

DATE: February 7, 2024

In Re:)
 [REDACTED]) Claims Case No. 2022-CL-120609.2
)
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. A claim may be allowed only if it is for an item authorized by statute or regulation. Under the order of precedence established by 10 U.S.C. § 2771(a), a designated beneficiary has a claim superior to the late member’s surviving spouse.

DECISION

The claimant, a surviving 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. 2022-CL-120609, dated October 20, 2023.

Background

On August 1, 1976, the member retired from the Air Force. On February 12, 2006, he completed a DFAS-CL 5890/2, *Designation of Beneficiary Information*, designating beneficiary(ies) for his arrears of retired pay (AOP). On September 26, 2021, the member passed away. On November 8, 2021, the claimant submitted a SF 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*, to the Defense Finance and Accounting Service (DFAS), claiming the AOP as the member’s surviving spouse. DFAS denied the AOP claim on the grounds that the claimant was not an eligible AOP beneficiary on the member’s account. DFAS stated that the member designated other person(s) as his AOP beneficiary(ies).

The claimant appealed DFAS's denial of her claim on the basis of specific information contained in the member's family trust and will. However, the claimant did not include the trust document or final will, but she did include a durable power of attorney signed by the member on August 25, 2018. She asserted that this document supersedes any prior designation of a beneficiary for AOP.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim, finding that the member made a written designation under 10 U.S.C. § 2771. Under that statute, the rights of a member's designated beneficiary(ies) are superior to those of a surviving spouse or a legal representative. The attorney examiner also noted that DFAS had made payment to the member's designated beneficiary(ies).

In the claimant's request for reconsideration, she attaches the member's will and trust, both signed by the member on August 25, 2018. The claimant maintains that as the member's successor trustee, she is entitled to the AOP.

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). When the language of a statute is clear on its face, the plain meaning of that statute will be given effect and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2016-CL-092101.3 (November 17, 2016); and DOHA Claims Case No. 2016-CL-052003.2 (September 27, 2016).

The final settlement of accounts owed by the Government to deceased members of the armed forces are to be paid according to the statutory instructions contained under 10 U.S.C. § 2771(a). Subsection (a) provides for payment of the amount due to the person or persons surviving the member in the following order of precedence:

- (1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.
- (2) Surviving spouse.
- (3) Children and their descendants, by representation.
- (4) Father and mother in equal parts or, if either is dead, the survivor.
- (5) Legal representative.
- (6) Person entitled under the law of the domicile of the deceased member.

Under 10 U.S.C. § 2771(b), designations and changes of designation of beneficiaries under subsection (a)(1) are subject to regulations prescribed by the Secretary of Defense. The

current implementing regulations for this statute are found in Chapter 30, Volume 7B of the DoD 7000.14-R, the *Department of Defense Financial Management Regulation* (DoDFMR), *Military Pay Policy and Procedures-Retired Pay*. Paragraph 2.4.1 restates the order of precedence set forth under 10 U.S.C. § 2771. Paragraph 2.4.2 states that a retired member may change a designated beneficiary either in writing or electronically via MyPay as long as the change is received by DFAS-Cleveland before the member's death. As set forth under 10 U.S.C. § 2771(d), AOP payments made by the Secretary of Defense under the authority of the statute, bars recovery by any other person of the amount paid.

On February 12, 2006, the member designated his beneficiary(ies) to receive any arrears of retired pay that might be due at his death. The fact that the surviving spouse has trust documentation and a will concerning the disposition of the member's estate is not legally sufficient to change the mandatory requirements of the cited statute, nor does it allow the surviving spouse to be recognized as the designated beneficiary within the purview of the law and applicable regulations. *See* Comptroller General decision B-142316, Apr. 6, 1960. As explained by the attorney examiner in the appeal decision, in setting forth the order of precedence of persons to whom payment may be made, 10 U.S.C. § 2771(a) lists the surviving spouse as second in the order of precedence. Since the member designated his beneficiary(ies) to receive any arrears of retired pay, his designation takes precedence over a surviving spouse. Therefore, there is no authority to allow payment to the member's spouse.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated October 20, 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

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