

KEYWORDS: Survivor Benefits, SBP

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, to allow payment of the claim up to \$25,000.00.

CASENO: 2018-CL-051101.2

DATE: 11/29/2018

DATE: November 29, 2018

In Re:)	
Rose M. Tannis)	
Claimant)	Claims Case No. 2018-CL-051101.2
)	

**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, to allow payment of the claim up to \$25,000.00.

DECISION

The claimant, the surviving spouse of a deceased member of the U.S. Air Force, requests reconsideration of the September 18, 2018, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-051101. 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 and DFAS’s application of the Barring Act to the claimant’s claim for the member’s arrears of pay (AOP) in the amount of \$15,401.53.

Background

At the time the member retired from the Air Force in 1979 he was married to the claimant. However, on June 11, 1979, he elected SBP coverage for child only with spouse excluded on his *Survivor Benefit Plan Election Certificate*, DD Form 1883. Child only SBP premiums were correctly withheld from the member's retired pay. On March 17, 1997, the member and the claimant were divorced. Pursuant to the divorce decree, the claimant was awarded a portion of the member's retired pay, and began receiving it effective June 1, 1997. In addition, the decree granted the claimant former spouse SBP coverage. Specifically, in the divorce proceeding, the court found that the claimant was or should have been named the SBP beneficiary and the member's election to provide the SBP benefits to her should be continued and maintained in full force and effect. The court ordered the member to immediately designate the claimant, his former spouse, as his beneficiary under the SBP. On May 21, 1997, the claimant submitted a timely deemed election to DFAS for the SBP coverage. However, since the member elected child only SBP coverage when he had an eligible spouse beneficiary at retirement, a future election for former spouse SBP coverage could not be made. Due to an administrative error, DFAS erroneously instituted former spouse SBP coverage and began deductions from the member's retired pay for payment of the premiums. At this point, the member was overpaying SBP premiums from his disposable retired pay and the claimant, as his former spouse, was being underpaid her portion of the member's retired pay.

On January 7, 2005, the member and the claimant remarried. However, DFAS was not notified of the remarriage. DFAS continued to erroneously deduct former spouse SBP premiums from the member's retired pay during the period June 1, 1997, through April 30, 2013, when the member reached a paid up status. On June 20, 2016, the member passed away and the claimant submitted her claim for the SBP annuity. DFAS initially reviewed the member's SBP account and determined that former spouse SBP coverage should not have been established at the time of the divorce since the member had elected child only SBP at retirement. Therefore, DFAS denied the claimant's claim for the SBP annuity. DFAS then found that the claimant, as the member's former spouse, had been underpaid her portion of his retired pay due to the erroneous deduction of former spouse SBP premiums from it during the period June 1, 1997, through April 30, 2013, in the amount of \$5,355.84. DFAS further determined that due to the six-year statute of limitations under 10 U.S.C. § 3702(b)(1), the Barring Act, they were only able to pay the claimant for the underpayment of her portion of the member's retired pay as the member's former spouse during the period June 21, 2010, through April 30, 2013, in the amount of \$1,151.15. DFAS advised the claimant that she had the right to seek waiver of the Barring Act by submitting a request with the Secretary of the Air Force for the barred portion of the underpayment of retired pay during the period June 1, 1997, through June 20, 2010, in the amount of \$4,204.69 (\$5,355.84 - \$1,151.15). On December 30, 2016, DFAS issued the claimant a check in the amount of \$1,151.15 for the unbarred portion of the underpayment.

During the processing of the claim, DFAS became aware of the member and claimant's remarriage. DFAS determined that as the spouse at the time of the member's death, the claimant was entitled to receive the AOP. DFAS advised the claimant that a total of \$19,617.76 in SBP premiums had erroneously been deducted from the member's retired pay during the period June 1, 1997, through April 30, 2013, when the member reached a paid up status. The overpayment of SBP premiums in the gross amount of \$19,617.76 also included the portion the claimant was

underpaid as the member's former spouse in the amount of \$5,355.84. DFAS was barred by the statute of limitations from paying the claimant \$15,401.53 for the period June 1, 1997, through June 20, 210. This amount also included the barred amount of \$4,204.69 the claimant was underpaid in former spouse payments. The total unbarred portion of the erroneously paid SBP premiums during the period June 21, 2010, through April 30, 2013, was \$4,216.23 (\$19,617.76 - \$15,401.53). However, since DFAS already paid the claimant \$1,151.15 for her unbarred portion of the member's retired pay for period June 21, 2010, through April 30, 2013, they issued her a check for \$3,065.08 (\$4,216.23 - \$1,151.15) on January 26, 2017. DFAS then advised the claimant that she could seek waiver of the Barring Act through the Secretary of the Air Force for the total amount barred, \$15,401.53.

Our office upheld DFAS's denial of the claim for the SBP annuity and again explained to the claimant that she could seek waiver of the Barring Act through the Secretary of the Air Force.

In her request for reconsideration, the claimant states that she is the 75-year old widow and former spouse of the member. She states that she has submitted her request for waiver of the Barring Act to the Assistant Secretary of the Air Force.

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. A married member is eligible to participate in SBP when he becomes eligible for retired pay. However, a member may elect not to participate, elect to provide less than maximum coverage or elect to provide SBP benefits to a dependent child rather than a spouse. *See* 10 U.S.C. § 1448(a)(3)(A). Currently, the law requires spousal concurrence when a married member elects to provide an annuity for a dependent child but not for the person's spouse. *See* Pub. L. No. 99-145, title VII, § 721(a), 99 Stat. 583, 676 (1985). However, prior to the enactment of Pub. L. No. 99-145, spouses merely had to be notified of the decisions not to participate or to reduce benefits.¹ *See Passaro v. United States*, 774 F.2d 456, 457 (Fed. Cir. 1985).

A married member who validly elects child only SBP coverage at retirement is not a participant in the plan for the purpose of establishing former spouse SBP coverage, if he later divorces. *See* 10 U.S.C. § 1448(b)(2). In addition, if he later remarries, spouse SBP coverage may not be established since he chose not to participate in spouse SBP coverage at retirement. *See* 10 U.S.C. § 1448(a)(5).

In 1979 when the member retired, he was married but elected child only SBP coverage. The member properly filled out the DD Form 1883, reporting that although he was married to the claimant he was electing child only SBP coverage. The claimant acknowledges that at the time of their divorce, the member informed her that he did not have SBP coverage for her as his

¹The implementing Air Force regulation for the SBP statute in effect at the time the member made his child only election in 1979 required that the notification to the spouse be made in writing. *See Dean v. United States*, 10 Cl. Ct. 563 (1986).

spouse. The claimant also states that the member did not begin paying into the SBP for her until he was court-ordered to do so. Although the divorce decree awarded the claimant former spouse SBP coverage, under the law it could not be established because the member had declined to participate in SBP coverage for his spouse at retirement. Even though the member and the claimant remarried in 2005, SBP coverage as his spouse could not be instituted because he never established it for her at retirement.²

Since DFAS improperly established former spouse SBP coverage for the claimant, erroneous deductions for SBP premiums were withheld from the member's retired pay account resulting in a gross underpayment of \$19,617.76 during the period June 1, 1997, through April 30, 2013. DFAS properly applied the Barring Act to the \$15,401.53, the amount of the claim accruing during the period June 1, 1997, through June 20, 2010. 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, 1997. The claimant filed her claim for the member's AOP after his death. 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 \$15,401.53 is barred. *See* DOHA Claims Case No. 2017-CL-112704.2 (May 22, 2018).

The Assistant Secretary of the Air Force 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 Air Force 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 September 18, 2018.

SIGNED: Catherine M. Engstrom

²DOHA is bound by statute and regulation and therefore is unable to allow the claim for the SBP annuity. However, under 10 U.S.C. § 1552, the Secretary of a military department, 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. Information on petitioning the Air Force Board for Correction of Military Records (AFBCMR) is found online at <http://www.afpc.af.mil/Career-Management/Board-for-Correction-of-Military-Records>. The claimant may submit a DD Form 149, *Application for Correction of Military Record*, which can be downloaded at <http://www.afpc.af.mil/Portals/70/documents/Home/AFBCMR/DD%20Form%20149.pdf?ver=2016-12-15-120123-183>.

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