

DATE: February 23, 2023

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In Re: )

[REDACTED] )

) Claims Case No. 2021-CL-091002.2

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 retired 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-091002, dated July 26, 2022.

**Background**

On February 1, 1983, the member retired from the Army, and elected Survivor Benefit Plan (SBP) coverage for his spouse. On April 17, 1990, the member divorced. On August 8, 1997, the member married the claimant. On September 11, 1998, the member requested that the Defense Finance and Accounting Service (DFAS) add the claimant as his new spouse beneficiary. He also provided DFAS with his divorce decree from his first spouse and his certificate of marriage to the claimant.

On August 14, 2018, the member and the claimant divorced. In pertinent part, the divorce decree awarded the claimant the following:

The [claimant] is awarded one-half of the [member's] military retirement benefits, which the Court recognizes to be approximately \$747.50 per month and any military benefits she may be entitled to such as medical insurance, survivor benefits, and military identification card. The [member] shall execute any and all

documents necessary to carry out the Order of this Court. If he fails to do so, the clerk of court may execute said documents.

On July 10, 2019, the Defense Finance and Accounting Service (DFAS) received a ten-page facsimile transmission from the claimant. In that transmission, the claimant submitted an excerpt from a DFAS document listing documentation to be submitted as part of an application for retired pay. She also submitted two pages from her divorce decree, but the first page of it was missing. She further submitted a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, and a DD Form 2656-8, *Survivor Benefit Plan (SBP) – Automatic Coverage Fact Sheet*. On July 25, 2019, an internal memorandum was issued by DFAS. In that memorandum, DFAS – Garnishment Operations acknowledges receipt of the SBP deemed election request but notes that the application package is incomplete, and requests that DFAS – Reserve Component Pay suspend SBP coverage. On December 11, 2019, DFAS sent a letter to the member advising him that they were unable to process his SBP request because they were missing a complete copy of the final divorce decree with the judge’s signature and divorce date. On December 18, 2019, the claimant faxed additional documentation to DFAS, including a DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election*, which was not signed nor dated by the claimant. On January 8, 2020, DFAS removed the claimant as the SBP beneficiary on the basis that the claimant submitted her application more than one year after the court order was filed.

On May 8, 2020, the member passed away. On June 26, 2020, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member’s former spouse. On June 30, 2020, DFAS denied the claim on the basis that although the divorce decree awarded the claimant former spouse SBP coverage, neither the member nor the claimant requested former spouse coverage within one year of the divorce.

The claimant appealed DFAS’s denial of her claim. She stated that she devoted her life as his caregiver and homemaker during the 20 years of marriage to the member. She stated that during those years, she and her kids were subjected to mental and verbal abuse. She stated that she was unaware of the deadline to submit any documents due to her condition and medical treatment for it. In the DOHA appeal decision, the attorney examiner upheld DFAS’s denial of the claim for the SBP annuity. He explained that although the divorce decree did require the member to make a former spouse election for the claimant, neither the claimant nor the member made a deemed election for former spouse coverage. The attorney examiner further stated that since DFAS rejected the claimant’s July 2019 fax submission as incomplete, the claim for SBP annuity must be denied. The attorney examiner also explained other avenues of relief the claimant may take, such as petitioning the Army Board for Correction of Military Records (ABCMR).

In her request for reconsideration, through her attorney, the claimant states that the relevant statute only requires a timely request and does not specify the nature of that request. The claimant states that the appeal decision erroneously applied the specificity requirements of 10 U.S.C. § 1450(f)(3)(A) to the requirement of a request under 10 U.S.C. § 1450(f)(3)(D). The claimant argues that she performed substantial compliance with the statute, which should be accepted as sufficient. Since the member failed to comply with the divorce decree, the claimant

provided DFAS with the information regarding the election to name her as the member's former spouse SBP beneficiary on July 10, 2019. She states DFAS acknowledged her request had been made but determined it was insufficient to deem the former spouse SBP election because a complete copy of the divorce decree was not provided. She states that once she was notified by DFAS that her request was insufficient, she should have been allowed more time to comply with the more specific requirements necessary for the approval of her request. She cites a Supreme Court decision, *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355 (2018) in support of her argument. In that case, she states that the Court held when a statute's language carries a plain meaning, the duty of an administrative agency is to follow its commands as written, not to supplant those commands with others it may prefer. She further argues that even if her reading of the SBP law is not the most reasonable interpretation of it, due process of law and equity are required to be considered given the substantial duress she endured during the years after her divorce.

### **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 the former spouse, the member must notify DFAS in writing of the divorce and his/her intention to provide coverage for the former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. The member must establish former spouse coverage within one year of the divorce decree, or pertinent court order. *See* 10 U.S.C. § 1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a court order to provide SBP coverage to a former spouse. If the member fails to do so, the former spouse has one year of the date of the court order or filing involved to file a request for a deemed election. *See* 10 U.S.C. § 1450(f)(3)(C). 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.

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 Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 43, contains the regulations concerning SBP elections and election changes. Paragraph 430302 of the DoDFMR provides that 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 court order. Both the DD Form 2656-10 and the court order must be received by DFAS within one year of the date of the court order or filing involved. *See* DoDFMR § 430503.

In this case, the member was obligated to cover the claimant as his former spouse under the SBP after their divorce, based on the divorce decree. Although the record reflects that DFAS was in possession of the documents faxed to them by the claimant as of July 10, 2019, that documentation was not sufficient to satisfy applicable statute and regulation regarding the requirements of a deemed election request. DFAS did not receive the DD Form 2656-10 from the claimant until December 18, 2019 (albeit unsigned and not dated), more than one year from the date of the divorce decree. Therefore, DFAS properly denied the claim for the SBP annuity.

The claimant cites a Supreme Court decision in support of her argument that she substantially complied with the overall scheme of the SBP law. It appears that she is asserting that the Department of Defense is prohibited from adding more requirements to the SBP law as written by supplanting the requirements contained in the statutes with other it prefers. However, as detailed above, the requirements for a deemed election request are set forth by federal statute and implemented by regulation under the authority of 10 U.S.C. § 1455. Specifically, 10 U.S.C. § 1450(f)(3)(A) states that 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. That manner is set forth under DoDFMR ¶ 430503. As for DOHA considering equity in this matter, we are bound by statute and regulation, and therefore, the claim for the SBP annuity must be denied. However, as detailed by the attorney examiner in the appeal decision, the claimant may have other available remedies based on equity that rest outside of DOHA's purview. Under 10 U.S.C § 1454, the Secretary concerned may correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error. Further, under 10 U.S.C. § 1552(a)(1), the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Either type of action is made through a civilian board, in this case the ABCMR. Please note that DOHA has no role in the correction of military records, and the discretion to act upon a petition for a request for correction rests in the sole discretion of the ABCMR.

## Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision in DOHA Claim No. 2021-CL-091002, dated July 26, 2022. 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

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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