

DATE: October 18, 2023

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In Re: )  
[REDACTED] ) Claims Case No. 2023-CL-051506.2  
Claimant )

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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.

**DECISION**

The claimant, a former spouse of a deceased, retired 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. 2023-CL-051506, dated July 12, 2023.

**Background**

The member and the claimant were married on June 2, 1998. On October 1, 2007, the member retired from the Air Force, having elected spouse only Survivor Benefit Plan (SBP) coverage for the claimant. On September 10, 2019, the member and the claimant divorced. The divorce decree did not require the member to elect former spouse SBP coverage for the claimant. Even though the member was divorced, he continued to pay spouse SBP premiums from his retired pay. On August 28, 2021, the member passed away.

On September 30, 2021, 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 October 2, 2021, DFAS received the SBP annuity claim along with a copy of the divorce decree. On December 9, 2021, DFAS denied the claim for the SBP annuity because the member did not establish former spouse SBP coverage for the

claimant, nor did the claimant make a request for a deemed election. On December 17, 2021, the claimant appealed DFAS's denial. She stated that the member did make an election for former spouse SBP coverage for her within one year of the date of their divorce. She submitted a completed DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, signed by the member, a witness, and the claimant on October 10, 2019. On April 7, 2022, DFAS sent a letter to the claimant requesting a complete copy of the divorce decree to include any documents mentioned in it. On October 5, 2022, the claimant provided the complete divorce decree and marital settlement agreement.

DFAS issued an administrative report on March 21, 2023, sustaining the denial of the claim for the former spouse SBP annuity. DFAS found no evidence that the member elected former spouse SBP coverage within one year of the divorce, nor that the claimant requested a deemed election within one year of the divorce decree. DFAS stated that the first time they learned of the member's divorce was on September 21, 2021, when the member's brother sent DFAS a copy of the member's death certificate. DFAS found that the divorce decree, including the marital settlement agreement, did not award the claimant former spouse SBP coverage. DFAS further found that DFAS has no record of receiving the DD Form 2656-1 within one year of the divorce.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim, finding no evidence that DFAS received the DD Form 2656-1 within one year of the divorce. The attorney examiner further advised the claimant that she may find relief outside the purview of DOHA by petitioning for a correction of military records under 10 U.S.C. § 1552.

In the claimant's request for reconsideration, she states the DD Form 2656-1 was signed and witnessed by an employee of Hurlburt Field Air Force Base and was hand-delivered to DFAS. Therefore, she states that it was DFAS who misplaced the form. She also states that the member did notify DFAS of their divorce because her health coverage benefits and base access identification card were surrendered to DFAS immediately following the divorce. She states that it may be necessary to review the member's retired pay documentation to determine what type of SBP coverage the member had after the divorce.

## **Discussion**

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 the claim by clear and convincing evidence on the written record that the United States Department of Defense is liable for the claim. *See* DoD Instruction 1340.21 (May 12, 2004) ¶ E5.7. Federal agencies and officials must act within the authority granted to them by statute in 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. Under 10 U.S.C. § 1448(a)(1)(A), SBP is open to a member who is eligible for retired pay. Spousal coverage ends upon divorce, but SBP includes provisions to allow a member to elect coverage for a former spouse. If a member elects

to provide coverage for a former spouse, he must notify the Secretary concerned with a written statement (in the form to be prescribed by that Secretary and signed by the member and the member's former spouse) setting forth whether the election is being made pursuant to a court order or to an agreement voluntarily entered into and incorporated in, ratified, or approved by the court order. *See* 10 U.S.C. § 1448(b)(5). The member's election for former spouse coverage must be received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to a former spouse. If the member fails to do so, the former spouse has one year from the date of the court order or filing involved. *See* 10 U.S.C. § 1450(f)(3)(C). The Service Secretaries have delegated their authority under the SBP law to DFAS.

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired in 2007 until such coverage ended with their divorce in 2019. The divorce decree did not require the member to provide the claimant with former spouse coverage. Therefore, she had no statutory right to request a deemed election. Further, although the member may have intended the claimant be covered as his former spouse SBP beneficiary, he failed to establish former spouse SBP coverage for her within one year of the divorce. DFAS has no evidence of receiving the member's election for former spouse coverage for the claimant, and the first time DFAS was aware the member was divorced was when the member's brother notified DFAS of his death. Therefore, DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2020-CL-122809.2 (July 19, 2022); and DOHA Claims Case No. 2021-CL-110301.2 (May 11, 2022).

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the attorney examiner in the appeal decision, the claimant may have other available remedies that rest with the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1552 and 10 U.S.C. § 1454 (the specific authority to correct or revoke an election for SBP). The AFBCMR has the discretionary authority to correct the record when it considers it necessary to correct an error or remove an injustice. The AFBCMR's authority is broader than DOHA's authority to settle a claim and is beyond DOHA's purview. Information on petitioning the AFBCMR is located online at <https://afrba-portal.cce.af.mil>.

Finally, the record reflects that the member continued to pay spouse SBP premiums from his retired pay after he and the claimant divorced. 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 should be refunded to the proper beneficiary as arrears of retired pay (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

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated July 12, 2023, disallowing the claim. 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

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Catherine M. Engstrom  
Chairperson, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

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Member, Claims Appeals Board