

DATE: March 22, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-060703.2

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 widow of a deceased member of the U.S. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-060703, dated July 25, 2022.

Background

The member and the claimant were married on July 15, 1966. On January 23, 1991, in preparation for his retirement from the Navy, the member completed a NavComp Form 2272 (Rev 12-85), *Navy Retired/Retainer Pay Data Form*. On that form he noted that he was married and had two dependent children. He elected child(ren) only Survivor Benefit Plan (SBP) coverage at his full retired pay. On January 23, 1991, the claimant signed the form concurring in the member's SBP election. She acknowledged that she had received information that explained the options available and the effects of those options, and signed her concurrence of her own free will. The claimant's signature was witnessed by the Naval Air Station's Officer in Charge (OIC). On April 1, 1991, the member retired from the Navy and began receiving military retired pay. On July 1, 2002, the member passed away.

On July 6, 2002, the claimant completed a DD Form 1884, *Application for Annuity under the Retired Serviceman's Family Protection Plan (RSFPP) and/or Survivor Benefit Plan (SBP)*, and DD Form 2790, *Custodianship Certificate to Support Claim on Behalf of Minor Dependent*

Children of Deceased Members of the Armed Forces, listing five dependent children of the deceased member in the claimant's custody. The claimant submitted both completed forms to the Defense Finance and Accounting Service (DFAS). On April 20, 2009, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the child SBP annuity on behalf of another dependent child of the member. The record reflects that DFAS established SBP child annuities for three of the member's dependent children.

On October 1, 2021, the claimant submitted another DD Form 2657-7, and claimed the spouse SBP annuity of the deceased member. DFAS disallowed the claim for the spouse annuity based on the fact that the member elected to participate in SBP for child only coverage. The claimant appealed DFAS's denial of her claim. In her appeal, she stated that she and the member elected child only SBP coverage based on incorrect information. She stated that they were informed child only SBP coverage was best because the children would not have to pay taxes. She stated that she was married to the member for 36 years and raised his children. She stated that two of children still live with her, she is now 71 years old and continues to work full time to support the household.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim finding the member had elected child only SBP coverage, and that the claimant concurred in writing, and thus there was no statutory basis to award spouse SBP coverage.

In the claimant's request for reconsideration, she states that if she signed anything it was when she was 16 years old at the time of their marriage. She states that the member told her three days before his death that he elected child only SBP coverage. They never had time to discuss the matter since he passed away after surgery. She states that she raised all their children and has worked hard these last 30 years to support them. She is now 72 years old with health issues making it very difficult for her to work.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2022-CL-041901.2 (August 31, 2022).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. A married member or a member who has dependent children is eligible to participate in SBP when he becomes eligible for retired pay. *See* 10 U.S.C. § 1448(a)(2)(A). Further, a married member who is eligible to provide an SBP annuity, may not, without the concurrence of the member's spouse, elect to not participate in SBP, to provide an annuity for the member's spouse at less than the maximum level, or to provide an annuity for a dependent child but not the member's spouse. *See* 10 U.S.C. § 1448(a)(3). A member's SBP election is irrevocable if not revoked before the date on which the member first becomes entitled to retired pay. *See* 10 U.S.C. § 1448(a)(4)(A). The member's election becomes final at the time the member's entitlement to retired pay begins, and the member may not thereafter unilaterally revoke or modify it. *See* DOHA Claims Case No. 2020-CL-081719.2 (January 15, 2021).

In this case, the member elected to participate in SBP for child only coverage upon retirement and the claimant, as his spouse, concurred with that election. As required by law, the spousal written concurrence was obtained when a married member elects to provide an annuity for a dependent child but not the member's spouse. Therefore, DOHA is unable to allow this claim for the SBP annuity because we are bound by statute and regulation, and the written record as submitted to us by the agency and the claimant.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2022-CL-060703, dated July 25, 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: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board