

KEYWORDS: Survivor Benefits, SBP annuity

DIGEST: The burden of proving the existence of a valid claim against the United States is on the person asserting the claim.

CASE NO: 2019-CL-022108.2

DATE: 09/17/2019

DATE: September 17, 2019

In Re:)
[REDACTED]) Claims Case No. 2019-CL-022108.2
Claimant)
_____)

**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, a former spouse of a deceased 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. 2019-CL-02218, dated August 8, 2019.

Background

On March 1, 1993, the member retired from the Army. At the time of his retirement, he was married and elected Survivor Benefit Plan (SBP) spouse coverage. On January 14, 2015, the member and the claimant divorced. The divorce decree, which incorporated a prior agreement by the parties dated November 17, 2014, awarded the claimant 50% of the member's military retired pay and ordered the member to continue to provide the claimant with SBP coverage. Specifically, the SBP provision stated the following:

The Husband shall maintain his Survivor Benefit Plan from his military service in full force and effect, with the Wife as sole

beneficiary. The husband shall provide the Wife with documentation evidencing same, no later than 1 January of each year, beginning in 2015.

The record reflects that the member filed with the Defense Finance and Accounting Service (DFAS), a DD Form 2894, *Designation of Beneficiary Information*, requesting that his former spouse, the claimant, be designated his beneficiary for 100% of his arrears of pay (AOP) due him as a retired member on the date of his death. DFAS accepted the DD Form 2894, and noted the member's AOP designation in MyPay effective February 27, 2015. In addition, the record reflects that the member submitted a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, to DFAS on August 10, 2015, by fax. On the application, he noted his name as the service member, but did not complete the section concerning the applicant, his former spouse. He noted that the applicant was entitled to receive 50% of his disposable retired pay.

At some point after the divorce, the claimant applied for a portion of the member's retired pay as set forth in the divorce decree. This is evidenced by two letters in response to her application from DFAS, one dated April 5, 2016, and the other dated May 31, 2016. In both letters, DFAS advised the claimant that although they had received her application for payment of a portion of the member's retired pay under the Uniformed Services Former Spouses' Protection Act (10 U.S.C. § 1408), they needed her to submit a certified copy of the final court order of divorce. In addition, DFAS advised the claimant that if her divorce decree specified that she is to be designated as a former spouse beneficiary for SBP, she must make a 'deemed election' for SBP coverage within one year of the date of her divorce directly to DFAS-Retired Pay Office, U.S. Military Retirement Pay, London, Kentucky. DFAS advised her that she must do so by submitting a DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, to their address in Kentucky.¹

Despite these actions by the member and the claimant, DFAS advised our office that the member did not elect former spouse SBP for the claimant, nor did the claimant request a deemed election for SBP coverage within one year of the date of their divorce.

The member passed away on December 11, 2017. On February 13, 2018, the claimant advised DFAS of his death and claimed the AOP by filing the SF 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*. On March 29, 2018, she claimed the SBP annuity as the member's former spouse.

On May 29, 2018, DFAS denied the claimant's claim for an SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election within one year of the divorce. Throughout the appeal process, the claimant asserted that the member did timely elect her as his former spouse beneficiary as evidenced by his filing of the DD Form 2894 and DD Form 2293. On appeal, the DOHA attorney examiner explained that the member's filings of those forms were separate

¹DFAS has advised our office that the claimant began receiving a direct payment of her portion of the member's retired pay on July 1, 2016. DFAS also advised that the last payment made to her was dated December 29, 2017.

actions from electing her as his former spouse SBP beneficiary. Therefore, he upheld DFAS's denial of the SBP claim, finding no evidence that the member elected former spouse SBP. He further advised the claimant that she may find relief outside the purview of DOHA with the Army Board for Correction of Military Records (ABCMR).

In her reconsideration request, through her attorney, the claimant points out the language in the divorce decree requiring the member to maintain her as his SBP beneficiary and provide documentation evidencing that his election had been made. The claimant contends that the member complied with the SBP provision of the divorce decree by making a timely election for former spouse SBP coverage by filing the DD Form 2894 and the DD Form 2293. She further asserts that the member's actions in 2015 reflect his intent to carry out the terms of the divorce decree and provide her with the SBP annuity. She states that she relied on the terms of the divorce decree for her financial support. Finally, she requests additional time to supplement her reconsideration request if DOHA finds the documents submitted are not sufficient to affirm her entitlement to the SBP annuity.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2018-CL-080201.2 (January 3, 2019).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. *See* DOHA Claims Case No. 2017-CL-112704.2 (May 22, 2018); and DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018). Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for his former spouse, he must notify DFAS in writing of the divorce and his intention to provide coverage for his former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. Former spouse coverage must be established within one year from the date of the divorce. *See* 10 U.S.C. § 1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to his former spouse. If he fails to do so, the former spouse has one year from the date of the divorce to request a deemed election. *See* 10 U.S.C. § 1450(f)(3).

The implementing regulations for SBP elections and election changes are found under Chapter 43, Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures — Retired Pay. Under paragraph 430301.B., a member changing his election from spouse to former spouse SBP coverage must use the DD Form 2656-1. Under paragraph 430504.B., a member with a spouse may change the spouse SBP election to former spouse within one year of the date of the divorce.

In this case, the member was obligated based on the divorce decree to cover the claimant as his former spouse under the SBP. However, the member failed to establish former spouse SBP coverage and the claimant did not file a timely deemed election. Therefore, DFAS properly denied the claim for the SBP annuity.

DFAS has advised us that the claimant is the member's AOP beneficiary, and since the member continued to erroneously pay spouse SBP coverage from his retired pay when he did not have a spouse beneficiary, the member was underpaid retired pay after his divorce. Thus, this underpayment of retired pay is payable as AOP. The claimant should contact DFAS for a calculation and resulting payment of the AOP.

As set forth above, DOHA has no authority under statute or regulation to allow the claim. However, as explained by the attorney examiner in the appeal decision, the claimant may have other available remedies that rest with the ABCMR under 10 U.S.C. § 1552 and 10 U.S.C. § 1454. These remedies are outside DOHA's authority and any request for a correction of the record needs to be pursued with the ABCMR. s

Conclusion

The claimant's request for relief is denied, and we affirm the appeal decision dated August 8, 2019. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
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