

DATE: March 23, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-080205.2

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 former spouse of a deceased member of the U.S. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-080205, dated October 20, 2022.

Background

The member was serving in the Army when he married the claimant on July 5, 1965. The member received a disability retirement from the Army on November 21, 1977, having elected spouse and child Survivor Benefit Plan (SBP) coverage. On September 10, 2002, the member and the claimant divorced. The divorce decree approved and ratified the member and the claimant's prior marital agreement in which the parties agreed that the claimant would continue to be covered as the member's SBP beneficiary. The member also agreed he would never change his SBP beneficiary as long as the claimant lived.

The record reflects that neither the member nor the claimant took any action within one year from the date of the divorce to elect former spouse SBP coverage for the claimant. The record contains a completed DD Form 149, *Application for the Correction of Military Record under the Provisions of Title 10, U.S.C, Section 1552*, signed by the claimant on December 27, 2004. On that form, the claimant requested that the Army Board for Correction of Military Records (ABCMR) correct the member's military record to reflect that she was the member's

former spouse SBP beneficiary since the member failed to elect such coverage for her as required by the divorce decree. On September 20, 2005, the member sent a letter to the Defense Finance and Accounting Service (DFAS), providing the divorce decree and requesting that the claimant be removed as his beneficiary from his SBP account. DFAS removed the claimant as the member's spouse beneficiary effective November 1, 2005, and refunded the member the spouse SBP premiums deducted from his retired pay for her coverage from October 1, 2002, through October 30, 2005. On February 7, 2021, the member passed away. The claimant claimed the SBP annuity as the member's former spouse by filing a DD Form 2656-7, *Verification for Survivor Annuity*, dated July 8, 2021. On January 10, 2022, the DFAS denied her claim on that basis that the member did not make a request to change his SBP election to former spouse, nor was a deemed election request made by the claimant. On January 10, 2022, the claimant appealed the denial of her claim for the SBP annuity. She stated that the member failed to continue to cover her as his SBP beneficiary as required by the divorce decree. In response to her appeal, on April 1, 2022, DFAS issued an administrative report upholding the denial of her claim. On June 27, 2022, the claimant filed a rebuttal to DFAS's administrative report. In her rebuttal, she acknowledged that the original paperwork was not processed properly, nor was it filed within the allotted one-year requirement to request former spouse SBP coverage after the divorce. She stated that she discovered the member had not completed the process to make her the beneficiary of the SBP as required by the terms of their divorce on December 20, 2004. The claimant stated she was told by someone in DFAS to submit a DD Form 149, which DFAS provided, along with her divorce decree, to the ABCMR, which she did on December 27, 2004. She stated that she did not hear anything more about her petition with the ABCMR.

In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He explained that an election for former spouse SBP coverage, whether voluntary, ordered, or deemed, had to have been received by DFAS within one year of the date of the divorce. The attorney examiner then described other available remedies outside the DOHA claims process that rest with the ABCMR under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In the request for reconsideration, the claimant states that she was married to the member for almost 38 years. In their marital settlement agreement, she agreed to relinquish ownership of the family home in exchange for continued SBP coverage after their divorce. When she learned that the member had not elected former spouse SBP coverage for her, she submitted her petition to the ABCMR in 2004. She believed that filing with the ABCMR corrected the error with the SBP election. The first time she learned that she was not entitled to the SBP annuity was after the member's death. Therefore, she again requests that the ABCMR correct an error or injustice in order to grant her the SBP annuity. She attaches her completed 2004 DD Form 149, and supporting documentation. She acknowledges that the new DD Form 149 gives former spouses the right to apply to the ABCMR in cases of SBP issues.

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.

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. If a member divorces and wishes to provide SBP coverage for the 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. *See* 10 U.S.C. §1448(b)(3)(A). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to the former spouse. If the member fails to do so, 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 1977 until such coverage ended with their divorce in 2002. 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. 2019-CL-060401.2 (December 7, 2020).

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. 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. However, as acknowledged by the claimant, a more current version of the DD Form 149 seems to encompass the relief she is seeking. Therefore, she may wish to submit a new DD Form 149 with all supporting documentation, including her submission in 2004, to the ABCMR. For more information on submitting a petition with the ABCMR, please see the Army Review Boards Agency's website at: <https://arba.army.pentagon.mil/abcmr-overview.html>.

Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision dated October 20, 2022. 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