

DATE: April 3, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-062803.2

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 child of a deceased retired member of the Army National Guard (ARNG), requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-062803, dated January 24, 2023.

Background

The claimant, the member's daughter, was born on June 10, 1987. While serving in the ARNG, a reserve component of the Army, the member received his *Notice of Eligibility for Retired Pay* (NOE) letter on March 12, 2001, notifying him that he had 20 years of qualifying service for retired pay upon his application at age 60. He was also informed that he was eligible to make an election under the Reserve Component Survivor Benefit Plan (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 retirement age of 60. On May 6, 2001, the member completed the DD Form 1883, *Survivor Benefit Plan Election Certificate*, indicating that he was not married but had a dependent child, the claimant. In response to the type of SBP coverage the member desired, the member chose "None." However, he checked the box for Option A, declining to make an SBP election until he reached the age of 60.

On May 10, 2002, the member married, and divorced on July 9, 2012. In anticipation of his retirement, the member executed a DD Form 2656, *Data for Payment of Retired Personnel*, dated August 22, 2016. The record reflects that the member's entries on the form are full of inconsistencies. Although the member indicated that he was not married and did not have dependent children, he elected child only SBP coverage but then also elected not to participate in SBP. Under level of coverage, he elected coverage at a reduced base amount of \$824.40. Under the SBP insurable interest beneficiary section of the form, the member filled out the information for the claimant, noting that she was his daughter. On September 6, 2016, an ARNG retired personnel official wrote to the claimant explaining that her father asked that she be sent a letter explaining the SBP that he elected for her. Specifically, the letter stated the following:

My office is submitting your father's paperwork for retired pay. And he elected that if and when anything would happen to him that you will receive a monthly check. You will receive this monthly check until your passing then it will stop. When that time comes please contact this office so paperwork can be completed for you to receive SBP.

The member retired from the ARNG on November 24, 2016. The record reflects that the Defense Finance and Accounting Service (DFAS) established child SBP coverage for the claimant and deducted SBP premiums for that coverage from the member's monthly retired pay. On September 13, 2020, the member passed away. On October 7, 2020, the claimant claimed the SBP annuity as the member's insurable interest beneficiary. On November 18, 2021, DFAS denied the claim for the SBP annuity on the basis that the member did not designate the claimant an insurable interest beneficiary at the time of his retirement. On December 18, 2021, the claimant appealed DFAS's denial of her claim. In that appeal, she stated that the member completed the DD Form 2656, with the assistance of someone in the official capacity for retired personnel, electing her as an insurable interest beneficiary. She stated that she then received a letter dated September 6, 2016, advising her of her father's election. On April 7, 2022, in response to the claimant's appeal, DFAS issued an administrative report sustaining the denial of the claim. DFAS explained that the member's DD Form 2656 contained numerous ambiguities and internal inconsistencies that made it impossible to determine what type of election the member was seeking to make, or even if he was seeking an SBP election at all.

In the DOHA appeal decision, the adjudicator upheld DFAS's denial of the claim for the SBP annuity. The adjudicator found that under the applicable statute and regulation, a member must elect gross retired pay as the base amount under an SBP election for a natural person with an insurable interest, but the member elected a reduced amount, \$824.40, on the DD Form 2656. Therefore, the adjudicator concluded that the validity of the member's SBP election for the claimant as an insurable interest beneficiary is questionable. 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 request for reconsideration, the claimant requests that the ABCMR correct an error or injustice in order to grant her the SBP annuity. She acknowledges that there were irregularities in her father's SBP election process. However, she states the record evidence clearly reflects that it was her father's intent that she be covered under the SBP. She attaches a

retiree account statement (RAS) from November 25, 2016, that reflects under the SBP section that the annuity base amount is \$2,075.00, and that “the annuity payable is 55% of your monthly base amount which is \$1,141.25.”

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. 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). Therefore, under DOHA’s claims settlement authority, we must render decisions based on applicable statutes, regulations, and our prior administrative decisions. The interpretation of a statutory provision through implementing regulations 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. 2022-CL-042609.2 (February 23, 2023); DOHA Claims Case No. 2021-CL-032618.2 (February 7, 2022); and DOHA Claims Case No. 2020-CL-081718.2 (May 4, 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. A member who is not married and does not have a dependent child when he becomes entitled to retired pay may elect to provide an annuity to a natural person with an insurable interest in that person. *See* 10 U.S.C. § 1448(b)(1)(A).¹ A dependent child is defined by 10 U.S.C. § 1448(11) as a person who:

- (i) is unmarried;
- (ii) is (I) under 18 years of age, (II) at least 18, but under 22, years of age and pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution, or (III) incapable of self support because of a mental or physical incapacity existing before the person's eighteenth birthday or incurred on or after that birthday, but before the person's twenty-second birthday, while pursuing such a full-time course of study or training; and
- (iii) is the child of a person to whom the Plan applies, including (I) an adopted child, and (II) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

Therefore, by statute, a member may establish SBP insurable interest beneficiary coverage for a non-dependent child. *See also* Comptroller General Decision 52 Comp. Gen. 973 (1973); and B-179465, July 19, 1974 (Comptroller General found that a member who was not

¹In the case of a member providing a Reserve Component SBP annuity, such an election shall include a designation under 10 U.S.C. § 1448(e). Under subsection (e), a member shall designate whether, in the event he dies before becoming 60 years of age, the annuity provided shall become effective on – the day after the date of his death or the 60th anniversary of his birth.

married at the time he becomes entitled to retired pay may elect an insurable interest beneficiary under the SBP for a child who also qualifies as his dependent child notwithstanding 10 U.S.C. § 1448(b)).

The Secretary of Defense has issued implementing regulations for the SBP law pursuant to 10 U.S.C. § 1455. The Department of Defense Financial Management Regulation (DoDFMR) sets forth those regulations for the SBP law. The regulations in effect at the time of the member's election in 2016 are set forth in the DoDFMR, volume 7B, chapter 54. Paragraph 540204-A includes "non-dependent" child in the definition of a natural person with insurable interest for SBP purposes. Paragraph 540204-A further provides that a natural person with an insurable interest is a "person who has a reasonable and lawful expectation of pecuniary benefit from the continued life of the member." Paragraph 540503 requires that the member "elect gross retired pay as the base amount under an election for a natural person with an insurable interest."

In this case, at the time the member received his NOE in 2001, he did list the claimant as his dependent child on the DD Form 1883 (she would have been almost 14 years old at the time), but he elected Option A, declining to make an SBP election until he reached the age of 60. In 2016, when the member was preparing for his retirement at age 60, he did list his daughter as his insurable interest beneficiary on the DD Form 2656. However, he elected SBP coverage at a reduced base amount of \$824.40, which is in direct contravention of the implementing regulations set forth above.

DOHA recognizes that a retired personnel official sent the claimant a letter detailing the member's election, and DFAS withheld SBP premium payments from the member's monthly retired pay for child SBP coverage for the claimant. However, DFAS has determined that the SBP annuity is not payable to the claimant based on its own implementing regulations, and the DOHA adjudicator has upheld that determination.

DOHA has no authority under statute or regulation to allow the claim for the SBP annuity. However, as explained by the adjudicator 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. Therefore, the claimant should submit her application for a correction of record to the ABCMR, not DOHA, since DOHA has no authority over this type of relief. Information on petitioning the ABCMR, including the DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*, may be found online at <https://arba.army.pentagon.mil/abcmr-app.html>.

Finally, the record reflects that SBP premiums for child coverage were deducted from the member's retired pay when he did not have an eligible child beneficiary. We note that the monthly SBP premium cost for child coverage is a lot less than the monthly cost for insurable interest coverage. In any event, the overpayment of SBP premiums when the member had no eligible beneficiary should be refunded to the proper beneficiary as arrears of pay under 10 U.S.C. § 2771.

Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision dated January 24, 2023. 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board