

DATE: January 13, 2020

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2019-CL-052401.3  
)  
)

**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, the surviving spouse of a deceased member of the U.S. Army Reserve, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-052401.2, dated October 31, 2019.

**Background**

The record reflects that the member was a chaplain in the United States Army Reserve (USAR). On October 18, 1990, in the probate court for the County of Essex, Massachusetts, the member was awarded a divorce *nisi*. Under the terms of the decree and of the law of Massachusetts (Chapter 208, Section 21, Annotated Law of Massachusetts), the divorce did not become absolute until after the expiration of 90 days from the entry thereof. The member and the claimant were married on December 28, 1990, in Lynn, Massachusetts, before the member's divorce became absolute. On January 17, 1991, the member's divorce became absolute.

On June 18, 1993, the member executed a DA Form 4240, *Data for Payment of Retired Army Personnel*, electing Survivor Benefit Plan (SBP) spouse coverage for the claimant. The member specifically elected spouse coverage under the Reserve Component Survivor Benefit Plan (RCSBP). The RCSBP extends eligibility for SBP to Reserve Component members who

would otherwise be eligible to receive retired pay except that they have not reached the required retirement age of 60. The member retired from the USAR upon reaching the age of sixty years on October 25, 1993. The Defense Finance and Accounting Service (DFAS) began deducting SBP premiums from the member's monthly retired pay.

On January 29, 1996, the member and the claimant married again. The claimant reports that she and the member were concerned about the validity of their marriage since they had married prior to the issuance of the member's divorce absolute.

On August 28, 2018, the member passed away. On September 15, 2018, the claimant submitted DD Form 2656-7, *Verification of Survivor Annuity*, to DFAS claiming the SBP annuity as the member's surviving spouse. She attached her marriage certificate dated January 29, 1996. This was the first time DFAS learned that the member had married again in 1996. DFAS denied the claim for the SBP annuity because the member did not elect SBP spouse coverage within a year of his marriage to the claimant. DFAS determined that the first marriage in 1990 was not valid since it occurred prior to the member's divorce absolute. DFAS further advised the claimant that since she was the member's designated beneficiary for his arrears of pay (AOP), she would be entitled to a refund of the member's overpayment of SBP premiums. However, any refund would be subject to the six-year Barring Act under 31 U.S.C. § 3702(b).

The claimant appealed DFAS's denial of her claim to DOHA. She stated that she and the member were first married during a brief period of leave while he was on active duty overseas; that he elected SBP spouse coverage in 1993; and that SBP premiums were deducted from his retired pay for 25 years. In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim. The adjudicator explained that the claimant may have other available remedies. First, under 10 U.S.C. § 1454, the Secretary of the member's service may correct or revoke an SBP election when the Secretary deems it necessary to correct an administrative error. Second, under 10 U.S.C. § 1552, the Secretary, acting through a correction board, may correct a member's record when the Secretary considers it necessary to correct an error or remove an injustice.

In her reconsideration request, forwarded to DOHA by the claimant's congressional representative, she states that her husband made a mistake with the timing of their original marriage, and neither of them was aware of the 90-day rule of a divorce to be finalized. She states that her husband did not elect SBP for her after their second marriage in 1996 because he believed she was already covered. She states that he paid SBP premiums for over 25 years and his mistake should not override his obvious intention. She wishes to pursue her case under 10 U.S.C. § 1454 and 10 U.S.C. § 1552.

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation. 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. *See* Comptroller General decision B-203903, Feb. 11, 1985.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. 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 reserve-component member is an eligible participant when he becomes eligible for reserve-component retired pay but for the fact that he is under 60 years of age. *See* 10 U.S.C. § 1448(a)(1)(B) and (a)(2)(B). Members who marry or acquire a dependent child after becoming eligible for retired pay may elect to include that spouse or dependent child in the program if they provide the statutory notice. *See* 10 U.S.C. § 1448(a)(5)(A). The member's election must be in writing and received by the Secretary concerned within one year after the date on which that member marries. *See* 10 U.S.C. § 1448(a)(5)(B).

In this case, the member and the claimant's marriage in December 1990 was *void ab initio*, since the member's divorce from his first spouse had not become final at the time. Therefore, the member's election of SBP spouse coverage for the claimant in preparation for his retirement in 1993 was ineffective since he was not legally married to her. When the member and the claimant married again on January 29, 1996, he was able to elect to cover her as his new spouse but had to make such an election within one year after the date of the marriage. Although the member may have intended to cover the claimant as his spouse SBP beneficiary, the member's election was not received within one year of the marriage. *See* DOHA Claims Case No. 2019-CL-032006.2 (October 17, 2019).

The member erroneously paid spouse SBP premiums after his ineffective SBP election for the claimant in 1993. Therefore, the claimant is entitled to be refunded the amount of the overpaid SBP premiums as the member's AOP beneficiary. She should contact DFAS concerning her claim for the refund of overpaid SBP premiums as AOP. DFAS advises that the claimant's refund is subject to the six-year statute of limitation under 31 U.S.C. § 3702(b), the Barring Act. After the claim is made for the refund, DFAS will conduct an audit of the member's retired pay account to determine the amount immediately payable to the claimant as AOP, and any amount barred from payment. The claimant will then be given the right to request waiver of the Barring Act through the Assistant Secretary of the Army (ASA).

As explained by the DOHA adjudicator in the appeal decision, the claimant may have other available remedies that rest with the Army Board for Correction of Military Records (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 record needs to be pursued with the ABCMR. Any remedy granted by the ABCMR may require payment of SBP premiums. Thus, seeking AOP prior to petitioning for relief with the ABCMR may necessitate repayment of any refunded SBP premiums.

## Conclusion

The claimant's request for relief is denied. In accordance with the Department of Defense Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

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Member, Claims Appeals Board