

DATE: March 21, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-072718.2

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. The claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed.

DECISION

The claimant, a former spouse of a deceased retired member of the U.S. Navy Reserve, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2022-CL-072718, dated September 26, 2022.

Background

The record reflects that the member was born on October 11, 1942. On October 7, 1967, the member and the claimant were married. In 1985, the member received his Notification of Eligibility (NOE) for retired pay at age 60, notifying that he was eligible to make an election under the Reserve Component Survivor Benefit Plan (SBP). The Reserve Component SBP extends eligibility for the 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 August 9, 1985, the member completed the *Reserve Component – Survivor Benefit Plan Option – Election Certificate (RC-SBP)*, NRPC 1772/3, electing immediate SBP coverage for his spouse and child. On June 30, 1999, the member and the claimant divorced. The divorce decree awarded the claimant 50% of the member’s monthly annuity under the Civil Service Retirement

System. The claimant was also awarded 43% of the member's disposable military retired pay once he began receiving it. In addition, the member was ordered to elect former spouse SBP coverage for the claimant. Specifically, the decree stated the following:

IT IS FURTHER ORDERED that Defendant shall make Plaintiff the sole beneficiary of his United States Navy Survivor Benefit Plan Annuity, (hereinafter referred to as "Survivor Benefit Plan"). Defendant shall elect to make Plaintiff the Survivor Benefit Plan sole beneficiary within one (1) year after the date of the Final Decree of Divorce. Defendant shall make this election no later than six (6) months after the date of the Final Decree of Divorce.

Should Defendant fail to execute his voluntary election of Plaintiff as the Survivor Benefit Plan sole beneficiary within six (6) months from the date of the Final Decree of Divorce as required herein, Defendant shall be deemed to have elected to make Plaintiff the Survivor Benefit Plan sole beneficiary, and Plaintiff hereby accepts full responsibility to make all applications required by governmental law or administration policy for a deemed election within one (1) year of the date of the Final Decree of Divorce.

On October 11, 2002, the member's 60th birthday, he retired and began receiving military retired pay. On October 23, 2002, the member faxed the divorce decree to the Defense Finance and Accounting Service (DFAS). On November 8, 2002, the claimant submitted her application for a portion of the member's monthly retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), along with a certified copy of the divorce decree to DFAS. On November 18, 2002, DFAS acknowledged receipt of the claimant's request under the USFSPA and advised her that direct payments from the member's retired pay would tentatively commence in January 2003. DFAS also informed the claimant of the following:

If your divorce decree specifies that you are to be designated as a former spouse beneficiary for the Survivor Benefit Plan (SBP), you must make a 'deemed election' for SBP coverage within one year of the date of your divorce directly to the Retired Pay office, DFAS-CL/FRB, PO Box 99191, Cleveland, OH 44199-1126. If you have any questions regarding SBP coverage, you may call the Retired Pay office at 1-800-321-1080.

DFAS subsequently approved the claimant's application for direct payment of the member's monthly disposable retired pay under the USFSPA. On January 5, 2022, the member passed away. The record reflects that SBP premiums were deducted from the member's retired pay for spouse coverage for 230 months from the date he retired through the date of his death.

On February 7, 2022, the claimant submitted a DD Form 2656-7, *Verification of Survivor Annuity*, claiming the member's SBP annuity as his former spouse. On March 10, 2022, DFAS denied her claim for the SBP annuity because the member did not change his SBP election to former spouse coverage for the claimant, nor did the claimant make a request for a deemed election. On March 21, 2022, the claimant appealed DFAS's denial of her claim. In her appeal, she stated that the member was ordered under the divorce decree to provide her with former

spouse SBP coverage. She stated that since 2002 she was receiving 43% of the member's retired pay as his former spouse. She noted that the member's retiree account statement (RAS) for December 2021 reflects that the member continued to pay spouse SBP premiums for her. She stated that the evidence reflects that the member clearly intended that she receive the SBP annuity since he was charged with 230 months of SBP coverage for her, did not change his SBP beneficiary and was ordered to maintain her as his beneficiary. She also stated that she believed it was possible that the member did in fact properly inform DFAS that she was his former spouse SBP beneficiary, but due to a clerical error, DFAS did not change the coverage to former spouse.

On May 20, 2022, DFAS issued an administrative report in response to the claimant's appeal. DFAS found no record of a deemed election for former spouse coverage from the claimant, nor of any election for former spouse coverage made by the member, within one year of the date of the divorce. The claimant, through her attorney, submitted a rebuttal to DFAS's administrative report. In that rebuttal, the claimant stated that DFAS was obviously aware of her right to receive a portion of the member's monthly retired pay under the USFSPA because DFAS made direct payment to her for almost 20 years. Moreover, DFAS collected SBP premiums for nearly 20 years. The claimant questioned why DFAS would continue to collect SBP premiums from the member's retired pay (and the claimant's portion of that retired pay) if DFAS did not receive a deemed election for former spouse SBP coverage. She stated that both she and the member believed that she would receive the SBP annuity upon his death. She also requested information on submitting an application for correction of military record under 10 U.S.C. § 1552.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He explained that the member did not make an election to provide former spouse SBP coverage for the claimant after the divorce and the claimant did not request a deemed election. He further explained that although the claimant did file an application for a portion of the member's monthly retired pay under the USFSPA in 2002, she was already too late to make a deemed election for former spouse SBP coverage. Finally, he advised the claimant that although DOHA was limited by statute and regulation in the allowance of a claim, the claimant may find possible relief with the Board for Correction of Naval Records (BCNR).

In her request for reconsideration, the claimant, through her attorney, states that after filing her rebuttal to DFAS's administrative report, she found further evidence that she did request a deemed election for former spouse coverage within one year of the divorce decree. She now submits a copy of a letter dated March 6, 2000, that she sent to DFAS' Retired Pay Section requesting SBP coverage. In that letter, she noted all the identifying information for herself and the member and stated that she enclosed a final decree of divorce that was entered on July 13, 1999. In her reconsideration request, the claimant also encloses a copy of a letter dated June 20, 2000, that she sent to the Retirement and Benefit Division of the Human Resources Service Center (HRSC) East of the Naval Shipyard in Portsmouth, Virginia. That letter has an HRSC East date stamp of June 22, 2000. In that letter, the claimant provided the final decree of divorce and the identifying information of the member as a civil service employee. Based on this new evidence, the claimant requests that she be paid the SBP annuity. As for taking action through the BCNR, the claimant has been advised by the Navy that she must first exhaust all her administrative remedies before submitting a petition to the correction board.

Discussion

The fundamental rule in adjudicating a claim is that payment may be made only for an expense authorized by statute or regulation. Therefore, DOHA must render decisions based on applicable statutes, regulations, and our prior administrative decisions. The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. *See* DOHA Claims Case No. 2021-CL-102701.2 (March 14, 2022).

The SBP program, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the dependents 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). An election for former spouse SBP coverage may not be deemed to have been made unless the Secretary concerned receives such a request from the former spouse within one year of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C). The Service Secretaries have delegated their authority under the SBP law to DFAS.

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he elected immediate spouse coverage for her in 1985 until June 2000 when their divorce ended the coverage. Although the member may have intended that his former spouse be covered under the SBP, he failed to establish former spouse SBP coverage within one year of their divorce. The claimant asserts that she timely filed her deemed election with DFAS on March 6, 2000. However, DFAS has searched their records again and has no record of receiving this letter. In fact, DFAS's first record of receiving the divorce decree was on October 23, 2002, the date the member faxed it to their office. Therefore, in the absence of any proof of receipt by DFAS of the deemed election request, such as a certified mail receipt, dated within one year of the date of the divorce decree, we uphold DFAS's denial of the claim for the former spouse SBP annuity. *See* DOHA Claims Case No. 2020-CL-042702.2 (September 14, 2020).

As explained by the DOHA attorney examiner in the appeal decision, the claimant has the right to petition the BCNR under 10 U.S.C. § 1552.¹

¹We note that if the claimant is unsuccessful in her BCNR petition, she has the right to pursue a claim for the underpayment of her portion of the member's disposable retired pay resulting from the overpayment of spouse SBP premiums.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated September 26, 2022. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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