



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



DATE: April 9, 2025

In Re:

[REDACTED]

Claimant

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Claims Case No. 2024-CL-092303.2

**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-092303, dated January 14, 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 divorced his first spouse on July 2, 2003. On April 20, 2009, in preparation for his retirement from the Army, the member completed DD Form 2656, *Data for Payment of Retired Personnel*. On that form, the member elected SBP spouse and child coverage. However, the member was not married but listed his former spouse as his wife. He also identified her on the form as his wife for the purposes of naming an arrears of retired pay (AOP) beneficiary for unpaid any retired pay due upon his death. On September 1, 2009, the member retired from the Army. At the time, the Defense Finance and Accounting Service (DFAS) established the member's retired pay and SBP

accounts and began deducting SBP premiums for spouse and child coverage from his monthly retired pay.

On July 3, 2017, the member married the claimant. On May 7, 2019, the member changed his designation of his AOP beneficiary to the claimant. On March 9, 2023, the member passed away.

On March 31, 2023, the claimant submitted to DFAS a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the surviving spouse of the member. On that same day, she also submitted a SF 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*. DFAS subsequently established the SBP annuity for the claimant as the member's surviving spouse and began making SBP annuity payments to her beginning May 2023. However, on January 30, 2024, DFAS sent the claimant a letter explaining that the member had no eligible spouse SBP beneficiary when he retired. DFAS also explained that since the member did not have an eligible spouse SBP beneficiary at retirement, when he later married the claimant, he had one year from the date of their marriage to elect spouse SBP coverage for her. Since the member failed to elect spouse SBP coverage for her within one year of their marriage, DFAS denied her claim for the SBP annuity. DFAS also advised her of her right to appeal the decision to DOHA. On February 12, 2024, DFAS sent a letter to the claimant responding to her claim for the member's AOP. In that letter, DFAS explained that a claim of AOP accrues upon the death of a member but the claim for a SBP refund payable as AOP accrued, due to the member paying the incorrect SBP monthly premiums, on the date of the member's retirement. DFAS advised the claimant that six years had passed since the claim for the SBP refund accrued. Therefore, payment of AOP in the amount of \$11,468.36, for the period September 1, 2009, through March 9, 2017, is subject to the Barring Act, the six-year statute of limitations set forth under 31 U.S.C. § 3702(b). As a result, DFAS barred payment of the \$11,468.36, and then detailed the process available to the claimant for requesting waiver of the Barring Act.

On February 26, 2024, the claimant appealed DFAS's denial of her claim for the SBP annuity. In her appeal, the claimant stated that the member paid monthly spouse SBP premiums from 2009 until his death. She stated that since the member had not declined SBP coverage for her, he should not have had to elect it for her. In addition, she and the member believed that his designation of her as his AOP beneficiary also applied to the SBP coverage for her. She stated that she should not be required to repay the SBP annuity payments after the member's death. She also identified the financial hardship that the denial of the SBP annuity would cause.

On April 22, 2024, DFAS sent the claimant a letter regarding the establishment of an indebtedness on her SBP account. DFAS explained that her debt totaled \$15,028.32. DFAS advised the claimant of her right to contest the validity of the debt and her right to request waiver of the debt. On May 20, 2024, the claimant wrote to DFAS contesting the validity of the debt on the basis that she was the spouse of the member and entitled to the SBP annuity payments. The claimant's congressional representative also contacted DFAS on her behalf. On June 28, 2024, DFAS responded to that inquiry, advising the congressional representative that DFAS sent the claimant an administrative report dated January 30, 2024.

In an administrative report dated July 11, 2024, sent to the claimant, DFAS sustained the denial of the claim for the SBP annuity based on the fact that the member did not elect spouse SBP coverage

for the claimant within one year of their marriage. DFAS also explained the application of the six-year statute of limitations to the AOP claim resulting from the member's overpayment of spouse SBP premiums when he did not have an eligible spouse beneficiary.

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 required to file the SBP election with DFAS within one year of the date of his marriage to the claimant. The attorney examiner explained that because DFAS erroneously established the SBP annuity for the claimant and began paying her the annuity, she is now indebted for the overpayments. The claimant had the right to request waiver of the repayment of the annuity payments under 10 U.S.C. § 1453, with DFAS. In addition, the attorney examiner also directed the claimant to another possible avenue of relief under 10 U.S.C. § 1552, that rests with the Army Board for Correction of Military Records (ABCMR).

In her request for reconsideration, the claimant acknowledges the validity of the attorney examiner's statements made in the appeal decision. However, she states that the member had no ill intention in his handling of her SBP coverage. She states that he was permitted to begin coverage when he retired and was not married. He was also permitted to continue spouse SBP coverage after his children aged out of the SBP. He designated the claimant as his AOP beneficiary. Therefore, all relevant departments knew of his marriage to her. She further requests that if the denial of her SBP annuity claim is upheld, that her AOP claim be reconsidered. She states that it was impossible to file a claim for the overpayment of SBP premiums when she had no knowledge that the premiums were being erroneously deducted from the member's retired pay. She states that she will be requesting a waiver of the Barring Act. She questions why the overpaid premiums have not been paid to her for the period March 10, 2017, through March 9, 2023. She further states that she will be requesting a waiver of the debt for the SBP annuity payments with DFAS.

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* Department of Defense 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).

In the adjudication of cognizable claims under 31 U.S.C. § 3702, it is a well-established rule that a claim may only be allowed for an expense authorized by statute or regulation. *See* DOHA Claims Case No. 2021-CL-030920.2 (October 25, 2022). When the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2021-CL-082409.2 (March 14, 2022). The rights of individuals to receive benefits under Federal statutes are by virtue of the language of the statute and subject to the conditions and limitations contained therein. *See* DOHA Claims Case No. 2019-CL-031806.2 (October 28, 2019).

The SBP program, 10 U.S.C. §§ 1447-1455, was established in 1972 as 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. *See* DOHA Claims Case No. 2019-CL-041101.2 (September 24, 2019). The Service Secretaries have delegated their authority under the SBP law to DFAS.

In this case, in preparation for retirement, the member elected SBP spouse and child coverage. However, he was not married and listed his former spouse as his wife on the DD Form 2656 in August 2009. The member retired from the Army on September 1, 2009, and began receiving retired pay. Although the member was not married but had dependent children, based on his erroneous SBP election of his former spouse as his wife, the SBP premium payments withheld from his retired pay incorrectly included those for spouse coverage. On July 3, 2017, the member married the claimant. Although the member did designate the claimant as his AOP beneficiary on May 7, 2019, his AOP designation is separate from electing spouse SBP coverage for a newly acquired spouse. The designation of beneficiaries and the entitlement to AOP upon a member's death are set forth under 10 U.S.C. § 2771, a separate statute from the SBP law. In any event, the member's AOP beneficiary designation of the claimant fell outside the statutory period permitted for submitting a spouse SBP election under 10 U.S.C. § 1408(a)(5). The applicable statutory law renders the SBP claim unpayable.

As set forth in the appeal decision, the claimant may seek relief with the ABCMR under 10 U.S.C. § 1552. Under that statute, the ABCMR's authority to correct a military record is discretionary and broader than DOHA's authority to settle a claim. Under 10 U.S.C. § 1552(a)(1), the Secretary of a military department, acting through a correction board, may correct a member's record when the Secretary, in this case, the Secretary of the Army, considers it necessary to correct an error or remove an injustice. This remedy is outside DOHA's authority and any request for a correction of the record needs to be pursued with the ABCMR.

As for the AOP, the claim accrued at the time the member began receiving retired pay. Since DFAS improperly established spouse SBP coverage when the member retired, erroneous deductions of spouse SBP premiums were withheld from the member's retired pay account resulting in an underpayment of retired pay. DFAS erroneously began deducting premiums from the member's retired pay beginning on September 1, 2009. DFAS barred payment of the portion of the claim for the underpaid retired pay starting at the member's retirement, September 1, 2009, through March 9, 2017, in the amount of \$11,468.38. In this regard, under 31 U.S.C. § 3702(b), jurisdiction to consider claims is limited to those that are filed within six years after they accrue. *See* DOHA Claims Case No. 2018-CL-051101.2 (November 29, 2018). However, as DFAS previously advised the claimant, she may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Army. Under 31 U.S.C. § 3702(e), upon the request of the Assistant Secretary of the Army, the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for

claims involving a member's pay, allowances or survivor benefits. Requests for waiver should be submitted to the Assistant Secretary of the Army at the following address:

Assistant Secretary of the Army
(Financial Management & Comptroller)
109 Army Pentagon
Washington, DC 20310-0190

As for payment of the overpaid SBP premiums as AOP deducted from the member's retired pay during the period March 10, 2017, through the member's death, the claimant should contact DFAS about reimbursement and payment as AOP.

Since DFAS erroneously established an SBP annuity for the claimant upon the member's death and began paying her an annuity, she is now indebted for the overpayments. As set forth under 10 U.S.C. § 1453, recovery of an amount erroneously paid to a beneficiary under the SBP is not required if the Secretary concerned determines that there is no fault by the annuitant to whom the amount was erroneously paid, and recovery of such amount would be contrary to the purposes of the law or against equity and good conscience. As previously stated, the Service Secretaries have delegated their authority under the SBP law to DFAS. Therefore, the claimant should submit her request for waiver of the indebtedness resulting from the erroneously paid annuity payments to DFAS. She may make this request by submitting a DD Form 2789, *Waiver/Remission of Indebtedness Application*, to DFAS.

Conclusion

The claimant's request for reconsideration is denied, and we affirm the appeal decision dated January 14, 2025, disallowing the 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