



DEPARTMENT OF DEFENSE
DEFENSE LEGAL SERVICES AGENCY
DEFENSE OFFICE OF HEARINGS AND APPEALS
POST OFFICE BOX 3656
ARLINGTON, VIRGINIA 22203-1995



DATE: June 23, 2025

In Re:

[REDACTED]

Claimant

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Claims Case No. 2024-CL-102112.2

**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

A claimant, the surviving spouse of a deceased retired member of the U.S. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2024-CL-102112, dated May 14, 2025.

Background

The member married the claimant on April 24, 1992. On March 26, 2007, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*. On that form, he noted that he was married and had two children. He designated the claimant, his spouse, as his 100% arrears of retired pay beneficiary payable upon his death. Under item 26, the beneficiary categories for the Survivor Benefit Plan (SBP), he marked item 26g, electing not to participate in the SBP. He did not fill out the level of coverage under item 27, because as instructed on the form, he elected not to participate in SBP by marking item 26g. The member's signature on the DD Form 2656 was witnessed, and the claimant's signature as his spouse was witnessed by a notary, acknowledging her concurrence with the member's election to not participate in SBP. The Defense Finance and Accounting Service (DFAS) accepted the member's election not to participate in the SBP. On August 1, 2007, the member retired from the Navy.

The member passed away on May 12, 2022. On January 12, 2023, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS claiming the SBP annuity as the member's spouse. On February 17, 2023, DFAS denied her claim on the basis that the member did not elect to participate in SBP. On March 11, 2023, the claimant appealed DFAS's denial of her claim. She stated that at the time the member retired she was not notified of his decision to not participate in the SBP. She requested a copy of the document reflecting her signature concurring to the member's election to not participate.

On July 12, 2024, DFAS reviewed the claimant's appeal and issued an administrative report, upholding the initial denial of the SBP annuity claim. On August 8, 2024, the claimant submitted a rebuttal to DFAS's administrative report. In her rebuttal, she wrote that she had significant reason to believe that the signature on the DD Form 2656 was not hers. She stated that she did not sign or authorize any documents relating to the member's SBP election. She requested a professional handwriting analysis to compare her signature to that on the DD Form 2656.

In the DOHA appeal decision, the attorney examiner sustained DFAS's denial of the claim, finding that the record evidence reflected that the member elected to not participate, and the claimant concurred in that election. The attorney examiner explained that DOHA had no authority to adjudicate what amounts to an allegation of forgery. The attorney examiner 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 Board for Correction of Naval Records (BCNR) under 10 U.S.C. § 1552. The attorney examiner noted that the BCNR's authority was discretionary, and any pursuit of a record correction was beyond DOHA's purview.

In her request for reconsideration, the claimant presents evidence of a settlement conference in 2018, which included a proposed agreement that the member and her retirement accounts would be divided equally pending divorce. She states that the new documentation she submits reflects her eligibility for the SBP. She also states that she is prepared to present further clarifying documentation and is available to participate in any hearings, should they be required.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove by clear and convincing evidence on the written record that the United States is liable to the claimant for the amount claimed. All relevant evidence to prove the claim should be presented when a claim is first submitted; and in the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered. *See* Instruction ¶ 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. *See* DOHA Claims Case No. 2023-CL-020207.2 (August 7, 2023).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. A married member is eligible to participate in SBP when the member becomes eligible for retired pay. *See* 10 U.S.C. § 1448(a)(2)(A). However, a member may elect not to participate, elect to provide less than maximum coverage, or elect to provide SBP benefits to a dependent child rather than a spouse. *See* 10 U.S.C. § 1448(a)(3)(A) and (B). The law requires spousal written concurrence when a married member elects not to participate in SBP. An election to forgo participation in SBP under 10 U.S.C. § 1448(a)(2)(A) is irrevocable if it is not revoked before the date the member first becomes entitled to retired pay. *See* 10 U.S.C. § 1448(a)(4)(A). Further, a married member who elects not to participate in SBP at retirement is not a participant in the plan for purposes of establishing former spouse SBP coverage, if the member later divorces. *See* 10 U.S.C. § 1448(b)(3).

In this case, on March 26, 2007, the member elected not to participate in the SBP upon retirement, and the claimant, as his spouse, concurred with the election. The claimant's signature was notarized. DFAS accepted the member's election not to participate. Therefore, DOHA is unable to allow this claim for the SBP annuity because we are bound by statute and regulation. *See* DOHA Claims Case No. 2021-CL-030103.2 (July 25, 2022).

The claimant presents new documentation for the Board to consider upon reconsideration and suggests that her eligibility to the SBP is based on a settlement conference held in 2018. As set forth above, all record evidence reflects that the member, at the time of his retirement, elected not to participate in the SBP and the claimant, as his spouse, concurred in that election. Even assuming the claimant was to be awarded former spouse SBP coverage in their divorce, under the law it could not be established because the member had declined to participate in SBP at retirement. *See* DOHA Claims Case No. 2021-CL-040904.2 (August 23, 2021).

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated May 14, 2025. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

Catherine M. Engstrom

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Administrative Judge

Chair, Claims Appeals Board

David F. Hayes

David F. Hayes

Administrative Judge

Member, Claims Appeals Board

Charles C. Hale

Charles C. Hale

Administrative Judge

Member, Claims Appeals Board