

KEYWORDS: Survivor Benefits, SBP

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

CASENO: 2017-CL-112707.2

DATE: 10/23/2018

DATE: October 23, 2018

)	
In Re:)	
[REDACTED])	Claims Case No. 2017-CL-112707.2
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

The claimant, a former spouse of a deceased member of the U.S. Air Force, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-CL-112707, dated August 16, 2018. In that decision, DOHA upheld the Defense Finance and Accounting Service’s (DFAS’s) denial of the claimant’s claim for the member’s Survivor Benefit Plan (SBP) annuity.

Background

On February 11, 1956, the claimant and the member were married. On November 1, 1977, the member retired from the Air Force and at that time, although the member had a dependent child, he elected to participate in the SBP for spouse only at the reduced base amount. On October 17, 1988, the claimant and the member divorced. Pursuant to a settlement agreement which was incorporated into the divorce decree, the claimant was awarded a portion

of the member's retired pay and the member agreed to provide her with former spouse SBP coverage. Specifically, the settlement agreement stated the following:

The Plaintiff shall be awarded one-half of the Defendant's military pension benefits, as well as the survivor annuity benefits on that pension and any health and life insurance benefits available to him through his employer or his Air Force retirement, and the Defendant shall complete the forms necessary to have payments made directly to the Plaintiff from the Air Force Payment Office.

However, the member did not make a former spouse SBP election within one year of the date of the divorce. Further, DFAS and the Air Force have no record of the claimant submitting a request that she be deemed a former spouse for SBP purposes.

From 1988 until March 2003 the member's retired account statements (RAS) reflected the member's marital status as "Married" and no deductions were made for direct payment of a portion of his retired pay to the claimant. However, in 1992 the member executed an allotment form for recurring deposits payable to the claimant's account. On March 31, 2003, the claimant filed a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, with DFAS. On May 1, 2003, DFAS informed the member that the claimant's application had been received and that direct payments to his former spouse should tentatively commence June 2003. The member's RAS after June 2003 reflected the direct payment of a portion of his retired pay to his former spouse. However, after the divorce the member continued to make spouse only SBP premium payments until he reached "paid up" status on October 1, 2008.¹

On December 8, 2016, the member passed away. On January 12, 2017, the claimant filed a DD Form 2656, *Verification for Survivor Annuity*, claiming the SBP annuity as the former spouse of the member. DFAS subsequently denied the claim for a SBP annuity because the member did not establish former spouse SBP coverage for the claimant within one year of the date of the divorce decree as required by 10 U.S.C. § 1448(b)(3), nor did the claimant request a deemed election within one year of the issuance of the decree as required by 10 U.S.C. §1450(f)(3).

On appeal, the claimant submitted correspondence from multiple parties expressing their support for her receipt of the SBP annuity. The correspondence explained the member had expressed his intent for the claimant to receive the SBP annuity. The claimant also submitted an affidavit from her divorce attorney and included correspondence from her attorney from the 1988-1990 timeframe. Of note is an unsigned letter from November 1988 addressed to the Office of Personnel Management in Boyers, Pennsylvania requesting confirmation "that all steps necessary to preserve (claimant's) rights ... had been taken." In the appeal decision, the DOHA attorney examiner upheld DFAS's denial of the claim for the SBP annuity. He explained that although the attorney may have submitted a letter to OPM in November 1988 concerning the

¹The RAS also showed in the "Former Spouse Protection Act Deductions" section the amount of the former spouse payments to the claimant, and the next section showed her relationship as "spouse" in the "Arrears of Pay Beneficiary Information" section.

claimant's rights under the divorce decree, there was no evidence that the claimant requested a deemed election for SBP by submitting it, as required by statute, to the Secretary concerned. *See* 10 U.S.C. § 1450(f)(3)(C).

In her request for reconsideration, the claimant alleges that DOHA erred in applying the standard of review in her case. She states that she has submitted enough evidence to establish clear and convincing evidence of her request for a deemed election within one year of her divorce. She states that the evidence is sufficient to overcome DFAS's version of events. She also states that the evidence she has presented reflects her substantial compliance of a valid deemed election as set forth under *Holt. v. United States*, 64 Fed. Cl. 215 (2005). She states that the facts clearly reflect that her divorce attorney sent the divorce decree and supporting affidavit to the Air Force's Office of Personnel Management, and the Air Force repeatedly returned her filings.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. *See* DOHA Claims Case No. 2016-CL-111002.2 (October 31, 2017). The burden of proving a valid claim against the United States is on the person asserting the claim. A claimant must prove her claim 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 ¶ E5.7 (May 12, 2004).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. *See* DOHA Claims Case No. 2017-CL-081403.2 (January 8, 2018); DOHA Claims Case No. 2016-CL-111002.2, *supra*; DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012); and DOHA Claims Case No. 99102801 (July 21, 2000). Spousal coverage ends upon divorce. If a member divorces and wishes to provide SBP coverage for his former spouse, he must notify DFAS in writing of the divorce and his intention to provide coverage for his former spouse, even if the former spouse was the spouse beneficiary immediately prior to the divorce. Former spouse coverage must be established within one year from the date of the divorce. *See* 10 U.S.C. §1448(b)(3)(A)(iii). In addition, a member may be required under the terms of a divorce decree to provide SBP coverage to his former spouse. If he fails to do so, the election may be "deemed" to have been made if the Secretary concerned, here the Secretary of the Air Force, receives a written request from the former spouse requesting that such an election be deemed to have been made and a copy of the court order requiring the SBP annuity to the former spouse. *See* 10 U.S.C. § 1450(f)(3)(A). For a former spouse to invoke this deemed election, the Secretary of the Air Force must receive a request from the former spouse within one year of the date of the court order. *See* 10 U.S.C. § 1450(f)(3)(C).

In this case, the claimant argues that substantial compliance with the requirements of the SBP deemed-election process occurred and should be given effect. She contends that she did submit a written request to the Air Force concerning her divorce and benefits during the one-year period from the date of her divorce. However, the evidence she presents is a letter from her

attorney addressed to the “Air Force” Office of Personnel Management in Boyers, Pennsylvania. DFAS and the Air Force reviewed their records, and found that no request for a deemed election was received from the claimant. Although the claimant’s attorney may have sent a letter to the Office of Personnel Management, that office is responsible for civilian employee retirements and

benefits, and has nothing to do with retired Air Force members and their retirements and annuities. See OPM’s website at <https://www.opm.gov/retirement-services/contact-retirement/>. At the time of the claimant’s divorce, the Air Force Finance and Accounting Center, located in Denver, Colorado, was the responsible agency for the processing of SBP elections. This agency was never located in Boyers, Pennsylvania. Therefore, claimant’s argument for substantial compliance under *Holt*, 64 Fed. Cl. 215, cannot be supported because there is no evidence that she submitted her divorce decree to the Secretary of the Air Force during the one-year period within which she could have made a deemed election. See *Holmes v. United States*, 98 Fed. Cl. 767 (2011).

In the appeal decision the claimant was informed she may file a petition with the Air Force Board for Correction of Military Records (AFBCMR) under 10 U.S.C. § 1552, and may seek redress under 10 U.S.C. § 1454. Both of these statutes provide the Secretary of the Service concerned with the discretionary authority to correct the record that is broader than our authority to settle a claim.

Conclusion

The claimant’s request for relief is denied. In accordance with the Department of Defense 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