



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



DATE: March 25, 2025

In Re:

[REDACTED]

Claimant

)
)
) Claims Case No. 2023-CL-101007.2
)
)

**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 their claim by clear and convincing evidence on the written record that the United States Department of Defense is liable for the claim. 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). Since military pay entitlements, including survivor benefits, are governed by statute, the Defense Office of Hearings and Appeals (DOHA) must apply the appropriate statutes to the written record as presented to DOHA by the claimant and the Component concerned.

DECISION

The claimant, the surviving spouse of a deceased 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. 2023-CL-101007, dated December 18, 2024.

Background

The member and the claimant were married on February 29, 1984. On January 11, 2000, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*. On that form, he noted that he was married and had no dependent children. Under item 28, the beneficiary categories for the Survivor Benefit Plan (SBP), he marked item 28g, electing not to participate in the SBP. He did not fill out the level of coverage under item 29, because as instructed on the

form, he elected not to participate in SBP by marking item 28g. The claimant, as the member's spouse, had to concur with the member's declination to participate in the SBP, and signed the DD Form 2656 on January 11, 2000. Above her signature, the form contained the following language:

I hereby concur with the Survivor Benefit Plan election made by spouse. I have received information that explains the options available and the effects of those options. I have signed this statement of my own free will.

The member's signature and the claimant's signature on the DD Form 2656 were witnessed. The member retired from the Navy on February 1, 2000. The Defense Finance and Accounting Service (DFAS) accepted the member's election not to participate in the SBP, and as a result did not withhold SBP premiums from his monthly retired pay.

On September 4, 2017, the member passed away. On August 19, 2021, the claimant telephoned DFAS to inquire about the SBP coverage. DFAS told her to request in writing the status of the SBP and the form to file. On October 18, 2021, she telephoned DFAS again and was told (incorrectly) that the Navy did not have a copy of the member's SBP election.

On October 18, 2021, the claimant submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS, claiming the SBP annuity as the member's spouse. On November 15, 2021, DFAS denied her claim on the basis that the member did not elect to participate in SBP. On December 7, 2021, the claimant appealed DFAS's denial of her claim. She stated that at the time the member signed the DD Form 2656, she was not provided the opportunity to accept or decline SBP coverage. She further maintained that she did not sign any document concerning SBP coverage at the time of the member's retirement.

On November 17, 2022, DFAS reviewed the claimant's appeal and issued an administrative report, upholding the initial denial of the SBP annuity claim. DFAS found that the member declined to participate in the SBP, and that the claimant concurred. DFAS also noted that the member had not established SBP coverage during the relevant open enrollment period from October 1, 2005, through September 20, 2006. The claimant submitted a rebuttal to DFAS's administrative report reiterating that she did not concur in the member's decision to not participate in the SBP.

In the DOHA appeal decision, the adjudicator sustained DFAS's denial of the claim. In examining the record evidence, the adjudicator applied the long-standing precedent that with respect to disputed questions of fact, because the administrative office, *i.e.*, DFAS, is in a better position to consider and evaluate the facts, DOHA will accept the statement of facts furnished by the administrative office, in the absence of clear and convincing evidence offered by a claimant. *See* DOHA Claims Case No. 2012-CL-101006.3 (March 20, 2014); and DOHA Claims Case No. 01060501 (June 20, 2001), *citing* 57 Comp. Gen. 415, 419 (1978). Based on a review of the record and the relevant documentation, the adjudicator concluded that the member elected not to participate in the SBP and that he did so with the claimant's spouse concurrence as required by 10 U.S.C. § 1448(a)(2)(A) and 10 U.S.C. § 1448(a)(3)(A). 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 BCNR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. The adjudicator noted that any pursuit of a record correction is outside the scope of DOHA's authority.

In her request for reconsideration, the claimant states that she never saw the DD Form 2656, never signed it, and never met the person who signed as a witness. She further states that the member retired on February 1, 2000, but notes that the date written in the block by the member and the witness is "11-1-00." Therefore, she states that the member and the claimant signed the DD Form 2656 on November 1, 2000, not January 11, 2000, as DFAS indicates. She also points out that the version of the DD Form 2656 used, 1993 version, was outdated. She states there were two other more current versions of the DD Form 2656 issued (one in 1995 and one in 1999) since the version used by the member and the witness (1993). She states that the outdated version from 1993 was easily tampered with, as she believes happened in this case. She requests that this matter be further reviewed as she supported the member as his military wife while he served his country. She is disappointed that the financial sector of the military could not keep forgery and corruption out of their survivor beneficiary system meant to protect members' families.

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. The rights of individuals to receive benefits under federal statute are by virtue of the language of the statute and subject to the conditions and limitations contained therein. 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. A married member is eligible to participate in SBP when he 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). Under 10 U.S.C. § 1454, the Secretary concerned may, under regulations prescribed under 10 U.S.C. § 1455, correct or revoke any election under the SBP when the Secretary considers it necessary to correct an administrative error.

In this case, DOHA is limited to the written record as presented to us by the claimant and the Component concerned, DFAS. In our view, a review of the documentation in the record and the signatures therein does not clearly establish that the signature on the DD Form 2656 was not the claimant's signature. The record reflects that on January 11, 2000, the member elected not to participate in the SBP upon retirement, and his spouse concurred with the election. The

member's and the spouse's signatures were both witnessed on January 11, 2000. Further, DFAS accepted the member's election not to participate, and DFAS did not withhold spouse SBP premiums from the member's monthly retired pay commencing on February 1, 2000. DFAS's electronic system of records for the member's retired pay reflect that he declined to participate in the SBP effective February 1, 2000, the date of his retirement. *See* DOHA Claims Case No. 2023-CL-020207.2 (August 7, 2023); and DOHA Claims Case No. 2022-CL-041901.2 (August 31, 2022).

DOHA is unable to allow the claim for the SBP annuity because we are bound by statute and regulation, and the written record as submitted to us by the claimant and DFAS. As explained by the DOHA adjudicator in the appeal decision, the claimant may have other remedies that rest with the BCNR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454 (the specific authority for the BCNR to correct or revoke an election for SBP). The BCNR has the discretionary authority to correct the record when it considers it necessary to correct an error or remove an injustice. The BCNR's authority to correct a record is broader than DOHA's authority to settle a claim and is beyond DOHA's purview. Information on the BCNR is located online at <https://www.secnav.navy.mil/mra/bcnr>.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated December 18, 2024. 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

Catherine M. Engstrom
Administrative Judge
Chair, Claims Appeals Board

Richard C. Ourand, Jr

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

Michelle P. Tilford

Michelle P. Tilford
Administrative Judge
Member, Claims Appeals Board