

DATE: May 11, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-062802.2

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 Air National Guard, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2022-CL-062802, dated January 6, 2023.

Background

The member served in the Air Force and then in the Air National Guard, a reserve component of the U.S. Air Force. The member married his first wife on November 9, 1957. In 1979, the member met the requirements for retired pay, except for the 60-year age requirement, which made him eligible to participate in the Reserve Component Survivor Benefit Plan (SBP). In September 1979, he elected to participate in SBP with spouse and child coverage. The member became eligible for retired pay on September 23, 1993, his 60th birthday. On December 18, 2001, the member divorced. The divorce decree did not contain any provisions concerning SBP.

On September 28, 2002, the member married the claimant. In an undated letter, he notified the Defense Finance and Accounting Service (DFAS) that he had divorced his first wife and married the claimant. He requested that the claimant receive his benefits. DFAS established spouse SBP coverage for the claimant on September 28, 2003. However, on December 2, 2013, the claimant and the member divorced. The divorce decree incorporated a settlement agreement dated November 25, 2013. It contained a provision that stated:

The Husband has designated the Wife as a surviving beneficiary on his military retirement. He warrants and covenants that he will not change nor attempt to change that designation as long as the Wife is alive.

On July 29, 2021, the member passed away. On September 1, 2021, the claimant submitted DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. By letter dated October 28, 2021, DFAS responded to the claimant and denied her claim because DFAS had no record of the member requesting to change his SBP election to former spouse coverage, nor did the claimant make a request for a deemed election within one year of the divorce. DFAS noted that a divorce decree alone does not constitute a deemed election.

On December 2, 2021, the claimant appealed DFAS's decision to DOHA. On May 6, 2022, in response to the claimant's appeal, DFAS sent her their administrative report dated April 13, 2022. In that report, DFAS explained that the claimant was not entitled to SBP annuity because the member failed to request continued SBP coverage for the claimant as his former spouse within one year of the divorce decree; and that the claimant also failed to deem an election for former spouse SBP coverage within that year.

On January 6, 2023, a DOHA claims adjudicator sustained DFAS's denial of the claim on appeal. He determined that the language in the court order did not specifically order the member to establish former spouse SBP coverage for the claimant, giving her the statutory right to request a deemed election for that coverage. Further, the adjudicator found no record evidence of a voluntary election by the member or a deemed election by the claimant. The adjudicator advised the claimant that she may find relief outside the purview of DOHA by petitioning the Air Force Board for Correction of Military Records (AFBCMR).

In the claimant's reconsideration request, she stated that the member's affairs were handled by his daughters, but that his daughters assured her they would meet the requirements of the divorce. She also stated that she was not familiar with the requirement to deem an election for SBP after the divorce. She noted that the divorce was unexpected and unwanted by both her and the member. She requested that she be granted benefits ordered in the divorce.

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 coverage for her was established on September 28, 2003, until such coverage ended with their divorce on December 2, 2013. After the divorce, the member failed to establish former spouse SBP coverage for the claimant. We need not reach a determination of whether or not the language in the court order required the member to provide the claimant with former spouse SBP in order for her to have the statutory right to request a deemed election. That is because even if the language required the member to do so, there is no evidence that the claimant requested a deemed election within one year of the divorce decree. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2022-CL-090604.2 (March 9, 2023).

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the adjudicator 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 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 statutory authority for the AFBCMR to correct or revoke an election for SBP). The AFBCMR's authority under these two statutes is discretionary and outside DOHA's authority.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated January 6, 2023. 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: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

Jennifer I. Goldstein
Member, Claims Appeals Board