

DATE: March 30, 2017

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In Re: )

[REDACTED] )

) Claims Case No. 2016-CL-090801.3

Claimant )

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**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. Further, under Department of Defense Instruction 1340.21 ¶E7.13, the Defense Office of Hearings and Appeals (DOHA) must receive a request for reconsideration within 30 days of the appeal decision.

**DECISION**

The claimant, a former spouse of a deceased member of the U.S. Navy, requests reconsideration of the November 25, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-CL-090801.2.

**Background**

On May 27, 1972, the claimant and the member were married. In 1988 the member retired from the Navy. He did not elect a Survivor Benefit Plan (SBP) annuity for the claimant prior to his retirement. However, since the claimant and the member had been married since 1972, SBP spouse coverage was automatically established. On February 2, 2012, the claimant and the member were divorced. Pursuant to the divorce decree, the claimant was entitled to receive 42.5% of the member's retired pay and the member was required to provide her with a SBP annuity. The Defense Finance and Accounting Service (DFAS) has advised our office that at the time of the claimant's divorce, they were not notified by either the member or the claimant of it, the member did not elect former spouse SBP for the claimant and the claimant did not

request a deemed election for SBP coverage.<sup>1</sup> On October 21, 2015, the member died. In November 2015 the claimant advised DFAS of his death. DFAS has advised our office that they were unaware of the claimant's divorce until that time.<sup>2</sup> However, the claimant was in proper receipt of her share of the member's retired pay upon their divorce.

DFAS subsequently denied the claimant's claim for a SBP annuity because the member did not establish former spouse SBP coverage for the claimant, nor did the claimant make a request for a deemed election within one year of the divorce.

The claimant appealed DFAS's denial of her claim to DOHA. She stated that when she submitted a claim for her portion of the member's retired pay, she also claimed the SBP annuity as his former spouse. The DOHA adjudicator upheld DFAS's denial of the claim. The adjudicator found no evidence that the member elected to provide the claimant with a SBP annuity or that the claimant requested a deemed election. The adjudicator noted that when facts are in dispute between a claimant and the agency concerned, DOHA will accept the account furnished by the agency in the absence of clear and convincing evidence to the contrary. The adjudicator further explained that payments of a portion of member's retired pay to a former spouse under the Uniformed Services Former Spouses' Protection Act (USFSPA) are distinct from those made under the SBP. Finally, the adjudicator advised the claimant that she may request reconsideration of the appeal decision, but under Department of Defense Instruction 1340.21 ¶ E7.13, DOHA had to receive such a request within 30 days of the date of the appeal decision (November 25, 2016). The appeal decision also stated that this deadline may be extended for up to an additional 30 days for good cause shown, and that no request for reconsideration may be accepted after this time has expired.

DOHA received the claimant's request for reconsideration, dated and postmarked February 8, 2017, on February 14, 2017, after the 30-day time limit had expired. In her reconsideration request, the claimant submits a DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election* signed by her on June 3, 2012. She states that after receiving a letter from DFAS in April 2012 requesting she submit the DD Form 2656-10, she filled it out and promptly submitted it to DFAS. She states that she sent it certified mail but is unable to find the certified return receipt for it. She maintains that this is evidence she submitted a timely deemed election for a SBP annuity.

## Discussion

The Board has no authority to reconsider the November 25, 2016, appeal decision. Under Instruction ¶ E7.13, DOHA had to receive the claimant's request for reconsideration within 30 days of the November 25, 2016, appeal decision (absent good cause shown for an extension).<sup>3</sup> The request for reconsideration should have been received at DOHA no later than

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<sup>1</sup>This was necessary because the claimant, as the former spouse, no longer qualified for SBP spouse coverage.

<sup>2</sup>The record reflects that the Defense Enrollment and Eligibility Reporting System (DEERS) did have a record of the claimant's divorce as of February 2, 2012.

<sup>3</sup>This provision is also codified at 32 C.F.R. Part 282, Appendix E, subparagraph (m).

December 26, 2016. That did not occur, nor did the claimant request a 30-day extension to file her reconsideration request for good cause.<sup>4</sup>

Even if the claimant's reconsideration request was timely, and we had the authority to consider this matter, it does not appear that the claimant would have been able to properly support her claim. When DOHA received the claimant reconsideration request, we sent DFAS a copy of the DD Form 2656-10. DFAS again checked their records and verified that they never received it. As set forth in the appeal decision, DOHA must accept the version of facts presented by the agency in the absence of clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 09091701 (September 24, 2009). Further, as explained by the DOHA adjudicator, under 10 U.S.C. § 1450(f)(3), the timeliness of a deemed election depends on the date of receipt by DFAS, not the date the former spouse makes or mails the request.

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* Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 43. 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.<sup>5</sup>

### Conclusion

In accordance with Instruction ¶ E7.11, the November 25, 2016, appeal decision is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board

Signed: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

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<sup>4</sup>Although DOHA may extend the period to request reconsideration for up to an additional 30 days for good cause shown, no request for reconsideration may be accepted after this time has expired. *See* Instruction ¶ E7.13.

<sup>5</sup>Information on petitioning the Board for Correction of Naval Records (BCNR) is found online at <http://www.public.navy.mil/bupers-npc/career/recordsmanagement/Pages/BCNR.aspx>. The claimant should submit a DD Form 149, *Application for Correction of Military Record*, which can be downloaded at <http://www.dtic.mil/whs/directives/forms/eforms/dd0149.pdf>.