

KEYWORDS: Survivor Benefits, SBP annuity

DIGEST: Pursuant to a divorce decree, a member was required to provide his former spouse with a Survivor Benefit Plan (SBP) annuity. Although the member failed to make an election for his former spouse, she made a timely request for a deemed election for former spouse SBP coverage. Therefore, his surviving spouse’s claim for the SBP annuity must be denied

CASE NO: 2018-CL-080208.2

DATE: 08/29/2019

DATE: August 29, 2019

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2018-CL-080208.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Pursuant to a divorce decree, a member was required to provide his former spouse with a Survivor Benefit Plan (SBP) annuity. Although the member failed to make an election for his former spouse, she made a timely request for a deemed election for former spouse SBP coverage. Therefore, his surviving spouse’s claim for the SBP annuity must be denied.

DECISION

The surviving spouse (hereinafter claimant) of a deceased member of the U.S. Army requests reconsideration of the April 23, 2019, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-080208. In that case, this Office denied the claimant’s claim for the member’s Survivor Benefit Plan (SBP) annuity because his former spouse made a timely and proper deemed election.

Background

On December 1, 2001, the member retired from the Army. At that time he was married but attempted to participate in SBP with child only coverage. Since the member’s spouse did not

concur with his election of child only SBP coverage, the Defense Finance and Accounting Service (DFAS) established automatic spouse coverage for her. On June 18, 2002, the member divorced. Pursuant to the divorce decree, the member's former spouse was entitled to receive 37% of the member's disposable retired pay, and the member was required to provide her with an SBP annuity. The decree also stated that the former spouse would be responsible for payment of the SBP premiums from her share of the benefits. In July 2002 the member married the claimant. On January 9, 2003, the former spouse submitted a deemed election to remain the member's SBP beneficiary. DFAS accepted the deemed election but failed to change the automatic spouse SBP coverage to reflect former spouse SBP coverage. As a result, the member's Retiree Account Statements (RAS) continued to reflect spouse only SBP coverage. On December 10, 2004, the member requested that DFAS update his records to reflect his current spouse's information. The record reflects that DFAS updated his spouse's birth date on the member's RAS.

On April 27, 2017, the member passed away. On May 14, 2017, claimant filed a DD Form 2656-7, *Verification for Survivor Annuity*, claiming the SBP annuity as the spouse of the member. DFAS denied the claim on June 24, 2017, on the basis that the member's former spouse requested a timely deemed election and was entitled to the SBP annuity. The claimant also claimed the arrears of pay (AOP) on the member's retired pay account. On July 3, 2017, DFAS denied her claim for the AOP because the record indicated the member had elected his sister to receive 100% of his AOP. The claimant appealed DFAS's denial of her claims to DOHA.

In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the SBP annuity claim and the AOP claim. He found that the error on the member's RAS reflecting the SBP coverage as spouse only could not effectuate the establishment of an SBP annuity for the surviving spouse.

In her request for reconsideration, claimant's counsel argues that DFAS committed several errors. Counsel states that DFAS disregarded a key provision of the divorce decree. Counsel maintains that DFAS was required under the divorce decree to deduct SBP premiums from the former spouse's share of the member's retired pay. In addition, since DFAS failed to change the SBP coverage from spouse only to former spouse, the member and the claimant never received notice that the former spouse had been deemed the beneficiary for the SBP annuity. Counsel states that the effect of this error was that the member and the claimant continued to pay SBP premiums, despite the divorce decree's requirement that the former spouse bear that expense. Counsel states that if the member and the claimant knew about the situation in 2004, they could have acted to protect their interests including asking DFAS to reconsider their decision to deem the member's former spouse the beneficiary of the SBP annuity, especially since the decree required her to pay the SBP premiums. They could have sought relief with the court to compel the former spouse to bear the cost of the premiums. Finally, they could have adjusted their own retirement savings to account for the loss of the member's retired pay. Since the claimant was not aware that the former spouse was the member's SBP beneficiary until he died in 2017, it was too late for her to exercise any of these options. Therefore, counsel states that DOHA should correct this injustice and award the claimant the SBP annuity without the

claimant having to seek further administrative relief or judicial review. The claimant's attorney did not raise the issue of AOP on reconsideration.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No.2018-CL-041801.2 (December 20, 2018); DOHA Claims Case No 2016-CL-111002.2 (October 21, 2017); and DOHA Claims Case No. 09051901 (July 16, 2009). Regulations that are promulgated pursuant to an express statutory authority have the force and effect of law, and our Office cannot issue a determination at variance with such regulations. *See* DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012). Therefore, DOHA has no authority under statute or regulation to allow the claim on the basis of correcting an injustice.

The Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, gives state courts the right to distribute a member's disposable retired pay to a spouse or former spouse, and provides a method of enforcing these orders through the Department of Defense. Under 10 U.S.C. § 1408(d), the law provides that the Department make payments directly to the spouse or former spouse of a portion of the member's disposable retired pay under state court orders as a division of property. The term 'disposable retired pay' as defined in 10 U.S.C. § 1408(a)(4) is the member's total monthly retired pay from which certain deductions have been made. Specifically, one of those enumerated deductions is for the SBP premium cost when a member is obligated under a divorce decree to provide an SBP annuity to a former spouse. *See* 10 U.S.C. § 1408(a)(4)(iv).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A member may elect coverage for a former spouse. *See* 10 U.S.C. § 1448(b)(3). Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage to his former spouse, he must notify DFAS in writing. If the member is required under the terms of a divorce decree to provide SBP coverage to his 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).

In this case, the member's former spouse was automatically covered under SBP as the member's spouse beneficiary from the time he retired in 2001 until such coverage ended with their divorce in June 2002. The divorce decree awarded the former spouse a portion of the member's disposable retired pay and designated her as the beneficiary of the member's SBP. On January 9, 2003, the former spouse timely submitted her request for a deemed election to DFAS.

Although the divorce decree also directed that the former spouse be responsible for payment of the SBP premiums, as set forth above, the USFSPA requires the deduction of the SBP premium cost from a member's retired pay prior to the division and payment of the former

spouse's share of the disposable retired pay. In addition, under 10 U.S.C. § 1452(a), reduction for SBP premiums is required to be made from the member's retired pay. Further, the implementing regulation, the Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 29, Paragraph 290610, also requires SBP premiums to be paid from the member's retired pay, and specifically prohibits payment of SBP premiums from the former spouse's portion of the member's retired pay. Paragraph 290610 notes that any provision in a court order stating the premium should be deducted from the former spouse's portion is unenforceable and the member and former spouse would have to work out the issue between them. Therefore, there is no authority for DFAS under the USFSPA, the SBP law or their implementing regulations to enforce this provision of the divorce decree to compel the former spouse to pay for the SBP premiums from her share of the member's retired pay.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated April 23, 2019.

SIGNED: James B. Norman

James B. Norman,
Acting Chairman, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board