

DATE: October 10, 2023

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2023-CL-021301.2  
)  
)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

A surviving spouse's failure to submit an application for the annuity within six years of the member's death bars the Survivor Benefit Plan (SBP) claim under 31 U.S.C. § 3702(b).

**DECISION**

The claimant, the surviving spouse of a deceased 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-021301, dated July 19, 2023. In that decision, DOHA sustained the decision by the Defense Finance and Accounting Service (DFAS) to deny the surviving spouse's claim for the member's SBP annuity because it was filed more than six years after the member's death.

**Background**

The member and the claimant were married on December 22, 1980. The member retired from the Army on May 20, 1995, and established SBP spouse coverage for the claimant. On June 2, 2015, the member passed away.

On September 28, 2021, the claimant completed the DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's spouse. The claimant repeated her claim with a second DD Form 2656-7, dated January 4, 2022. DFAS received both claims on the same date, September 28, 2021, and January 4, 2022, respectively. On March 15, 2022, DFAS sent a response to the claimant denying the claim. However, that response was apparently not delivered to the claimant. On May 6, 2022, DFAS sent a second response denying the SBP

annuity claim on the basis that it was received by DFAS more than six years after it accrued and thus was barred from consideration by the statute of limitations, 31 U.S.C. § 3702(b), commonly known as the Barring Act. In the letter, DFAS also advised the claimant of three possible administrative recourses available to her: (1) an appeal of her claim to DOHA; (2) a request for waiver of the Barring Act under 31 U.S.C. § 3702(e); and (3) a petition to the Army Board for Correction of Military Records (ABCMR) to correct the record to show timely receipt of the SBP annuity claim. Of these three options, DFAS recommended pursuing the record correction with the ABCMR on the basis that DFAS believed it offered the best resolution to make the claimant whole.

The claimant, through her attorney, appealed DFAS's application of the Barring Act to the claim to DOHA. In that appeal, her attorney described the circumstances following the member's death and the claimant's inability to manage her affairs. He indicated that effective treatment of the claimant's condition did not begin until 2020, and it was not until late 2021 that the claimant learned of the possibility of receiving the SBP annuity. The claimant's attorney noted that the member paid SBP premiums for the claimant's coverage and maintained that denial of the claim would be against equity and good conscience.

DFAS responded to the claimant's appeal in an administrative report dated December 26, 2022. In that report, DFAS sustained the denial of the claim on the basis that it was untimely. DFAS also reported a further complication of the matter. DFAS wrote that effective July 1, 1998, the member's Department of Veterans Affairs (VA) disability compensation exceeded his retired pay. Therefore, DFAS suspended payment of the member's retired pay which, in turn, suspended deduction of SBP premiums from his retired pay. DFAS explained that since the member did not pay SBP premiums by direct remittance to DFAS, his SBP account had a net delinquency of \$21,031.09 in SBP premiums. DFAS again suggested that the claimant petition the ABCMR, cautioning that even if a correction was made to reflect timely receipt of her SBP annuity claim, the member's SBP premium delinquency would have to be deducted from any retroactive SBP annuity payments payable to her.

In the appeal decision, the DOHA adjudicator sustained DFAS's application of the Barring Act, disallowing the SBP annuity claim. The adjudicator explained that the claimant had the right to request waiver of the Barring Act through the Assistant Secretary of the Army to allow payment of SBP benefits retroactive to the member's death up to the statutory maximum of \$25,000.00, as set forth under 31 U.S.C. § 3702(e). He further explained that under 10 U.S.C. § 1552, the claimant may find relief outside the purview of DOHA. Under that statute, the Secretary of a military department, acting through a correction board, in this case, the ABCMR, may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice.

In her request for reconsideration, through her attorney, the claimant states that she was unaware of the SBP annuity until she spoke with her daughter in January 2022. Prior to her husband's death, she had been dealing with medical issues brought on by two major surgeries. She was married to her husband since she was 15 years old and relied on him as her sole means of financial support. The member elected SBP coverage for her in order to provide for her in the event of his death. She maintains that her circumstances clearly justify an exception to policy in

applying the Barring Act. She only missed the six-year deadline to apply for the annuity by three months. She again attaches all the medical documentation reflecting her condition after the member's death. She states that strictly enforcing the statute of limitations is unfair and against equity and good conscience. She also states that if an exception to policy is not possible, she requests that her case be expedited so that she can pursue other available remedies.

### **Discussion**

The SBP, now codified under 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 10 U.S.C. § 1450(a), a monthly SBP annuity is payable to a retired member's surviving spouse effective as of the first day after the date of the member's death. Under 31 U.S.C. § 3702(b), a survivor has six years to file a claim for an SBP annuity. In pertinent part, section (b)(1) states the following:

A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues . . .

The official responsible for establishing the SBP annuity accounts for survivors of retired military members is the office of DFAS – U.S. Retired and Annuitant Pay. All events giving rise to the government's liability to make SBP payments to a survivor occur at the date of the member's death, and the survivor has six years from that date to file the claim with DFAS. Claims filed more than six years after a member's death are barred. *See* DOHA Claims Case No. 2021-CL-122804.2 (July 27, 2022); DOHA Claims Case No. 2018-CL-091702.2 (June 17, 2019); and DOHA Claims Case No. 2017-CL-062703.2 (August 31, 2017).

We acknowledge the claimant's health during the period after the member's death and her financial situation. However, DOHA has no authority to allow her claim for the SBP annuity. The member's death in 2015 fixed the liability of the government and entitled the claimant to make a claim. DOHA does not have the authority to modify or make any exceptions to the time limitations imposed by the Barring Act. *See* DOHA Claims Case No. 2021-CL-122804.2, *supra*.

As explained by DFAS and DOHA, the claimant may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Army. Under 31 U.S.C. § 3702(e), upon request of the Assistant Secretary of the Army, the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for claims involving a uniformed service member's pay, allowances or survivor benefits. Under DoD Instruction 1340.21 ¶ E6.4 (May 12, 2004), the Director of DOHA is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. However, the claimant must file her request directly with the Secretary of the Army at the following address:

Assistant Secretary of the Army  
(Financial Management and Comptroller)  
109 Army Pentagon  
Washington, D.C. 20310-0109

We note that under 31 U.S.C. § 3702(e), waiver shall only be granted to allow payment up to a maximum of \$25,000.00, and the claimant will not be granted the SBP annuity prospectively. Therefore, the claimant may wish to also pursue the matter with the ABCMR. Under 10 U.S.C. § 1552, the Secretary of a military department, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. The ABCMR's authority is much broader than DOHA's claims settlement authority, and any petition for a correction of record must be pursued with the ABCMR. Information on petitioning the ABCMR can be found on the Army Review Boards Agency's website.

### **Conclusion**

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated July 19, 2023. In accordance with DoD Instruction 1340.21 (May 12, 2004) ¶ 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: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board