decision, which was that an otherwise defective SBP election or administrative error can be corrected on equitable grounds instead of enforcing technical, bureaucratic, and highly formalized approaches where the parties' intentions were clear. She states that the member's intent that she be covered under the SBP was recognized by the DOHA adjudicator. Therefore, she maintains that the issue is not whether the member's divorce decree included a requirement to cover the claimant as his former spouse SBP beneficiary, but rather, whether or not the member substantially complied with all the requirements in naming her as his intended beneficiary.

### **Discussion**

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* DoD Instruction 1340.21 (May 12, 2004) ¶ E5.7. 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).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under 10 U.S.C. § 1448(a)(1)(A), SBP is open to a member who is eligible for retired pay. 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 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, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(3)(A)(iii). Under 10 U.S.C. § 1448(b)(5), a member who elects to provide an annuity to a former spouse under section 1448(b)(3), shall, at the time of making the election, provide the Secretary concerned with a written statement signed by the member and the member's former spouse. 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.

In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to a former spouse. If the member fails to do so, 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).

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired until such coverage ended with their divorce in October 2003. The claimant was not awarded former spouse SBP coverage in the divorce decree. Therefore, she had no statutory right to request a deemed election. *See* DOHA Claims Case No. 2022-CL-031603.2 (August 22, 2022); DOHA Claims Case No. 2021-CL-042308.2 (November 30, 2021); DOHA Claims Case No. 2021-CL-020502.2 (August 19, 2021); and DOHA Claims Case No. 2020-CL-062903.2 (February 25, 2021).

The claimant now asserts that the member substantially complied with the statutory requirements for naming the claimant as his former spouse beneficiary. However, the member did not elect former spouse SBP coverage for the claimant within one year of the divorce. There is no evidence that the member submitted anything to DFAS in order to elect former spouse coverage. Although the member intended that the claimant be covered as his former spouse SBP beneficiary, he failed to establish SBP coverage for her within one year of the divorce. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2021-CL-032612.2 (November 19, 2021); and DOHA Claims Case No. 2021-CL-030918.2 (November 19, 2021).

As set forth above, DOHA has no authority to allow this claim for the SBP annuity because we are bound by statute and regulation, and the written record as submitted to us by DFAS and the claimant. As explained by the adjudicator in the appeal decision, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case, the AFBCMR, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. *See also* 10 U.S.C. § 1454 (the specific authority for the AFBCMR to correct or revoke an election for SBP). The AFBCMR's authority under these two statutes is discretionary, and is outside of DOHA's authority.

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-100605, dated August 9, 2022, disallowing the claim. 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  
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