

DATE: February 23, 2023

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In Re: )

[REDACTED] )

) Claims Case No. 2022-CL-042609.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law.

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

**DECISION**

The claimant, the surviving 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. 2022-CL-042609, dated June 27, 2022. In that case, DOHA denied the claimant's claim for the member's Survivor Benefit Plan (SBP) annuity because his former spouse made a timely and proper deemed election.

**Background**

The member was born on October 26, 1938. The member joined the Army National Guard in 1964. On September 9, 1973, the member was married. On March 21, 1984, the member received a *Notification of Eligibility for Retired Pay at Age 60*, notifying him that he had 20 years of qualifying reserve service towards retirement. The record reflects that the member declined to make an election for SBP until he reached age 60. On July 30, 1998, in anticipation of the member's 60<sup>th</sup> birthday, he completed a DD Form 2656, *Data for Payment of Retired Pay*, electing SBP coverage for his spouse. On October 28, 2002, the member divorced. The divorce decree, issued by a Michigan state court, in pertinent part, provided that the member

receive as his sole and separate property, free and clear from his former spouse, all his retirement funds from the U.S. Army. The divorce decree also stated the following:

The Plaintiff, [the member's former spouse], shall be entitled to receive an amount equal to 55% of the Defendant's U.S. Military benefits upon the death of the Defendant, [the member].

The court also specifically reserved jurisdiction for the purpose of enforcing provisions of the divorce decree:

Retention of Jurisdiction. This court reserves and retains jurisdiction over this cause and the parties hereto for the purpose of enforcing the provisions of this Judgement of Divorce until the terms of the property settlement have been satisfied, including enforcement thereof by way of lien, wage assignment of appointment of receiver as well as any other appropriate Court action.

On May 21, 2018, the member and the claimant were married. On July 24, 2018, the member submitted a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, to the Defense Finance and Accounting Service (DFAS), requesting that the claimant be named as his spouse SBP beneficiary. DFAS subsequently established SBP coverage for the claimant.

On May 14, 2019, the member's former spouse's attorney filed several motions (including a motion to add the member's current spouse as a party and a motion to clarify and implement the divorce decree) with the same Michigan state court that issued the divorce decree in 2002. On June 6, 2020, the court issued an order adding the member's current spouse, the claimant, as a necessary party, and setting the matter for a hearing on July 18, 2019, to determine whether the former spouse or the current spouse was the member's beneficiary for the SBP. Specifically, the court stated:

THEREFORE, the Court orders [the claimant] added as a Party Defendant and set this matter for Hearing on the 18<sup>th</sup> day of July at 9:00 o'clock in the fore noon to determine if [the member's former spouse] or [the member's current spouse] is entitled to the Survivor Benefit Plan benefits of [the member].

On July 18, 2019, after having listened to the arguments of the parties and finished the review of the documents in the case file, the court issued an order requiring that the member immediately elect SBP coverage for his former spouse. Specifically, the court ordered the following:

[The member] shall immediately elect former-spouse Survivor Benefit Plan (SBP) coverage for [the member's former spouse].

Should [the member] fail or refuse to elect former spouse benefits under the Survivor Benefit Plan for [the member's former spouse], within 30 days of this Order, [the member's former spouse] shall be entitled to submit a deemed election to the Defense Finance and Accounting Service (DFAS).

On August 23, 2019, the member's former spouse completed a DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election*. On November 1, 2019, DFAS received, through her attorney, the member's former spouse's deemed election request, along with the divorce decree and subsequent court order. On November 26, 2019, DFAS notified the member that they had received a SBP deemed election request from his former spouse and that DFAS had updated his retired pay account to reflect his former spouse as his SBP beneficiary. On January 30, 2020, DFAS notified the member that cost for his former spouse's SBP coverage would be assessed retroactive to the first day of the month following the date of the court order which awarded the coverage. DFAS stated that the court order awarding the coverage was dated July 18, 2019.

The member passed away on April 1, 2020. On April 7, 2020, the claimant filed a DD Form 2656-7, *Verification for Survivor Annuity*, with DFAS, claiming the SBP annuity as the spouse of the member. On April 27, 2020, DFAS denied the claim on the basis that the member's former spouse requested a timely deemed election and was entitled to the SBP annuity. On May 26, 2020, the claimant, through her attorney, appealed DFAS's denial of her claim. In her appeal, she stated that the member's former spouse did not submit her request for a deemed election until 18 years after the divorce and that the member's Retiree Account Statement (RAS) dated December 15, 2019, reflected that the claimant was listed as his spouse SBP beneficiary. She stated that the divorce decree issued in October 2002 provided that the member's former spouse was entitled to receive 55% of the member's military benefits upon his death. She argued the clause was not ambiguous and clearly referred to the SBP. Therefore, under the law, she maintained that the member's former spouse was not entitled to the SBP annuity because she did not deem her election within one year of the issuance of the divorce decree in 2002.

On December 21, 2021, DFAS issued an administrative report upholding the denial of the claimant's claim for the SBP annuity. DFAS stated that the language in the October 2002 divorce decree did not mention SBP and did not require the member to provide SBP coverage to the former spouse. Therefore, issuance of the subsequent order requiring the member to provide SBP coverage to his former spouse gave the former spouse the right to request a deemed election for former spouse SBP coverage.

In the DOHA appeal decision, the adjudicator sustained DFAS's denial of the claim. The adjudicator found that DFAS's interpretation of the governing law is entitled to great deference and should be sustained unless contrary to law. The adjudicator upheld DFAS's determination that the language contained in the original divorce decree was insufficient to require the member to provide former spouse SBP coverage to the former spouse under 10 U.S.C. § 1448(b)(2)(B). The adjudicator affirmed DFAS's determination that the court order issued on July 18, 2019, which was unambiguous and clearly ordered the member to provide former spouse SBP coverage to his former spouse, met the statutory definition of a court order under 10 U.S.C. § 1450(f)(3)(A), which gave the former spouse the right to request a deemed election for former spouse coverage. The adjudicator held that the former spouse timely deemed her election, and thus, there was no legal basis to award the claimant the SBP annuity as the member's widow.

In the claimant's reconsideration request, through her attorney, she contends that the 2019 court order violates Michigan state law and cannot be used to circumvent federal law. She states that order was not regular on its face as defined by 10 U.S.C. § 1447(13)(C), because it was not issued by a court of competent jurisdiction. She states that the court lacked jurisdiction to issue the order because its action violated the 10-year statute of limitations set forth under Michigan Compiled Laws (MCL) Chapter 600.5809(3). She requests that the DOHA Claims Appeals Board either reverse the decision or remand the case to DFAS.

### **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. Claims against the government may be allowed only for expenses authorized by statute or regulation. 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 interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. *See* DOHA Claims Case No. 2020-CL-081718.2 (May 4, 2021).

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 the Secretary concerned 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 by the member within one year after the date of the decree of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(3)(A). In addition, a member may be required under the terms of a court order in the proceedings of a divorce, dissolution or annulment, to provide SBP coverage to the 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). Under 10 U.S.C. § 1450(f)(3)(A), the former spouse must provide the Secretary concerned with a written request for the deemed election and a copy of the court order, regular on its face, which requires such an election or incorporates, ratifies or approves the written agreement by the member. Pursuant to the deemed election, once the former spouse is designated the beneficiary under the SBP, a subsequent change can only be made following the submission of a modifying court order to the Secretary concerned which permits such a change of election. *See* 10 U.S.C. § 1450(f)(2)(A) and DOHA Claims Case No. 05100302 (November 30, 2005). In accordance with 10 U.S.C. § 1455, the Department of Defense has issued implementing regulations for the SBP law. The SBP for members is administered by DFAS.

Under 10 U.S.C. § 1447(13), "court order" means a court's final decree of divorce, dissolution, or annulment or court ordered, ratified, or approved property settlement incident to

such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or of a court ordered, ratified, or approved property settlement agreement incident to such previously issued decree). The term “final decree” means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for the taking of such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals. *See* 10 U.S.C. § 1447(13)(B). Further, under 10 U.S.C. § 1447(13)(A), the term “regular on its face” means a court order that meets the conditions prescribed under 10 U.S.C. § 1408(b)(2). Under that section, a court order is regular on its face if the order is issued by a court of competent jurisdiction; is legal in form; and includes nothing on its face that provides reasonable notice that it is issued without authority of law.

In this case, the member elected spouse SBP coverage in 1998, and divorced his spouse in 2002. The divorce decree issued in October 2002 did not require that the member elect former spouse SBP coverage and in fact stated that the court retained and reserved jurisdiction over the parties and the divorce action. The court order issued in July 2019 expressly required that the member “shall immediately elect” former spouse SBP coverage, thus satisfying the statutory definition of “court order” which requires such election under 10 U.S.C. § 1450(f)(3)(A). The claimant now challenges the validity of the court order issued in 2019 which gave rise to the former spouse’s statutory right to request a deemed election for former spouse SBP coverage. She contends that the 2019 order should not be recognized because it is invalid on its face. Specifically, the claimant cites the 10-year statute of limitations set forth under MCL Chapter 600.5809(3), which provides that an action founded upon a judgment of a Michigan state court must be commenced within ten years following entry of the judgment. The 2019 court order was not issued by a court of competent jurisdiction, the claimant maintains, because the court lost jurisdiction in 2012 when the statute of limitations had elapsed.

A review of the 2019 order reflects that it was issued by the judge after review of the documentation in the record and listening to the parties’ arguments. In fact, both the member and the claimant were listed as defendants at the hearings. The order was signed by the presiding judge and contains the filing date and corresponding case number. In addition, it is stamped by the clerk of the court certifying that it is a full, true and correct copy of the original on file in the clerk’s office. After receiving the court order and the former spouse’ request for a deemed election, DFAS found it to be regular on its face, and followed the procedures established under the SBP law. DFAS sent the member two letters concerning the establishment of SBP coverage for his former spouse, one in November 2019, and the other in January 2020. Based on the record, the member had the opportunity to raise his concerns with DFAS or seek relief in the state court. Although the claimant is now contesting the validity of the court order based on the statute of limitations, neither she nor the member raised the issue at the hearing in the Michigan state court in 2019, nor after receiving the two letters from DFAS. In any event, we find that the claimant has failed to identify any deficiencies in the court order that would render it irregular on its face. DFAS had the responsibility and the obligation under the law to correctly determine the legal SBP beneficiary of the member. Substantial evidence in this case supports DFAS’s determination, and it is reasonable. DFAS properly designated the member’s former spouse as his SBP beneficiary in 2019.

## 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

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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