

DATE: February 27, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-051001.2

Claimant)

**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. Marine Corps, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-051001, dated July 11, 2022.

Background

On April 11, 1981, the claimant and the member were married. The member retired from the Marine Corps on August 1, 1997. In preparation for his retirement, the member elected spouse and child Survivor Benefit Plan (SBP) coverage. On January 6, 2003, the claimant and the member divorced. The divorce decree incorporated a marital settlement agreement signed by the claimant and the member, and their respective attorneys. In pertinent part, the claimant and the member agreed to an approximate amount of the claimant's share of the member's military retired pay, with a more precise calculation to follow through a separate order. The agreement also stated the following with regard to the division of the member's military retired pay:

HUSBAND is presently receiving a military pension distribution, and has been attributed that amount in the child support calculation. As such, HUSBAND will continue to retain the community share of the pension without payment thereto to WIFE, and child support will remain unchanged by the division of the pension in this judgment, until the PARTIES actually receive separate pension payments

from the Department of Defense after actual division of the military retirement benefit.

The agreement then mentioned the SBP:

The maintenance of the Survivor Benefit[s] Plan premium, to the extent it benefits the non-service member shall be maintained by the recipient of the benefit, here WIFE, and accordingly if the Survivor Benefit[s] Plan is not desired by WIFE she may retain for her benefit the savings in the cost of maintaining the Plan.

The member took no action to elect former spouse SBP coverage for the claimant. On May 8, 2004, the member married again. On September 15, 2006, the member sent the Defense Finance and Accounting Service (DFAS) a request to remove the claimant as his SBP beneficiary and add his new spouse as his SBP beneficiary. The record reflects that the member and his second spouse were legally separated on April 10, 2013. The member then made two attempts to cancel spouse SBP coverage for his second spouse, once in 2013 and the other in 2016. DFAS responded to the member both times advising him that SBP coverage could not stop until a final divorce was awarded.

The member passed away on May 5, 2021. On July 22, 2021, the claimant's attorney sent DFAS a letter requesting that the claimant be reinstated as the member's SBP beneficiary based on a *Stipulation Resolving Petitioner's Request for Order Filed November 3, 2020*, that had not been signed due to the member's death. That unsigned request for an order stated the following:

Survivor Benefit Plan Beneficiary

4. Respondent agrees to immediately reinstate Petitioner as the Survivor Benefit Plan (hereafter "SBP") beneficiary either within 30 days of filing a stipulation between [the member's 2nd spouse] and Respondent to remove [the member's 2nd spouse] as Respondent's SBP beneficiary, which comes first. If the Petitioner is not reinstated as SBP as stated above, the outstanding arrears balance of \$11,208.12 as discussed in paragraph 3 will become immediately due and payable to Petitioner. Petitioner shall be responsible for any and all fees required to reinstate and maintain her as the SBP beneficiary.

On September 7, 2021, the claimant submitted to DFAS, a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. On October 6, 2021, DFAS denied her claim on the basis that the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a former spouse deemed election. DFAS explained that if a member and the member's former spouse sign an agreement to continue SBP with former spouse coverage, and a qualified court order incorporates, ratifies, or approves the agreement, the former spouse may request a deemed election for former spouse coverage if the member fails to elect coverage. However, a request for a deemed former spouse election must be received within one year of the divorce.

On October 18, 2021, the claimant appealed DFAS's denial of her claim. She stated that it was an injustice to deny her the entitlement to receive the SBP annuity. She stated that she and her two sons (one who is disabled), endured financial hardship during the member's absences due to his military detachments. She stated that neither she nor the member were aware that upon divorce they were required to make a request for former spouse SBP coverage. She noted that she remained as the member's spouse beneficiary of record after their divorce, and submitted the member's Retiree Account Statement (RAS) dated February 23, 2006, reflecting that the member continued to pay SBP premiums for her coverage, as well as his adult, disabled son's coverage. She further stated that no one advised her that the member removed her as his SBP beneficiary. Therefore, she stated that she was not afforded an opportunity to contest the change. She stated that the member sent her personal checks for her share of his monthly retired pay. She stated that she and the member continued to contribute SBP premiums for coverage through deductions from his retired pay. She emphasized that these premiums were also being deducted from her share of the member's retired pay. She stated that the member's death has caused her financial hardship since she is the only care-giver for their adult disabled son.

DFAS issued an administrative report in the claimant's case on March 16, 2022, upholding their denial of the claim for the SBP annuity. On May 5, 2022, DFAS forwarded the claimant's appeal package to DOHA. In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He found no evidence that the member notified DFAS within one year of their divorce to change the SBP coverage from spouse to former spouse.

In her request for reconsideration, the claimant reiterates that she believes it is an injustice to deny her the SBP annuity. She states that she was married to the member for 22 years, and during 16 of those years, the member served in the military. She states that she provided a court order, regular on its face, to DFAS, which required the member to continue to cover her as his SBP beneficiary after their divorce. Neither she nor the member knew of the requirement to elect former spouse SBP coverage within one year of the divorce. She states that the member subsequently removed her name as his SBP beneficiary when he remarried without her knowledge or consent. She states that the member violated the terms of their divorce decree by removing her as the SBP beneficiary. She maintains that the member's divorce from his 2nd spouse was to be finalized in October 2021. She also explains that prior to the member's death, they had come to an agreement to continue SBP coverage for her, and this was reduced to writing by her attorney. Unfortunately, the member passed away before the agreement was finalized by the court.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. 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.

SBP is an income maintenance program for the survivors of deceased members of the uniformed services. *See* 10 U.S.C. §§ 1447-1455. 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 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. *See* 10 U.S.C. §1448(b)(3)(A). In addition, a member may be required under the terms of a divorce decree 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 divorce to request a deemed election. *See* 10 U.S.C. § 1450(f)(3). The former spouse's request that the retired member shall be deemed to have made such an election if the Secretary concerned receives an election for former spouse SBP coverage in writing and in the manner prescribed by the Secretary concerned. *See* 10 U.S.C. § 1450(f)(3)(A). An election for former spouse SBP coverage may not be deemed to have been made unless the Secretary concerned receives such a request from the former spouse within one year of the date of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C). The Service Secretaries have delegated their authority under the SBP law to DFAS.

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time of his retirement in 1997 when he elected coverage for her and his children, until 2003 when their divorce ended the spouse SBP coverage for her. Under the SBP law, the member failed to establish former spouse SBP coverage for the claimant within one year of their divorce. In addition, even if the language in the divorce decree is interpreted to require the member to elect former spouse SBP coverage for the claimant (giving her the statutory right to request a deemed election), she still had to submit her request within one year of the date of the divorce. Since she failed to do so, the SBP annuity is not payable to her. *See* DOHA Claims Case No. 2020-CL-102613.2 (July 18, 2022).

While it is unfortunate that the member may have passed away before resolving certain issues regarding his survivor benefits, DOHA has no authority under applicable statute and regulation to allow the SBP annuity. However, the claimant may have other available remedies that rest with the Board for Correction of Naval Records (BCNR) under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. These remedies are outside of DOHA's authority and any request for a correction of record needs to be pursued with the BCNR.

Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision dated July 11, 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

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