

DATE: March 9, 2023

In Re:

[REDACTED]

Claimant

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Claims Case No. 2021-CL-051104.2

**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.

DECISION

The claimant, a former spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-CL-051104, dated September 22, 2022.

Background

On February 11, 1983, the claimant and the member were married while the member was serving in the Air Force. On October 30, 1995, in anticipation of his retirement, the member elected Survivor Benefit Plan (SBP) coverage for the claimant as his spouse. In January 1996 the member retired from the Air Force. On November 27, 1996, the member and the claimant divorced. The divorce decree did not require the member to provide the claimant with former spouse SBP coverage. However, it awarded the claimant 50% of the member's retired pay and ordered her to pay the premiums on the member's SBP account. On December 9, 2004, a Domestic Relations Order (DRO) was approved by the court. The DRO required the member to provide former spouse SBP coverage to the claimant.

On April 6, 2020, the member passed away. The claimant subsequently claimed the member's SBP annuity as his former spouse. The Defense Finance and Accounting Service (DFAS) denied her claim on the basis that the member elected spouse only SBP coverage when he retired and did not establish former spouse SBP coverage for the claimant. The claimant appealed DFAS's denial of her claim. She stated that when she and the member divorced, both of their attorneys agreed that she would be awarded the SBP annuity. She stated that she was awarded 50% of the member's monthly retired pay and paid the member the monthly SBP premiums for her coverage. She also stated that she is disabled and dependent on the member's income to survive.

In the DOHA appeal decision, the adjudicator upheld DFAS's denial of the claim for the SBP annuity. She explained that the member did not elect former spouse coverage for the claimant. She further explained that the claimant did not make a deemed election for former spouse coverage within one year of the date of the DRO. The adjudicator then described other available remedies outside the DOHA claims process that rest with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In the claimant's request for reconsideration, she states that the member was suffering from memory problems as a result of an injury he received while serving in the Air Force. Therefore, if the member had been told to elect former spouse SBP coverage for her, he would not have remembered to do so.

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. *See* DOHA Claims Case No. 2020-CL-052601.2 (January 25, 2021).

The SBP, set out in 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. However, a member may elect coverage for a former spouse. *See* 10 U.S.C. § 1448(b)(2). When a member elects former spouse SBP coverage, he must provide the Secretary concerned with a written statement setting forth whether the election is being made pursuant to a court order or to an agreement voluntarily entered into and incorporated in, ratified, or approved by court order. *See* 10 U.S.C. § 1448(b)(5). However, former spouse coverage can be established without the member's active participation. The former spouse may request a deemed election by providing the Secretary concerned with a written request and a copy of the court order requiring the SBP election. *See* 10 U.S.C. § 1450(f)(3)(A). The former spouse's request for a deemed election must be submitted to DFAS within one year of the date of the court order. *See* 10 U.S.C. § 1450(f)(3)(C).

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired in January 1996 until such coverage ended with their divorce on November 27, 1996. The divorce decree did not award the claimant former spouse SBP coverage. However, the member was obligated based on the DRO to cover the claimant as his former spouse under

the SBP. The member failed to establish former spouse SBP coverage, and the claimant did not file a timely deemed election. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2020-CL-0526.1.2, *supra*.

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the attorney examiner in the appeal decision, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case the ABCMR, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. *See also* 10 U.S.C. § 1454 (the specific statutory authority for the ABCMR to correct or revoke an election for SBP). The ABCMR's authority under these two statutes is discretionary and outside DOHA's authority. Information on petitioning the ABCMR may be found online at <https://arba.army.pentagon.mil/abcmr-overview.html>.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-051104, dated September 22, 2022, disallowing the claim. In accordance with DoD 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board