

DATE: September 23, 2024

In Re:)
))
 [REDACTED])
Claimant)
))
))

Claims Case No. 2022-CL-101801.2

**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. Further, under Department of Defense Instruction 1340.21 (May 12, 2004) ¶ E7.13, the Defense Office of Hearings and Appeals (DOHA) must receive a request for reconsideration within 30 days of the DOHA appeal decision.

DECISION

The claimant, the surviving spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-CL-101801, dated March 21, 2024. In that decision, DOHA sustained the Defense Finance and Accounting Service's (DFAS's) denial of the claim for the spouse Survivor Benefit Plan (SBP) annuity of the deceased member.

Background

The member divorced his first wife on February 4, 1987. On September 28, 1993, in preparation for his retirement, the member and his former spouse completed and signed an Air Reserve Personnel Center (ARPC) Form 0-508, *Survivor Benefit Plan Election*. On that form, the member elected former spouse SBP coverage. On February 16, 1994, the member's 60th birthday, he retired from the Air Force and DFAS established former spouse SBP coverage on his retired pay account. On December 22, 1999, the member married the claimant. On July 19, 2000, DFAS received a note from the member dated June 27, 2000, requesting that DFAS provide him with the appropriate form to use to change his SBP election from former spouse to

spouse coverage for the claimant. DFAS has no record of responding to the member's request. DFAS does have retiree account statements (RASs) that reflect that the member continued to have former spouse SBP coverage on his retired pay account. On August 2, 2007, the member passed away.

On August 22, 2007, the claimant filed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the spouse of the member. DFAS originally denied the annuity claim on September 27, 2007, on the basis that DFAS's records reflected that the member elected former spouse SBP coverage. However, DFAS did not give the claimant appeal rights to DOHA as required by Department of Defense Instruction 1340.21 (May 12, 2004) ¶ E6.1.6. The claimant then filed additional DD Form 2656-7s with DFAS. On October 7, 2020, DFAS received a letter from the claimant requesting assistance in determining her entitlement to SBP benefits. On October 15, 2020, DFAS denied the claimant's spouse SBP annuity claim on the basis that the member's former spouse had properly deemed her election for SBP coverage within one year of the divorce. DFAS then gave the claimant her appeal rights to DOHA. In her appeal, the claimant stated that the member had provided the necessary documentation to DFAS to properly elect spouse SBP coverage for her. In an administrative report dated August 16, 2022, DFAS sustained the denial of the spouse SBP annuity claim on the basis that the member elected former spouse SBP coverage for his first wife. On October 18, 2022, DFAS forwarded the claimant's appeal package to DOHA.

In the DOHA appeal decision dated March 21, 2024, the attorney examiner upheld DFAS's denial of the claim. The attorney examiner found that the record evidence reflected that the member elected former spouse SBP coverage for his first wife under 10 U.S.C. § 1448(b)(2). The attorney examiner noted that it was possible for the member to make changes to his former spouse SBP election under 10 U.S.C. § 1450(f)(2)(B). However, the member failed to make any change to his former spouse SBP election in accordance with the statute and implementing regulation. Finally, the attorney examiner advised the claimant that she may request reconsideration of the appeal decision, but under Department of Defense Instruction 1340.21 ¶ E7.13, DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision. The appeal decision also stated that the deadline may be extended for up to an additional 30 days for good cause shown, and that no request for reconsideration may be accepted after the time has expired.

DOHA received the claimant's request for reconsideration, dated and postmarked June 4, 2024, on June 12, 2024. The claimant acknowledges that she was past the deadline in submitting her request for an extension to file her reconsideration request but states that she was recovering from knee surgery.

Discussion

The Claims Appeals Board has no authority to grant an extension to the claimant to file a reconsideration request or reconsider the appeal decision dated March 21, 2024. Under Instruction 1340.21 ¶ E7.13, DOHA had to receive the claimant's request for reconsideration within 30 days of the appeal decision (absent good cause shown for an extension). Although

DOHA may extend the period to request reconsideration for up to an additional 30 days for good cause shown, no request for reconsideration may be accepted after this time has expired.

Even if the claimant's reconsideration request was timely, and we had the authority to consider the matter, it does not appear the claimant would have been able to properly support her claim. DOHA must accept the version of facts presented by the agency in absence of clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 2016-CL-090801.3 (March 30, 2017).

Conclusion

In accordance with Instruction ¶ E7.11, the appeal decision dated March 21, 2024, 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: Michelle P. Tilford

Michelle P. Tilford
Administrative Judge
Member, Claims Appeals Board