

DATE: August 21, 2024

In Re:

[REDACTED]

Claimant

)
)
)
)
)

Claims Case No. 2023-CL-091105.2

**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. Army, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2023-CL-091105, dated March 29, 2024.

Background

On July 19, 1971, the claimant and the member were married. On January 1, 1998, the member retired from the Army, having elected spouse only Survivor Benefit Plan (SBP) coverage for the claimant. On September 25, 1998, the claimant and the member divorced. The divorce decree, in pertinent part, provided the following:

Petitioner [REDACTED] be and she is hereby awarded as her sole and separate property one-half (1/2) of the Respondent's U.S. Army retirement account which is currently in "pay" status. Respondent is currently receiving monthly payments from his retirement from the U.S. Army in the total sum of \$3,662 per month. Petitioner and Respondent are ordered to continue to share equally the deduction from the gross monthly sum of the annuity premium of \$238.03 per month, which deduction is paid to continue Petitioner's right to receive this monthly retirement income in the event of Respondent's death. Petitioner is awarded as her sole and

separate property one-half (1/2) of the adjusted gross monthly payment of \$1,711.98 per month ($\$3,423.97 \div 2$). This amount shall be paid directly to Petitioner by the U.S. Army Retirement, less any appropriate deductions she may choose for taxes on a monthly basis in accordance with retirement provisions of the U.S. Army. Petitioner and Respondent shall cooperate in completing and filing with the U.S. Army any documentation necessary to activate this direct payment to Petitioner. Until such time the U.S. Army begins payment of the adjusted gross sum of \$1,711.98 per month directly to Petitioner, Respondent is ordered to pay to Petitioner her one-half (1/2) of this monthly retirement proceeds of \$1,711.98. Petitioner be and she is hereby awarded her one half (1/2) share of Respondent's retirement as a permanent property settlement. The award is not to terminate because of her remarriage or her cohabitation. If Respondent predeceases the Petitioner, Petitioner be and she is hereby awarded any and all monthly benefits to which she is to receive as a surviving ex-spouse under the provisions of the aforementioned annuity plan. Petitioner's right to the aforementioned monthly payment is not assignable or transferable. If Petitioner predeceases Respondent and the annuity provisions have not been implemented, Respondent is awarded all of his retirement benefits in accordance with the regulations of the U.S. Army Retirement Plan.

On March 24, 1999, the claimant completed a DFAS-IN Form 0-1767, *Application for Direct Payments from a Member's U.S. Army Retired Pay Pursuant to the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408*, and submitted it to the Defense Finance and Accounting Service (DFAS) in order to receive direct payments of her portion of the member's monthly disposable retired pay. On April 23, 1999, DFAS-Garnishment Operations sent the claimant a letter acknowledging receipt of her application under the Uniformed Services Former Spouses' Protection Act (USFSPA) to receive a portion of the member's retired pay. However, DFAS advised the claimant that DFAS was unable to honor her request without evidence, generally a marriage certificate, reflecting that the claimant was married to the member for at least 10 years during which the member performed at least 10 years for creditable military service. DFAS also informed the claimant that if her divorce decree specified that she is to be designated as a former spouse beneficiary for the SBP, she must 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, Attn: Code FRABA, P.O. Box 99191, Cleveland, Ohio 44199-1126.

On August 19, 1999, DFAS received another application from the claimant for former spouse payments under the USFSPA. On January 20, 2001, a court order was issued approving a stipulation on alimony arrearage and modifying the divorce decree. In pertinent part, the order provided the following:

If Respondent predeceases Petitioner, Petitioner is hereby awarded any and all monthly benefits to which she is entitled as a surviving ex-spouse under the provisions of the aforementioned annuity plan.

On March 4, 2022, the member passed away. On July 6, 2022, the claimant submitted a DD Form 2656-7, *Verification for 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 the member completed all necessary paperwork to allow her to continue as his SBP beneficiary. The claimant stated that she was told the only form she needed to complete was the DFAS-IN Form 0-1767, which she did and submitted to DFAS. She also stated that she and the member were each to pay one-half of the SBP monthly premiums for her coverage. However, she stated that instead of sharing the premium payments, the premiums were only taken out of her share of the member's monthly retired pay.

DFAS issued an administrative report on July 31, 2023, sustaining the denial of the claim for the former spouse SBP annuity. DFAS accepted the language in the divorce decree as requiring the member to elect former spouse SBP coverage for the claimant. However, DFAS found no evidence that the member elected former spouse SBP coverage for the claimant nor that the claimant submitted a deemed election for such coverage.

In the appeal decision, the DOHA attorney examiner upheld DFAS's determination, finding no evidence that the member elected former spouse SBP coverage for the claimant or that the claimant submitted a deemed election request. The attorney examiner explained that the claimant's filing of her application under the USFSPA by submitting the DFAS-IN Form 0-1767 in August 1999 to DFAS, was a separate action from requesting a deemed election for former spouse SBP coverage. The attorney examiner stated that in order to be covered as the member's former spouse SBP beneficiary, the claimant needed to submit a separate written request to deem her SBP election within one year of the divorce decree.

In the claimant's request for reconsideration, she states that she did not know she had to submit a separate written request for a deemed election. She followed all the directions given to her by the DFAS-Retired Pay Office, and there was no mention of the requirement of a separate writing requesting a deemed election. She submits a copy of her appeal she sent to DFAS, and states that it explains again how she felt assured that she had taken all necessary action needed within the year following the divorce to receive the former spouse SBP coverage.

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, the member must notify DFAS in writing of the divorce and the member's intention to provide coverage for the 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 a former spouse. If the member fails to do so, the former spouse has one year from the date of the court order or filing requiring the election to request a deemed election. The former spouse's request that the retired member shall be deemed to have made an election for former spouse coverage must be in writing and include a copy of 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 on January 1, 1998, until such coverage ended with divorce on September 25, 1998. However, the member failed to establish former spouse SBP coverage for the claimant and the claimant did not submit a request for a deemed election. Although the claimant submitted her divorce decree with her application for direct payment of her share of the member's monthly disposable retired pay under the USFSPA in March 1999, she did not submit a separate request for a deemed election as required by 10 U.S.C. § 1450(f)(3). *See* DOHA Claims Case No. 2020-CL-120205.2 (June 24, 2021). Therefore, DFAS properly denied the claim for the SBP annuity.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated March 29, 2024, 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. Hales

Charles C. Hale
Administrative Judge
Member, Claims Appeals Board

Signed: David F. Hayes

David F. Hayes
Administrative Judge
Member, Claims Appeals Board