

DIGEST: In clear language, the statute governing the Survivor Benefit Plan (SBP) requires that a surviving spouse, *i.e.*, widow, be married to the deceased member for at least one year immediately before his death in order to receive benefits.

KEYWORDS: SBP claim

CLAIM NO: 2017-CL-121204.2

DATED: 07/30/2018

DATE: July 30, 2018

In Re:)	
[REDACTED])	Claims Case No. 2017-CL-121204.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

In clear language, the statute governing the Survivor Benefit Plan (SBP) requires that a surviving spouse, *i.e.*, widow, be married to the deceased member for at least one year immediately before his death in order to receive benefits.

DECISION

The claimant, widow of a retired 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-121204, dated May 14, 2018. In that case, DOHA denied her request for an annuity under the Survivor Benefit Plan (SBP).

Background

On September 1, 1990, the member retired from the Air Force and elected SBP coverage for his spouse. On October 23, 2008, the member's spouse died and the member notified the Defense Finance and Accounting Service (DFAS) of her death. As a result, SBP coverage was

suspended. On July 22, 2015, the member married the claimant. On August 31, 2015, the member completed DD Form 2656-6, *Survivor Benefit Plan Election Change Certificate*, in order to request SBP coverage for his new spouse. On July 14, 2016, the member died. On August 8, 2016, the claimant submitted DD Form 2656-7, *Verification for Survivor Annuity*.

On September 7, 2016, DFAS denied the claim for the SBP annuity because the claimant and the member were not married for one full year. On appeal, the claimant stated that she and the member began dating in 2008, were engaged in 2011, and started living in the same household in 2012. Due to health issues, they delayed their nuptials until 2015. She stated that she was the primary care giver to the member starting in 2012. She stated that after being hospitalized, she made the difficult decision to take the member off life support on July 14, 2016. Our office upheld DFAS's denial of the claim for the SBP annuity.

In her request for reconsideration, her attorney states that the member made it clear that he wanted the claimant to have the SBP annuity. He states that their marriage was not the type of "deathbed" marriage that the one-year waiting period in 10 U.S.C. § 1447(7) was designed to prevent. He states that the member and the claimant had a loving marriage and long courtship that preceded it. He states that their marriage was not designed to simply convey benefits. Her attorney states that the claimant could have decided to leave the member on life support for a longer period of time. However, she chose a course of action that she believed her husband wished to follow, and made the difficult decision to take him off of life support, eight days shy of the one-year anniversary of their marriage. Her requests that the Department of Defense (DoD) exercise its discretion and allow the claim for the SBP annuity because of the unique circumstances in the claimant's case. He cites the DoD Office of General Counsel Opinion: DoD/CG #97-2 for support of the claim. In that opinion, the General Counsel allowed the claim for the SBP annuity under the specific facts of the case. The General Counsel found that when it is clear that a marriage has not been a deathbed marriage, adherence to a strict interpretation of the SBP statutory language is not required where such interpretation would achieve a result clearly not intended by Congress.

Discussion

The SBP is authorized by 10 U.S.C., subtitle A, part II, chapter 73, subchapter II, §§ 1447 through 1455. The fundamental rule in adjudicating a claim is that payment may be made only for an expense authorized by statute or regulation. *See* Comptroller General decision B-257180, Sept. 29, 1994. Moreover, it is a rule of statutory construction that when the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2012-CL-061105.2 (September 27, 2012)

Title 10, U.S.C. § 1450(a)(1), states that upon the death of a retired and married member participating in the SBP, payment of the SBP annuity is authorized to "the eligible surviving spouse." "Surviving spouse" is defined for SBP purposes by 10 U.S.C. § 1447(9) as a "widow or widower." Widow is defined under 10 U.S.C. § 1447(7) as the surviving spouse of a person who, if not married to the person at the time he became eligible for retired pay, was married to

him for at least one year immediately before his death or was the mother of issue of that marriage.

The claimant was not married to the member at the time that he retired from the Air Force, and no issue resulted from their marriage. They were married on July 22, 2015, and the member died on July 14, 2016, less than one year after their marriage. The claimant's attorney cites a DoD General Counsel advance decision opinion for support of her claim. In that opinion, the General Counsel found that the widow of a member was entitled to the SBP annuity even though their current marriage at the time of his death had been less than one year. The facts in the case were as follows: The member was married to his spouse from 1978 until they were divorced in 1992. The divorce decree required the member enroll his former spouse in full SBP coverage for her and their minor child. The member retired from the U.S. Army in 1993, and elected former spouse and child SBP coverage. On December 20, 1994, the member remarried his former spouse and requested that she be covered as his spouse beneficiary under the SBP. However, the member died before the first anniversary of his remarriage to his former spouse. In the opinion, the General Counsel cited to a Comptroller General decision that allowed a similar claim for the SBP annuity upon a member's remarriage to his former spouse. The General Counsel found that there was no issue of a deathbed marriage to acquire benefits because the "new spouse" was already covered as the member's SBP beneficiary prior to the marriage. In the case in front of us, the member was never married to the claimant prior to July 22, 2015, nor was she ever his SBP beneficiary. Therefore, the facts in the case decided by the General Counsel's opinion are not analogous here.

In addition, the Secretary of Defense under the authority of 10 U.S.C. § 1455 has issued regulations regarding this matter. The Department of Defense Financial Management Regulation (DoDFMR), volume 7B, paragraph 44021 states that the spouse of a member such as here becomes eligible upon the first anniversary of the marriage. Specifically, subparagraph 440201(B) states the following:

If the member elected spouse coverage at retirement and the member's previous spouse has become ineligible for SBP due to death or divorce, the spouse who marries the member after the date of retirement is the eligible beneficiary. Spouse coverage is resumed upon the first anniversary of remarriage or birth of a child of that remarriage, whichever is earlier, unless the member elects not to resume spouse coverage within 1 year of the remarriage.

Accordingly, under applicable statute and regulations, we find that the claimant does not meet the definition of surviving spouse in order to be eligible for the SBP annuity under 10 U.S.C. § 1447. Since we are bound by statute and regulation, the claim must be disallowed.

Finally, although we do not have the authority to consider the claimant's reconsideration request, she may have other available remedies. First, under 10 U.S.C. § 1454, the Secretary of the member's service may correct or revoke an SBP election when the Secretary deems it necessary to correct an administrative error. *See* DoDFMR, volume 7B, paragraph 430606. Second, under 10 U.S.C. § 1552, the Secretary, 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.¹

Conclusion

The claimant's request for relief is denied, and we affirm the May 14, 2018, appeal decision to deny entitlement to the SBP annuity. In accordance with 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: Ray T. Blank, Jr.

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

SIGNED: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board

¹Information on petitioning the Air Force Board for Correction of Military Records (AFBCMR) is found online at <http://www.afpc.af.mil/Career-Management/Military-Personnel-Records/>. The claimant should submit a DD Form 149, *Application for Correction of Military Record*, which can be downloaded at <http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf>.