

KEYWORDS: SBP Annuity, Survivor Benefits

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

CASE NO: 2018-CL-011903.2

DATE: 06/27/2019

DATE: June 27, 2019

In Re:)
[REDACTED]) Claims Case No. 2018-CL-011903.2
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

A surviving dependent child, through her mother, hereinafter claimant, 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. 2018-CL-011903, dated March 22, 2019. In that decision, DOHA sustained the denial by the Defense Finance and Accounting Service (DFAS) of the claim for additional payments under the Survivor Benefit Plan (SBP).

Background

On October 21, 1988, the member married his first wife, and on April 2, 1990, their son was born. On September 19, 1989, the member entered the Army under the Delayed Entry Program and was transferred to the Regular Army on November 21, 1989. On July 16, 1993, the member was divorced. On November 22, 2003, the member married the claimant's mother. On November 22, 2003, the member married the claimant's mother. The claimant was 10 years old when her mother married the member. On January 2, 2005, the member was called to active duty. On September 25, 2005, the member was killed on active duty in the line of duty.

An SBP Beneficiary Worksheet dated October 21, 2005, listed two SBP children of the member, the claimant and his son. On December 8, 2005, the claimant's mother, the member's spouse, elected child only SBP coverage for the claimant without spouse coverage. On February 9, 2006, the claimant's mother submitted a DD Form 2656-7, *Verification of Survivor Annuity*, claiming the SBP annuity on the claimant's behalf. In a memorandum to the Defense Finance and Accounting Service (DFAS) dated February 21, 2006, the Department of the Army approved SBP child-only coverage for the member's beneficiaries. DFAS then began payment of 50% of the SBP annuity established by the member to the claimant effective September 26, 2005. DFAS reserved the other 50% for the member's son. Due to an administrative error, neither the member's son nor his mother were informed by DFAS of his eligibility for an SBP annuity.

On July 11, 2013, the claimant requested that DFAS audit the SBP account and claimed the full SBP annuity payable upon the member's death. The claimant maintained that she was entitled to the member's son's share of the annuity because he had forfeited it by not claiming it within six years of the member's death.

During the period 2013 through 2015, the claimant and DFAS exchanged various correspondence concerning underpayments and overpayments of the SBP annuity payments made to the claimant. As a result, DFAS audited the claimant's SBP account and retroactively paid the claimant for the periods between her 18th and 22nd birthdays when she was a full-time student. However, DFAS determined that a portion of the SBP due the claimant was barred from payment under 31 U.S.C. § 3702(b), the Barring Act. On July 21, 2015, DFAS paid the unbarred SBP annuity payments in the amount of \$32,468.00.

On August 11, 2015, the claimant protested DFAS's action as having been done without her knowledge or consent. The claimant maintained that the \$32,468.00 would be considered a partial retroactive payment of a larger amount claimed. On August 18, 2015, DFAS advised the claimant that her claim for an SBP annuity for the period through June 30, 2007, was time barred. On September 8, 2015, DFAS advised the claimant that her case was under review by their Office of General Counsel. On September 11, 2015, the claimant maintained that the Barring Act did not apply and disagreed with DFAS's calculations of the SBP annuity.

On December 2, 2015, the claimant filed a lawsuit in United States District Court seeking payment of the SBP annuity. On June 29, 2016, the court dismissed the suit based on its lack of jurisdiction under 42 U.S.C. § 1983, and because the claimant had not exhausted her administrative remedies.

On June 7, 2016, DFAS denied the claim for additional SBP on the grounds that there was a lack of evidence that the claimant became incapable of self-support due to a condition that existed prior to her 18th birthday, or prior to her 22nd birthday had she been a fulltime student. On July 6, 2016, the claimant responded to DFAS explaining that she had been adopted by the member and described her extenuating circumstances. In their administrative report dated September 20, 2016, DFAS denied the claim on the ground of inadequate supporting information.

On November 17, 2016, the claimant responded to DFAS's denial. She argued that the member's son was ineligible for an SBP annuity because he had lived with his mother, not the member. She also claimed: (1) approval of an SBP annuity as the member's child was incapable of self-support; (2) recalculation of the SBP annuity from 2006 onward based on the member's service as an E-5 for 10 years with the claimant as the sole beneficiary; and (3) payment of an additional amount for a member killed on a ground unit patrol (*GUP*) mission. The claimant subsequently retained an attorney. On January 13, 2017, the attorney supplied DFAS with additional arguments on the claimant's behalf. He argued: (1) PTSD, anxiety, and depression kept the claimant from maintaining gainful employment; (2) her expenses exceeded her income; (3) an audit was necessary due to DFAS's alleged failure to properly apply the SBP law to her case.

On July 17, 2016, the member's son filed a claim for his 50% share of the SBP annuity arising from the member's death. He sought waiver of the six-year statute of limitations of the Barring Act under 31 U.S.C. § 3702(b). On March 30, 2017, upon recommendation of the Assistant Secretary of the Army (Financial Management & Comptroller), DOHA waived the statute of limitations in the son's case to allow payment of his SBP claim for the period between the member's death and the son's 18th birthday. On October 16, 2017, DFAS contacted the member's son to determine if he had been a fulltime student from January 2010 through April 2010. However, DFAS never received a response.

On October 30, 2017, DFAS modified their administrative report dated September 20, 2016. DFAS found that the claimant's medical records established to their satisfaction that she was incapable of self-support. DFAS recalculated the claimant's monthly SBP annuity resulting in an increase from \$837.00 to \$853.00. However, DFAS disallowed the claim as sole beneficiary for the periods: (1) September 26, 2005, through March 31, 2008, because the member's son was less than 18 years old during that period; and (2) January 1, 2010, through April 30, 2010, because the son reported being a fulltime student during that period. DFAS based their decision on the provision in 10 U.S.C. § 1450(a)(3) that a deceased member's children receive the SBP annuity in equal shares. DFAS allowed the rest of the claimant's claim as the sole SBP beneficiary, *i.e.*, DFAS concluded that the claimant is, or was, entitled to 100% of the SBP annuity only for those periods during which the member's son was not entitled to a share of it.

When DFAS forwarded the claimant's appeal package to DOHA, they reported that since the member's son never responded to their inquiry concerning his status as a fulltime student, they allowed the claimant the remaining 50% share of the SBP for the period January 1, 2010, through April 30, 2010.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claimant's claim for 100% of the SBP annuity for the period September 26, 2005, through March 31, 2008. The adjudicator disagreed with DFAS and denied payment for 100% of the SBP annuity for the period of time the member's son reported being a fulltime student. The adjudicator explained that the member's son had requested waiver of the Barring Act before, and presumably could do so in the future for this period of time. The adjudicator also examined the claimant's claim for recalculation of the SBP annuity based on the member's service as an E-5 for 10 years and an

additional amount for a member killed on a *GUP* mission. The adjudicator found that the member held the rank of an E-5 for a period of 15 months before his death. He further found that under 10 U.S.C. § 1407, in the case of a member who entered service after September 7, 1980, the SBP annuity amount is derived from the deceased member's average pay for the member's three highest years of pay. The adjudicator further explained that there is no provision in the statute for calculating an SBP annuity, 10 U.S.C. § 1451, for an additional amount in the case of a member killed while on *GUP* or otherwise in the line of duty.

In her request for reconsideration, the claimant's mother states that she is not claiming the amount paid to the member's son during the period he was a minor, September 26, 2005, through March 31, 2008, as long as the amount paid was correct. She alleges that the government owes her SBP annuity payments as the member's widow and "*GOP*" survivor payments, not *GUP* payments. She states that *GOP* payments are not part of the SBP but stand alone as a survivor benefit owed because the member was murdered during a *GOP* mission. She further states that the appeal decision did not address other issues concerning the claimant's ability to receive health insurance (Tricare) and to enroll in DEERS. She states that once his daughter was found incapable of self-support, she should have automatically been granted coverage and enrollment. However, after receiving the modified administrative report dated October 30, 2017, she contacted Tricare and DEERS and was told that DFAS's administrative report was incomplete to grant these benefits. She requests payment of \$500,000.00 for her costs and attorney's fees incurred over the last 13 years in her attempts to obtain SBP benefits for herself as the member's widow and the claimant. She maintains that DOHA's appeal decision was yet another attempt to cloud and cover up religious discrimination that started in 2005. She maintains that all the actions taken by the government after the member's death have been discriminatory because of the member's religious affiliation. The claimant also requests an indefinite extension of time to file her reconsideration request. She states that she has never received DFAS's modified administrative report dated October 17, 2017. She states that it appears that her attorney conspired with DFAS to take away her right to respond to the modified administrative report. She requests that she be provided a copy of her entire file including all emails sent between DFAS and her attorney. She alleges that both DFAS and DOHA have changed the factual background and covered up the error. She states that all she wants is what she is entitled to under the law.

Discussion

The SBP, codified under 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 10 U.S.C. §1448(d)(2), an SBP annuity may be paid to the dependent children of a deceased member who dies in the line of duty on active duty. Specifically, under 10 U.S.C. § 1448(d)(2)(B), in the case of a member who dies on active duty with a surviving spouse, the Secretary concerned, in consultation with the surviving spouse, may pay an SBP annuity pursuant to 10 U.S.C. § 1450(a)(3) to the member's dependent children instead of an SBP annuity for the surviving spouse.

Under 10 U.S.C. § 1447(11), eligible dependent children are defined as including individuals: (1) under 18 years of age; (2) at least 18, but under 22, years of age and pursuing a fulltime course of study or training in recognized educational institution; or (3) incapable of self-

support because of a mental or physical incapacity existing before the person's eighteenth birthday, or incurred on or after that birthday, but before the person's twenty-second birthday, while pursuing such a fulltime course of study or training. Eligible dependent children must be unmarried and the child of the member including an adopted child, stepchild, foster child or recognized natural child who lived with the member in a regular parent-child relationship. Under 10 U.S.C. § 1450(a)(3), payment is made to the member's dependent children in equal shares effective as of the first day after the death of the member. A child's entitlement to an equal share of an SBP dependent children's annuity ends when that child no longer qualifies under 10 U.S.C. § 1447(11).

In this case, the claimant's mother was the surviving spouse of the member at the time of his death. However, on December 8, 2005, the claimant's mother waived her entitlement to an SBP annuity and requested that the Army approve an SBP election of child only. On February 21, 2006, the Army approved this request retroactive to the member's death. The record reflects that September 26, 2005, was the day after the member's death, and April 1, 2008, was the day before the member's son's 18th birthday. An SBP annuity is paid on a monthly basis, and March 31, 2008, was the end of the month preceding the son's 18th birthday. Therefore, the son is entitled to an equal share or 50% of the SBP annuity for the period September 26, 2005, through March 31, 2008.

Although the DOHA adjudicator denied the portion of the claim for 100% of the SBP annuity during the period January 1, 2010, through April 30, 2010, the period in which the member's son reported being a fulltime student, we have been advised by DFAS that they found the son ineligible for SBP during this period and in January 2018 paid the claimant the remaining 50% of the SBP. Therefore, this issue is moot.

As for the concerns about Tricare eligibility and enrollment in DEERS, DOHA has no authority over these matters. The claimant should consult the Tricare website for information on how to file a claim under Tricare. See <https://www.tricare.mil/>.

We are unaware of *GUP* or *GOP* mission survivor benefits. However, as explained by the adjudicator in the appeal decision, there is no provision in the statute for calculating the SBP annuity for additional payments in the case of a member killed while on such a mission or otherwise in the line of duty. If this involves a Department of Veterans Affairs (VA) benefit program, the claimant should contact that agency.

As for the claimant's request for reimbursement for legal fees and payment of \$500,000.00, the liability of the United States is limited to that provided by law. See DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012). Absent such authority, there is no legal basis upon which we may authorize such payment. Any requests for documentation should be made through DFAS, as we have no authority to order DFAS to produce records. In addition, our office is an appellate organization dealing with the written record only submitted to us from the Component concerned, DFAS, and the claimant.

Finally, DOHA is prohibited from granting an indefinite extension of time. Pursuant to our Instruction, DOHA must receive a request for reconsideration within 30 days of the date of

the DOHA appeal decision. This period may be extended for up to an additional 30 days for good cause shown. However, no request for reconsideration may be accepted after this time has expired. *See* DoD Instruction 1340.21 (May 12, 2004) ¶ E7.14. Therefore, we are precluded from considering anything submitted by the claimant after May 22, 2019, or 60 days from the dated of the appeal decision.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated March 22, 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board