

DATE: September 12, 2024

In Re:)

[REDACTED])

) Claims Case No. 2023-CL-102301.2

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, retired 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. 2023-CL-102301, dated May 13, 2024.

Background

On June 8, 1968, the claimant and the member were married. On July 1, 2003, the member retired from the Air Force, having elected spouse only Survivor Benefit Plan (SBP) coverage for the claimant. On May 11, 2017, the claimant and the member divorced. The divorce decree which incorporated a stipulation agreement dated May 9, 2017, awarded the claimant former spouse SBP coverage.

On September 19, 2022, the member passed away. On September 29, 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 former spouse. On December 2, 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. In the appeal, she submitted a completed DD Form 2656-10, *Survivor Benefit Plan (SBP) Former Spouse Request for Deemed Election*, dated December 8, 2022. She also submitted a statement from the personnel superintendent of the member's Guard unit. The superintendent stated that when his Wing received notification of the member's death, he reported it to DFAS and DFAS confirmed that the member had paid SBP premiums, and the claimant was the designated SBP beneficiary. He also stated that after the divorce, the divorce decree was submitted to the Defense Eligibility Enrollment Reporting System (DEERS) for the claimant's Tricare benefits. However, the decree was not submitted to the Air Reserve Personnel Center (ARPC) within the required one-year period. He stated that the claimant, not being a military member, would not have known about this rule. In addition, the claimant submitted documentation reflecting that she filed an application with the Air Force Board for Correction of Military Records (AFBCMR) by submitting a DD Form 149, *Application for Correction of Military Record under the Provisions of Title 10, U.S. Code, Section 1552*.

DFAS issued an administrative report on September 18, 2023, sustaining the denial of the claim for the former spouse SBP annuity. DFAS stated that the first time DFAS received the divorce decree was on November 2, 2022, when it was sent by fax by the claimant. DFAS explained that although the claimant submitted a DD Form 2656-10, requesting a deemed election, it was signed and dated December 8, 2022. Therefore, it was not valid because DFAS did not receive it within one year of the divorce decree.

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 within the period prescribed by law. The attorney examiner found that although DOHA had no authority under statute or regulation to allow the SBP annuity claim, the AFBCMR has the authority to correct a member's record under 10 U.S.C. § 1552, when the AFBCMR considers it necessary to correct an error or remove an injustice. He further explained that the AFBCMR's authority under 10 U.S.C. § 1552 is discretionary and outside DOHA's authority.

In the claimant's request for reconsideration, she submits a statement from the superintendent of the member's Guard unit. In that statement, the superintendent states that the member passed away on September 19, 2022, and the claimant, his former spouse, has filed numerous appeals and congressional inquiries. The claimant also attaches a letter from an attorney explaining the unique circumstances of her divorce, his opinion that she qualifies for the SBP annuity, and that the only document missing to institute payment of the annuity is the DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*. The claimant attaches a DD Form 2656-1, that has no date, but lists under the member's name, "deceased." The form is signed by the claimant and the superintendent signs as the member's witness. She also attaches three arrears of retired pay (AOP) decisions from DFAS dated October 22, 2022, August 3, 2023, and October 2, 2023. DFAS's AOP decisions dated October 22, 2022, and August 3, 2023, deny the claimant's claim for the AOP on the basis that DFAS's records reflect that someone else is the AOP beneficiary and the AOP will be paid out to the member's beneficiary who falls higher in the legal order of precedence under 10 U.S.C. § 2771. DFAS's AOP decision dated October 2, 2023, reverses their denial of the claim for the AOP.

DFAS states that upon closer examination the claimant is the beneficiary for 100% of the deceased member's AOP. DFAS states that they have a valid AOP claim on file for the claimant, but DFAS will not pay her the AOP until the amount DFAS paid out in AOP to the improper person is returned to DFAS. DFAS states that they have re-opened a reclamation to the bank for \$2,684.23, the amount they improperly paid.

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 and 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. A member's election of former spouse coverage must be written, signed by the member making the election, and received by the Secretary concerned within one year after the date of the decree of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(3)(A)(iii). A member who makes a former spouse election, at the time of making the election, shall provide the Secretary concerned with a written statement (in a form to be prescribed by that Secretary and signed by the member and the former spouse) setting forth whether the election is being made pursuant to a requirement of a court order or a written agreement previously entered into voluntarily by the member as part of, or incident to, a proceeding of divorce, dissolution, or annulment. *See* 10 U.S.C. § 1448(b)(5). If a member is required under the terms of a divorce decree to provide SBP coverage to a former spouse, and 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. Under 10 U.S.C. § 1450(f)(3)(A), the former spouse's request that the retired member shall be deemed to have made an election for former spouse coverage must be submitted in writing and in a manner prescribed by the Secretary concerned. Under 10 U.S.C. § 1450(f)(3)(C), the former spouse's request for a deemed election must also include a copy of the court order, regular on its face, which requires such an election. An election for former spouse SBP coverage may not be deemed to have been made unless the Secretary concerned receives such a request from the former spouse within one year of the date of the divorce decree. *See* 10 U.S.C. § 1450(f)(3)(C).

The Secretary of Defense has issued implementing regulations for the SBP law pursuant to 10 U.S.C. § 1455. The implementing regulations for SBP elections and election changes are found under Chapter 43, Volume 7B of the DoD 7000.14-R, the Department of Defense Financial Management Regulations (DoDFMR), Military Pay Policy and Procedures – Retired

Pay. Under paragraph 430301(B), a retired member changing his SBP election from spouse to former spouse must use the DD Form 2656-1. When a member makes such an election, the member and the member's former spouse must complete an election statement indicating whether the election is being made pursuant to the requirement of a court order or by a voluntary written agreement. *See* DoDFMR ¶ 430504. The member has one year from the date of the decree of divorce, dissolution, or annulment, whichever is later, to make the election and submit the election statement to DFAS. *See* DoDFMR ¶ 430504(B). Under paragraph 430302, a former spouse or former spouse's legal representative requesting the Secretary concerned to deem a former spouse SBP election, must request the deemed election by completing the DD Form 2656-10. The DD Form 2656-10 must be accompanied by a court order or filing involved requiring the election and be received by the Secretary concerned within one year of the court order or filing involved. *See* DoDFMR ¶ 430504(C).

In this case, the claimant was covered as the member's spouse SBP beneficiary from the time he retired on July 1, 2003, until such coverage ended with divorce on May 11, 2017. The record evidence reflects that the member failed to establish former spouse SBP coverage within one year after the date of the decree of divorce and the claimant did not make a request for a deemed election within one year of the divorce decree. Although the claimant has now submitted a DD Form 2656-1, which is required to be used by retired members only, to change an SBP election from spouse or spouse and child coverage to former spouse or former spouse and child coverage, it is apparent that the form was not completed by the member because it was completed after his death. Accordingly, we find that the claimant is not entitled to the SBP annuity as the member's former spouse and DFAS properly denied the claim for the SBP annuity. *See* DOHA Claims Case No. 2022-CL-080205.2 (March 23, 2023); and DOHA Claims Case No. 2021-CL-021901.2 (June 28, 2021).

The record reflects that the member continued to pay spouse SBP premiums from his retired pay after he and the claimant divorced. Since SBP premiums for spouse coverage were deducted from the member's retired pay when he did not have an eligible spouse beneficiary, those costs should be refunded by DFAS to the proper beneficiary as AOP under 10 U.S.C. § 2771. DFAS has determined that the claimant is the member's proper AOP beneficiary and has her claim in their record. It appears that the member paid for spouse SBP coverage for over five years after the divorce and prior to his death, and that amount would seem to exceed \$2,684.23. The claimant should contact DFAS for a calculation and resulting payment of AOP.

As set forth above, DOHA has no authority under statute or regulation to allow the claim for the former spouse SBP annuity. However, the claimant has petitioned the AFBCMR, and as explained by the attorney examiner in the appeal decision, the authority of the AFBCMR to act under 10 U.S.C. § 1552 is outside of DOHA's purview. We note that if the AFBCMR corrects the record and awards the claimant the former spouse SBP annuity, SBP premiums must have been paid on the account prior to DFAS's commencement of monthly annuity payments.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated May 13, 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: Michelle P. Tilford

Michelle P. Tilford
Administrative Judge
Member, Claims Appeals Board