

DATE: January 9, 2024

In Re:)

[REDACTED])

) Claims Case No. 2022-CL-030403.2

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.

Annuity payments under the Survivor Benefit Plan may not be made to the surviving spouse of a deceased service member if their marital status at the time of the member's death was of doubtful validity, but such doubts may be resolved to the satisfaction of the accounting officers of the government if a court of competent jurisdiction renders judgment declaring the marriage valid.

DECISION

The claimant requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-030403, dated July 19, 2023. In that decision, DOHA found that the claimant's claim for the surviving spouse Survivor Benefit Plan (SBP) annuity of a deceased retired member of the U.S. Air Force was too doubtful for DOHA to authorize payment.

Background

The claimant and the member were married on August 6, 1977, in the state of California. On July 29, 1997, the member executed a DD Form 2656, *Data for Payment of Retired Personnel*, in which he elected spouse and child SBP coverage. On February 1, 1998, the member retired from the Air Force. On March 9, 2005, the claimant and the member were divorced in the state of South Carolina. The decree of divorce stated that the hearing request for a final divorce from the member was made by the claimant. The decree also awarded the claimant 50% of the member's military retired pay but was silent as to the SBP. Specifically, the judge ordered the following:

I find Plaintiff is entitled to fifty (50%) percent of Defendant's military retirement for the years of his military service that they were married.

On June 10, 2005, the member married in the state of Texas. On October 31, 2005, the claimant filed a motion to amend or correct the divorce decree issued on March 9, 2005, requesting that the South Carolina Family Court grant a decree of separate maintenance and support from the member, not a divorce decree. On January 25, 2006, the Court granted the claimant's motion and issued an order stating the following:

ORDERED:

1. That Plaintiff's Motion For Relief From Judgement Or Order is granted;
2. That the Decree Of Divorce signed by the undersigned dated March 9, 2005, was erroneous and is recalled; and
3. That in place of the Decree Of Divorce, a Decree of Separate Maintenance And Support is to be issued.

On January 26, 2006, the Court issued a Decree of Separate Maintenance and Support. In that decree, the claimant was again awarded 50% of the member's military retired pay and alimony and there was no mention of the SBP.

In January 2007, the claimant first applied for her 50% portion of the member's retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA) with the Defense Finance and Accounting Service (DFAS). On May 3, 2007, DFAS approved her request under the USFSPA, and began direct payment of her portion of the member's retired pay on July 2, 2007.

On April 4, 2018, the member passed away in Texas. The member's death certificate identifies the woman he married on June 10, 2005, as his surviving spouse. On August 7, 2018, the claimant completed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's spouse, not his former spouse. On September 17, 2018, DFAS denied the claim finding that although the member had elected SBP coverage for his spouse, a spouse loses eligibility upon divorce. DFAS further stated that the member did not make a request to change his SBP election to former spouse coverage nor was a deemed election for former spouse coverage made by the claimant. On December 14, 2018, the woman the member married on June 10, 2005, submitted a DD Form 2656-7 claiming the member's SBP annuity as his surviving spouse.

On July 21, 2020, DFAS's Office of General Counsel sent letters to both the claimant and the woman who married the member in 2005, notifying them that DFAS had doubts concerning the member's marital status and inviting them to seek a declaratory judgment from a court of competent jurisdiction as to their status as the legal spouse of the member at the time of his death.

On September 30, 2020, DFAS received a letter from an attorney notifying DFAS that he had been retained by the claimant and he would be petitioning the Court in South Carolina on her

behalf regarding a declaratory judgment. On October 9, 2020, DFAS General Counsel sent the claimant's lawyer a letter acknowledging his correspondence and advising him that DFAS would suspend any further action on the member's account for approximately 120 days. On February 3, 2021, DFAS General Counsel received a letter from the claimant's attorney. In that letter, the attorney requested a second 120-day extension of time in order to obtain the declaratory judgment on behalf of the claimant. DFAS approved the request for an additional extension until June 10, 2021. On June 16, 2021, DFAS received another 120-day extension request from the claimant's attorney. DFAS responded to the attorney on July 6, 2021, noting that it was understandable that more time may be necessary, but stating that DFAS was unable to grant an extension indefinitely. DFAS did approve a final extension of time until August 9, 2021.

On August 11, 2021, DFAS received correspondence from the claimant's attorney. In that correspondence, the attorney enclosed court pleadings that he had filed on behalf of the claimant against the estate of the member. Included in the pleadings was a complaint filed by the claimant on August 6, 2021, wherein she requested, in relevant part, for the court to grant affirmation that she was in fact married to the deceased member. On October 14, 2021, DFAS General Counsel spoke to the claimant's attorney regarding the status of the claimant's pending court action. The attorney informed DFAS that he was in the process of perfecting service. DFAS followed up with emails to the attorney.

On January 24, 2022, DFAS issued an administrative report upholding the denial of the claimant's claim for the SBP annuity as the deceased member's spouse. DFAS explained that SBP annuity payments may not be made to the surviving spouse of a deceased member if their marital status at the time of the member's death was of doubtful validity. However, such doubts may be resolved to the government's satisfaction if a court of competent jurisdiction renders judgment declaring the marriage valid. DFAS cited a Comptroller General decision in B-217743, July 15, 1985, and a DOHA Claims Appeals Board decision in DOHA Claims Case No. 96070219 (January 30, 1997), as case precedent. DFAS found that the claimant failed to furnish evidence clearly and satisfactorily proving the validity of her claim that she was the lawful surviving spouse of the member at the time of his death.

In the DOHA appeal decision, the attorney examiner sustained DFAS's denial of the claim. The attorney examiner explained that it was unclear from the record whether the Court was aware that the member had remarried in Texas on June 10, 2005, when it issued the order dated January 25, 2006, recalling and rescinding the divorce between the claimant and the member. The attorney examiner found that DFAS properly requested the claimant provide a decision from a court of competent jurisdiction to support her claim for an SBP annuity. However, the claimant failed to submit a ruling from a court of competent jurisdiction clearly establishing that she was the member's spouse at the time of his death.

In the claimant's reconsideration request, her attorney states that she was married to the member for 24 years and they had three children together. When the member and the claimant separated, she had to seek shelter in a domestic abuse facility. The claimant is a devout and religious person and does not believe in divorce. This is the reason she asked for an order for separate maintenance and support in 2004. The attorney states that even though the court erred in giving her a divorce, the member was ordered to provide her with Tricare benefits for her

lifetime. The divorce decree also awarded her 50% of the member's military retired pay. Therefore, the attorney contends that if DOHA is going to uphold the divorce decree, it should uphold the award of 50% of the member's retired pay to the claimant so that she can continue to receive it. The attorney contends that the order should be honored so that half of the member's SBP annuity be paid directly to the claimant for the remainder of her life.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. Pay officials shall only act under the authority prescribed by statute and regulation. Therefore, DOHA must render decisions based on applicable statutes, regulations, and our prior administrative decisions. Under Department of Defense Instruction 1340.21 (May 12, 2004), the claimant has the burden of proving the existence of a valid claim against the government. 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.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation in the SBP is automatic for members who are married or have dependent children when they become eligible to participate in SBP, *i.e.*, when they become eligible for retired pay. Spousal coverage ends upon divorce. If a member ceases to have an eligible spouse beneficiary and later remarries, he may decline coverage for the subsequent spouse if he does so within the first year of the marriage. *See* 10 U.S.C. § 1448(a)(6).

Subsection (a)(1) of 10 U.S.C. § 1450 directs payment of the SBP annuity to the "eligible surviving spouse" upon the death of the member. Surviving spouse is defined under 10 U.S.C. § 1447(9) as the member's widow or widower. Section (7) defines widow as the surviving wife of a member.

As the Comptroller General held before us, the validity of a marriage is for determination under the law of the jurisdiction where the marriage is performed. *See* B-217743, *supra*. A claimant seeking a spousal SBP annuity must submit the relevant documents in order to obtain the status of a member's surviving spouse. Until a claimant establishes status as the surviving spouse of a member, no spousal SBP annuity may be established for the claimant. Annuity payments under the SBP may not be made if the marital status at the time of the member's death is too doubtful, but such doubts may be resolved to the satisfaction of the accounting officers of the government if a court of competent jurisdiction renders judgment declaring the marriage valid. *See* DOHA Claims Case No. 96070219, *supra*.

In this case, the decree of divorce dated March 9, 2005, stated that the hearing request for a final divorce from the member was made by the claimant. The claimant had moved to amend her pleading to request a divorce on the basis of a one year's continuous separation. The judge found that the parties had lived separate and apart since July 2001; the claimant's witness corroborated this; and reconciliation was not desired or possible. The judge ordered that the claimant be granted a divorce. The decree also awarded the claimant 50% of the member's

military retired pay but was silent as to the SBP. On June 10, 2005, the member married in the state of Texas. At the time of the member's marriage, he was legally divorced from the claimant, and there were no known impediments to his new marriage. While the divorce decree was later recalled and rescinded in January 2006, it is unclear from the record evidence whether the court had any knowledge that the member had remarried prior to entering its order.

The court in South Carolina would have jurisdiction to determine the validity of the divorce and marriage. In the absence of a judicial determination of the validity of the revocation of the divorce decree, there is no basis for conclusion that the claimant is the proper SBP beneficiary. Accordingly, the validity of the marriage is too doubtful to warrant DOHA's allowance of the claim for the SBP annuity. Therefore, in light of the facts and circumstances described above, the claimant has not satisfied the necessary requirements to be recognized as the member's surviving spouse for the purposes of establishing a spouse SBP annuity for her.

Finally, the matter of the court-ordered payments raised by the claimant applies to direct payment of a portion of the member's retired pay under the USFSPA, 10 U.S.C. § 1408(d)(2). As reflected in the divorce decree, the claimant was entitled to receive monthly payments of a portion of the member's retired pay. In May 2007, DFAS accepted the claimant's application under the USFSPA, and began direct payment of her portion of the member's retired pay in July 2007. However, the USFSPA is a separate statute from the SBP law, and both set forth separate entitlements. Direct payments under the USFSPA terminate at the time of a member's death. Therefore, the claimant's court-ordered former spouse payments under the USFSPA does not provide her any help or legal inference in establishing her claim as the member's surviving spouse for the purposes of receiving a spouse SBP annuity. *See* DOHA Claims Case No. 2020-CL-081720.3 (January 10, 2023).

Conclusion

The claimant's request for reconsideration is denied. 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