

DATE: March 14, 2024

In Re:)

[REDACTED])

) Claims Case No. 2023-CL-071002.2

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 retired member of the U.S. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2023-CL-071002, dated September 12, 2023.

Background

On August 19, 1972, the claimant and the member were married. On January 1, 1991, the member retired from the Navy, having elected spouse and child Survivor Benefit Plan (SBP) coverage for the claimant and his dependent children. On May 15, 2001, the claimant and the member entered into a marital dissolution agreement. That agreement did not require the member to elect former spouse SBP coverage for the claimant. However, the agreement stated the following:

If Wife desires SBP protection, she shall bear the costs thereof.

On January 25, 2002, an amended final divorce decree was issued which finalized the divorce between the claimant and the member. The decree incorporated by reference the marital dissolution agreement. In addition, the decree awarded the claimant 50 % of the member's monthly disposable retired pay. The decree was silent on SBP.

On February 6, 2002, the Defense Finance and Accounting Service (DFAS) Garnishment Operations received a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, from the claimant, applying for direct payment of 50 % of the member's monthly disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, along with the divorce decree and marital settlement agreement. In response, DFAS mailed the claimant a letter dated February 12, 2002, advising her that her application for payment of a portion of the member's retired pay had been received. The letter advised her to expect direct payments to begin in March 2002. The letter further advised her that if her divorce decree specifies that she is to be designated as a former spouse SBP beneficiary, she should make a "deemed election" for SBP coverage within one year of the date of her divorce directly to the DFAS Retired Pay Office at DFAS-CL/FRB, P.O. Box 99191, Cleveland, Ohio.

The claimant received her first monthly payment of a portion of the member's retired pay on April 1, 2002 (for the month of March 2002). DFAS continued to directly pay the claimant her share of the member's monthly retired pay until his death.

On April 21, 2002, the member remarried. DFAS continued to deduct SBP premiums from the member's retired pay for spouse coverage until he reached paid-up status on January 1, 2021. SBP premiums for child coverage ended when the member's youngest child aged off on August 1, 2005.

On July 6, 2002, DFAS received a request from the claimant to continue her SBP coverage, citing the agreement incorporated into the divorce decree. However, the claimant did not attach the divorce decree or agreement. There is no response from DFAS in the record. On August 16, 2002, DFAS received a letter from the claimant requesting that insurance continue for her, but she only attached the amended final divorce decree. There is no response from DFAS in the record. On October 12, 2002, DFAS received a fax from the claimant requesting an investigation of her SBP coverage to ensure that it was in effect. There is no response from DFAS in the record.

On December 3, 2002, the member submitted a request to update his arrears of retired pay beneficiaries by legal order of precedence to his current spouse and two sons.

On March 4, 2022, the member passed away. On March 11, 2022, the claimant submitted a DD Form 2656-7, *Verification of Survivor Annuity*, to DFAS claiming the SBP annuity as the member's former spouse. On April 18, 2022, DFAS denied the claim on the basis that the member did not make a request to change his election to former spouse coverage, nor was a deemed election for former spouse coverage made by the claimant.

The claimant appealed DFAS's denial of her claim. She stated that she married the member in 1972, divorced in 2001, and 17 of those years he served in the Navy Judge Advocate General Corps. She supported the member during his Navy career and multiple military moves, even putting her own career on hold. Despite their divorce, they remained in a trusting relationship. She stated that the member sent a letter to DFAS in July 2002 stating that he wanted to change his SBP election to former spouse. She stated that she was never told that she had to request a deemed election because the member voluntarily elected former spouse

coverage for her. She stated that she sent the member a monthly check for her 50% share of the SBP coverage as they agreed and that he combined that share with his and sent the money to DFAS for her SBP coverage. She stated that the member continued to pay premiums for her SBP coverage for 18 years after their divorce. She attached copies of monthly checks that she sent to the member for her share of the SBP premiums.

DFAS issued an administrative report on April 25, 2023, sustaining the denial of the claim for the former spouse SBP annuity. DFAS concluded that the divorce decree and marital dissolution agreement did not give the claimant the right to request a deemed election for former spouse SBP coverage. DFAS found no evidence that the member voluntarily elected former spouse SBP coverage for the claimant within one year of their divorce. In the appeal decision, the DOHA attorney examiner upheld DFAS's determination, finding no evidence that the member made a voluntary former spouse SBP election within one year of the divorce.

In the claimant's request for reconsideration, through an attorney, she contends that both she and the member filed the necessary paperwork to ensure that she was entitled to the former spouse SBP annuity. She notes that DFAS acknowledges they have no record of responding to three of her written requests in 2002. She attached a copy of a letter DFAS Retired and Annuitant Pay sent her dated June 12, 2003. In that letter, DFAS stated that the SBP is in effect for her as the named beneficiary.

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 their 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).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under 10 U.S.C. § 1448(a)(1)(A), SBP is open to a member who is eligible for retired pay. Spousal coverage ends upon divorce, but the SBP includes provisions to allow a member to elect coverage for a former spouse. If a member elects to provide coverage for a former spouse, he must notify DFAS in writing of the divorce and his intention to provide coverage for his former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. Former spouse coverage must be established within one year from the date of the 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 divorce decree to provide SBP coverage to his former spouse. If he fails to do so, the former spouse has one year from the date of the court order requiring the election to request a deemed election. The former spouse's request must be in writing and include the court order requiring the election. *See* 10 U.S.C. § 1450(f)(3).

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired in 1991 until such coverage ended with divorce in January 2002. In order for the claimant to be covered as the member's former spouse under the SBP after the issuance of the amended final divorce decree, the member must have expressly elected the claimant as his former spouse beneficiary within one year after the date of the divorce. Therefore, if the member voluntarily decided to designate the claimant as his former spouse SBP beneficiary, he could have done so within the statutory time limit. DFAS has no record of the member submitting a former spouse SBP election for the claimant.

The claimant was not awarded former spouse SBP coverage in the final amended divorce decree, nor the marital dissolution agreement. In fact, the language of the agreement only stated that "if wife desires SBP protection, she shall bear the costs thereof." The actual decree is silent on SBP. There is no language in either document that required the member to elect former spouse SBP coverage for the claimant. *See* 72 Comp. Gen. 293 (1993). In addition, there is no evidence that a subsequent court order was issued concerning the SBP annuity. Therefore, the claimant had no statutory right to request a deemed election for former spouse SBP coverage. *See* DOHA Claims Case No. 2021-CL-032612.2 (November 19, 2021).

As for the letter the DFAS Retired Pay Office sent to the claimant dated June 12, 2003, advising her that the SBP is in effect for her, that was in error. As of January 25, 2002, the claimant was no longer the member's spouse SBP beneficiary and as set forth above, since the member did not voluntarily elect former spouse SBP coverage for the claimant, she was not the member's former spouse SBP beneficiary. As for the monthly checks the claimant sent to the member for her share of the premiums for what she believed was her SBP coverage, her remedy for recoupment of those funds rests in state court, and is outside DOHA's jurisdiction.

Finally, we note that SBP premiums were deducted from the member's retired pay after the divorce in January 2002. Beginning in March 2002, those premiums were also deducted from the member's retired pay prior to DFAS's monthly division and direct payment to the claimant of her portion of the member's retired pay under the USFSPA. *See* 10 U.S.C. § 1408(a)(4)(A)(iv).¹ Therefore, the claimant may file a claim for any resulting underpayment of her share of the member's monthly disposable retired pay during the period March 2002 through January 2021, when the member reached paid-up status and no longer was making SBP premiums payments. The claimant should contact DFAS for information on the matter. *See* DOHA Claims Case No. 2021-CL-030509.2 (January 26, 2022); DOHA Claims Case No. 2020-CL-123004.2 (October 25, 2021); and DOHA Claims Case No. 2020-CL-123106.2 (August 31, 2021).

¹Under 10 U.S.C. § 1408(a)(4)(A), the term "disposable retired pay" is defined as the total monthly retired pay to which a member is entitled less amounts authorized as deductions. Subsection 1408(a)(4)(A)(iv) sets forth a specific authorized deduction for amounts resulting from a member's SBP election to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order. The Department of Defense Financial Management Regulation, Volume 7B, Chapter 29, further defines "disposable retired pay" under the USFSPA as a member's total monthly retired pay (gross pay) minus authorized deductions and lists one of those authorized deductions as "SBP premiums paid, but only if the former spouse applying for retired pay award payment under the USFSPA is the beneficiary of the SBP."

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2023-CL-071002, dated September 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