

DATE: November 12, 2024

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2023-CL-060605.2

**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, the daughter of a deceased 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-060605, dated May 21, 2024.

Background

The member was born on August 7, 1931, and became a member of the Army Reserve. In 1979, the member was notified that he was eligible to make an election under the Reserve Component Survivor Benefit Plan (SBP). The Reserve Component SBP extends eligibility for SBP to Reserve Component members who would otherwise be eligible for retired pay except that they have not reached the required retirement age of 60. On July 23, 1979, the member completed the DD Form 1883, *Survivor Benefit Plan Election Certificate*. On that form, he noted that he was not married and had no dependent children. He elected SBP coverage for the claimant as a natural person with an insurable interest (NPII) to be paid immediately upon his death.

On August 7, 1991, the member turned 60 years old and retired from the Army. In preparation for his retirement, he completed the DD Form 4240, *Data for Payment of Retired Army Personnel*, on April 11, 1991. On that form, he noted that he was not married, had no

dependent children, and elected to decline to participate in SBP. On August 7, 1991, the member retired. Records from the Defense Finance and Accounting Service (DFAS) reflect that the member communicated with his branch of service regarding the SBP between September 27, 1991, and February 3, 1992. On September 27, 1991, DFAS provided information that the member called the Army with concerns regarding his SBP election, and on February 3, 1992, the SBP Board of Corrections issued a decision terminating the member's SBP election. DFAS reports that SBP premiums were collected from the member's retired pay from September 1991 through January 1992 in error because the member did not have an SBP beneficiary, and those premiums totaling \$902.36 were refunded to the member on February 6, 1992.

The member passed away on November 13, 2011. In April 2021, the claimant found her copy of the member's DD Form 1883. On April 12, 2021, the claimant sent a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS claiming the SBP annuity as the member's child. On May 17, 2021, DFAS denied the claim on the grounds that the claimant no longer qualified as an SBP child beneficiary on the basis of either age or being incapable of self-support.

DFAS received an undated letter on June 8, 2021. In that letter, the claimant explained that she received the DD Form 1883 from her father in the 1990s and she rediscovered it in April 2021. She stated that she had not received a letter from DFAS denying her claim and learned of DFAS's denial when she called DFAS on May 18, 2021. She also stated that the DD Form 1883 did not state that she had to be a minor or an incapacitated child to receive the SBP annuity. On July 22, 2021, the claimant wrote DOHA a letter requesting an appeal of DFAS's decision.

DFAS reconsidered the SBP annuity claim in an administrative report dated April 7, 2023. In the administrative report, DFAS stated that the denial of the claim in 2021 was correct, but on the wrong grounds. DFAS stated that while the member elected NP II SBP coverage for the claimant on the DD Form 1883 in 1979, that election was not irrevocable, and it was within the member's option to terminate the NP II SBP coverage. DFAS received the member's DA Form 4240 showing he declined SBP coverage on July 24, 1991. DFAS's records indicated that the SBP Board decision was received by DFAS on February 3, 1992, and the member's SBP coverage was then terminated.

In the DOHA appeal decision, the adjudicator upheld DFAS's denial of the claim. The adjudicator first found that the claimant's claim for the SBP annuity was untimely since the claim accrued upon the member's death and she did not file a claim for it until April 12, 2021. Therefore, the claim for the SBP annuity is subject to the six-year statute of limitations set forth under 31 U.S.C. § 3702(b). The adjudicator also found that even if the claim was not time-barred, the underlying claim for the SBP annuity still could not be allowed because the member elected not to participate in SBP in 1991. The adjudicator further advised the claimant that although DOHA did not have the authority to award the SBP annuity under applicable statute and regulation, the claimant had another possible avenue of relief that existed with the Army Board for Correction of Military Records (ABCMR) under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

In her reconsideration request, the claimant states that her father served in the U.S. Marine Corps, the Air National Guard, and the U.S. Army Reserve, and he had fought in the

Korean War. She states that her father sent her the DD Form 1883 in the 1990s and told her to keep it in a safe place. She notes that the DD Form 1883 clearly states that her father's SBP election "is a permanent irrevocable decision."

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A claimant must prove by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. *See* Instruction ¶ E5.7. A claimant must submit a claim so that it is received by the agency concerned within the time limit allowed by statute. *See* Instruction ¶ E5.6. Therefore, DOHA must render decisions based on applicable statutes, regulations, and our prior administrative decisions.

As set forth in the adjudicator's decision, when the member died on November 13, 2011, all events arose which fixed the liability of the government. A claim for an SBP annuity had to be received in the Department of Defense on or before November 12, 2017. *See* 31 U.S.C. § 3702(b). The claimant's DD Form 2656-7 was submitted to the Department of Defense (DoD) on April 12, 2021, more than nine years after the SBP annuity claim accrued. However, as set forth below, the Barring Act does not apply to the SBP claim in this case because the claimant had no underlying entitlement to it. Therefore, even assuming the claimant made a timely claim for the SBP annuity, it would not be payable under applicable statute and regulation.

The SBP, 10 U.S.C. §§ 1447-1455, was established in 1972 as 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 in the SBP is automatic for members who are married or have dependent children when they become eligible to participate in SBP, *i.e.*, when they become eligible for retired pay. A member who is not married and has no dependent children when the member becomes eligible to participate in the SBP may elect to provide an annuity to a person with an insurable interest. *See* 10 U.S.C. § 1448(b)(1). This election is revocable and may be changed under 10 U.S.C. § 1450(f). A member may terminate insurable interest coverage by submitting a request to discontinue participation in the SBP to the Secretary concerned. *See* 10 U.S.C. § 1450(f)(1). When SBP participation is terminated, so are the reductions in the member's monthly retired pay that were previously required to pay for the premiums.

In this case, in 1979, the member received his notification of eligibility to make an SBP election. On July 23, 1979, he elected to participate in the SBP by submitting a DD Form 1883. On that form, the member marked that he was not married and had no dependent children. He elected SBP coverage for the claimant as a NPII. In anticipation of his 60th birthday, the member executed a DD Form 4240, *Data for Payment of Retired Army Personnel*, on April 11, 1991. On that form, he again noted that he was not married and had no dependent children. However, he elected to decline to participate in SBP. On August 7, 1991, the member turned 60 years old and

began receiving his retired pay. The record reflects that premiums were erroneously withheld from his retired pay during the period September 1991 through January 1992, but those premiums were refunded to the member on February 6, 1992, after the SBP Board of Corrections issued a decision terminating the member's SBP election. Thereafter, no further deductions were made from the member's retired pay for premiums for NP II SBP coverage.

As set forth above, the claimant's NP II coverage was validly terminated. Therefore, DOHA has no authority under statute or regulation to allow the claim for the SBP annuity. However, as explained by the adjudicator, the claimant may have other available avenues of relief outside our purview. First, under 10 U.S.C. § 1454, the Secretary of the member's service may correct or revoke an SBP election when the Secretary deems it necessary to correct an administrative error. Second, under 10 U.S.C. § 1552, the Secretary, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice. Any request for a correction of record should be pursued with the ABCMR.

Conclusion

The claimant's request for relief is denied. 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: Richard C. Ourand, Jr.

Richard C. Ourand, Jr.
Administrative Judge
Member, Claims Appeals Board

SIGNED: Michelle P. Tilford

Michelle P. Tilford
Administrative Judge
Member, Claims Appeals Board