

DATE: February 29, 2024

In Re:)

[REDACTED])

) Claims Case No. 2023-CL-051606.2

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.

In clear language, the statute governing the Survivor Benefit Plan (SBP) requires that a surviving spouse be married to the deceased member for at least one year immediately before the member's death in order to receive the SBP annuity.

DECISION

The claimant, a 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-051606, dated July 12, 2023.

Background

On May 9, 1987, the member, a reservist, completed DD Form 1883, *Survivor Benefit Plan Election Certificate*. He elected Option C, immediate Survivor Benefit Plan (SBP) coverage, for his spouse and children based on the full amount of his retired pay. The member and his spouse divorced on October 4, 1989. The divorce decree did not require the member to elect former spouse SBP coverage.

On July 1, 1998, in preparation for his retirement, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*, indicating that his marital status was "single" and

electing not to participate in the SBP, as he had no dependents at the time. On March 22, 1999, the member reached the age of 60, retired from the Army and began receiving his monthly military retired pay. Since the member elected not to participate in SBP and was not married at the time he retired, no SBP premiums were deducted from his retired pay. On May 11, 1999, the member completed the DFAS-CL Form 1741/70, *Survivor Benefit Plan (SBP) - Automatic Coverage Fact Sheet*. On that form, the member stated that he was not married and did not have any dependent children. On January 21, 2020, the member and the claimant were married in the state of Texas. On April 8, 2020, the member passed away in Texas, less than three months after his marriage to the claimant.

On November 8, 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 spouse. On that form, the claimant noted her marriage date to the member was January 21, 2020. On December 16, 2021, DFAS denied the claim for the SBP annuity because the claimant was not married to the member for at least one year before his death.

In the claimant's appeal, she stated that she was married to the member on January 21, 2020, after being together exclusively for over 33 years. She stated that although she was not legally married to the member until January 2020, the history and story of their relationship reflects that they were married. She stated that she and the member grew up together in Texas. In 1961, they went their separate ways but 25 years later, in October 1986, they met again at the member's father's funeral. She stated that they went out on a few dates and then decided to continue to see each other. They each maintained their own homes but by February 1987, they started living together more often at the member's home and were committed to each other. They attended the same church together for 28 years and both sang in the choir. They went to military balls, social events, conventions, and games, and traveled together. She stated that they were inseparable and when they got married, many of their friends were surprised because they thought they were already married. She also stated that they maintained a bank account together. She stated that they took care of each other including taking each other to their doctor's appointments and nursing each other during times of illness. When the member's cancer returned and became aggressive in January 2020, she put off her knee replacement surgeries to take care of him. She stated that they always knew they were going to be married, but just kept putting it off, not realizing time was not on their side. When they did get married, they did not know that his life would end so quickly. She stated that the member was so sick, he was unable to take the steps to make sure she qualified for the SBP annuity, and her focus was on caring for him and making him comfortable. She requested that DFAS complete the task that the member was too sick to do and approve her application for the SBP annuity. She included several photographs of them together over the years beginning in 1987; notes that they sent each other; travel documents reflecting trips they had taken over the years; an email from the member's friend from 2019 stating he was happy to know the member was feeling better and knew that it was because of the claimant's care; and a sympathy card from a church friend noting that the friend always had assumed they were married.

On March 24, 2022, a DFAS technician sent a letter to the claimant in response to a phone conversation regarding the establishment of a common-law marriage. In that letter, the

technician stated that in order for DFAS to determine if a common-law marriage existed between the claimant and the member, certain documentation should be submitted such as tax documents, documents that verify property owned jointly and documents that verify joint bank accounts.

On March 28, 2023, the claimant's congressional representative contacted DFAS on her behalf requesting a status of her claim for survivor benefits. The representative stated that the Department of Veterans Affairs (VA) recognized the claimant as the member's surviving spouse, and enclosed the VA's correspondence dated June 15, 2021, acknowledging the claimant's entitlement as the member's survivor to monthly VA benefits in the form of Dependency and Indemnity Compensation (DIC).

DFAS issued an administrative report on April 24, 2023, sustaining the denial of the claimant's claim for the SBP annuity. DFAS reviewed the written record and found that although the member elected immediate SBP coverage for his spouse and children in 1987, SBP coverage for that spouse terminated upon their divorce on October 4, 1989. DFAS found that the member's spouse SBP coverage went into a suspended status when he no longer had an eligible spouse beneficiary. DFAS determined that when he married the claimant on January 21, 2020, spouse SBP coverage automatically would have resumed at the first anniversary of their marriage. However, the member passed away on April 8, 2020. Therefore, DFAS concluded that under 10 U.S.C. § 1450 and 10 U.S.C. § 1447(7), the SBP annuity was not payable to the claimant as the member's widow since she was married to him less than one year prior to his death. DFAS then analyzed the claimant's claim that she and the member were married under common law for more than one year before the member passed away. Citing *Russell v. Russell*, 865 S.W.2d 929 (Tex. 1993), DFAS found that Texas has recognized common-law marriage, also known as informal marriage, since 1847. DFAS explained that under Texas law, citing Texas Family Code § 2.401, in order for a common-law marriage to be entered into in Texas and recognized by the courts there as a legal marriage, it must be established that either 1) a declaration of their marriage be signed, or 2) the parties agreed to be married and after the agreement, they lived together in the state as husband and wife, and represented to others that they were married. DFAS found that since there was no evidence that a declaration of marriage was ever signed, in order for the claimant to prove she was the common-law spouse of the member, she must show that they agreed to be married, that after agreeing to be married, they lived together in Texas as husband and wife, and that they represented to others that they were married. DFAS noted that it was unclear when the claimant was claiming that the common-law marriage started. DFAS then concluded the facts in the case did not establish that the claimant was the common-law spouse of the member under Texas law.

The claimant filed a rebuttal to DFAS's administrative report. In her rebuttal, she stated that she does not like it being insinuated that she is being disingenuous about the type of relationship she had with the member. She reiterated that they were together 33 years. She stated that the fact that they chose to get married in January 2020, was a decision they both made, and it was not the first time that they scheduled a wedding. She stated that in early 2000 they planned a wedding, but then changed their minds for personal reasons. She stated that when she started dating the member, they were both secure in their personal lives, and had their own bank accounts, personal property, houses, and credit cards. They did have one joint saving account, but they felt there was no reason for joint bank accounts or credit cards. They did

cohabitate on weekends but maintained separate houses since they lived only 11 minutes apart. She stated that they were together for so many years, the people who knew them believed them to be married. She stated that their public status was that they were married. She stated that they were the beneficiaries on each other's Teacher Retirement System of Texas policies. She stated that in January 2020 they simply chose to finish what they started and solemnize their vows on paper in a ceremonial marriage. She stated that she did not change her last name until three months after the member's death. She enclosed a statement from a long-time friend supporting the fact that the couple held themselves out as a loving, supportive couple, and it was not until a year before the member's death, that the friend found out that they were not married "on paper." The claimant also enclosed a decision by the Board of Veterans' Appeals dated February 22, 2021, recognizing the claimant as the member's surviving spouse for the purposes of receiving DIC benefits. The decision states that the common-law marriage between the veteran (member) and the appellant (claimant) is deemed valid in establishing the claimant as the member's surviving spouse for the purpose of eligibility to DIC benefits. The claimant also enclosed a letter from the Teachers Retirement System of Texas dated August 3, 2020, acknowledging her status as the beneficiary of the member's annuity payments under that system. Finally, she enclosed evidence of a credit union account in both the member and her name for the period March 2019 through June 2019.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim. The attorney examiner acknowledged that the claimant and the member were in a relationship for 33 years and took note of all the evidence provided by the claimant including the travel documents, the bank account information, the photos of the couple, and the numerous letters from friends in support of the claimant. He also noted, as DFAS had, that it was not clear from the record at what point the claimant was claiming her common-law marriage began. He explained that at the time of retirement, the member stated that he was single, and did not want to participate in SBP. He explained that no spouse SBP premiums were ever deducted from his retired pay. The attorney examiner also found that the claimant noted their date of marriage as January 21, 2020, on the DD Form 2656-7. He also quoted the claimant's statement in her appeal that she and the member were married on "Tuesday, January 21, 2020, after being together continuously and exclusively over thirty-three (33) years." The attorney examiner found no official documentation reflecting that the claimant and the member were in a common-law marriage. Thus, he concluded that the member and the claimant were not married for at least one year prior to his death.

In the claimant's request for reconsideration, she states that she is not sure what is needed to establish that she and the member were in a common-law marriage. However, they were in a loving and continuous relationship for over 33 years. She states that she and the member always planned to get married but kept putting it off. She encloses documentation for the Board to consider.

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 under the law for the amount claimed. *See* DoD Instruction 1340.21 (May 12, 2004) ¶ E5.7. Federal agencies and officials must act within the authority granted to them by statute and in issuing regulations. Thus, the liability of the United States is limited to that provided by the law (including implementing regulations). The fundamental rule in adjudicating a claim is that payment may be made only for an expense authorized by statute or regulation. Since military pay entitlements, including survivor benefits, are governed by specific statutes, DOHA must apply the appropriate statutes and regulations in the adjudication of those entitlements. Moreover, it is a rule of statutory construction that when the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2020-CL-052603.2 (September 21, 2021).

The SBP, 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the survivors of deceased members of the uniformed services. The SBP was designed on an actuarial basis as a contributory plan. That is, generally, in return for protection of a member's dependents upon the member's death, the retired member contributes SBP premiums in the form of deductions from the member's retired pay. *See* 10 U.S.C. § 1452. Under 10 U.S.C. § 1448(a)(1) and (a)(2), the SBP is open to a member who is eligible for retired pay. Once a member has made an election to participate in SBP, participation is irrevocable and cannot be waived by the member. *See* 10 U.S.C. § 1448(a)(4). If the 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 marriage. *See* 10 U.S.C. § 1448(a)(6).

Under 10 U.S.C. § 1450(a)(1), a spousal annuity is to be paid to a member's eligible surviving spouse as defined under 10 U.S.C. § 1447(9). "Surviving spouse" is defined for SBP purposes as a "widow or widower." In turn, "widow" is defined by 10 U.S.C. § 1447(7) as:

(7) Widow.—The term "widow" means the surviving wife of a person who, if not married to the person at the time he became eligible for retired pay—

- (A) Was married to him for at least one year immediately before his death; or
- (B) Is the mother of issue by that marriage.

In 1987, the member was eligible for reserve-component retired pay but for the fact that he was not yet 60 years old. At that time, he was married and had dependent children and elected Option C, immediate SBP coverage for his then spouse and children. However, the member divorced in 1989. At that time, his former spouse was no longer an eligible beneficiary under his SBP, and his spouse SBP coverage went into suspended status. In 1998, in preparation for his retirement from the Army, the member was not married and did not have any dependent children and elected not to participate in the SBP. On March 22, 1999, the member reached the age of 60, retired from the Army and began receiving his monthly military retired pay. As set forth above, the claimant was not married to the member at the time he became eligible to participate in the SBP, nor at the time the member began receiving his retired pay. The member and the claimant married in January 2020, and no issue was born of the marriage. The member passed away on April 8, 2020, less than one year after their marriage.

We now address the assertion that the claimant and the member were married over the one-year statutory limitation under the common law of the state of Texas. The Secretary of Defense has issued implementing regulations under the authority of 10 U.S.C. § 1455, regarding this matter. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, chapter 44, paragraph 2.1, *Spouse (Including the Spouse of a Common-Law Marriage)*, states that the spouse of a member who marries the member after retirement becomes an eligible spouse beneficiary upon the first anniversary of the marriage. Common-law marriage is defined in volume 7B as “a marriage not solemnized by religious or civil ceremony as defined in pertinent state law.” *See* DoDFMR, volume 7B, *Definitions*. Therefore, the validity of a marriage is for determination under the laws of the jurisdiction where the marriage is performed, in this case, Texas. DFAS and the attorney examiner reviewed the record evidence in this case, applied the pertinent Texas law to the facts and concluded that the claimant failed to establish the existence of a common-law marriage. The claimant has offered no new information that would change the determination made by DFAS and the attorney examiner. We find no error in DFAS’s denial of the SBP claim, nor in the attorney examiner’s appeal decision upholding the denial.

As for the VA’s determination of the claimant’s entitlement to DIC benefits, we note that the VA is a separate agency from the Department of Defense and adjudicates different entitlements upon a member’s death under different statutory authority. Therefore, DOHA is only bound by the SBP law, as set forth under pertinent statute and regulation. *See* DOHA Claims Case No. 2021-CL-041302.2 (August 31, 2021) *citing* Comptroller General decisions B-155453, June 13, 1996; and B-154689, Oct. 26, 1994.

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

Catherine M. Engstrom
Chairperson, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board