

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. The claimant must prove by clear and convincing evidence on the written record that the government is liable under the law for the amount claimed.

CASE NO: 2018-CL-090701.2

DATE: 06/28/2019

DATE: June 28, 2019

In Re: [REDACTED]  Claimant	) ) ) ) )	Claims Case No. 2018-CL-090701.2
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**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. The claimant must prove by clear and convincing evidence on the written record that the government is liable under the law for the amount claimed.

**DECISION**

The claimant, the former spouse of a deceased retired member of the U.S. Air Force, requests reconsideration of the appeal decision issued by the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-090701, dated April 26, 2019.

**Background**

On August 1, 1966, the member retired from the Air Force. At that time, the Survivor Benefit Plan (SBP) did not exist. From the enactment of SBP in 1972 through 1974, there was an 18-month open season for members who retired prior to the law’s enactment to participate in the Plan. The member was not married during this period and did not elect to participate in the Plan. On December 23, 1999, the member married the claimant. The record reflects that the member and the claimant may have entered into a premarital agreement in which the member

agreed to provide the claimant an SBP annuity if it was titled in her name. On January 5, 2000, the member sent a letter to the Defense Finance and Accounting Service (DFAS) advising them of his marriage and stating his desire to cover his new spouse under the SBP. He then completed a DD Form 2656, *Data for Payment of Retired Personnel*, electing SBP spouse coverage. However, DFAS has no record of receiving this form. On December 5, 2000, DFAS received a letter from the member requesting information about SBP coverage. DFAS provided the forms to the member in a letter dated December 20, 2000.

On February 2, 2001, the member and the claimant separated. On March 10, 2001, the member sent a letter to DFAS advising them of his separation and stating that he no longer sought SBP spouse coverage for the claimant. On July 6, 2001, the member's attorney sent a letter to DFAS advising them of the same information. On October 23, 2002, the member and the claimant were divorced.

On July 30, 2006, the member passed away. On October 12, 2009, the claimant submitted a DD Form 2656-7, *Verification of Survivor Annuity*, claiming the SBP annuity as the member's spouse. Although DFAS received the DD Form 2656-7 on October 22, 2009, they took no action on it due to the absence of the claimant's address on the form.

In 2010 the claimant contacted her congressional representatives for assistance. DFAS responded to two separate congressional inquiries on behalf of the claimant. DFAS advised them that the member never established SBP coverage for the claimant. DFAS also invited the claimant to submit a copy of her divorce decree.

Also in 2010 the claimant petitioned the Air Force Board for Correction of Military Records (AFBCMR) requesting that former spouse SBP coverage be established for her. By memorandum to the AFBCMR dated November 9, 2010, Headquarters Air Force Personnel Center (HQ AFPC) provided background information on the claimant's case and the SBP law. HQ AFPC recommended denial of the claimant's petition on the grounds that they found no error or injustice in her case. The record does not contain the final determination of the AFBCMR.

From 2014 through 2017 the claimant requested assistance from her congressional representatives, the Department of Defense Inspector General and the President of the United States. The White House forwarded her claim to DFAS. DFAS denied the claim for SBP on the grounds that the member could have established SBP coverage for her pursuant to 10 U.S.C. § 1448(a)(5)(A), but did not.

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the claim. The adjudicator found that although the record reflected the member's attempts to establish spouse SBP coverage for the claimant, because of missing and required information, DFAS did not establish it. He also presupposed that even if the member had elected spouse SBP coverage under 10 U.S.C. § 1448(a)(5), spousal coverage ended upon their divorce. He found that if the member had been required under the terms of a divorce decree to provide former spouse SBP coverage to claimant, she had one year from the date of the divorce to request a deemed election. *See* 10 U.S.C. § 1450(f)(3). However, he found that the one-page submission of what appears to

be a section of a premarital agreement did not constitute evidence of a court order requiring former spouse SBP coverage. He found that although the member may have agreed to provide SBP coverage for the claimant in a premarital agreement, there was no evidence that the agreement was adopted by, incorporated into, or otherwise enforced under the divorce decree. *See* 10 U.S.C. § 1450(f)(4).

On May 5, 2019, the claimant requested an extension of time to file her reconsideration of the DOHA appeal decision. On May 10, 2019, the adjudicator granted the claimant a 30-day extension of time to file her reconsideration request. He advised her that she had until June 27, 2019, to submit all information she wished the DOHA Claims Appeals Board to consider.

In her request for reconsideration, the claimant requests an indefinite extension of time to request reconsideration. She contends that the documents she encloses reflect the receipt of the date, time and place where the “contract” was recorded. Of note, the only new document submitted is a receipt dated May 18, 2000, from the clerk of a county court in Florida for a \$4.00 payment charged for “miscellaneous” service.

### **Discussion**

Claims against the government may be allowed only for expenses authorized by statute or regulation. The claimant must prove by clear and convincing evidence on the written record, that the United States is liable to the claimant for the amount claimed. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered. *See* Department of Defense Instruction 1340.21 (May 12, 2004) ¶ E5.7. Our office 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* Instruction ¶ E7.14.

Preliminarily, we will discuss the claimant’s request for an indefinite time to submit documentation supporting her reconsideration request. Pursuant to our Instruction, we are precluded from considering anything she submits after the expiration of her 30-day extension request, or after June 27, 2019. Therefore, we will decide this case on the written record we have in front of us.

Pursuant to Public Law 92-425, 86 Stat. 706, September 21, 1972, Congress enacted the SBP, which is currently codified at 10 U.S.C. §§ 1447-1455, as an income maintenance program for the survivors of deceased members of the uniformed services. Members who retired prior to the effective date of the SBP were provided an opportunity to elect participation in SBP under subsection 3(b) of Public Law 92-425. In addition, currently, under 10 U.S.C. § 1448(a)(5)(A), a member who is not married and has no dependent children upon becoming eligible to participate in SBP but who later marries or acquires a dependent child may elect to participate in the Plan. Such an election must be in writing, signed by the member making the election and be received

by the Secretary concerned within one year after the date on which that member marries or acquires a dependent child. *See* 10 U.S.C. § 1448(a)(5)(B). A member, who is not a participant under SBP at retirement and later marries, but does not establish spouse SBP coverage for his spouse under 10 U.S.C. § 1448(a)(5)(A), and then divorces, cannot establish former spouse SBP coverage under the provisions of 10 U.S.C. §1450(f)(4), nor can his former spouse request a deemed election under 10 U.S.C. § 1450(f)(3)(A).

We find no error in DFAS's denial of the SBP claim, nor in the adjudicator's appeal decision upholding the denial. In this case, the member was not a participant in the SBP when he retired. He was not married and did not have dependent children. Although he married the claimant on December 23, 1999, he did not establish spouse SBP coverage for her pursuant to the requirements set forth under 10 U.S.C. § 1448(a)(5)(B). Therefore, when the claimant and the member divorced, former spouse SBP coverage could not be established under 10 U.S.C. § 1450(f)(3) or (4).

We note that the DOHA adjudicator did discuss the possibility of a deemed election for former spouse coverage in this case under 10 U.S.C. § 1450(f)(3) and (4). However, this discussion was on the presupposition that the member did establish spouse SBP coverage for the claimant under 10 U.S.C. § 1448(a)(5). Since the member never was a participant in SBP, former spouse coverage could not be established upon the claimant and the member's divorce.

### **Conclusion**

The claimant's request for relief is denied, and we affirm the appeal decision dated April 26, 2019. In accordance with Department of Defense Instruction 1340.21 ¶ E7.15, 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: Gregg A. Cervi

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Gregg A. Cervi  
Member, Claims Appeals Board