

DATE: August 7, 2023

In Re:)

[REDACTED])

) Claims Case No. 2023-CL-020207.2

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

A claimant, the surviving spouse of a deceased member of the U.S. Marine Corps, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2023-CL-020207, dated June 16, 2023.

Background

The member married on March 30, 2012. On March 14, 2013, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*. On that form, he noted that he was married and had no dependent children. He designated his spouse as his 100% arrears of retired pay beneficiary payable upon his death. Under item 26, the beneficiary categories for the Survivor Benefit Plan (SBP), he marked item 26g, electing not to participate in the SBP. He did not fill out the level of coverage under item 27, because as instructed on the form, he elected not to participate in SBP by marking item 26g. While he elected not to participate in SBP, he did list his spouse's name and information under item 28 as his insurable interest beneficiary. Although the member listed his spouse as a possible person with an insurable interest on the DD Form 2656, the information listed by the member was a nullity because a spouse cannot be an insurable interest beneficiary under the SBP. Consequently, the only permissible decision, on the part of the member on the DD Form 2656, was that he elected not to participate in the SBP.

The member's signature on the DD Form 2656 was witnessed, and his spouse's signature was witnessed by a notary acknowledging her concurrence with the member's election to not participate in SBP. The Defense Finance and Accounting Service (DFAS) accepted the member's election not to participate in the SBP.

On June 30, 2013, the member was transferred to the Temporary Disability Retired List (TDRL). On March 28, 2014, the member divorced his first wife. The member was transferred from the TDRL to the Permanent Disability Retired List (PDRL) effective April 1, 2015.

On August 1, 2017, the member and the claimant married. On January 17, 2021, the member passed away. On January 25, 2021, the claimant wrote to DFAS requesting the SBP annuity for herself and their unborn child. She stated that when the member retired, he was suffering from a brain tumor, and had received two brain tumor resections, chemotherapy, and radiation treatment. In order to provide for the member's child and continue to live in their home, the claimant requested payment of the SBP annuity.

On July 13, 2021, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS, claiming the SBP annuity as the member's spouse. On August 17, 2021, DFAS denied her claim on the basis that the member did not elect to participate in SBP. On December 11, 2021, the claimant appealed DFAS's denial of her claim. She stated that at the time the member retired from the Marine Corps, he was suffering from a brain tumor and in the process of a divorce. He was never counseled concerning the effect his election, not to participate in SBP, would have on any subsequent marriage. He was never advised that if he remarried, he would not have the ability to elect SBP for his new spouse. She stated that the member passed away unexpectedly after a regrowth of his brain tumor caused a stroke. At that time, she was 16 weeks pregnant with his child.

The record reflects that on December 11, 2021, the claimant filed a DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*, with the Board for Correction of Naval Records (BCNR), appealing DFAS's denial of the claim for the SBP annuity. On that application, she stated that the member did not elect SBP upon his retirement and due to a brain tumor, was unaware that he needed to elect SBP coverage when he married in 2017. The record does not contain the outcome of the claimant's petition to the BCNR.

On November 29, 2022, DFAS reviewed the claimant's appeal and issued an administrative report, upholding the initial denial of the SBP annuity claim. DFAS found that since the member did not revoke his election to not participate in SBP prior to his retirement, his declination to participate in SBP became permanent. DFAS further determined that there were no SBP open season enrollment periods relevant to the claim.

In the DOHA appeal decision, the adjudicator sustained DFAS's denial of the claim, finding no evidence that the member revoked his election to not participate in SBP prior to his retirement from the Marine Corps. The adjudicator explained that the member's election to not participate became irrevocable and, therefore, he was not able to elect into the SBP when he married the claimant in 2017, nor would he have been able to cover his child within one year of

the child's birth. The adjudicator further advised the claimant that, although DOHA did not have the authority to award the SBP annuity under applicable statute and regulation, the claimant had another possible avenue of relief that existed with the BCNR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. The adjudicator noted that any pursuit of a record correction was beyond DOHA's authority, and although the claimant filed the DD Form 149 with the BCNR, DOHA's record contained no disposition concerning the claimant's request for a records correction.

In her request for reconsideration, the claimant reiterates that at the time of the member's retirement he was suffering from a brain tumor and going through a divorce. He was unaware that his election not to participate in SBP at retirement disqualified him from ever participating in it. She acknowledges that as a 30-year-old man going through a divorce, he declined to participate in SBP coverage for his then spouse, and his spouse signed her concurrence. However, the member believed that he could obtain the SBP coverage in the future. She understands that the BCNR may correct any military record of a member when it considers it necessary to correct an error or remove an injustice. She states that she appealed the denial of the SBP annuity on the basis that the member was not provided correct information upon his retirement. She states that the government should provide members adequate information in regard to the documents they require them to sign. She states that she has been in consultation with a BCNR examiner, and he explained that she would be responsible for the unpaid SBP premiums before receiving the annuity, which she accepts as a fair result.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), 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. Federal agencies and officials must act within the authority granted to them by statute and issuing regulations. Thus, the liability of the United States is limited to that provided by law, including implementing regulations.

The SBP, 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 he becomes eligible for retired pay. *See* 10 U.S.C. § 1448(a)(2)(A). 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) and (B). The law requires spousal written concurrence when a married member elects not to participate in SBP. 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). Under 10 U.S.C. § 1454, the Secretary concerned may, under regulations prescribed under 10 U.S.C. § 1455, correct or revoke any election under the SBP when the Secretary considers it necessary to correct an administrative error.

The Secretary of Defense has issued implementing regulations under the authority of 10 U.S.C. § 1455. The implementing regulations for SBP elections and election changes are set forth under the Department of Defense Financial Management Regulation (DoDFMR), Volume

7B, Chapter 43. At the time of the member's election in this case, DoDFMR ¶ 430303-E states that spousal concurrence was required as follows:

Spousal Concurrence. Written spousal concurrence is required when the member elects to decline coverage or provide the spouse with less than the maximum SBP coverage available, to include electing child-only coverage, and when a member eligible for RC-SBP declines coverage or elects coverage that provides less than a maximum immediate spouse annuity. The signature of the spouse must be notarized. The requirement to have the spouse's signature notarized is not to suggest that the spouse has received additional counseling regarding the option being selected. It simply provides certification that the spouse signed the form.

DoDFMR ¶ 430303-E-1 states that any change in SBP election subsequent to retirement must be done through an administrative correction of records. DoDFMR ¶ 430101 states that all SBP elections in writing, signed and properly witnessed are irrevocable unless otherwise provided by law. DoDFMR ¶ 4304 states that the Secretary concerned may revoke an election when necessary to correct an administrative error, and revocation or correction based on administrative error is a Secretarial prerogative and except when procured by fraud, is final and conclusive on all officers of the United States. DoDFMR ¶ 430606 states that the Secretary of the Military Department concerned (or designee) may correct any election or any change or revocation of an election when the Secretary considers it necessary to correct an administrative record.

In this case, on March 14, 2013, the member elected not to participate in the SBP upon retirement, and his spouse concurred with the election. The member's spouse's signature was notarized. DFAS accepted the member's election not to participate. On June 30, 2013, the member was transferred to the TDRL and became entitled to receive retired pay. Since he elected not to participate in SBP and did not revoke his election prior to becoming eligible for retired pay, his SBP election to not participate became irrevocable. Therefore, DOHA is unable to allow this claim for the SBP annuity because we are bound by statute and regulation. *See* DOHA Claims Case No. 2021-CL-030103.2 (July 25, 2022).

DOHA understands that the member was suffering from a brain tumor and had undergone two surgeries, chemotherapy, and radiation treatment at the time he was preparing for his retirement from the Marine Corps. We note that after electing not to participate in SBP by marking item 26g on the DD Form 2656, he mistakenly filled out the insurable interest coverage for his spouse. This was an error because 1) he had already declined to participate in the SBP and therefore, should have left this section blank and 2) under 10 U.S.C. § 1448(b)(1), listing his spouse as the possible SBP insurable interest beneficiary on the form, was a nullity because a married member cannot elect insurable interest coverage under the SBP. However, even if the member had not been adequately counseled or was not understanding of the effect of his decision on any future marriage, DOHA is bound by statute and regulation, and therefore, unable to allow the claim for the SBP annuity. *See* DOHA Claims Case No. 2021-CL-030103.2, *supra*; and DOHA Claims Case No. 2021-CL-070805.2 (April 18, 2022).

Although DOHA has no authority to allow the claim, as explained by the DOHA adjudicator in the appeal decision, the claimant may have other remedies that rest with the BCNR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454 (the specific authority for the BCNR to correct or revoke an election for SBP). The BCNR has the discretionary authority to correct the record when it considers it necessary to correct an error or remove an injustice. The BCNR's authority is broader than DOHA's authority to settle a claim and is beyond DOHA's purview. As set forth above, it appears that the claimant has already petitioned the BCNR for relief and has been told by a BCNR examiner that she will have to pay the unpaid SBP premiums before receiving the annuity. Therefore, the claimant should continue to pursue the matter with the BCNR, the proper authority for relief under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. Information on the BCNR is located online at <https://www.secnav.navy.mil/mra/bcnr>.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated June 16, 2023. In accordance with DoD 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