

DATE: March 20, 2023

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| In Re: |) | |
| [REDACTED] |) | Claims Case No. 2022-CL-072713.2 |
| |) | |
| 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 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. 2022-CL-072713, dated September 29, 2022.

Background

The member and the claimant were married on October 16, 1969. On February 1, 1996, the member retired from the Air Force. Upon retirement, the member elected spouse Survivor Benefit Plan (SBP) coverage at a reduced rate for the claimant. On March 11, 2004, the member and the claimant divorced. The divorce decree incorporated a prior marital settlement agreement dated January 20, 2004, providing for the division of their property. Pursuant to that agreement, the claimant was awarded 45% of the member’s disposable retired pay under the Uniformed Services Former Spouses’ Protection Act (USFSPA) (10 U.S.C. § 1408). In addition, the claimant was awarded former spouse SBP coverage. The member remarried on June 3, 2006, but divorced his second spouse on January 24, 2019.

On August 28, 2021, the member passed away. On December 1, 2021, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to the Defense Finance and

Accounting Service (DFAS), claiming the SBP annuity as the member's former spouse. On January 4, 2022, DFAS denied her claim for the SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election. On January 24, 2022, the claimant appealed DFAS's denial of her claim. She stated that she was married to the member for 35 years, and for 25 of those years, he served in the Air Force. Pursuant to their divorce decree she was awarded a portion of his monthly retired pay and was covered as his SBP beneficiary. She stated that she was receiving \$1,700.00 per month from the member's monthly retired pay, but after his death, she receives nothing. She stated that she is 77 years old, sick and needs the money to survive. She questions why she was receiving 45% of the member's retired pay if he did not elect former spouse SBP coverage for her.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim finding no evidence that the member elected former spouse SBP coverage for the claimant or that the claimant requested a deemed election for SBP coverage within one year of the divorce decree.

In the claimant's request for reconsideration, she states that since she was in receipt of a portion of the member's monthly retired pay, he had to have informed DFAS of their divorce. She states that the member agreed to provide her the SBP annuity in their marital settlement agreement and that should be honored by DFAS.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2021-CL-051108.2 (January 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. Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for a 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, dissolution or annulment. *See* 10 U.S.C. §1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to a former spouse. A member is considered to be required to make a former spouse election if the member enters into a written agreement to make such an election, and that agreement is incorporated into the divorce decree. *See* 10 U.S.C. § 1450(f)(3). If the member fails to make the required election, 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).

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired in 1996 until such coverage ended with their divorce in March 2004. Pursuant to the marital settlement agreement which was incorporated into the divorce decree, the claimant was awarded former spouse SBP coverage. However, 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. 2021-CL-051108.2, *supra*.

The claimant argues that DFAS was aware of her divorce from the member in 2004 as evidenced by her receipt of 45% of his monthly retired pay under 10 U.S.C. § 1408(d)(2), the USFSPA. However, the USFSPA is a separate statute from the SBP law, and both set forth different entitlements. *See* DOHA Claims Case No. 2020-CL-081720.3 (January 10, 2023).

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, under 10 U.S.C. § 1552, a Secretary of a military department, acting through a correction board, in this case, the Air Force Board for Correction of Military Records (AFBCMR), 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 authority for the AFBCMR to correct or revoke an election for SBP). The AFBCMR's authority under these two statutes is discretionary and is outside of DOHA's authority. Information on petitioning the AFBCMR may be found online at <https://www.afpc.af.mil/Career-Management/Military-Personnel-Records/>.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2022-CL-072713, dated September 29, 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