

DATE: July 10, 2023

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2022-CL-090702.2
)
)

**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. Payment of a claim may only be made for an expense authorized by statute or regulation. 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.

DECISION

The claimant, the surviving spouse of a deceased member of the U.S. Army, on behalf of her nephew, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-090702, dated February 7, 2023.

Background

On August 12, 1996, the claimant and the member were married. There were two children who became part of the family at the time of the marriage: one child, born on August 12, 1994, who the member raised as his stepson, and a daughter, born on April 27, 1996.

On January 6, 2005, a court order was issued that stated that the claimant, along with the parents of a minor child (the claimant's nephew) agreed to share joint legal custody of that child, with the claimant having primary physical custody. The member was not a party to this court action.

On October 1, 2007, the member filled out a DD Form 93, *Record of Emergency Data*, listing the claimant as his spouse, and three children, his stepson, his daughter, and a son born on December 26, 1994.

On March 29, 2008, the member was killed on active duty, in the line of duty. On April 15, 2008, after receiving in-depth, personal counseling, the claimant signed a *Spouse Statement of Desired SBP Election Active Duty Death*, selecting the option of child only SBP coverage. Specifically, she elected:

CHILD(REN) ONLY (Spouse Excluded) I desire the Secretary of the Army to make the following SBP election on my behalf. I understand that this election authorizes all of my Soldier spouse's eligible children to receive an equal share of the SBP annuity. All eligible children will receive the annuity until age 18 or 22 if a full-time unmarried student, or forever if the child is incapable of self support due to a condition incurred before age 18, or age 22 until all children are ineligible.

The claimant's election was signed and witnessed by the Retirement Service Officer (RSO). On that same date, April 15, 2008, the claimant also completed and signed a DD Form 2790, *Custodianship Certificate to Support Claim on Behalf of Minor Children of Deceased Members of the Armed Forces*. The DD Form 2790's purpose is to identify the custodian of an unmarried minor child(ren), incapacitated child or child at least 18 but under 22 who is attending school and is a child of a deceased military member. On that form, the claimant certified that she was the custodian of the member's stepson and daughter. Along with the DD Form 2790, the claimant submitted two separate DD Forms 2656-7, *Verification for Survivor Annuity*, for each of her children, the member's stepson and his daughter.

On the DD Form 1300, *Report of Casualty*, dated April 22, 2008, the claimant was listed as the member's wife, and the member's three children were listed as: his stepson, his daughter, and his son born on December 26, 1994, prior to his marriage to the claimant. On the *Report of Casualty*, his son's mother's name was also listed. On May 28, 2008, the RSO forwarded the complete SBP package to the Defense Finance and Accounting Service (DFAS). The RSO advised DFAS that in accordance with 10 U.S.C. § 1448(d), the Army had approved the SBP election of child only retroactive to the member's death, March 29, 2008. DFAS established a child only SBP annuity for the member's stepson and daughter in equal shares.

On May 3, 2021, the claimant, as a custodian of her nephew, completed a DD Form 2790, and on May 4, 2021, signed a DD Form 2656-7, claiming the SBP annuity for her nephew as the member's child. On June 3, 2021, DFAS denied the claim for the child SBP annuity for the claimant's nephew on the basis that the claim was presented more than six years after the claim accrued, or six years after the member's death. DFAS advised the claimant that she had the right to appeal the application of the six-year statute of limitations contained under 31 U.S.C. § 3702(b), the Barring Act, through DFAS to DOHA. DFAS also advised the claimant that she had the right to request a waiver of the time limitations established by the Barring Act by petitioning the Assistant Secretary of the Army under the authority of 31 U.S.C. § 3702(e) to allow payment of up to \$25,000.00.

In the claimant's appeal of the application of the Barring Act, she stated that her nephew was ill for many years following the member's death, and it was not until 2016 that the claimant received approval to obtain a military identification card for him. The claimant also stated that she then submitted a DD Form 2788, *Child Annuitant's School Certification*, on behalf of her nephew in 2016. However, she stated that it was not until 2021 when she was informed of the proper form to use to claim the SBP annuity for her nephew.

The record reflects that after further review of the claim and appeal, DFAS advised the claimant that the Army Human Resources Command (AHRC) determined that her nephew was not a dependent of the member because the court documentation only listed the claimant as his guardian, not the member. In an administrative report issued on July 15, 2022, DFAS upheld the denial of the claim based on DFAS's application of the Barring Act under 31 U.S.C. § 3702(b). DFAS also advised the claimant that they had not made an official determination on the merits of her claim on behalf of her nephew. DFAS disavowed any current obligation on their part to do so citing Department of Defense (DoD) Instruction 1340.21 (May 12, 2004) ¶ E7.4.3.

In the appeal decision, the DOHA attorney examiner adjudicated the claimant's underlying claim for the child SBP annuity on the merits. The attorney examiner applied the pertinent law and regulations to the claim and found that the claimant's nephew did not meet the qualifications of a dependent child of the deceased member for purposes of payment of an SBP annuity under 10 U.S.C. § 1448(d)(2)(B).

In her request for reconsideration of the DOHA appeal decision, the claimant states that she married the member on August 12, 1996. She states that she and the member raised her nephew, who was born on August 22, 2004, as their son, and he was part of their family unit. She states that she was serving in the Air Force as a reservist at that time, and the member was serving in the Army. She states that she has been fighting for eight years to have her nephew recognized as the member's dependent after his death. She states that before the member was deployed to Iraq, her application to place her nephew on her Tricare account was denied. The member did not have time to go to court before his deployment in order to recognize her nephew as his dependent. She believes that there are too many different interpretations of dependent by the Army, Tricare, the Department of Veterans Affairs, and the SBP law. She requests that her nephew be recognized as the member's dependent so that he can receive the SBP annuity to help him go to college. She states that the dependency laws need to be reviewed due to the fact that there are so many different family dynamics and so many types of blended families.

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-021904.2 (August 30, 2022).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 10 U.S.C. § 1448(d)(2), an SBP annuity may be paid to the dependent children of a deceased member who dies in the line of duty on active duty. Specifically, under 10 U.S.C. § 1448(d)(2), in the case of a member who dies on active duty with a surviving spouse, the Secretary concerned, in consultation with the surviving spouse, may pay an SBP annuity pursuant to 10 U.S.C. § 1450(a)(3) to the member's dependent children instead of an SBP annuity for the surviving spouse. Section 1447(11)(A) defines a dependent child as one who:

- (i) is unmarried;
- (ii) is (I) under 18 years of age, . . . , and;
- (iii) is the child of a person to whom the Plan applies, including (I) an adopted child, and (II) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship.

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) sets forth those regulations for the SBP law. The section of the DoDFMR in effect at the time of the court order issued on January 6, 2005, giving the claimant shared joint legal custody of her nephew, with the parents of the child, is DoDFMR, volume 7B, chapter 44, paragraph 440102. That paragraph states:

An adopted child, stepchild, foster child, or recognized natural child, if that stepchild, foster child or recognized natural child lived with the retiree in a regular parent-child relationship; a child under age 18 and serving on active duty in the Uniformed Services, under age 22 and enrolled in an institution of higher learning under a military subsistence scholarship. In addition, to qualify as a dependent child, a foster child must have resided with the retiree at time of death, received over one-half of his or her support from the retiree and not be cared for under a social agency contract. A relative of the member (such as a grandchild) may qualify as an eligible child beneficiary if a foster parent/foster child relationship exists.

The claimant's nephew does not meet the definition of the member's dependent child since he was not the member's adopted child, stepchild, foster child, or natural child. The claimant's nephew had a mother and a father who shared joint legal custody of the child, with the claimant having primary physical custody. The member was not a party to the court action in January 2005. Although the child may have lived with the claimant and the member in their family unit, the member did not adopt him and he was not his foster child. The member did not list the child on his *Record of Emergency Data* when he filed it in October 2007. Further, the child was not listed on the *Report of Casualty*, dated April 22, 2008.

DOHA has no authority under statute or regulation to allow the claim for the child SBP annuity. However, we note that pursuant to the National Defense Authorization Act for Fiscal Year 2020 (NDAA FY 2020), 10 U.S.C. § 1448 was amended to restore the SBP annuity to any eligible surviving spouse who, in consultation with the Secretary concerned, previously elected to transfer payment of the SBP annuity to a surviving child or children under the provisions of 10 U.S.C. § 1448(d). See Public Law No. 116-92, § 622, 133 Stat. 1198, 1427 (2019). Such

restoration of eligibility to the surviving spouse is effective January 1, 2023. Information on the process of restoring the surviving spouse SBP annuity may be found on DFAS's website at: <https://www.dfas.mil/RetiredMilitary/survivors/SBP-2023-Optional-Child-Annuity-Reversion/>

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated February 7, 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

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