

KEYWORDS: SBP, Survivor Benefits

DIGEST: Under 31 U.S.C. § 3702(b), the Barring Act, jurisdiction to consider claims is limited to those that are filed within six years after they accrue. However, under 31 U.S.C. § 3702(e), upon request of the Secretary concerned, the Secretary of Defense may waive the time limits established by the Barring Act for claims involving a uniformed service member's pay, allowances or survivor benefits, as long as a claim does not exceed \$25,000.00.

CASENO: 2018-CL-052103.2

DATE: 10/01/2018

DATE: October 1, 2018

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In Re: )

[REDACTED] )

Claimant )

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Claims Case No. 2018-CL-052103.2 )

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 31 U.S.C. § 3702(b), the Barring Act, jurisdiction to consider claims is limited to those that are filed within six years after they accrue. However, under 31 U.S.C. § 3702(e), upon request of the Secretary concerned, the Secretary of Defense may waive the time limits established by the Barring Act for claims involving a uniformed service member's pay, allowances or survivor benefits, as long as a claim does not exceed \$25,000.00.

**DECISION**

The claimant, the surviving spouse of a deceased member of the U.S. Navy, requests reconsideration of the August 3, 2018, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-052103. In that case, this Office upheld the Defense Finance and Accounting Service's (DFAS's) denial of the claim for the member's Survivor Benefit Plan (SBP) annuity because the member did not elect coverage for the claimant within one year after the date on which they were married. In addition, DOHA upheld DFAS's

application of the Barring Act to the claimant's claim for the member's arrears of pay (AOP) in the amount of \$12,241.84.

## **Background**

At the time the member retired from the Navy in 1998 he was not married. Since he was not married, his SBP election should have been recorded as "no beneficiary." However, due to an administrative error, he was provided automatic SBP coverage effective June 1, 1998. On February 14, 1999, the member and the claimant were married. The member did not make an election within one year of the date of the marriage in order to establish SBP coverage for his spouse under 10 U.S.C. § 1448(a)(5). DFAS erroneously deducted SBP premiums from the member's retired pay during the period June 1, 1998, through January 31, 2017, in the amount of \$19,267.96.

On February 20, 2017, the member passed away. The claimant submitted the DD Form 2656-7, *Verification of Survivor Annuity*, to DFAS. On April 8, 2017, DFAS erroneously established the SBP annuity for the claimant. When DFAS received the SF-1174, *Claim for Unpaid Compensation of Deceased Member of the Uniformed Services*, from the claimant, DFAS reviewed the member's retired pay account and found that they had established the SBP annuity account for the claimant in error. At that time, DFAS found that the claimant was erroneously paid SBP annuity payments in the amount of \$3,718.00. In addition, DFAS determined that since there was no SBP coverage for the claimant, the member erroneously paid SBP premiums from his retired pay during the period June 1, 1998, through January 31, 2017, causing an underpayment of \$19,267.96. However, due to the Barring Act, 31 U.S.C. § 3702(b), the administrative statute of limitations, DFAS was only able to pay the claimant a refund of the SBP premiums as AOP for the period February 21, 2011, through January 31, 2017, in the amount of \$7,026.12. The statute of limitations barred refund of the overpaid SBP premiums deducted from the member's retired pay during the period June 1, 1998, through February 20, 2011, in the amount of \$12,241.84. DFAS also determined that the claimant was due AOP for the member's unpaid retired pay for the period February 1, 2017, through February 20, 2017, in the amount \$1,036.00. Therefore, the claimant was due a payment of \$8,062.12 (\$7,026.12 for the unbarred overpaid SBP premiums + \$1,036.00). However, DFAS was required by law and regulation to collect the debt for the erroneous payment of the SBP annuity to the claimant in the amount of \$3,718.00 from the \$8,062.12 owed to her, reducing the amount paid to her to \$4,344.12. DFAS then advised the claimant that she could seek waiver of the Barring Act for the \$12,241.84 with the Assistant Secretary of the Navy.

The claimant appealed DFAS's denial of her claim for the SBP annuity and the application of the Barring Act to the \$12,241.84 in overpaid SBP premiums. In her appeal, she requested that DOHA reinstate the SBP annuity, or in the alternative, pay her the barred portion of the overpaid SBP premiums. In DOHA's appeal decision, the attorney examiner first explained that under 10 U.S.C. § 1448(a)(5), the member had to elect SBP coverage for the claimant within one year after the date of their marriage. Since the member failed to do so, the

claimant was not eligible for the SBP annuity.<sup>1</sup> Second, the attorney examiner found that DFAS properly applied the Barring Act to the \$12,241.84 in overpaid SBP premiums. He too advised the claimant that she could seek waiver of the Barring Act through the Assistant Secretary of the Navy.

The claimant was then advised that she could request reconsideration of DOHA's appeal decision sustaining DFAS's denial of her claim for the SBP annuity and upholding DFAS's application of the Barring Act to the overpaid SBP premiums. In her request for reconsideration of DOHA's appeal decision, the claimant requests that the DOHA Claims Appeals Board accept both her application for waiver of the Barring Act and her petition for correction of the member's military record under 10 U.S.C. § 1552. She enclosed both with her reconsideration request.

### **Discussion**

We construe claimant's submission as both a request for reconsideration of the denial of her claim on the merits for the SBP annuity and DFAS's denial of her claim for the refund of the overpaid SBP premiums in the amount of \$12,241.84 due to the application of the Barring Act.

First, we will discuss the claim for the SBP annuity. The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A member who is not married upon becoming eligible to participate in SBP but who later marries may elect to participate in SBP. *See* 10 U.S.C. § 1448(a)(5)(A). The member's election must be in writing and received by the Secretary concerned within one year after the date on which the member marries. *See* 10 U.S.C. § 1448(a)(5)(B). In this case, the member was not married and had no dependent children at the time he retired and became eligible to participate in SBP. He later married the claimant on February 14, 1999. However, there is no record of the member electing SBP coverage for the claimant as required under 10 U.S.C. § 1448(a)(5)(B). As noted in the appeal decision by the attorney examiner, DFAS suggested in their administrative report and denial of the claim for the SBP annuity, that the member may have assumed that the claimant was covered under SBP because he was paying monthly SBP premiums. It appears that the claimant has petitioned the Board for Correction of Naval Records (BCNR) for relief under 10 U.S.C. § 1552, requesting that the record be changed to reflect her eligibility for the SBP annuity. Under this authority, the BCNR may correct an error or remove an injustice. This authority is completely separate from DOHA's authority to settle a claim, and DOHA has no control over what the BCNR may decide.<sup>2</sup>

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<sup>1</sup>The attorney examiner also explained that there are two legal mechanisms that might, in theory, correct the record to show a timely SBP election by the member for the claimant. 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. 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. The attorney examiner explained that both avenues of relief under those statutes provide the Secretary concerned with a discretionary authority to correct the record that is broader than DOHA's authority to settle a claim under 31 U.S.C. § 3702. The claimant was advised that in order to pursue either remedy, she must contact the Secretary of the Navy.

<sup>2</sup>Information for properly submitting a petition to the BCNR can be found online at <http://www.secnav.navy.mil/mra/bcnr/Pages/home.aspx>.

Second, we will discuss the application of the Barring Act to the portion of the overpaid SBP premiums, which can be characterized as AOP due the claimant. Unfortunately, as explained above, DFAS erroneously instituted SBP coverage on the member's account when he retired in 1998 and had no eligible SBP beneficiary. This caused the erroneous deduction of SBP premiums from the member's retired pay account, resulting in the underpayment of retired pay in the total amount of \$19,267.96, for the period June 1, 1998, through January 31, 2017. DFAS properly applied the Barring Act to the \$12,241.84, the amount of the claim accruing during the period June 1, 1998, through February 20, 2011. In this regard, under 31 U.S.C. § 3702(b), jurisdiction to consider claims is limited to those that are filed within 6 years after they accrue. DFAS erroneously began deducting SBP premiums from the member's retired pay beginning on June 1, 1998. The claimant filed her claim for the member's AOP after his death by submitting the SF-1174 to DFAS. The record does not show any inquiries made, or a claim filed within six years of the accrual of the claim for the erroneous deduction of SBP premiums from the member's retired pay. Therefore, the claimant's request for the AOP in the amount of \$12,241.84 is barred. *See* DOHA Claims Case No. 2017-CL-1127404.2 (May 22, 2018); and DOHA Claims Case No. 2016-CL-101801.2 (May 30, 2017).

In her request for reconsideration, the claimant attached her request for waiver of the Barring Act addressed to the Assistant Secretary of the Navy, dated August 29, 2018. Under 31 U.S.C. § 3702(e), upon request of the Secretary concerned (in this case, the Secretary of the Navy), the Secretary of Defense may waive the time limits established by 31 U.S.C. § 3702(b) for claims involving a uniformed service member's pay, allowances or survivor benefits, as long as the claim does not exceed \$25,000.00. Under Department of Defense Instruction 1340.21 ¶ E6.4 (May 12, 2004), the Director of the Defense Office of Hearings and Appeals (DOHA) is delegated the authority to grant or deny the request on behalf of the Secretary of Defense. The Assistant Secretary of the Navy has advised us that they are in receipt of the claimant's request for waiver of the Barring Act. Upon recommendation from the Assistant Secretary of the Navy to waive the Barring Act, the claimant's request will be forwarded to DOHA for review and action.

### **Conclusion**

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated August 3, 2018.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom

Chairman, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

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

SIGNED: Gregg A. Cervi

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Gregg A. Cervi  
Member, Claims Appeals Board