

By letter dated March 9, 2001, the attorney for the member's former spouse provided the Defense Finance and Accounting Service (DFAS), a copy of the final divorce decree and the direct pay order, and requested that she receive direct payment of her portion of the member's monthly retired pay pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. DFAS established a former spouse account for direct payment of the member's retired pay. However, DFAS has no record of receiving a deemed election request for former spouse SBP coverage from the member's former spouse, nor a voluntary election for former spouse SBP coverage from the member, within one year from the date of the divorce. DFAS continued to deduct spouse SBP premiums for the member's former spouse from his monthly retired pay after their divorce.

The member remarried on December 27, 2003. On January 9, 2007, the member notified DFAS that his former spouse had remarried and requested that they update his retired pay account to reflect her new married name.

On February 10, 2021, DFAS sent the member a letter informing him that an adjustment was made to the SBP portion of his retired pay account due to his divorce. DFAS explained that a spouse loses eligibility as an SBP beneficiary upon divorce, and that since DFAS received no election or deemed election within one year of the date of the divorce, DFAS updated the member's SBP account to reflect that effective December 11, 2000, he no longer had a spouse SBP beneficiary. DFAS advised the member that as a result, he overpaid SBP premiums in the amount of \$68,173.49. DFAS barred payment of a portion of that amount due to the six-year statute of limitations under 31 U.S.C. § 3702(b). DFAS advised the member that he could seek waiver of the barred amount by requesting it through the Assistant Secretary of the Army (Financial Management & Comptroller).

The member appealed the adjustment to his SBP account. He stated that his former spouse's attorney did take action to timely request a deemed former spouse election by submitting the divorce decree and direct pay order to DFAS within one year of the divorce. DFAS issued an administrative report on August 27, 2021, stating that the member was appealing the barred SBP premium overpayments, and upholding the denial of the application of the six-year statute of limitations. DFAS failed to address the member's claim that his former spouse be covered as his SBP beneficiary based on the submission of a timely deemed election. Thus, DOHA remanded the case to DFAS to properly follow the procedures set forth in Department of Defense (DoD) Instruction 1340.21, *Procedures for Settling Personnel and General Claims and Processing Advance Decision Requests* (May 12, 2004). On January 6, 2023, DFAS issued an amended administrative report upholding the adjustment made to the member's SBP account, and denied the member's request to designate his former spouse as his SBP beneficiary.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the member's request for coverage of his former spouse, finding no evidence that the member elected former spouse SBP coverage for the claimant. She explained that although the military pay order required the member to elect former spouse SBP coverage, the member did not elect former spouse coverage within one year of the divorce. She found that although the former spouse's attorney provided DFAS with the divorce decree and military pay order, there is no evidence that

either the former spouse or her attorney requested a deemed election for coverage in the manner set forth in the statute and regulation. The adjudicator also noted that since spouse SBP coverage ceased upon the member's divorce, when he married his current spouse, and did not decline spouse coverage for her within one year of the marriage, she became his spouse SBP beneficiary under 10 U.S.C. § 1448(a)(6).

In the member's request for reconsideration, he points to language in DFAS's administrative report dated January 6, 2023. In that report, he states that DFAS acknowledged receipt of the divorce decree and direct pay order, but due to an internal routing error, did not forward the documentation to the necessary office within DFAS for action. He states that DFAS continued to deduct SBP premiums for his former spouse's coverage as reflected on his Retiree Account Statements (RAS). He states that this error continued for over 20 years and should be corrected so that SBP coverage be reinstated in accordance with the direct pay order.

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 ¶ 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).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under 10 U.S.C. § 1448(a)(1)(A), SBP is open to a member who is eligible for retired pay. 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. If the member fails to do so, the former spouse has one year from the date of the court order or filing involved to request a deemed election. The former spouse's request that the retired member shall be deemed to have made 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 date of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C). The request from the former spouse must be in writing, in such a manner as the Secretary shall prescribe, along with a copy of the court order requiring the election. *See* 10 U.S.C. § 1450(f)(3)(A). The Service Secretaries have delegated their authority under the SBP law to DFAS.

The Secretary of Defense has issued implementing regulations under the authority of 10 U.S.C. § 1455. The implementing regulations for SBP elections and election changes are

currently found under Chapter 43, Volume 7B of the DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay. The current regulation states that effective September 27, 2008, use of the DD 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election*, to make a deemed election became mandatory. See DoDFMR ¶ 4.4.3.1 (version April 2021). The regulation in effect at the time of the divorce in this case, giving rise to the former spouse’s right to request a deemed election, required the former spouse or the former spouse’s attorney to make a written request. Concerning the content of the request, the regulation also states that the request is acceptable if it refers to, or cites provisions in a court order concerning SBP former spouse coverage, or makes clear by other references to SBP that there is an intent that the coverage be provided to a former spouse; and the written request is accompanied by a copy of the court order and/or a statement from the clerk of the court. Concerning the statutory time limit for submitting a request, the regulation states that the former spouse’s deemed election must be received by DFAS within one year of the date of the court order. See DoDFMR ¶ 430503(C)(2) (version September 1999).

In this case, the member’s former spouse was covered as the member’s spouse SBP beneficiary from the time he retired until such coverage ended with their divorce in December 2000. The direct pay order required the member to elect former spouse coverage. However, the member failed to establish former spouse SBP coverage and DFAS did not receive the former spouse’s request for a deemed election within one year of the date of the court order. Although the former spouse’s attorney submitted the divorce decree and the direct pay order to DFAS in March 2001 applying for her share of the member’s monthly retired pay under the USFSPA, there is no evidence that a separate request for a deemed election was submitted by the former spouse as required by statute and regulation. See DOHA Claims Case No. 2020-CL-120205.2 (June 24, 2021); DOHA Claims Case No. 2020-CL-042702.2 (September 14, 2020); and DOHA Claims Case No. 99102801 (July 21, 2000).

As explained by the DOHA adjudicator in the appeal decision, once a member ceases to have an eligible spouse beneficiary and later remarries, the member may decline coverage for the subsequent spouse if the member does so within the first year of marriage. See 10 U.S.C. § 1448(a)(6). Once a member is a participant in SBP, the member continues to be considered a participant, even during a period when the member has no eligible spouse beneficiary. In this case, since there was no former spouse SBP coverage in effect, the member’s spouse became his spouse SBP beneficiary when he took no action to decline coverage for her within one year of their marriage. See DOHA Claims Case No. 2022-CL-052501.2 (May 17, 2023); and DOHA Claims Case No. 2022-CL-030901.2 (August 30, 2022).

The member insists that DFAS committed an error and this error continued for over 20 years. As set forth above, DOHA has no authority to grant the member’s request to cover his former spouse as his SBP beneficiary because we are bound by statute and regulation, and the written record as submitted to us by DFAS and the claimant. However, the member may have other available remedies that exist outside of DOHA’s authority. Under 10 U.S.C. § 1454(a), the Secretary concerned may correct or revoke any election under this subchapter when the Secretary considers it necessary to correct an administrative error. See also DoD Instruction 1332.42, *Survivor Benefit Plan* (December 30, 2020). Further, 10 U.S.C.

§ 1552(a)(1) states that the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Either type of action is made through a civilian board, in this case the Army Board for Correction of Military Records (ABCMR). These remedies are outside of DOHA's authority and any request for a correction of record needs to be pursued with the ABCMR.

Conclusion

The member's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2021-CL-102703.2, dated April 10, 2023. 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Member, Claims Appeals Board