

DATE: February 21, 2024

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2023-CL-032803.2

**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. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2023-CL-032803, dated September 5, 2023.

**Background**

The member and the claimant were married on May 22, 1978. On May 4, 1990, the member and the claimant's marriage was dissolved by a *Decree of Divorce a Vinculo Matrimonii* in the state of Virginia. The divorce decree listed one child born of the marriage. The decree did not mention the Survivor Benefit Plan (SBP), nor did it approve or incorporate any agreement that might have provided for SBP coverage.

On March 27, 1995, in preparation for his retirement, the member executed a DD Form 2656, *Data for Payment of Retired Personnel*. On that form, the member designated his mother as his arrears of retired pay (AOP) beneficiary due upon his death. He listed that he was married, identified his spouse, and reported their marriage date as November 8, 1987. He listed three dependent children, including the child born during his marriage to the claimant. He elected spouse and child SBP coverage based on his full retired pay. The member retired from the Army on May 1, 1995.

The claimant married again on January 10, 1998, but divorced December 18, 2004. The member passed away on November 15, 2018. The member's death certificate reflects that he was divorced at the time of his death. The member's brother reported his death to the Defense Finance and Accounting Service (DFAS) on November 20, 2018. The record reflects a "screenshot" from DFAS's database of the report of the member's death. On that screenshot, under annuity comments, DFAS noted "Marital Status does not match SBP information." Under spouse information, DFAS noted the member had no spouse, but listed the woman's name who he married on November 8, 1987, and their marriage date. No information was listed concerning the member's divorce. DFAS reports that the notification of the member's death was the first time they received information that the member was divorced.

On November 12, 2021, the claimant submitted a claim for the SBP annuity as the member's former spouse to DFAS. On December 21, 2021, and March 31, 2022, DFAS requested more information from the claimant. The record reflects that the claimant submitted that information. On April 19, 2022, DFAS denied her claim for the SBP annuity. In that letter, DFAS erroneously stated that the member established SBP coverage for the claimant at his retirement. DFAS then stated that divorce terminates SBP coverage and that SBP former spouse coverage can be established, within one year of the divorce, by either an election by the member or by a request for a deemed election from the former spouse. DFAS concluded that since neither had been made in the claimant's case, the claim was not payable.

The claimant appealed DFAS's denial of her claim. In her appeal, she maintained that the member elected former spouse SBP coverage at retirement; that he paid for that coverage from then until his death; and that his SBP former spouse election was somehow incorrectly recorded as an SBP spouse election possibly due to his disability issues. The claimant also confirmed that she was married in January 1998, but was divorced in December 2004. She concluded that she was qualified for the SBP annuity of the member.

DFAS reconsidered the claimant's claim in their administrative report dated January 25, 2023. DFAS reported that they had not been notified of the member's divorce from the claimant until after his death. DFAS stated that they did not receive a voluntary former spouse SBP election from the member for the claimant. DFAS stated that if a member is required by a court order to elect former spouse SBP coverage, then the former spouse has the right to request a deemed election within one year of that court order. DFAS, citing the decision in *Holt v. United States*, 64 Fed. Cl. 215 (Fed. Cl. 2005), stated that prior to the implementation of the DD Form 2656-10, *Survivor Benefit Plan (SBP) Former Spouse Request for Deemed Election*, there was no prescribed manner of making a former spouse deemed election request, and former spouses were not bound by any particular form or procedure when making a deemed election. However, DFAS found that the divorce decree did not require the member to make a former spouse SBP election. The claimant filed a rebuttal to DFAS's administrative report. In her rebuttal, she stated that neither she nor the member knew how to establish former spouse SBP coverage.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim. The adjudicator found no evidence that the member established former spouse SBP coverage for the claimant at the time he retired. The adjudicator examined the divorce decree and found no

provision in it that would provide the claimant the right to request a deemed election for former spouse coverage.

In her reconsideration request, the claimant states that she was married to the member for 12 years until their divorce in May 1990. She states that her documented marriage to the member and her divorce excludes any false claim arising from the member's second marriage in 1987. She states that after the divorce, she retained custody of their son and the member continued to pay monthly child support payments by voluntary allotment from his bank account. During the years he paid child support, the member continued to reassure the claimant that she would be awarded the SBP annuity upon his death. She points to DFAS's initial denial letter dated April 19, 2022, which advised her that the member had elected SBP coverage for her when he retired. She maintains that this letter from DFAS clearly supports her contention the member made an election to provide her with SBP coverage when he completed the DD Form 2656 at his retirement. She states that the member did not realize he had to fill out a new form to provide her with former spouse SBP coverage. She notes that the member also listed their child on the DD Form 2656 as his dependent and continued to pay the SBP premiums for child and spouse coverage until his death. She asserts that based on the decision in *Holt*, since there was no prescribed form for requesting a former spouse SBP deemed election request at the time the member retired, the facts support his election of former spouse SBP coverage for her at retirement.

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2021-CL-040904.2 (August 23, 2021).

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. Under the SBP, participating members contribute a portion of their retired pay to fund annuity payments for their designated beneficiaries. Participation in SBP is automatic for members who are married or have dependent children when they become eligible to participate in SBP. *See* 10 U.S.C. § 1448(a)(1) and (a)(2).

A member who has a former spouse upon becoming eligible to participate in the SBP may elect to provide an annuity to that former spouse. *See* 10 U.S.C. § 1448(b)(2)(A). The requirements for making such an election are found under 10 U.S.C. § 1448(b)(5). Under that section, a member shall, at the time of making the former spouse election, provide the Secretary concerned with a written statement in the form to be prescribed by the Secretary and signed by the member and the former spouse setting forth whether the election is being made pursuant to the requirements of a court order, or pursuant to the consideration of a voluntary agreement as part of, or incident to, a divorce proceeding.

In this case, the member and the claimant divorced prior to his eligibility to participate in SBP. The divorce decree was silent on the issue of SBP. Thus, since the claimant was not awarded former spouse coverage in the divorce decree or any other associated court documents, she had no statutory right to request a deemed election for former spouse SBP coverage. *See*

DOHA Claims Case No. 2022-CL-040802.2 (September 12, 2022). When the member retired, he did not voluntarily elect former spouse SBP coverage for the claimant, *i.e.*, he did not submit a former spouse election along with a written statement required by statute and regulation. Instead, the member elected spouse coverage for a woman he indicated he married in 1987, and child coverage for his three dependent children.

We note that DFAS's application of the *Holt* decision to the claimant's case is misguided. The divorce decree in *Holt* clearly ordered the member to establish former spouse SBP coverage. As set forth above, the divorce decree in this case was silent on the SBP. Therefore, the claimant had no statutory right to request a deemed election for former spouse SBP coverage. *See* DOHA Claims Case No. 2021-CL-100605.2 (February 23, 2023); and DOHA Claims Case No. 2020-CL-081702.2 (June 15, 2021).

As for the member's marriage in 1987, we see no issue between the claimant and the woman the member purportedly married before his divorce. That is because the issue of the legitimacy of the member's 1987 marriage is not relevant to the determination of whether the claimant's former spouse SBP claim is authorized by statute or regulations. Further, even if the member's marriage in 1987 was a nullity, based on the fact that he was still married to the claimant, the claimant lost eligibility for the spouse SBP annuity upon divorce on May 4, 1990. DOHA is bound by statute and regulation, and therefore, is unable to allow the claim for the SBP annuity. *See* DOHA Claims Case No. 2023-CL-032905.2 (June 26, 2023).

## Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated September 5, 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