

DATE: November 18, 2024

In Re:

[REDACTED]

Claimant

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Claims Case No. 2023-CL-062605.2

**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. The claimant must prove by clear and convincing evidence on the written record that the government is liable under the law for the amount claimed.

DECISION

The claimant, the widow of a retired U.S. Air Force member, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2023-CL-062605, dated June 5, 2024. In that decision, DOHA denied the claim for a Survivor Benefit Plan (SBP) annuity because the member did not elect SBP coverage for his spouse within one year of their marriage.

Background

The member was born on April 4, 1960. The record reflects that he served in both the U.S. Marine Corps and the Air Force Reserve. He was married on February 17, 1984. On October 31, 2002, he was divorced. At the time of the member's divorce, he had three dependent children (one born on March 27, 1985; one born on January 28, 1988; and the other born on October 4, 1992). On March 11, 2004, the member reached 20 years of satisfactory service in the Air Force Reserve, entitling him to the receipt of retired pay upon application on his 60th birthday. The Reserve Component SBP (RC-SBP) is substantially similar to the active duty SBP, except that the reserve component member is eligible to participate in the SBP at the time he is notified that he has completed twenty years of qualifying service toward retired pay. *See* 10 U.S.C. § 1448(a)(2)(B). Air Force Reserve records reflect that on March 11, 2004, the member received his notification for eligibility (NOE) for retired pay when he turned 60 years old, commonly known as the "Twenty-year Letter." At the time the member was eligible to make an SBP election, he was not married and had

two dependent children. However, the member did not make a written election for SBP coverage. Therefore, the member's election defaulted by law to Option C, immediate child only SBP coverage. Under Option C, if the member dies before age sixty, the child SBP annuity will immediately commence on the day after the member's death. This is labeled the default coverage option and, if the member does not make a written election within the ninety-day window to make the election, Option C will be elected for the member. *See* 10 U.S.C. § 1448(a)(2)(B).

On May 26, 2007, the member and the claimant were married. On June 2, 2019, prior to the member receiving retired pay on his 60th birthday in April 2020, he completed the DD Form 2656, *Data for Payment of Retired Personnel*. On that form, he listed the claimant as his spouse and designated her as his 100% beneficiary for the unpaid arrears of his retired pay (AOP). Under Block 33, he checked that he "previously elected or defaulted to immediate RC-SBP coverage" under Option C. Under Block 34, the member elected spouse only SBP coverage for the claimant and indicated that he did not have dependent children. The Defense Finance and Accounting Service (DFAS) did not place the claimant on the SBP account when it established the member's retired pay account. On April 4, 2020, the member turned 60 years old and began receiving retired pay. DFAS did not deduct premiums from the member's retired pay for either spouse or child SBP coverage. The member only paid premiums for the add-on child coverage prior to his reaching age 60. On April 24, 2020, the member completed a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*. On that form, he indicated that his current SBP coverage was child only and requested a change to that coverage to spouse only SBP coverage, based on his marriage. On July 18, 2020, DFAS denied the member's request because he did not submit a spouse SBP election prior to the one-year anniversary of the date of his marriage. DFAS advised the member of his right to appeal their decision. On September 7, 2021, the member completed another DD Form 2656-6. On that form, he again indicated that his current SBP coverage was child only and requested a change to spouse only SBP coverage, this time based on his remarriage. He also requested an increase of his existing level of coverage to his full retired pay. On October 16, 2021, DFAS again denied the member's request to add his spouse to his SBP coverage because he did not do so prior to the one-year anniversary of the date of his marriage. DFAS again provided information to the member on how to appeal their decision.

On March 23, 2022, the member passed away. On April 8, 2022, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS, to claim the SBP annuity as the surviving spouse of the member. On May 12, 2022, DFAS denied the SBP annuity claim "in part" because DFAS's records reflect that the member had elected child only SBP coverage. On May 16, 2022, the claimant appealed DFAS's denial of her claim. She stated that the member did not have dependent children at the time he made his RC-SBP election, and that he elected spouse only SBP. She attached the member's DD Form 2656 and ARPC Form 83, *Application for Retired Pay*, dated June 16, 2019.

On April 24, 2023, DFAS issued an administrative report sustaining their initial denial of the SBP annuity claim. DFAS determined that the member never made a valid election for spouse SBP coverage for the claimant. DFAS explained that the record reflected that in 2004 when the member was eligible to participate in SBP, he elected child only SBP coverage. DFAS acknowledged that they could not find a copy of the RC-SBP election form that the member executed to elect child only SBP coverage. However, DFAS determined that since they had no record that the member was

married or divorced when he made the child only SBP election, he had one year, from May 26, 2007, the date of his marriage to the claimant, to elect spouse SBP coverage for her. In the appeal decision, the DOHA adjudicator sustained DFAS's denial of the claim for the SBP annuity. He explained that under the SBP law, the member was required to file the election with DFAS within one year of the date of his marriage to the claimant. Since the member did not request coverage for the claimant until 2019, 12 years after their marriage, the adjudicator denied the claim for the SBP annuity. The adjudicator then explained that the claimant may have another avenue of relief available outside of DOHA that rests with the Air Force Board for Correction of Military Records (AFBCMR).

In the claimant's request for reconsideration, she states that DFAS, the agency responsible for administering the SBP, has acknowledged that they do not have a copy of the member's child only SBP election from 2004. Therefore, she is requesting that DFAS remove the member's child only SBP election dated October 17, 2004, from their Retired and Annuity Archived Data (RAAD) record. She notes that the next line on the RAAD record, after the member's child only SBP election, identifies her as his dependent spouse and lists that the member has no dependent children. She states that when the member retired from the Air Force upon reaching age 60 on April 4, 2020, he had elected on his DD Form 2656, spouse only SBP coverage for her. She states that the member then executed a DD Form 2656-6, requesting that his child only SBP coverage be changed to spouse only SBP coverage for her. She is requesting that this information be added to the RAAD record. She cites the AFBCMR's authority under 10 U.S.C. § 1454 and 10 U.S.C. § 1552 to make these changes as detailed in DOHA's appeal decision.

Discussion

The SBP program (including the RC-SBP), 10 U.S.C. §§ 1447-1455, was established in 1972 as an income maintenance program for the dependents 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. *See* 10 U.S.C. § 1448(a)(1)(A) and (B). Specifically, a reserve-component member is eligible to participate in SBP when the member would be eligible for reserve-component retired pay but for the fact that the member is under 60 years of age. *See* 10 U.S.C. § 1448(a)(1)(B). Under 10 U.S.C. § 1448(a)(2)(B), a reserve-component member, who is eligible to participate in SBP upon receipt of the NOE or Twenty-Year Letter, is automatically enrolled in the SBP unless the member makes an affirmative election not to enroll within ninety days. *See* 10 U.S.C. § 1448(a)(2)(B).¹

Under the SBP law members who marry or acquire a dependent child after becoming eligible for retired pay may elect to include that spouse or dependent child in the program if they provide the 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).

¹In 2000, Congress amended 10 U.S.C. § 1448 to make automatic enrollment in the SBP for every member who receives the NOE after January 1, 2001, if the member is married or has a dependent child. *See* Public Law No. 106-398, § 655, 114 Stat. 1654 (2000).

In this case, in 2004 the member was not married at the time he became eligible for retired pay. At that time, the record reflects that the member did have two dependent children, one born in 1988 and the other born in 1992. The record reflects that the member did not submit an SBP election within ninety days of receiving his NOE. Thus, he was automatically enrolled in Option C, immediate child only SBP coverage. The member married the claimant on May 26, 2007, after he became a participant in SBP under 10 U.S.C. § 1448(a)(1)(B). Therefore, he had to elect spouse SBP coverage for the claimant within one year of their marriage, as required under 10 U.S.C. § 1448(a)(5)(B). Although the member later attempted to elect spouse SBP coverage by his submission of the DD Form 2656, and then by his submissions of the DD Form 2656-6 twice to DFAS, all three attempts were well past the one-year anniversary of his marriage to the claimant.

DOHA is bound by statute and regulation, and therefore, is unable to allow the claim for the SBP annuity. However, as explained by the DOHA adjudicator in the appeal decision, the claimant may have other remedies that rest with the AFBCMR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454 (the specific authority for the AFBCMR to correct or revoke an election for SBP). The AFBCMR's authority is broader than DOHA's authority to settle a claim and is beyond DOHA's purview. As set forth above, it appears that the claimant does wish to petition the AFBCMR for relief. Therefore, the claimant should pursue the matter with the AFBCMR, the proper authority for relief under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. Information on petitioning the AFBCMR is located online at <https://afrba-portal.cce.af.mil/#board-info/bcmr>.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2023-CL-062605. 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