

KEYWORDS: SBP annuity, Survivor Benefits

DIGEST: Failure to submit an application for the Survivor Benefit Plan (SBP) annuity on behalf of a dependent child within six years of the member's surviving spouse beneficiary's death, bars the child's SBP claim under 31 U.S.C. § 3702(b).

CASENO: 2018-CL-061203.2

DATE: 12/19/2018

DATE: December 19, 2018

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2018-CL-061203.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Failure to submit an application for the Survivor Benefit Plan (SBP) annuity on behalf of a dependent child within six years of the member's surviving spouse beneficiary's death, bars the child's SBP claim under 31 U.S.C. § 3702(b).

DECISION

The claimant, the dependent adult child of a deceased member of the U.S. Air Force, through his representative, requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-CL-061203, dated October 26, 2018.

Background

On February 1, 1956, the member retired from the Air Force. In 1972 the SBP was established and an open season was held in order to allow service members retiring prior to its enactment to participate. On September 17, 1973, the member elected spouse and child SBP

coverage, and listed the claimant as his incapacitated child. On November 11, 1977, the member divorced, and no longer had an SBP spouse beneficiary. On June 8, 1979, the member remarried. On November 6, 1979, he timely requested that his new spouse be covered under SBP. He also named the claimant as his incapacitated child and requested that SBP coverage continue for him. On March 1, 1982, the member passed away. His widow timely submitted her claim for the SBP annuity, which the Air Force subsequently established for her. On April 19, 1982, the Air Force sent the widow a letter requesting additional information in order to verify if the claimant would still be entitled to an SBP annuity upon the widow's remarriage or death. However, there is no evidence in the record that additional documentation was received concerning this request.

On August 25, 2005, the widow died, and the Defense Finance and Accounting Service (DFAS) was notified of the death. On March 7, 2017, the claimant filed a DD Form 2656, *Verification of Survivor Annuity*, claiming the SBP annuity as the dependent child of the member. DFAS denied the claim because it was not filed within six years of the widow's death as required under 31 U.S.C. § 3702(b), also referred to as the Barring Act. On appeal, DFAS advised the claimant that he could request a waiver of the Barring Act through the Assistant Secretary of the Air Force (ASAF). DFAS further advised him that if waiver of the Barring Act was approved, he would be limited to payment of \$25,000.00. Since DFAS valued his claim at more than \$200,000.00, DFAS strongly recommended he petition the Air Force Board for Correction of Military Records (AFBCMR) for relief.

In the appeal decision, the attorney examiner upheld DFAS's denial of the claim due to the application of the Barring Act. The attorney examiner also explained the process for requesting waiver of the Barring Act through the Assistant Secretary of the Air Force. He also advised the claimant of the process for seeking relief from the AFBCMR under 10 U.S.C. § 1552. Under this statute, the Secretary of the Air Force, 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.

In his request for reconsideration, the claimant argues that he is not making a claim against the United States under 31 U.S.C. § 3702, but a request for survivor benefits that his father pre-paid for him. He states that the denial of the SBP annuity for him constitutes denial of personal property without compensation or at least the breaking of a contract the government held with his father, the service member, who made monthly payments for his SBP coverage in good faith. Therefore, he maintains DFAS has no right to deny his the SBP annuity because DFAS is merely a disbursing agent and guardian of his benefits during his lifetime.

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 10 U.S.C. § 1447(11), payment of an annuity is authorized for the dependent children of participating service members when they die. Eligible dependent children are defined as including individuals more than 18 years old but incapable of supporting themselves because of a mental or physical incapacity existing before their eighteenth birthday.

See 10 U.S.C. § 1447(11)(A)(ii). Under 10 U.S.C. § 1450(a)(3), the SBP annuity is payable to the member's dependent children when the member's surviving spouse is dead, dies, or otherwise becomes ineligible for the annuity.

Our authority to consider appeals of claims for uniformed services pay and allowances under 31 U.S.C. § 3702, includes claims for survivor benefits. However, under 31 U.S.C. § 3702(b), a survivor has six years to file a claim for an SBP annuity. Claims filed outside the six years are barred. See DOHA Claims Case No. 02082608 (March 26, 2003); and DOHA Claims Case No. 98033020 (June 12, 1998).

In this case, the member elected coverage for his spouse and claimant in 1973. He divorced and remarried but requested his new spouse be covered under the SBP, as well as coverage continue for the claimant. After the member's death, the SBP annuity was properly established for his surviving spouse. However, upon her death in 2005, the claimant had six years from that date to file his claim for the SBP annuity. At the time of the widow's death, all the events giving rise to the government's liability to make SBP payments to the claimant became fixed. The claimant failed to make a claim until approximately 15 years after it arose. Therefore, the claim was properly denied by DFAS.

As explained by the attorney examiner in the appeal decision, the claimant may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the Assistant Secretary of the Air Force. Under 31 U.S.C. § 3702(e), waiver shall only be granted to allow payment up to a maximum of \$25,000.00.¹ In addition to being limited to \$25,000.00, the claimant would not be awarded the SBP annuity prospectively. As explained above, the claimant may wish to pursue another available remedy. Information on petitioning the Air Force Board for Correction of Military Records (AFBCMR) can be found online at <http://www.afpc.af.mil/Board-for-Correction-of-Military-Records/>. If he wishes to pursue this remedy, he should 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>.

¹Under 31 U.S.C. § 3702(e), upon request of the Secretary concerned (in this case, the Secretary of the Air Force), 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.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated October 26, 2018.

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