

KEYWORDS: Survivor Benefits, SBP annuity

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. Payment of a claim may only be made for an expense authorized by statute or regulation. 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.

CASENO: 2018-CL-032003.2

DATE: 09/27/2018

DATE: September 27, 2018

In Re:)
 [REDACTED]) Claims Case No. 2018-CL-032003.2
)
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. 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. Payment of a claim may only be made for an expense authorized by statute or regulation. 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.

DECISION

The claimant, the widow of a deceased retired member of the U.S. Army National Guard, requests reconsideration of an appeal decision issued by the Defense Office of Hearings and

Appeals (DOHA) in DOHA Claim No. 2018-CL-032003, dated August 15, 2018. In that decision, DOHA denied the claimant's claim for a Survivor Benefit Plan (SBP) annuity because the member failed to elect coverage for her within one year of the date of their marriage.

Background

A reserve component member usually obtains retirement eligibility prior to reaching age 60. The member in this case reached retirement eligibility in 1997, seven years prior to reaching age 60. At the time of reaching retirement eligibility he was unmarried but had dependent children. The member upon reaching retirement eligibility elected to participate in the Reserve Component Survivor Benefit Plan (RCSBP), part of the SBP. Since most documents in the case file refer to the RCSBP as the SBP and for clarity, the term SBP will be used hereafter.

When the member reached retirement eligibility in 1997 he completed a DD Form 1883, *Survivor Benefit Plan Election Certificate*, choosing coverage for his dependent children and electing Option C (immediate coverage). The member married the claimant in 1999. In 2001, 18 months after his marriage to the claimant, in a drill period shortly after the 9/11 attacks, the member completed a DD Form 1882, *Survivor Benefit Election Plan Change*. The DD Form 1882 is used to change the SBP coverage election because of marriage or a change in a dependent's status after the member's previous election. The member elected "Spouse, based on full retired pay (because of marriage)." The member affirmed his 2001 election to cover the claimant, his spouse, in 2004 when he reached age 60 and was entitled to receive retired pay. As part of the process to activate the payment of his retired pay he completed a DD Form 2656, *Data for Payment of Retired Personnel*. The DD Form 2656 has an SBP election section. The SBP section gives a member the full range of SBP election options. The member marked the box "I elect coverage for spouse only" which also then required him to acknowledge "I Do" have dependent children. Other potentially applicable SBP election options available to the member, "spouse and children" and "children only" were not chosen.

SBP premiums were withheld from the member's retired pay at the reduced child rate. This withholding was reflected on the member's monthly retiree account statement (RAS). There is no evidence in the record reflecting that the member was ever informed his 2001 or 2004 elections were invalid. The last child aged out of coverage in 2006. Claimant acknowledges child only premiums were withheld from the member's retired pay and no premiums for spouse coverage were withheld from the member's retired pay.

The DOHA adjudicator upheld DFAS's denial of the claim for the SBP annuity. The adjudicator found the record did not support the claimant's contention that the member had attempted to designate the claimant as his SBP beneficiary within a year of their marriage.

In her request for reconsideration, the claimant again acknowledges that the member did not pay premiums for spouse SBP coverage. However, she maintains that since he did pay

premiums for his children's SBP coverage, his estate should receive some benefit.¹ She also requests the interpretation of "one year" to be computed to mean 365 days a reserve component member was in military duty in a duty status to effect notice of marriage within one year. In support of her argument she sets forth the drill periods from their marriage in 1999, until the member executed the DD Form 1882 in 2001. The total the numbers of days the member was in some form of duty status equaled 62 days.

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. 2011-CL-101402.2 (February 9, 2012); DOHA Claims Case No. 05033105 (November 30, 2005); and DOHA Claims Case No. 05021409 (March 30, 2005). Thus, the claimant must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious, or contrary to law. *See* Instruction 1340.21 ¶ E7.3.4; and DOHA Claims Case No. 2011-CL-101402.2, *supra*.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. Under 10 U.S.C. § 1448(a)(1)(B), members eligible to participate in the SBP include members who would be eligible for reserve-component retired pay but for the fact that they are under 60 years of age.

The implementing regulations at the time of the member's original election in 1997 for child only SBP coverage and at the time he married in 1999, provided that a member in his situation may elect spouse coverage "within 1 year after marriage or remarriage." *See* Department of Defense Financial Management Regulation (DoDFMR) Vol 7B ¶¶ 4305 and 4307.² The member attempted to elect SBP coverage for his spouse in 2001, over 18 months after his marriage, during a drill period shortly after the 9/11 attacks. The member again attempted to elect SBP coverage for his spouse in 2004 when he was completing the paperwork to initiate the receipt of retired pay. When the member began receiving retired pay in 2004, SBP premiums were withheld from the member's retired pay at the reduced child rate. These withholdings were reflected on the member's monthly RAS. The member's last child aged out of coverage in 2006. SBP premium payments continued consistent with the member's election

¹When the member elected child SBP coverage and even though the children were no longer eligible after 2006, he still had to pay the reserve component "tack-on cost" since he had SBP coverage prior to age 60. *See* 10 U.S.C. § 1452(b)(3).

²Currently, these regulations are found under DoDFMR Vol 7B ¶ 4306.

which would have permitted immediate payment of the SBP annuity prior to the member turning age 60.

The claimant argues that the one year to make an election after marriage should be calculated based on the number of duty days a reserve component member has performed. This Board has no authority to alter or extend the meaning or interpretation of a statutory provision and its implementing regulations; or to disregard the regulations in certain individual cases. We find no error in the appeal decision.

This decision does not prevent the claimant from pursuing any other remedy that she may have. Claimant's arguments may be more appropriately addressed under 10 U.S.C. § 1552. This statute provides that the Secretary of a military department may correct or revoke any election under SBP when the Secretary considers it necessary to correct an administrative error.

Conclusion

For the reasons stated, the August 15, 2018, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-032003 is affirmed. In accordance with Department of Defense Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense under 31 U.S.C. § 3702.

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

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DOHA Claims Case No. 2018-WV-032003.2

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