

DATE: March 9, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-010601.2

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, the guardian of a deceased member of the U.S. Navy's biological son, on the son's behalf, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2022-CL-010601, dated September 6, 2022. In that decision, DOHA sustained the Defense Finance and Accounting Service's (DFAS's) denial of the claim for the child Survivor Benefit Plan (SBP) annuity of the deceased member.

Background

The member was born on October 7, 1957. On November 7, 1983, the member was married. On April 22, 2003, the member received her Notification of Eligibility for Retired Pay memorandum (NOE), notifying her that she was eligible to make an election under the Reserve Component SBP. The Reserve Component SBP extends eligibility for SBP to Reserve Component members who would otherwise be eligible to receive retired pay except that they have not reached the required age of 60. The record reflects that the member completed a DD Form 1883, *Survivor Benefit Plan Election Certificate*, in 2003 electing Option C, to provide immediate SBP coverage for her spouse. On April 14, 2003, the Naval Reserve Personnel Center issued the member a retirement order and transferred her to retired status effective June 1,

2003. On February 10, 2004, the member gave birth to her son. On May 17, 2004, the member passed away, leaving a surviving husband (a military member) and her son.

On June 24, 2005, the claimant married the member's widower and father of the member's son. On January 31, 2010, the member's widower completed the DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's surviving spouse. DFAS established the SBP annuity for the member's surviving spouse. In May 2012, the member's widower (surviving spouse/claimant's husband) retired from the U.S. Air Force and elected SBP coverage for the claimant and his children (including the deceased member's biological son). The claimant's husband passed away on December 14, 2020.

The claimant completed a DD Form 2656-7, signed on January 21, 2021, claiming the SBP annuity for the deceased member's son. On February 2, 2021, DFAS sent the claimant a letter stating that the member's son was eligible to receive the child SBP annuity as his biological mother's beneficiary. DFAS requested that the claimant complete and resubmit new SBP forms. On February 8, 2021, the claimant resubmitted the forms to DFAS. On April 7, 2021, DFAS denied the child SBP annuity claim on the basis that the child's mother had only elected spouse SBP coverage at the time she became eligible to retire.

On May 3, 2021, the claimant appealed the denial of the child SBP annuity claim. In her appeal, she noted various inconsistencies in her correspondence with DFAS. She stated that the member's son had not yet been born at the time of her election in 2003, and the record reflected that the member would have included him as her SBP beneficiary had she survived. She stated that the treatments the member received while pregnant, as well as the health of her baby after his birth, precluded the member from adding him as her child SBP beneficiary in the few months prior to her death. She stressed that the member's son has had health issues since he was a year old and these health issues require treatment and specialized care that the SBP benefits would have covered.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the child annuity claim. The attorney examiner explained that under the applicable statute, 10 U.S.C. § 1448(a)(5), the member did not establish child SBP coverage before her death. Therefore, DOHA had no authority to allow the SBP claim. However, the attorney examiner advised the claimant that other available relief may be found outside the purview of DOHA by petitioning the Board for Correction of Naval Records (BCNR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

On reconsideration, the claimant offers no new information or grounds for allowing the claim, and requests review of the claim on the established written record.

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A married reservist or reservist with a dependent child may elect to participate in SBP when the member is notified under 10 U.S.C. § 12731(d) that the member has

completed the years of service required for eligibility for reserve-component retired pay. *See* 10 U.S.C. § 1448(a)(2)(B). A member who does not have a dependent child upon becoming eligible to participate in the plan but who later acquires a dependent child, may elect to establish coverage for that child pursuant to 10 U.S.C. § 1448(a)(5). That section requires a written election, signed by the member, and received by the Secretary concerned within one year of the marriage. *See* DOHA Claims Case No. 2021-CL-082409.2 (March 14, 2022); and DOHA Claims Case No. 2021-CL-031602.2 (June 28, 2021).

The member was eligible for reserve-component retired pay in 2003 but for the fact that she was not yet 60 years old. After receiving her NOE, she elected RCSBP, Option C, for immediate coverage for her spouse. At that time, the member had no dependent children. Therefore, as set forth above, when the member gave birth to her son, she was able to elect for her newly acquired dependent child but had to make such an election within one year of his birth. Since the member did not make an election for her child, the claim is not payable.

As set forth in the appeal decision, the claimant may have other available remedies that exist outside DOHA's authority. Under 10 U.S.C. § 1454(a), the Secretary concerned may correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error. Further, 10 U.S.C. § 1552(a)(1) states that 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 BCNR. These remedies are outside 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 affirm the appeal decision in DOHA Claim No. 2022-CL-010601, dated September 6, 2022. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board