

DATE: May 6, 2020

In Re:)

[REDACTED])

Claimant)

Claims Case No. 2019-CL-042603.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 31 U.S.C. § 3702(b), the Barring Act, jurisdiction to consider claims is limited to those that are filed within six years after they accrue. However, under 31 U.S.C. § 3702(e), upon request of the Secretary concerned, the Secretary of Defense may waive the time limits established by the Barring Act for claims involving a uniformed service member's pay, allowances or survivor benefits, to allow payment of the claim up to \$25,000.00.

DECISION

The claimant, the surviving spouse of a deceased member of the U.S. Navy, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-CL-042603, dated February 14, 2020. In that case, DOHA upheld the application of the Barring Act by the Defense Finance and Accounting Service (DFAS) to the claim for the member's Survivor Benefit Plan (SBP) annuity and the claim for the member's arrears of retired pay (AOP).

Background

On June 17, 1944, the member married the claimant. On June 30, 1963, prior to the enactment of the SBP in 1972, the member retired from the Navy. During an SBP open season in 1973, the member elected SBP spouse coverage for the claimant.

On September 21, 2005, the member passed away. The record reflects that on September 10, 2010, DFAS – Retired and Annuity Pay, sent the claimant a letter offering condolences on the member's passing and notifying her of her potential entitlement to the member's AOP and

the SBP annuity. On November 2, 2010, DFAS sent the claimant a reminder concerning filing a claim for the AOP.

On April 10, 2018, the claimant executed a DD Form 1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*, claiming the member's AOP, and a DD Form 2656-7, *Verification of Survivor Annuity*, claiming the SBP annuity. On May 12, 2018, DFAS denied the claim for the SBP annuity on the grounds that it was untimely. Her claim was not filed within six years of the member's death as required by 31 U.S.C. § 3702(b), also referred to as the Barring Act. DFAS advised the claimant of her right to appeal the application of the Barring Act to our office. On October 2, 2018, DFAS advised her that in addition to submitting an appeal to DOHA, she had the right to request waiver of the application of the Barring Act by petitioning the Secretary concerned. DFAS further advised her that she had the right to seek relief by applying for a correction of record with the Correction Board for the appropriate service.

The claimant appealed the denial of her claims. In DFAS's administrative report dated October 9, 2018, DFAS found that the claimant was the proper beneficiary for both the member's AOP and the SBP annuity as his surviving spouse. DFAS noted that the AOP was approximately \$1,340.00 for the period September 1, 2005, through September 21, 2005. DFAS also calculated that the claimant was due an estimated \$127,382.70 in unpaid SBP annuity payments for the period October 1, 2005, through September 20, 2018. However, DFAS concluded that both claims were barred by the six-year statute of limitations.

In the appeal decision, the DOHA adjudicator sustained DFAS's denial of both claims due to the application of the Barring Act. The adjudicator also explained that the claimant had the right to request waiver of the Barring Act through the Assistant Secretary of the Navy. The adjudicator then explained that the Board for Correction of Naval Records (BCNR) has the authority under 10 U.S.C. § 1552, to correct a member's record when the Secretary concerned considers it necessary to correct an error or remove an injustice.

In her request for reconsideration, the claimant's personal representative states that it was not until 2018 when he was reviewing her mail dating back to 2002 that they discovered the letters in 2010 from DFAS. He states that the claimant was a victim of identity theft, mail fraud and elder abuse. He states that he does not understand a statutory limitation that would deny a widow's right to benefits that a member had earned and purchased. He argues that the statute of limitations should not apply because the claimant's entitlement to the SBP annuity was established by law and DFAS has confirmed her eligibility for it. She just failed to provide certain data to DFAS at the time of the member's death. He requests full relief for the claimant of payment of the SBP annuity, both retroactive payments due her and future payments. Although he has been informed of the claimant's right to seek waiver of the Barring Act, he is unsure if pursuing the waiver would constitute forfeiture of her right to continue to petition for full relief.

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 31 U.S.C. § 3702(b), a survivor has six years to file a claim for an SBP annuity. All events giving rise to the government's liability to make SBP payments to a survivor occur at the date of the member's death, and the survivor has six years from that date to file the claim. Claims filed more than six years after a member's death are barred. *See* DOHA Claims Case No. 2018-CL-061204.2 (January 18, 2019); and DOHA Claims Case No. 2018-CL-091702.2 (June 17, 2019).

In this case, the member elected coverage for the claimant in 1973 during an open season. SBP coverage was then established for her at that time and the member paid SBP premiums for the coverage. The events which fixed the liability of the government and entitled the claimant to make a claim arose at the time of the member's death in 2005. The claimant failed to make a claim until 12 years after it arose. Although we acknowledge the circumstances surrounding her failure to make a timely claim, we have no authority to allow her claim for the SBP annuity.

In addition, the claim for arrears of retired pay due the member accrued in September 2005, when he died. Thus, the claim received by DFAS for AOP in April 2018 was properly barred by 31 U.S.C. § 3702(b).

As explained by the DOHA adjudicator in the appeal decision, the claimant may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Navy. Under 31 U.S.C. § 3702(e), upon request of the Assistant Secretary of the Navy, 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. Under DoD Instruction 1340.21 ¶ E6.4 (May 12, 2004), the Director of DOHA is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. Requests for waiver should be submitted to the Assistant Secretary of the Navy at the following address:

Assistant Secretary of the Navy
(Financial Management & Comptroller)
720 Kennon Street SE, Bldg. 36, Room 118
Washington Navy Yard, DC 20374

We note that under 31 U.S.C. § 3702(e), waiver shall only be granted to allow payment up to a maximum of \$25,000.00, and the claimant will not be granted the SBP annuity prospectively. Therefore, the claimant may wish to also pursue the matter with the BCNR. The claimant's request for waiver of the Barring Act does not forfeit her right to seek redress from the BCNR. Under 10 U.S.C. § 1552, the Secretary of a military department, 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. Information on petitioning the BCNR can be found online at: <https://www.secnav.navy.mil/mra/bcnr/Pages/default.aspx>.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated February 14, 2020.

SIGNED: Catherine M. Engstrom
Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Jennifer I. Goldstein
Jennifer I. Goldstein
Member, Claims Appeals Board

SIGNED: Michael Ra'anan
Michael Ra'anan
Member, Claims Appeals Board