

DATE: June 26, 2023

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2023-CL-032905.2  
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)

**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 government is liable under the law for the amount claimed.

**DECISION**

The claimant, the former spouse of a deceased retired 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. 2023-CL-032905, dated April 18, 2023.

**Background**

On April 18, 2006, the member and the claimant married. Two children were born of their marriage. On December 5, 2014, they divorced. The divorce decree awarded the claimant 25% of the member's disposable military retired pay but was silent on the issue of the Survivor Benefit Plan (SBP). In preparation for the member's retirement from the Army, he completed a DD Form 2656, *Data for Payment of Retired Personnel*, on October 29, 2015. On that form, he noted that he was married, listing the claimant as his spouse, and the date of their marriage as April 18, 2006. He also listed their two dependent children, dates of birth September 28, 2007, and May 2, 2012, respectively. He elected spouse only SBP coverage based on his full gross retired pay for the claimant. In addition, the member designated the claimant as his beneficiary for 100% of his arrears of retired pay (AOP) payable on his death. On January 1, 2016, the

member retired from the Army, and SBP premium payments were withheld from the member's retired pay for spouse coverage for the claimant.

On June 3, 2021, the member passed away. The claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to the Defense Finance and Accounting Service (DFAS), claiming the SBP annuity as the member's former spouse on July 7, 2021. On October 29, 2021, DFAS denied the claim. DFAS originally denied the claim on the basis that the member did not elect former spouse SBP coverage upon his retirement from the Army, but instead elected spouse only SBP coverage. The claimant appealed DFAS's denial of her claim. In her appeal she stated that after their divorce, the member was in arrears of many months of child support. He stopped paying child support all together in 2021, and the children's health insurance coverage was suspended due to non-payment on his part. She requested the annuity for the benefit of her children.

In an administrative report dated February 1, 2023, DFAS sustained the denial of the SBP annuity claim. DFAS explained that while the initial denial of the claim was proper, the reason given for the denial was incorrect. DFAS should have denied the claim on the basis of the member incorrectly listing that he was married to the claimant on the SBP election form. DFAS explained that when a member makes an affirmative election to participate in SBP and indicates an ineligible beneficiary, the election to participate in SBP is defective and must be considered invalid.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim. The attorney examiner found that since the member and the claimant were divorced on January 1, 2016, the member's election to cover her as his spouse SBP beneficiary was invalid. The attorney examiner held that although the member's election for spouse SBP coverage was invalid, the member's two children were automatically covered under the SBP at the maximum level since he had made no valid election at his retirement. The attorney examiner explained that a claim for a child SBP annuity is separate from a claim for a former spouse SBP annuity. Therefore, a separate claim for a child SBP annuity must be presented to DFAS.

In her reconsideration request, the claimant states that after their divorce the member stopped paying child support and cancelled his life insurance policy. She states that she is a struggling single mother and needs the financial assistance to take care of their children. She states that the member wanted her to have the SBP annuity to support his children, and he continued to pay SBP premiums for her coverage until he died.

## **Discussion**

The fundamental rule in adjudicating a claim is that payment may be made only for an expense authorized by statute or regulation. Moreover, it is a rule of statutory construction that when the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2021-CL-082409.2 (March 14, 2022); and DOHA Claims Case No. 2019-CL-050704.2 (March 16, 2021).

The SBP, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for survivors of retired military members. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation in the SBP is automatic for a member who is married or has dependent children when the member becomes eligible to participate unless the member elects not to participate in the SBP before the first day for which he is eligible for retired pay. *See* 10 U.S.C. § 1448(a)(1) and (a)(2).

A member who has a former spouse upon becoming eligible to participate in the SBP may elect to provide an annuity to that former spouse. *See* 10 U.S.C. § 1448(b)(2)(A). The requirements for making such an election are found under 10 U.S.C. § 1448(b)(5). Under that section, a member shall, at the time of making the former spouse SBP election, provide the Secretary concerned with a written statement in the form to be prescribed by that Secretary and signed by the member and the former spouse setting forth whether the election is being made pursuant to the requirements of a court order, or pursuant to the conditions of a voluntary agreement as part of, or incident to, a divorce proceeding.

The Service Secretaries have delegated their authority under the SBP law to DFAS. The Secretary of Defense has issued implementing regulations for the SBP law pursuant to 10 U.S.C. § 1455. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 43, contains the regulations concerning SBP elections and election changes. In this case, the implementing regulation in effect at the time the member became eligible to participate in the SBP was set forth in DoDFMR ¶ 430301(A) (version April 2015). That paragraph, entitled *Elections by Member*, states the following:

A member who is retiring and is electing former spouse coverage should complete the former spouse election on a DD 2656. In addition to the former spouse election, the member must also provide a separate written statement (completed on a DD 2656-1, when applicable), that is signed by the member and the former spouse certifying whether the former spouse election is pursuant to court order or a voluntary written agreement.

In addition, DoDFMR ¶ 430501(B) states that a member at retirement is automatically covered at the maximum level for spouse and/or dependent children, unless the member elects not to participate or elects to participate at a reduced level before the first day of eligibility to retired pay with the concurrence of the member's spouse, if required.

In this case, the member and the claimant divorced prior to his eligibility to participate in the SBP. The divorce decree was silent on the issue of SBP, and the member did not voluntarily submit a former spouse election along with a written statement required by statute and regulation. Instead, the member elected spouse SBP coverage for the claimant who was not in fact his spouse, but his former spouse. Thus, the member's election of spouse only SBP coverage for the claimant, his former spouse, was invalid. However, the member's two minor children were automatically covered as his child SBP beneficiaries at the maximum level since he had no valid SBP election at retirement. Therefore, upon presentation of a child claim for the SBP annuity, the member's two children are entitled to payment, in equal shares. *See* 63 Comp.

Gen. 63 (1983). DFAS has advised our office that the SBP Child Annuity Claim Package was mailed to the claimant on May 12, 2023, with instructions for filing of the application and submitting the required forms on behalf of her children.

Finally, we note that since SBP premiums for spouse coverage were deducted from the member's retired pay when he did not have an eligible spouse beneficiary, those costs (less the cost for child SBP coverage) should be refunded to the proper beneficiary as AOP under 10 U.S.C. § 2771. In order to claim the AOP, the member's beneficiary should fill out the SF-1174, *Claim for Unpaid Compensation of a Deceased Member of the Uniformed Services*, and submit it to DFAS.

### **Conclusion**

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated April 18, 2023. 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

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Catherine M. Engstrom  
Chairperson, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board