

DATE: June 26, 2024

In Re:)

[REDACTED])

) Claims Case No. 2023-CL-091102.2

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, the widow of a retired 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-091102, dated December 14, 2023.

Background

On August 10, 1985, the claimant and the member were married. On April 13, 2005, the claimant and the member divorced. The final decree of divorce did not mention Survivor Benefit Plan (SBP) coverage but in pertinent part awarded the claimant the following:

Twenty percent (20%) of gross annuity from [the member's] service in the U.S. Armed Service. [The claimant] shall pay 20% of taxes thereon.

In anticipation of his retirement from the Army, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*, on June 8, 2012, indicating that he was single and had no dependent children, and declining to participate in the SBP. The member retired from the Army on July 1, 2012. On April 21, 2022, the claimant and the member remarried. The member passed away six days later on April 27, 2022. On May 24, 2022, 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 surviving spouse. On June 28, 2022, DFAS denied the claim on the basis that the member declined to participate in SBP at his retirement.

The claimant appealed DFAS's denial of her claim. She stated that she was married to the member for 20 years. She moved in with him to care for him for the last two years of his life and they remarried in April 2022, just before he passed away. She attached the final decree of divorce and pointed out the language awarding her 20% of the gross annuity from the member's service.

DFAS issued an administrative report on July 31, 2023, sustaining the denial of the claim for the spouse SBP annuity. DFAS stated that the member declined to participate in the SBP at his retirement, and as a result, no SBP premiums were withheld from the member's retired pay. DFAS also stated that the language in the divorce decree awarding the claimant 20% of the gross annuity refers to an award of a portion of the member's disposable retired pay under the Uniformed Services Former Spouses' Protection Act (USFSPA), not the SBP.

In the appeal decision, the DOHA attorney examiner upheld DFAS's determination. However, the attorney examiner explained that because the member was not married at retirement, when he married the claimant in April 2022, he had one year from the date of their marriage to elect spouse SBP coverage for her. Additionally, in order to receive the SBP annuity, the claimant, as the member's surviving spouse, must have been married to him for at least one year before his death.

In the claimant's request for reconsideration, she accepts that she is not entitled to the SBP annuity, but requests payment of any other entitlement or benefit as the member's surviving spouse having been married to him for a little short of 20 years. She again points to the language in the divorce decree awarding her 20% of the gross annuity based on the member's service.

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). 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. 2017-CL-121204.2 (July 30, 2018); and DOHA Claims Case No. 2012-CL-061105.2 (September 27, 2012).

The SBP, 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 is automatic for members who are married or have dependent

children when they become eligible to participate in the SBP. *See* 10 U.S.C. § 1448(a). Members who are not married and have no dependent children at retirement but who later marry or acquire a dependent child may elect to participate in the SBP if they provide the required statutory notice. *See* 10 U.S.C. § 1448(a)(5)(A). The member's election must be in writing and received by the Secretary concerned within one year after the date on which that member marries or acquires a dependent child. *See* 10 U.S.C. § 1448(a)(5)(B). The effective date of the member's election is the first day of the first calendar month following the month in which the election is received by the Secretary concerned. *See* 10 U.S.C. § 1448(a)(5)(D). The Service Secretaries have delegated their authority under the SBP law to DFAS. *See* 10 U.S.C. § 1455.

Under 10 U.S.C. § 1450(a)(1), a spousal annuity is to be paid to a member's "eligible surviving spouse." "Surviving spouse" is defined under 10 U.S.C. § 1447(9) as a widow or widower of the member. Under 10 U.S.C. § 1447(7), widow is defined as the surviving wife of a member who, if not married to the member at the time he became eligible for retired pay, was married to him for at least one year immediately before his death or was the mother of issue of that marriage.

In this case, the claimant was not married to the member at the time he retired from the Army. At his retirement, the member was single and had no dependent children. Therefore, as set forth above, when the member married the claimant on April 21, 2022, he was able to elect coverage for his newly acquired spouse but had to make such an election within one year after the date of the marriage. *See* 10 U.S.C. § 1448(a)(5)(B). In addition, the member and the claimant had to have been married for at least one year before his death in order for her to be paid the spousal annuity. *See* 10 U.S.C. § 1447(7). Accordingly, under applicable statute and regulations, we find that the claimant does not meet the definition of surviving spouse in order to be eligible for the SBP annuity under 10 U.S.C. § 1450. Since we are bound by statute and regulation, the claim must be disallowed. *See* DOHA Claims Case No. 2021-CL-041302.2 (August 31, 2021).

As for the claimant's request for other entitlements or benefits that may be available to her as set forth in the divorce decree, we note that it is unclear from the record if she ever filed for her monthly portion of the member's disposable retired pay under the USFSPA, 10 U.S.C. § 1408, with DFAS. However, even if she did file for and was receiving direct payment of a portion of the member's disposable retired pay, her former spouse payments terminated at the time of the member's death. *See* DOHA Claims Case No. 2022-CL-030403.2 (January 9, 2024).

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2023-CL-091102, dated December 14, 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
Administrative Judge
Chair, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Administrative Judge
Member, Claims Appeals Board

SIGNED: David F. Hayes

David F. Hayes
Administrative Judge
Member, Claims Appeals Board