



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



DATE: March 21, 2025

In Re:

[REDACTED]

Claimant

)
)
) Claims Case No. 2024-CL-010206.2
)
)

**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 widow of a 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. 2024-CL-010206, dated October 15, 2024.

Background

On August 30, 1980, the member married. On January 29, 1995, in preparation for his retirement from the Army, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*, electing spouse and child Survivor Benefit Plan (SBP) coverage based on his full gross retired pay. On July 1, 1995, the member retired from the Army. On December 4, 1995, the member divorced. Pursuant to the divorce decree, the member was required to elect former spouse SBP coverage for his ex-spouse. On May 20, 1996, the member's former spouse submitted a request for a deemed election, along with a copy of the divorce decree, to the Defense Finance and Accounting Service (DFAS). On July 9, 1996, DFAS acknowledged receipt of the former spouse's deemed election and instituted the change to the member's retired pay and SBP accounts. The record reflects that the member's former spouse remarried on December 3, 2004, prior to her 55th birthday.

The member and the claimant were married on September 2, 2011. On September 16, 2014, the member submitted a DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, to DFAS attempting to elect spouse SBP coverage for the claimant. On October 11, 2014, DFAS informed the member that DFAS was unable to process his request for spouse SBP coverage. DFAS explained that at the time of the member's divorce, his former spouse was awarded SBP coverage, making any future spouse ineligible.

On June 1, 2015, the member passed away. On August 11, 2015, DFAS wrote to the member's former spouse in reply to her correspondence concerning her eligibility to receive the SBP annuity as the member's former spouse. DFAS advised her that she was not entitled receive the SBP annuity because DFAS's records reflected that she remarried prior to the age of 55. DFAS advised her that should her current marriage end by death, divorce or annulment, she will become entitled to receive an SBP annuity. DFAS further advised her that in the event that occurs, to provide DFAS with documents verifying the marriage was terminated.

On September 15, 2021, the claimant submitted a DD Form 2656-7, *Verification of Survivor Annuity*, claiming the SBP annuity as the member's surviving spouse. DFAS denied the claim by letter dated October 20, 2021, finding the claim was barred by the six-year statute of limitations, the Barring Act, under 31 U.S.C. § 3702(b) because it was filed more than six years after the death of the member. On December 31, 2021, DFAS sent another letter to the claimant denying her claim on the basis that the member's former spouse had made a timely deemed election and that she was entitled to the former spouse SBP annuity.

The claimant appealed DFAS's denial of her claim. She questioned why she was not entitled to receive the SBP annuity when the member's former spouse married prior to the age of 55 and was therefore, ineligible to receive the annuity. DFAS issued an administrative report on November 21, 2022, sustaining the denial of the claim for the spouse SBP annuity. DFAS stated that the correct reason for the denial of the claim was contained in their letter dated December 31, 2021. DFAS explained that the member's former spouse was entitled to the SBP annuity after properly deeming her former spouse SBP election.

In the appeal decision, the DOHA attorney examiner upheld DFAS's determination. The attorney examiner explained that the member's former spouse's SBP deemed election prevented an annuity to be paid to the claimant, as his spouse. He further explained that the fact that the former spouse remarried in 2004, before she turned 55 years of age, did not end her eligibility for the SBP annuity, but merely suspended it. He stated that if the former spouse's marriage ends in divorce, annulment, or death of the other spouse, then her eligibility for payment of the annuity would start as set forth under 10 U.S.C. § 1450(b)(3).

In the claimant's request for reconsideration, she accepts that the member's former spouse properly deemed her election for SBP coverage. However, she states that under limited circumstances a member may withdraw from the SBP and change the election. She states that one of these limited circumstances at issue in this case is that the former spouse married before the age of 55, forever terminating her eligibility to the member's SBP annuity. The claimant cites to the DFAS letter sent to the member's former spouse on August 11, 2015, denying her claim for the former spouse SBP annuity. She also cites to the specific language contained in 10

U.S.C. § 1450(b), concerning the termination of a former spouse SBP annuity for death, remarriage before 55. She states that the language in the statute specifically refers to “termination” of an SBP annuity, not “suspension” of an SBP annuity. Therefore, she concludes that under the law when the member’s former spouse remarried in December 2004, she lost her eligibility because it was terminated effective as the first day of the month in which her eligibility was lost. In addition, she argues that when the member passed away, the former spouse cannot rehabilitate her eligibility for the SBP annuity by divorce, annulment, or death.

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 in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). *See* DOHA Claims Case No. 2022-CL-011805.2 (August 11, 2022); and DOHA Claims Case No. 2021-CL-040214.2 (August 23, 2021).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for a former spouse, the member must notify DFAS in writing. *See* 10 U.S.C. § 1448(b)(3). If the member is required under the terms of a divorce decree to provide SBP coverage for a former spouse and fails or refuses to do so, the former spouse has one year from the date of the divorce to request a deemed election pursuant to 10 U.S.C. § 1450(f)(3). A deemed election under 10 U.S.C. § 1450(f)(3), shall become effective on the first day of the first month which begins after the date of the court order or filing involved. A deemed election may not be changed or revoked except as specifically provided for under subsection 1450(f). Under that section, once a member’s former spouse is designated as the former spouse beneficiary under the SBP because of a court order, a subsequent change can only be made following submission by the member of a modifying court order which permits such a change of election. *See* 10 U.S.C. § 1450(f)(2). In addition, if a member subsequently acquires a new spouse, a former spouse election prevents the member from giving an annuity to the new spouse. *See* 10 U.S.C. § 1448(a)(6).

In this case, the member, at retirement in 1995, elected spouse and child SBP coverage. Spouse coverage ended upon his divorce on December 4, 1995. The divorce decree required the member to elect former spouse SBP coverage and the member’s former spouse timely submitted her request for a deemed election to DFAS. Therefore, any subsequent change to the member’s former spouse SBP coverage had to be accomplished by the submission by the member to DFAS of a certified copy of a court order that modified the previous order requiring former spouse coverage. There is no evidence that the member did so prior to his death.

As explained by the attorney examiner in the appeal decision, the fact that the member’s former spouse married before age 55 does not permanently end her eligibility for the SBP

annuity, but merely suspends it until that marriage is terminated by divorce, annulment, or death. When the former spouse remarried on December 3, 2004, prior to her 55th birthday, her eligibility for payment of the SBP annuity in the event of the member's death was suspended. The statutory language contained in 10 U.S.C. § 1450(b) does state that an SBP "annuity payable to the beneficiary terminates effective as of the first day of the month in which eligibility is lost." However, 10 U.S.C. § 1450(b)(3) directs the Government to make payment of the annuity, as set forth below:

(3) Effect of termination of subsequent marriage before age 55.-If the surviving spouse or former spouse remarries before reaching age 55 and that marriage is terminated by death, annulment, or divorce, payment of the annuity shall be resumed effective as the first day of the month in which the marriage is so terminated. However, if the surviving spouse or former spouse is also entitled to an annuity under the Plan based upon the marriage so terminated, the surviving spouse or former spouse may not receive both annuities but must elect which to receive.

The member's former spouse's timely deemed election for former spouse SBP coverage prevented the member from later covering the claimant as his spouse SBP beneficiary. At the time of the member's death, DFAS, by statute, was prevented from paying the member's former spouse the SBP annuity because of her remarriage before the age of 55. However, as explained by DFAS in their letter to the former spouse right after the member's death and as set forth under 10 U.S.C. § 1450(b)(3), payment of the former spouse SBP annuity would commence if the former spouse's subsequent marriage was terminated by death, annulment or divorce. *See* DOHA Claims Case No. 2022-CL-011805.2, *supra*; and DOHA Claims Case No. 2020-CL-123104.2 (September 21, 2021). Under the facts in this case, since the member's former spouse timely deemed the election for SBP coverage, DFAS and DOHA properly denied the surviving spouse's claim for the SBP annuity.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision in DOHA Claim No. 2024-CL-010206, 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.

Catherine M. Engstrom

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Administrative Judge

Chair, Claims Appeals Board

Michelle P. Tilford

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Administrative Judge

Member, Claims Appeals Board

David F. Hayes

David F. Hayes

Administrative Judge

Member, Claims Appeals Board