

DATE: March 21, 2024

In Re:)
) [REDACTED]) Claims Case No. 2023-CL-051507.2
))
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.

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-051507, dated October 11, 2023.

Background

On October 8, 1966, the member and the claimant were married. In 1986, the member received his Notification of Eligibility (NOE) for retired pay at age 60, notifying him that he was eligible to make an election under the Reserve Component Survivor Benefit Plan (SBP). The Reserve Component SBP extends eligibility for SBP to Reserve Component members who would otherwise be eligible to receive retired pay except that they have not reached the required retirement age of 60. On December 14, 1986, the member completed the DD Form 1883, *Survivor Benefit Plan Election Certificate*, electing Option C, to provide immediate coverage for his spouse (the claimant) and children. On November 26, 1990, the member and the claimant divorced. The judgment of divorce incorporated in its entirety, a marital settlement agreement signed by the member and the claimant on November 26, 1990. That agreement stated the following:

DARP-PAR-PAC is directed to pay 50 percent of [the member's] account balance under the plan as of November 27, 1990, to [the claimant], a/k/a [the claimant], together with interest thereon to the date of payment at the rate earned by the plan.

The agreement also stated the following:

For the purposes of the one-half (1/2) assignment in this order to [the claimant], a/k/a [the claimant], she shall be deemed the surviving spouse in the event of the participant's death and a spouse as far as any disability/survivorship/preretirement joint and survivor benefits provisions are concerned.

On July 13, 2005, the member turned 60 years old and became eligible to begin receiving his retired pay. Reserve Component members must file an application for retired pay, but the member did not. On July 25, 2005, the claimant wrote to the Assistant General Counsel for Garnishment Operations at the Defense Finance and Accounting Service (DFAS) requesting direct payment of a portion of the member's retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408. In her request, she enclosed a completed DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, and certified copies of the judgment of divorce and marital settlement agreement. On August 2, 2005, the DFAS Garnishment Operations Office responded to the claimant. In their letter, DFAS denied her application on the basis that the award language in the divorce decree, 50% of the member's account balance as of November 27, 1990, could not be computed by DFAS. DFAS stated that claimant's court order provided for a division of retired pay by means of a formula wherein the numerator (length of marriage or reserve points earned during the marriage) or percentage multiplier was not specified. DFAS explained that the claimant must obtain a certified copy of a clarifying order awarding either a fixed percentage or a fixed dollar amount of the member's retired pay, or which provides a formula wherein the only missing element is the denominator (member's years of service or total points earned by a reservist). DFAS also advised the claimant of the following:

If your divorce decree specifies that you are to be designated as a former spouse beneficiary for the Survivor Benefit Plan (SBP), you must make a 'deemed election' for SBP coverage within one year of the date of your divorce directly to the Retired Pay office; DFAS, US Military Retirement Pay, PO Box 7130, London, KY 40742-7130.

On August 29, 2005, the DFAS Retired Pay Office received a letter from the claimant. In her letter, the claimant stated that the DFAS Garnishment Operations Office gave her their contact information in order to find out about her SBP benefits. She advised that they were divorced in 1990 and asked if she was listed as the beneficiary on the member's account to receive the SBP benefits. There is no record of a response from the DFAS Retired Pay Office to this letter.

On December 5, 2006, a clarifying order of the marital settlement agreement was issued. That order stated that the total amount of Army Reserve Retirement Points to be used as earned by the member during the marriage of the member and the claimant is 2105, and that the amount

to be awarded to the claimant be stated as 50 percent of the member's total retirement benefits. There was no mention of the SBP or survivor benefits. On December 21, 2006, the claimant provided the DFAS Operations Office a certified copy of the clarifying order. On January 10, 2007, DFAS acknowledged receipt of the claimant's application for payment under the USFSPA. DFAS also sent a letter to the member advising him of their receipt of the claimant's USFSPA application.

On January 19, 2007, the DFAS Retired Pay Office received a letter from the claimant referencing her letter sent in August 2005. She stated that the marital settlement agreement awarded her the SBP benefits as the deemed surviving spouse of the member. On August 17, 2007, the DFAS Retired Pay Office received another letter from the claimant requesting a response to her inquiries about the SBP coverage. There is no record of a response from the DFAS Retired Pay Office to this letter.

On October 10, 2007, DFAS received an inquiry submitted by the claimant's congressional representative concerning the SBP benefits of the member. On October 15, 2007, DFAS responded to the congressional representative. DFAS stated that if former spouse SBP coverage had been elected by either party after their divorce, the coverage would have been changed to former spouse. DFAS stated that the member did not elect former spouse SBP coverage for the claimant, and the claimant did not deem her election for former spouse coverage. DFAS acknowledged that after the divorce, on February 18, 1991, the claimant was informed to delay submission of her financial documents and wait until three months after the member's retirement from the Army to submit them. DFAS stated that this guidance could be construed as advising the claimant to delay the deeming of her SBP former spouse election until that time. DFAS stated that the claimant may desire to petition the Army Review Boards Agency to request former spouse coverage under the SBP. DFAS enclosed the DD Form 149, *Application for Correction of Military Record Under the Provisions of Title 10, U.S. Code, Section 1552*, for the claimant to petition the Army Review Boards Agency.

On April 6, 2020, a court order was issued appointing a guardian of the member's estate due to incompetency. On April 27, 2020, the member signed a DD Form 108, *Application for Retired Pay Benefits*. On April 27, 2020, the member's guardian wrote a letter to the Army attaching the court order and the member's application for retired pay. In the letter, the guardian stated that the member's ex-wife is entitled to a portion of the member's retired pay and included the judgment of divorce, marital settlement agreement and clarify order. On May 5, 2020, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*, applying for his military retired pay. On that form, he noted he was single and designated the claimant, his former spouse, as his arrears of retired pay (AOP) beneficiary. Although he indicated that his previous SBP election was as a reserve-component member, Option C, he did not fill out any other information pertaining to SBP. On July 29, 2021, the member's retirement orders were issued, placing the member on the retired list effective July 13, 2005. On July 29, 2021, the Army Human Resources Command notified the member that his application for retired pay was approved. On July 31, 2021, DFAS received the member's approved retired pay application from the Army.

On August 15, 2021, the member passed away prior to DFAS's establishment of his retired pay account. As a result, the member never received any retired pay.

On December 14, 2021, the claimant submitted to DFAS a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the member's former spouse. On January 13, 2022, DFAS denied her claim on the basis that the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a former spouse deemed election.

On January 22, 2022, the claimant appealed DFAS's denial of her claim. She stated that for 17 years she has been trying to find out if the member enrolled her in the SBP, but to no avail. She stated that she was finally told that she should have elected former spouse SBP coverage for herself within one year of their divorce. She stated that the member neglected to sign her up for the SBP because he had no desire to share any of his income with her even though he signed the marital settlement agreement. She stated that the USFSPA should allow her payment of the SBP annuity.

On March 29, 2023, DFAS issued an administrative report sustaining the denial of the claim. DFAS stated that the claimant was awarded former spouse SBP coverage as set forth in the divorce documents. DFAS stated that the claimant had one year from the date of the divorce documents to deem her election for former spouse SBP coverage but failed to do so. DFAS stated that the member did not elect former spouse SBP coverage for her. In her rebuttal, the claimant stated that she is requesting 50% of the member's retired pay as set forth in the marital settlement agreement. She stated that the member originally elected her as his spouse SBP beneficiary in 1986, and pursuant to the marital settlement agreement, since her name was never changed from the member's original election in 1986, she should still receive the SBP annuity.

In the DOHA appeal decision, the attorney examiner upheld DFAS's denial of the claim for the SBP annuity finding no evidence that the member elected former spouse SBP coverage for the claimant or that the claimant submitted a deemed election for that coverage. He explained that DOHA obtained from DFAS the letter (dated February 18, 1991) referenced by DFAS in their response to the claimant's congressional representative. He enclosed the letter in his appeal decision. That letter was written by the Army Human Resources Command to the claimant's attorney concerning the member's military service. The attorney examiner explained that even though DFAS and the Army Human Resources Command may have provided the claimant and the claimant's attorney with information which may have affected the submission of a deemed election for former spouse coverage, both the Comptroller General and DOHA have consistently held that the government is not liable for the erroneous or negligent acts of its officers, agents or employees, even if committed in performance of their official duties. *See* DOHA Claims Case No. 9607022 (January 27, 1997). The attorney examiner stated that although DOHA had no authority to allow the SBP annuity claim under statute and regulation, the claimant may find other available relief outside of DOHA by petitioning the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1552.

In her request for reconsideration, the claimant reiterates that she spent 17 years trying to get an answer to her status as the member's SBP beneficiary. She now understands that she had

to deem her election within one year of the divorce decree. However, she was never given the correct information to file her election. She also notes that on the DD Form 1883, under the member's election of her as his spouse SBP beneficiary, the form states the following:

IMPORTANT: The decision you make with respect to participation in this Survivor Benefit Plan is a permanent irrevocable decision. Please consider your decision and its effect very carefully.

Since the form states that the member's election was irrevocable, she questions why she could be removed as the member's SBP beneficiary. She again asserts that under the USFSPA, as long as the award is set forth in the divorce decree or other court order in an acceptable manner, that is sufficient for her to be named the SBP beneficiary. She states that she need not join the member's plan as part of a divorce proceeding. Therefore, she maintains that it was not necessary for the member or her to elect into the SBP.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2022-CL-072718.2 (March 21, 2023). Therefore, DOHA must render decisions based on applicable statutes, regulations, and our prior administrative decisions. The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

The SBP is an income maintenance program for the survivors of deceased members of the uniformed services. *See* 10 U.S.C. §§ 1447-1455. 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 the SBP, *i.e.*, when they become eligible for retired pay. *See* 10 U.S.C. § 1448(a)(1) and (a)(2). Specifically, a married reservist or reservist with a dependent child may elect to participate in SBP when the member is notified under 10 U.S.C. § 12731(d) that the member has completed the years of service required for eligibility for reserve-component retired pay. *See* 10 U.S.C. § 1448(a)(2)(B). However, under 10 U.S.C. § 1448(a)(1)(B) and (2)(B), a reserve-component member who is married or has a dependent child is automatically entered into the Reserve Component SBP upon receiving notice, the NOE, that the member has completed the years of service needed for reserve-component retired pay (unless the members opts out of the SBP program with the written consent of the member's spouse before the end of the 90-day period beginning on the date on which he receives the notification). A reserve member's election under 10 U.S.C. § 1448(a)(2)(B), is irrevocable if not revoked before the end of the 90-day period referred to in the section. *See* 10 U.S.C. § 1448(a)(4)(B). Therefore, once a member has made an election to participate in SBP, participation is irrevocable and cannot be waived by the member.

Divorce ends spousal coverage under the SBP. If the member divorces and wishes to provide SBP coverage for the former spouse, the member must notify DFAS in writing of the divorce and the intention to provide coverage for the former spouse, even if the former spouse

was the spouse beneficiary immediately prior to the divorce. A member's election of former spouse coverage must be established within one year from the date of the decree of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a court order to provide SBP coverage to the former spouse. If the member fails to do so, the former spouse has one year from the date of the court order or filing involved to request a deemed election. *See* 10 U.S.C. § 1450(f)(3)(C). The former spouse must submit the request for a deemed election in writing along with the court order or other official statement to the Secretary concerned within the prescribed time limit. *See* 10 U.S.C. § 1450(f)(3)(A).

In this case, the member's election to participate in the SBP with spouse coverage became irrevocable when it was not revoked after the 90-day period following his receipt of his NOE. The claimant was covered as the member's spouse SBP beneficiary from the time he elected Option C coverage for her in 1986 until 1990, when their divorce ended her spouse SBP coverage. As set forth above, at the time of the divorce, there were two avenues available for establishing former spouse SBP coverage for the claimant: the first being by action taken by the member and the second being by action of the claimant. As for the member, there is no evidence that the member elected former spouse coverage for the claimant within one year after the date of the judgment of divorce as required under 10 U.S.C. § 1448(b)(3)(A)(iii). Therefore, the member failed to establish former spouse SBP coverage for the claimant.

As for the claimant's right to request a deemed election, we note that the marital settlement agreement signed by the parties and incorporated into the judgment of divorce on November 26, 1990, stated that the claimant "shall be deemed the surviving spouse in the event of the participant's death and a spouse as far as any disability/survivorship/preretirement joint and survivor benefits provisions are concerned." Although the clarifying order of marital settlement agreement issued on December 5, 2006, was silent regarding the SBP and survivor benefits, DFAS has accepted the language in the marital settlement agreement as requiring the member to elect former spouse SBP coverage for the claimant. Thus, under 10 U.S.C. § 1450(f)(3), the claimant had the statutory right to request a deemed election within one year of the judgment of divorce (incorporating the marital settlement agreement) dated November 26, 1990. There is no evidence that the claimant made a written request for a deemed election for former spouse SBP coverage within one year of the judgment of divorce. *See* DOHA Claims Case No. 2020-CL-081720.3 (January 10, 2023).

As explained by DFAS and the attorney examiner, the claimant received information that may have led her to delay in filing the necessary documents to request a deemed election. However, our office only has jurisdiction to adjudicate claims based on statutes and regulations and cannot be bound or held liable based on the erroneous advice or actions made by agency officials. *See* DOHA Claims Case No. 2021-CL-030920.2 (October 25, 2022). The claimant may seek relief with the ABCMR under 10 U.S.C. § 1552. Under that statute, the ABCMR's authority to correct a military record is discretionary and broader than DOHA's authority to settle a claim. Under 10 U.S.C. § 1552(a)(1), the Secretary of a military department, action through a correction board, may correct a member's record when the Secretary, in this case the Secretary of the Army, considers it necessary to correct an error or remove an injustice. This

remedy is outside DOHA's authority and any request for a correction of the record needs to be pursued with the ABCMR.

We note that the member passed away before DFAS established his retired pay account and the claimant is the member's AOP beneficiary. DFAS has already paid the claimant \$8,776.42 in AOP for the member's retired pay accruing during the period August 16, 2015, through August 15, 2021. On September 23, 2023, DFAS advised the claimant that payment of \$10,157.32 in AOP for the member's retired pay accruing during the period July 13, 2005, through August 15, 2015, was barred by the statute of limitations set forth in 31 U.S.C. § 3702(b), commonly known as the Barring Act. DFAS advised the claimant of her right to request waiver of the Barring Act under the authority of 31 U.S.C. § 3702(e), through the Assistant Secretary of the Army. Under subsection 3702(e), upon the 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 member's pay, allowances, or survivor benefits. Under DoD Instruction 1340.21 ¶ E6.4, the Director of DOHA is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. DOHA is currently in receipt of the Assistant Secretary of the Army's request to waive the time limitations under the Barring Act to allow payment of the barred funds to the claimant. The claimant was also underpaid her portion of the member's retired pay under the USFSPA. DFAS has advised DOHA that they are currently accounting for those payments.

Finally, if the claimant is successful with petitioning the ABCMR to receive the former spouse SBP annuity, any payments she receives through the Barring Act Waiver process must be accounted for before DFAS begins payment of the annuity.

Conclusion

The claimant's request for reconsideration is denied and we uphold the DOHA appeal decision in DOHA Claim No. 2023-CL-051507, dated October 11, 2023. 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board