

KEYWORDS: SBP Annuity, Survivor Benefits

DIGEST: The mandatory language contained under 10 U.S.C. § 1448(d) specifically prohibits payment of a Survivor Benefit Plan (SBP) annuity to the surviving spouse or dependent children of a member who dies on active duty if the member is required under a court order or spousal agreement to provide an annuity to his former spouse.

CASE NO: 2019-CL-012301.2

DATE: 06/25/2019

DATE: June 25, 2019

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2019-CL-012301.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The mandatory language contained under 10 U.S.C. § 1448(d) specifically prohibits payment of a Survivor Benefit Plan (SBP) annuity to the surviving spouse or dependent children of a member who dies on active duty if the member is required under a court order or spousal agreement to provide an annuity to his former spouse.

DECISION

The claimant, the surviving spouse 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. 2019-CL-012301, dated February 27, 2019.

Background

On November 1, 1980, the member was married. On October 25, 1996, the member was divorced. The final judgment and decree of divorce incorporated a separation agreement signed by the parties on March 11, 1996. The divorce decree awarded the member’s former spouse a

portion of his retired pay. In addition, the divorce decree ordered the member to elect former spouse Survivor Benefit Plan (SBP) coverage for his former spouse at the time of his retirement. Specifically, the divorce decree stated in pertinent part the following:

Husband shall elect Survivor Benefit Plan full base coverage for Wife as spouse/former spouse at the time of Husband's retirement . . .

On July 4, 1998, the member married the claimant, and a child was born of their marriage on April 6, 2009. On June 26, 2002, the member's former spouse sent a letter to the Defense Finance and Accounting Service (DFAS) advising DFAS of her entitlement to a portion of his retired pay at his retirement as set forth under the divorce decree. The former spouse made no mention of former spouse SBP coverage.

In February 2018, after over 39 years of service, the member began to prepare for his retirement. On February 2, 2018, the member completed a DD Form 2656, *Data for Payment of Retired Personnel*, indicating his intent upon retirement to elect full SBP coverage for his spouse. The member's last day of active duty was anticipated to be May 31, 2018, with his retirement effective June 1, 2018. However, before reaching his retirement date, the member passed away on May 27, 2018, while still on active duty.

Upon the member's death, the Defense Finance and Accounting Service (DFAS) established an SBP annuity for his former spouse. The claimant, as the member's surviving spouse, submitted a claim for the annuity. DFAS denied the surviving spouse's claim on the grounds that the member had been under a court order to provide former spouse SBP coverage that had to be paid in accordance with 10 U.S.C. § 1448(d)(3). The claimant appealed DFAS's denial of her claim. The DOHA adjudicator upheld DFAS's denial of her claim for the SBP annuity.

In her reconsideration request, the claimant states that the facts are largely undisputed but she wishes to add that in 2002 DFAS sent the former spouse a letter, in response to the former spouse's request for a portion of the member's retired pay, advising her that she must deem her election for SBP within one year of the date of the divorce. However, the former spouse did not respond and did not contact the Army or DFAS in order to seek enforcement of her SBP coverage. The claimant argues that the language of the statute clearly requires that the former spouse deem her election for SBP coverage based on the divorce decree within one year of the divorce. She also contends that the statute clearly reflects congressional preference to the surviving spouse.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A claimant must prove by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. *See* DoD Instruction 1340.21 (Instruction) ¶ E5.7 (May 12, 2004). Federal

agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. *See* DOHA Claims Case No. 05033105 (November 30, 2005); and DOHA Claims Case No. 05021409 (March 30, 2005). Thus, a claimant must prove that DFAS's

interpretation or implementation of its authority was arbitrary, capricious or contrary to law. *See* Instruction ¶ E7.3.4 and DOHA Claims Case No. 07032201 (April 4, 2007).

When a retired member dies, his retired pay stops. If this occurs, the member's surviving spouse or his former spouse may be left without a substantial income. The SBP, currently codified under 10 U.S.C. §§ 1447-1455, was established by Congress in 1972 as an income maintenance program for survivors of deceased members of the uniformed services. *See* Pub. L. 92-42, 86 Stat. 706, 708 (1972). Under the original legislation, there was no authority to provide coverage for a former spouse and upon divorce, a retired member's former spouse generally lost coverage. In 1982 and 1983, the Uniformed Services Former Spouses' Protection Act (USFSPA) amended the SBP to allow a member to make a voluntary election to provide an annuity for a former spouse. Congress then discovered that an agreement to provide an annuity to a former spouse could not be enforced even if the retired member was eligible to elect coverage, since it was up to the member to make the election voluntarily on behalf of the former spouse. *See* Pub. L. 97-252, 96 Stat. 718, 730, 735 (1982); and Pub. L. 98-94, 92 Stat. 652 (1983). In 1984 Congress concluded that, while participation in SBP remained a voluntary act on the part of the retired member, since coverage under the SBP could become an item of negotiation in a divorce settlement, a former spouse should be entitled to rely on a written agreement to provide coverage. As a result, Congress passed section 644 of Public Law No. 98-525, 98 Stat. 2492, 2548 (1984), which provided that if a member had agreed in writing to cover his former spouse, the agreement was incorporated, ratified or approved by a court order and the member then refused or failed to make the election as agreed, the former spouse could make a request to the appropriate Secretary concerned within a year of the date of the court order, and the Services would "deem" an election to have been made by the member.

Therefore, in a divorce situation, participation in the SBP ensures that the surviving former spouse continues to receive payments for the remainder of their life by paying them a monthly annuity to make up for the loss of military retired pay. In a pre-retirement divorce, if the parties desire immediate SBP coverage for the former spouse, and the court order directs former spouse coverage, the member can also request former spouse SBP coverage when he retires in order to be in compliance with the court order.

The legislative history of 10 U.S.C. § 1448(d) reflects that Congress included protection for personnel still on active duty who are and were eligible to retire so that a member who remained on active duty would not earn less survivor benefits than a member who retired at the same grade and with the same years of service. *See* 55 Comp. Gen. 854 (1976); and 53 Comp. Gen. 887, 889 (1974). Prior to 1985 only the surviving spouse of a retirement eligible member who died while on active duty was covered by the SBP under 10 U.S.C. § 1448(d). In 1985 the

law was amended to extend SBP coverage to dependent children and to a member's former spouse. This amendment stated in relevant part that if a member is required under a court order or spousal agreement to provide an annuity to the former spouse upon becoming eligible to be a participant in the SBP, the Secretary concerned may not pay an annuity to the surviving spouse or dependent children. *See* Pub. L. 99-14, § 712(a), 99 Stat. 583, 670. Therefore, an SBP annuity is payable to a surviving spouse or dependent children unless an annuity is payable to a former spouse under the provisions of 10 U.S.C. § 1448(d)(3). 10 U.S.C. § 1448(d) states the following:

(d) Coverage for Survivors of Members Who Die on Active Duty.—

(1) Surviving spouse annuity.—Except as provided in paragraph (2)(B), the Secretary shall pay an annuity under this subchapter to the surviving spouse of—

(A) a member who dies while on active duty after—

(i) becoming eligible to receive retired pay;

(ii) qualifying for retired pay except that the member has not applied for or been granted that pay; or

(iii) completing 20 years of active service but before the member is eligible to retire as a commissioned officer because the member has not completed 10 years of active commissioned service; or

(B) a member not described in subparagraph (A) who dies in line of duty while on active duty.

(2) Dependent children.—

(A) Annuity when no eligible surviving spouse.—In the case of a member described in paragraph (1), the Secretary concerned shall pay an annuity under this subchapter to the member's dependent children under section 1450(a)(2) of this title as applicable.

(B) Optional annuity when there is an eligible surviving spouse.—In the case of a member described in paragraph (1) who dies after October 7, 2001, and for whom there is a surviving spouse eligible for an annuity under paragraph (1), the Secretary may pay an annuity under this subchapter to the member's dependent children under section 1450(a)(3) of this title, if applicable, instead of paying an annuity to the surviving spouse under paragraph (1), if the Secretary concerned, in consultation with the surviving spouse, determines it appropriate to provide an annuity for the dependent children under this paragraph instead of an annuity for the surviving spouse under paragraph (1).

(3) Mandatory former spouse annuity.—If a member described in paragraph (1) is required under a court order or spousal agreement to provide an annuity to a former spouse upon becoming eligible to be a participant in the Plan or has made an election under subsection (b) to provide an annuity to a former spouse, the Secretary—

(A) may not pay an annuity under paragraph (1) or (2); but

(B) shall pay an annuity to that former spouse as if the member had been a participant in the Plan and had made an election under subsection (b) to provide an annuity to the former spouse, or in accordance with that election, as the case may be, if the Secretary receives a written request from the former spouse

concerned that the election be deemed to have been made in the same manner as provided in section 1450(f)(3) of this title.

(4) Priority.—An annuity that may be provided under this subsection shall be provided in preference to an annuity that may be provided under any other provision of this subchapter on account of service of the same member.

By the mandatory language contained under this section of the statute, the Secretary concerned is prohibited from paying the annuity to a surviving spouse or dependent children if (1) the member is required under a court order or spousal agreement to provide an annuity to a former spouse upon becoming eligible to participate in SBP or (2) he has already made an election to provide the former spouse SBP coverage. The language of section 1448(d)(3)(B) refers to how the annuity will be paid to the former spouse; it will be paid as if the member had become a participant in the SBP and made the election or as if the Secretary concerned had received a deemed election from the former spouse. Under this section of the statute, there is no requirement that the former spouse “deem” an election within one year of the divorce in order to receive the annuity. Thus, a former spouse annuity takes precedence over any other SBP annuity payable because of the service of the deceased member. *See* 10 U.S.C. 14448(d)(4).

The Defense Finance and Accounting Service has consistently implemented 10 U.S.C. § 1448(d) pursuant to the statutory language through its administrative practice set forth in pertinent regulations contained in the Department of Defense Financial Management Regulations (DoDFMR). *See* Volume 7B, Chapter 46, paragraph 4603 of the DoDFMR. We have examined the two other archived versions of the DoDFMR, and the regulations are consistent with the language of the statute, and DFAS’s administrative practice.

In this case, the member was obligated based on the divorce decree to pay his former spouse a portion of his retired pay when he became entitled to receive it and to cover her as his former spouse under the SBP when he became eligible to participate in the Plan. However, the member died on active duty prior to receiving retired pay or becoming a participant in the Plan. Under the mandatory language contained in 10 U.S.C. § 1448(d)(3), DFAS properly made payment of the SBP to the former spouse.

We do agree with the claimant that the original intent of the SBP was to cover surviving spouses and dependent children of military members. However, in 1982 and 1983 with the enactment of the USFSPA, coverage was expanded to former spouses, and in 1984, Congress recognized that former spouses should be able to rely on agreements to cover them under the SBP. In 1985 Congress expanded the coverage to dependent children and former spouses of members who died on active duty. Pursuant to the 1985 amendment to 10 U.S.C. § 1448(d)(3), Congress intended that a former spouse’s court order be honored under the SBP when a member dies on active duty prior to participating in the Plan. Although in this case the member had expressed an intent to cover his current spouse, his election was still ambulatory, meaning his last election before or at his retirement would stand.

Therefore, we do not agree with the claimant’s interpretation of 10 U.S.C. § 1448(d)(3), as requiring a deemed election by the former spouse. Unless the plain meaning of a statute conflicts with its intent, we will construe a statute consistent with its plain meaning. *See* 71

Comp. Gen. 125 (1991). The statute in question specifically prohibits payment of an SBP annuity to the surviving spouse or dependent children if the member is required under a court order to provide an annuity to his former spouse.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated May 3, 2019.

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