

DATE: May 17, 2023

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2022-CL-052501.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A member retired from the service and elected spouse and child Survivor Benefit Plan (SBP) coverage. The member subsequently divorced. Pursuant to a divorce decree, the member was required to elect former spouse SBP coverage for his former spouse. The member took no action to elect former spouse SBP coverage for her. Although the member's former spouse requested a deemed election for SBP coverage, the record evidence reflects that her request was not timely filed with the Defense Finance and Accounting Service (DFAS). Therefore, under the law, his spouse became his SBP beneficiary one year after their marriage.

DECISION

The claimant, the surviving 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-052501, dated August 24, 2022. In that decision, DOHA sustained DFAS's denial of the claim for the SBP annuity of the deceased member.

Background

On September 9, 1967, the member married. On October 1, 1990, the member retired from the Air Force and elected SBP coverage for his spouse and children. On January 6, 2006, the member divorced. The divorce decree, dated January 6, 2006, awarded 50% of the member's monthly disposal retired pay to his former spouse by direct payment under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. In addition, the divorce decree ordered the member to elect former spouse SBP coverage. Also on January 6, 2006, the

court issued a military pension division order. That order reiterated the former spouse's right to a portion of the member's retired pay and the member's obligation to elect former spouse SBP coverage for her.

On January 14, 2006, the member married the claimant. The record reflects that on February 10, 2006, DFAS's Garnishment Law Directorate received a DD Form 2293, *Application for Former Spouse Payments*, and the divorce decree from the member's former spouse. On February 23, 2006, DFAS's Retired Pay Office received from the member his change of address, noting his new spouse's name, the claimant's name, and their email addresses and phone numbers. On March 8, 2006, DFAS sent the member's former spouse a letter advising her that they had received her application and that direct payment should tentatively commence in April 2006. DFAS also advised the member's former spouse 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, US Military Retirement Pay, PO Box 7130, London, KY 20742-7130. If you have any questions regarding SBP coverage, you may call the Retired Pay office at 1-800-321-1080.

On February 7, 2007, DFAS's Retired Pay Office received a letter from the member's former spouse requesting a deemed election to be the former spouse beneficiary of the member's SBP. However, the record reflects that it was not until April 29, 2020, that DFAS updated its records to reflect that the member's former spouse was his SBP beneficiary, based upon a deemed election received from her, dated February 7, 2007. On July 18, 2020, DFAS wrote to the member informing him that a deemed election request had been received from his former spouse, and that SBP coverage for her and costs were assessed retroactive to the first day of the month following the date of the court order which awarded the coverage.

On June 26, 2021, the member's former spouse passed away, and on September 22, 2021, the member passed away. On October 26, 2021, the claimant filed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the spouse of the member. DFAS denied the claim on November 27, 2021, on the basis that the member's former spouse requested a timely deemed election and was entitled to the SBP annuity. The claimant also filed a claim for the arrears of retired pay (AOP). The claimant appealed DFAS's denial of her claim for the SBP annuity. She stated that the member's former spouse passed away on June 26, 2021, and the member was in the process of electing spouse SBP coverage for her when he fell ill and then passed away. She stated that the member called DFAS before he died and was working with his Veterans Service Office to gather all the documentation to submit to DFAS. On February 1, 2022, DFAS sent another letter to the claimant denying her claim for the annuity. DFAS incorrectly stated that the member had elected former spouse SBP coverage at the time he retired from the Air Force. DFAS further advised the claimant that if a member's former spouse is deceased, the member has one year from the date of the former spouse's death to elect SBP coverage for the current spouse. DFAS stated that after the member's former spouse's death, they were not notified by the member of his election for spouse SBP coverage for the claimant.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the SBP annuity claim. The attorney examiner did point out that the deemed election request by the former spouse was received by DFAS on February 7, 2007, which appeared to be beyond the one-year time limit for making such a request under 10 U.S.C. § 1450(f)(3)(C). Finally, the attorney examiner explained the claimant may find possible relief with the Air Force Board for Correction of Military Records (AFBCMR).

In her request for reconsideration, the claimant reiterates that the member was trying to cover her as his spouse SBP beneficiary after his former spouse's death, but his plans were derailed when he suddenly became ill and passed away. She attaches a statement from her stepdaughter and the member's Veterans Service Officer corroborating her version of events.

Discussion

The SBP, 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. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation is automatic for members who are married or have dependent children. Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for a former spouse, the member must notify the Secretary concerned in writing of the divorce and the member's 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 by the member within one year after the date of the decree of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(3)(A). In addition, a member may be required under the terms of a court order in the proceedings of a divorce, dissolution, or annulment, to provide SBP coverage to the former spouse. If the member fails to do so, the former spouse may request that the election be deemed to have been made. *See* 10 U.S.C. § 1450(f)(3)(A). In order to effect such an election, the former spouse must submit a written request for a deemed election and a copy of a court order requiring former spouse coverage within one year of the date of the court order. *See* 10 U.S.C. § 1450(f)(3).

If 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. When the member remarries, therefore, the new spouse becomes a beneficiary unless the member formally declines coverage within the first year of marriage. *See* DOHA Claims Case No. 2022-CL-030901.2 (August 30, 2022); DOHA Claims Case No. 2016-CL-111002.2 (October 31, 2017); and DOHA Claims Case No. 02120406 (December 19, 2002).

In this case, the member's former spouse was covered as his spouse beneficiary from the time he retired in 1990, until such coverage ended with their divorce on January 6, 2006. Under the terms of the divorce decree and military pension division order, both dated January 6, 2006, the former spouse was entitled to former spouse SBP coverage. However, the member did not make an election for former spouse SBP coverage for her, and DFAS's records reflect that the

date they received the former spouse's request for a deemed election was February 7, 2007, which was beyond the one-year time period required under the statute. Since there was no former spouse SBP coverage in effect, the claimant became the member's eligible spouse SBP beneficiary under 10 U.S.C. § 1448(a)(6), when he took no action to decline coverage for her. Under the circumstances, DFAS shall establish the SBP annuity for the claimant as the member's surviving spouse.

Conclusion

The claimant's request for relief is granted. In accordance with Department of Defense Instruction 1340.21 ¶ E7.11, 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