

DATE: July 12, 2023

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-110118.2

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.

DECISION

The claimant, a former 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-110118, dated April 17, 2023.

Background

The member was serving in the Air Force when he married the claimant on April 12, 1960. The record reflects that when he retired from the Air Force on February 1, 1982, he elected not to participate in the Survivor Benefit Plan (SBP) even though he was still married to the claimant. On July 30, 1987, the claimant and the member were divorced. On September 4, 1987, the member remarried. During an SBP Open Season in March 1993, the member elected SBP coverage for his spouse. On March 1, 2012, the member reached paid-up status. The member's spouse passed away on September 1, 2015. The member passed away on June 3, 2020.

The claimant subsequently claimed the SBP annuity as the member's former spouse. On June 12, 2020, the Defense Finance and Accounting Service (DFAS) denied her claim for the SBP annuity on the basis that the member did not establish former spouse SBP coverage for her, nor did she make a timely request for a deemed election. The claimant appealed DFAS's denial of her claim. She stated that the member assured her after his spouse died, that if he predeceased the claimant, the claimant would be entitled to the SBP annuity as his former spouse. She further

explained that the member continued to make monthly payments to her from his retired pay in the amount of \$700.00 until his death.

In response to the claimant's appeal, DFAS issued an administrative report on September 1, 2022, upholding the denial of her claim for the SBP annuity. In that report, DFAS stated that the initial reason for denial of the claim was incorrect. DFAS explained that their records reflect that the member declined to participate in SBP when he retired on February 1, 1982. DFAS also stated that they had no knowledge of the member's spouse's death on September 1, 2015, until after receiving notice of the member's death in 2020.

In the DOHA appeal decision, the adjudicator explained that DOHA requested DFAS provide our office with both the member's initial SBP election at retirement in 1982 and his SBP election during the SBP Open Season in 1993. DOHA further requested a copy of the member and the claimant's divorce decree from 1987. DFAS advised DOHA that they no longer possessed copies of these documents. The adjudicator upheld denial of the claim for the SBP annuity, explaining that even if the member did not decline SBP coverage for the claimant at his retirement, divorce ended any spouse SBP coverage that may have existed for the claimant. The adjudicator also found no evidence that the member voluntarily elected former spouse SBP coverage for the claimant after their divorce. The adjudicator explained that the member's Retiree Account Statement (RAS) reflected spouse SBP coverage for his spouse who died on September 1, 2015, as her birth date was indicated on the RAS dated December 31, 2018.

In the request for reconsideration, the claimant states that she was married to the member for 27 years and supported him for 23 years while he was on active duty in the Air Force. She states that she had no knowledge that the member declined SBP coverage for her when he retired. She encloses the divorce decree dated July 30, 1987, and a settlement agreement dated April 16, 1987. She also encloses the member's SBP Open Season election dated February 19, 1993.

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. A married member is eligible to participate in SBP when the member becomes eligible for retired pay. However, a member may elect not to participate, elect to provide less than maximum coverage, or elect to provide SBP benefits to a dependent child rather than a spouse. *See* 10 U.S.C. § 1448(a)(3)(A). At the time of enactment, the law stated that if a member who is married does not elect to participate in the SBP, to provide coverage at less than the maximum level, or elects to provide an annuity for a dependent child but not for the spouse, the member's spouse "shall be notified of that election." *See* Pub. L. No. 95-397, title II, § 202(a), 92 Stat. 844 (1978), amending 10 U.S.C.

§ 1448(a)(3)(A) and (B). Currently, the law requires spousal written concurrence when a married member elects not to participate in SBP. *See* Pub. L. No. 99-145, title VII, § 721(a), 99 Stat. 583, 676 (1985). An election to forgo participation in SBP under 10 U.S.C. § 1448(a)(2)(A) is irrevocable if it is not revoked before the date the member first becomes entitled to retired pay. *See* 10 U.S.C. § 1448(a)(4)(A).

In 1982, at the time the member retired, he was married to the claimant. The statute in effect at the time only required that the spouse be notified of the member's decision not to participate. In DFAS's administrative report dated September 1, 2022, DFAS found that the member was not a participant in SBP because the record reflected that the member elected not to participate when he retired in 1982. DFAS acknowledges that copies of the documents the member completed in 1982 do not exist at DFAS. When DOHA requested DFAS again verify their records, DFAS stated that no information could be retrieved from the Air Force. However, in the case before us, even assuming the claimant was not notified of the member's declination to participate in SBP, that fact is not dispositive of the outcome in the case.

Even if the Air Force did not notify the claimant of the member's failure to make such an SBP election, the claimant has an additional impediment to overcome. The impediment concerns the claimant's status as the member's former spouse after their divorce in 1987. 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 member's 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).

On July 30, 1987, the claimant and the member were divorced. An examination of the divorce decree, submitted by the claimant in her reconsideration request, reflects that it incorporated the parties' settlement agreement dated April 16, 1987. Pursuant to that agreement, the claimant was awarded \$627.00 of the member's monthly military retired pay. However, there is no mention in either the settlement agreement or the divorce decree of the SBP. Therefore, since the claimant was not awarded former spouse coverage in the divorce decree or settlement agreement, she had no statutory right to request a deemed election. The member did not voluntarily elect former spouse coverage for the claimant. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2021-CL-051110.2 (February 7, 2022).

Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision dated April 17, 2023. In accordance with the Department of Defense 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board