

DATE: February 27, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-060201.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A surviving spouse's failure to submit an application for the annuity within six years of the member's death, bars her Survivor Benefit Plan (SBP) claim under 31 U.S.C. § 3702(b).

DECISION

The claimant, the surviving spouse of a deceased 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-060201, dated August 22, 2022. In that case, DOHA denied the claim for the member's Survivor Benefit Plan (SBP) annuity because it was filed more than six years after the member's death.

Background

The member retired from the Army on November 1, 1991, with spouse SBP coverage. He divorced his spouse in 1993, but no former spouse SBP coverage was established on his retired pay account. On June 21, 1997, the member and the claimant were married, and as the member's newly acquired spouse, the claimant was covered as the member's spouse SBP beneficiary one year from the date of their marriage under 10 U.S.C. § 1448(a)(6). On June 14, 2010, the member passed away.

The record reflects that the Defense Finance and Accounting Service (DFAS) – Retired and Annuitant Pay sent the claimant a letter dated June 17, 2010, notifying her that in closing out the retired pay account of the member, DFAS discovered that premiums for SBP were not being

deducted from his retired pay as required by his election at the time of his retirement. DFAS requested that the claimant provide them with her marriage certificate, her social security number and her date of birth. DFAS enclosed a return envelope and asked that she also return their letter with the information requested. On July 25, 2010, the claimant completed a Standard Form (SF) 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*, and submitted it to DFAS claiming the unpaid arrears of retired pay (AOP) of the member. On August 9, 2010, DFAS responded to the claim for AOP. DFAS requested that the claimant submit a new SF-1174 along with a copy of the member's certificate of death with the cause and manner of his death.

On August 31, 2010, the Department of Veterans Affairs (VA) sent the claimant a letter expressing their sympathies upon learning of the member's death. The VA advised the claimant that as the member's surviving spouse, they would be sending her a check for VA compensation for the month of the member's death. On September 2, 2010, DFAS sent the claimant a letter expressing their condolences for her husband's death. DFAS advised the claimant to file a SF-1174 if she had not already done so. DFAS also advised her of her right to seek benefits from other agencies of the federal government. DFAS stated that she may be entitled to receive benefits from the VA or the Social Security Administration. On September 14, 2010, the VA sent the claimant their decision denying her claim for Dependency and Indemnity Compensation (DIC).

On August 13, 2021, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, applying for the SBP annuity. On September 20, 2021, DFAS denied the claim for the SBP annuity due to the six-year statute of limitations set forth under 31 U.S.C. § 3702(b), the Barring Act. DFAS stated that they researched the member's retired pay account and found that their records indicated that the first application for the SBP annuity sent to DFAS by the claimant was received on August 20, 2021.

The claimant appealed DFAS's determination to DOHA. In her appeal, she stated that in June 2010 she provided information to both the VA and DFAS confirming her status as the member's surviving spouse. She stated that she also visited the VA in person in June 2010. The DOHA attorney examiner upheld DFAS's denial of the SBP claim due to the application of the six-year statute of limitations, the Barring Act. The attorney examiner acknowledged that the claimant had interactions with both the VA and DFAS after the member's death. He also explained that although the claimant may have sought guidance regarding the SBP annuity and her requests were ignored or answered incorrectly, her application for the SBP annuity was not received by DFAS within six years of the member's death as required by federal statute. The attorney examiner advised the claimant that she had the right to request waiver of the Barring Act through the Assistant Secretary of the Army. The attorney examiner then explained that the Army Board for Correction of Military Records (ABCMR) has the authority under 10 U.S.C. § 1552, to correct a member's record when the Secretary concerned considers it necessary to correct an error or remove an injustice.

In her reconsideration request, the claimant states that when the member died in June 2010, she contacted DFAS and the VA. She encloses two letters she received from DFAS; one

dated September 2, 2010, and the other dated August 9, 2010. She requests compensation for the member's disability benefits from the VA as well as the SBP annuity.

Discussion

The SBP, now codified under 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 31 U.S.C. § 3702(b), a survivor has six years to file a claim for the SBP annuity. In pertinent part, section (b)(1) states the following:

A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues . . .

All the events giving rise to the government's liability to make SBP annuity payments to a survivor occur at the date of the member's death, and the survivor has six years from that date to file the claim. Claims filed more than six years after a member's death are barred. *See* DOHA Claims Case No. 2018-CL-091702.2 (June 17, 2019); DOHA Claims Case No. 2018-CL-061204.2 (January 18, 2019); and DOHA Claims Case No. 2017-CL-062703.2 (August 31, 2017).

In this case, the claimant was covered as the member's spouse SBP beneficiary one year after the date of their marriage. The member's death in June 2010 fixed the liability of the government and entitled the claimant to make a claim. We acknowledge the claimant received letters from DFAS and the VA, and that she sent information to both agencies. However, there is no evidence in the record that reflects that she filed a claim for the SBP annuity within six years of the member's death. DFAS has searched their records and found that the first application for the SBP annuity sent to DFAS by the claimant was received on August 20, 2021. DOHA has no authority to make any exceptions to the Barring Act, and the time limitations it imposes. *See* DOHA Claims Case No. 08112402 (November 26, 2008).

As explained by DFAS and DOHA, the claimant may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Army. Under 31 U.S.C. § 3702(e), upon request of the Assistant Secretary of the Navy, the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for claims involving a uniformed service member's pay, allowances or survivor benefits. Under DoD Instruction 1340.21 ¶ E6.4 (May 12, 2004), the Director of DOHA is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. However, the claimant must file her request directly with the Assistant Secretary of Army at the following address:

Assistant Secretary of the Army
(Financial Management & Comptroller)
109 Army Pentagon
Washington, D.C. 20310-0109

We note that under 31 U.S.C. § 3702(e), waiver shall only be granted to allow payment up to a maximum of \$25,000.00, and the claimant will not be granted the SBP annuity prospectively. Therefore, the claimant may wish to also pursue the matter with the ABCMR. Under 10 U.S.C. § 1552, the Secretary of a military department, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. Information on petitioning the ABCMR may be found online at <https://arba.army.pentagon.mil/abcmr-overview.html>.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated August 22, 2022.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairperson, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board