



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



DATE: May 8, 2025

In Re:

[REDACTED]

Claimant

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Claims Case No. 2024-CL-092325.2

**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 United States Department of Defense is liable under the law for the amount claimed. 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).

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-092325, dated March 11, 2025. 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 March 1, 1946, and became a reserve member of the Army. On March 23, 1995, the Army Reserve Personnel Center sent the member a memorandum entitled *Notification of Eligibility for Retired Pay at Age 60 (Twenty Year Letter)*, advising him that he had completed the required years of service necessary for eligibility for retired pay on application at age 60. That memorandum also advised the member that he was entitled to participate in the Reserve Component SBP, which enabled him to provide an annuity to a spouse, and other eligible

beneficiaries. On December 12, 1997, the member married the claimant, and on March 1, 2002, the member and the claimant's daughter was born.

On December 19, 2005, the member completed a DD Form 108, *Application for Retired Pay Benefits*. Also, on December 19, 2005, the member filled out and signed a DD Form 2656-9, *Survivor Benefit Plan (SBP) and Reserve Component Survivor Benefit Plan (RCSBP) Open Enrollment Election*. On that form, he noted that he was married to the claimant and listed his dependent daughter. He further noted that he was not previously married and had no divorces. He elected child only SBP coverage, at a reduced base amount of \$1,820.00, and the claimant, as his spouse, concurred in writing with his election on December 29, 2005. On February 14, 2006, the member filled out and signed a DD Form 2656, *Data for Payment of Retired Personnel*, in which he elected to participate in the SBP, but for child only SBP coverage with a reduced base amount. On February 21, 2006, the claimant again concurred in writing to the member's SBP election on the DD Form 2656. The member turned 60 years old, was placed on the retired list, and began receiving his retired pay on March 1, 2006, under the authority of 10 U.S.C. § 12731. At that time, the Defense Finance and Accounting Service (DFAS) established child only SBP coverage and began deducting premiums from the member's monthly retired pay for that coverage.

The member passed away on January 21, 2023, and by DD Form 2656-7, *Verification for Survivor Annuity*, dated January 31, 2023, the claimant claimed a SBP annuity as the member's spouse. On May 8, 2023, DFAS denied the claim for the spouse SBP annuity on the grounds that the member had elected child only SBP coverage. On May 9, 2023, the claimant appealed DFAS's denial of her claim for the SBP annuity. In her appeal, the claimant stated that the member's intent in choosing child only SBP coverage was for their daughter to continue her education after his death. She stated that their daughter will be turning 22 in March 2024, and the SBP annuity would not help her continue and complete her education goals. She also stated that DFAS originally mistook her daughter for the spouse of the member, not his child. She requested the SBP annuity as the member's surviving spouse.

In an administrative report dated July 11, 2024, sent to the claimant, DFAS sustained the denial of the claim for the SBP annuity because the member elected child only coverage, and the claimant concurred in the election.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the SBP claim. The attorney examiner concluded that under the SBP law, the member was able to cover the claimant as his newly acquired spouse within one year after the date they married, and the same was true of their daughter, that he was able to elect child SBP coverage for her within one year after the date she was born. He did not do so for either his spouse or child, but when he had the opportunity during the 2005 Open Season, he elected coverage for his daughter only and the claimant concurred in writing with that election.

In her request for reconsideration, the claimant acknowledges that she signed the DD Form 2656 in February 2006, but she believes that the member did not mark child only SBP coverage. She states that their daughter turned 23 in March 2025, without having received the SBP annuity the member wanted her to have for her education. She states that her daughter is a fulltime student, and she filled out all applicable documents to receive the child SBP annuity. She further states that the

time for which her daughter is eligible to receive the annuity payments (approximately two years) is far shorter than time she would receive the spouse annuity. She requests that the casefile be reopened in order to fulfill the member's wishes for his daughter to receive her education.

Discussion

Prior to 1996, the Claims Division of the Defense Office of Hearings and Appeals' authority to settle military member claims, including SBP claims, rested with the Comptroller General of the United States. Pursuant to the Legislative Branch Appropriations Act, Public Law 104-53, 109 Stat. 514, November 19, 1995, the statute that provides for the settlement of claims against the United States, title 31 of the United States Code, section 3702, was amended to provide that the Secretary of Defense shall settle claims involving uniformed service members' pay, allowances, travel, transportation, payments for unused leave, retired pay, and survivor benefits.¹ 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 Department of Defense Instruction 1340.21 (May 12, 2004) ¶ E5.7.

The SBP program, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. 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 (a)(2)(A). A member who is not married upon becoming eligible to participate in the plan but who later marries may elect to establish coverage for the member's spouse pursuant to 10 U.S.C. § 1448(a)(5). That section requires a written election, signed by the member, and received by the Secretary concerned within one year after the date of the marriage. In addition, for members who did not elect SBP coverage at the time they became eligible for military retired pay or when they acquired dependents, Congress has occasionally provided an open season for members to elect coverage. One such open enrollment was for the period October 1, 2005, through September 30, 2006, authorized by Public Law 108-375, § 645, 118 Stat. 1811 (2004). Under § 645(d), a member not currently participating in SBP could submit an election in writing, signed by the member, and received by the Secretary concerned before the end of the enrollment period. In addition, any such election shall be made subject to the same conditions as contained under the SBP law. One condition of note, which exists under 10 U.S.C. § 1448(a)(3)(A) and (B), provides that a married member who elects to provide an annuity for a dependent child but not for the member's spouse, may not do so without that spouse's concurrence.

¹Specifically, section 211 of the Public Law 104-53, transferred the claims settlement and certain related functions previously assigned by law to the Comptroller General of the United States and the General Accounting Office (GAO) to the Director of the Office of Management and Budget (OMB), who was authorized by Congress to delegate any such functions, in whole or in part, to any other agency or agencies. In the *Determination with Respect to Transfer of Functions Pursuant to Public Law 104-53*, dated June 28, 1996, the Acting Director of OMB delegated the settlement of claims for military personnel pay, allowances, travel, transportation, retired pay, and survivor benefits, and the final settlement of the accounts of such personnel to the Department of Defense, Office of General Counsel, Defense Office of Hearings and Appeals.

In this case, at the time the member received his notification of eligibility for retired pay at age 60, he was not married and had no dependent children. Therefore, when he married the claimant in 1997, in order to cover her as his newly acquired spouse, he would have had to elect spouse SBP coverage for her within one year after the date he married her. The member did not elect spouse SBP coverage at that time, and when he had the opportunity during the 2005 Open Season, he elected coverage for his daughter and the claimant concurred in writing with his election. The record reflects that the member used the proper form, the DD Form 2656-9, for making such an election.²

The claimant states in her reconsideration request that she does not believe the member's election on the DD Form 2656 in February 2006 was for child only. However, as set forth above, the member's open season election in December 2005, using the DD Form 2656-9, was the only legally operable one he was able to use. Therefore, his election as submitted later on the DD Form 2656 had no significance, but to reiterate his prior election submitted during the 2005 Open Season. As for the claimant's concern that her daughter receive the two years of the child SBP annuity payments prior to her 23rd birthday when she was enrolled as a fulltime student, she should contact DFAS to request those payments.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated March 11, 2025, disallowing the spouse SBP annuity claim.

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

David F. Hayes

David F. Hayes
Administrative Judge
Member, Claims Appeals Board

²The implementing regulations for Public Law 108-375 are contained in the Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 43 (June 2008). Under ¶ 330904(E), a member making an open season election must complete the DD Form 2656-9.