

KEYWORDS: RSFPP, annuity

DIGEST: A surviving spouse's failure to submit an application for the annuity within six years of the member's death, bars her Retired Serviceman's Family Protection Plan (RSFPP) claim under 31 U.S.C. § 3702(b).

CASENO: 2018-CL-061204.2

DATE: 01/18/2019

DATE: January 18, 2019

)		
In Re:)		
[REDACTED])		Claims Case No. 2018-CL-061204.2
Claimant)		

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A surviving spouse's failure to submit an application for the annuity within six years of the member's death, bars her Retired Serviceman's Family Protection Plan (RSFPP) claim under 31 U.S.C. § 3702(b).

DECISION

The court-appointed guardian of the surviving spouse of a deceased member of the U.S. Air Force (hereinafter claimant) requests reconsideration of the December 11, 2018, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-061204. In that case, this Office denied the claimant's claim for the member's RSFPP annuity because it was filed more than six years after the member's death.

Background

At the time the member retired from the Air Force in September 1971 he was married to the claimant and elected to participate in RSFPP.¹ On May 24, 2008, the member passed away. In September 2008 the claimant submitted a Standard Form 1174 (SF-1174), *Claim for Unpaid Compensation of Deceased Member of Uniformed Services*, to the Defense Finance and Accounting Service (DFAS) claiming the member's arrears of retired pay. On November 10, 2008, DFAS paid the claimant \$1,051.37 in arrears of retired pay for the period May 1, 2008, through May 25, 2008.

On November 16, 2016, the claimant was appointed a guardian. On November 30, 2016, the guardian submitted a DD Form 2656-7, *Verification for Survivor Annuity*, to DFAS, claiming the RSFPP annuity for the claimant. On January 23, 2017, DFAS denied her claim because it was untimely. Her claim was not filed within the six years as required under 31 U.S.C. § 3702(b), also referred to as the Barring Act. DFAS advised the claimant that in addition to filing an appeal of its decision to DOHA, she could request waiver of the Barring Act through the Assistant Secretary of the Air Force.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim due to the application of the Barring Act. The adjudicator also explained the process for requesting waiver of the Barring Act through the Assistant Secretary of the Air Force. He further advised the claimant that if waiver of the Barring Act was approved, she would be limited to payment of \$25,000.00. The adjudicator then explained that the Air Force Board of Correction of Military Records (AFBCMR) has the authority under 10 U.S.C. § 1552(a)(1), 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 guardian states that at the time of the member's death in 2008 the claimant was 86 years old and demonstrating signs of cognitive capacity issues. At that time, her nephew accompanied her to the local Veterans Affairs office in order to submit a claim for the RSFPP annuity. However, the claimant and her nephew were erroneously advised that she was not entitled to the annuity because the member did not pay into the RSFPP. The guardian states that it was not until she was appointed that she was able to pursue the claim. The guardian states that in her pursuit of the claim, she was also given erroneous information. She requests that DOHA reconsider the RSFPP claim and waive the statute of limitations to allow payment of the RSFPP annuity.

Discussion

The RSFPP, like the SBP now codified under 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 RSFPP annuity. All the events giving rise to the government's liability to make RSFPP payments to a survivor occur at the date of the member's

¹In 1972 the RSFPP was superseded by the Survivor Benefit Plan (SBP). However, the claimant remained covered under the RSFPP.

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. 2017-CL-062703.2 (August 31, 2017); DOHA Claims Case No. 02082608 (March 26, 2003); and DOHA Claims Case No. 98033020 (June 12, 1998).

In this case, the member elected coverage for the claimant at his retirement in 1971 and paid the RSFPP premiums on her behalf. 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 2008. The claimant failed to make a claim until eight years after it arose. Although we acknowledge her poor health and financial condition, we have no authority to allow her claim for the RSFPP annuity.

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 Air Force. Under 31 U.S.C. § 3702(e), upon request of the Assistant Secretary of the Air Force, the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for claims involving a uniformed service 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. However, the claimant must file her request directly with the Assistant Secretary of the Air Force at the following address:

Deputy Assistant Secretary of the Air Force
(Financial Management & Comptroller)
SAF/FMF, Rm #5D739
1130 Air Force Pentagon
Washington, DC 20330-1130

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 RSFPP annuity prospectively. As of June 2018 DFAS has valued the retroactive amount of the RSFPP annuity for the period May 1, 2008, through April 30, 2018, to be \$16,356.54. DFAS has also advised that the current monthly RSFPP annuity entitlement would be \$134.07.

As advised by the DOHA adjudicator in the appeal decision, DOHA has no authority to correct the record to allow the claim. However, 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.²

²Information on petitioning the AFBCMR is found online at <https://www.afpc.af.mil/Career-Management/Military-Personnel-Records/>. In order to petition the AFBCMR, it is necessary to complete the DD Form 149, *Application for Correction of Military Record*, which can be downloaded at https://www.afpc.af.mil/Portals/70/documents/06_CAREER%20MANAGEMENT/01_Military%20Personnel%20Records/DD%20149.pdf?ver=2018-03-09-115333-420.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated December 11, 2018.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

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

