

KEYWORDS: military member claim

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.

CASENO: 2016-CL-111002.2

DATE: 10/31/2017

DATE: October 31, 2017

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2016-CL-111002.2

**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.

DECISION

The claimant, the children of a deceased retired member of the U.S. Army, request reconsideration of an appeal decision issued by the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-CL-111002, dated June 14, 2017. In that decision, this Office denied the claim for arrears of pay (AOP) in the amount of \$1,387.00, which the Defense Finance and Accounting Service (DFAS) applied to the member's debt for unpaid Survivor Benefit Plan (SBP) premiums.

Background

The member elected spouse and children coverage under the SBP. On May 17, 1989, he retired from the Army and SBP premiums were properly deducted from his retired pay. After his spouse passed away on September 18, 1998, he notified DFAS. DFAS then terminated SBP premium deductions for the member's spouse effective the date of her death. On April 7, 2002, the member remarried. Prior to their marriage, the member and his second spouse signed a premarital agreement in order to keep their respective finances separate. On August 22, 2011, the member divorced his second spouse. On July 31, 2015, the member passed away. The claimant notified DFAS of the member's death. DFAS found that the member owed \$5,050.91 in unpaid SBP premiums for his second spouse for the period May 1, 2003, the start of the first month after the first anniversary of their marriage, through August 31, 2011, the final month of their marriage. DFAS also determined that the member was due \$1,387.00 in unpaid retired pay for the month of July 2015.

The claimant alleged that the member notified DFAS of his remarriage in 2002, and he excluded his spouse as his beneficiary under the SBP in favor of children from his first marriage. DFAS considered the matter and determined it had not been notified of the member's remarriage until after his death. Therefore, as required by statute and regulation, DFAS applied the \$1,387.00 for AOP to the member's debt for the unpaid SBP premiums for his second spouse, reducing it to \$3,663.91. This left no AOP to be paid to the member's children.

The claimant appealed DFAS's denial of the claim for AOP to DOHA. The claimant continued to assert that the member specifically declined spouse SBP coverage by submitting a notarized SBP form to DFAS in 2002. In addition, the claimant stated that the member's intention to exclude his second spouse from SBP coverage is evidenced by the premarital agreement keeping their financial interests separate, his execution of a special beneficiary form from his previous employer designating his children as beneficiaries and the documentation he submitted during his divorce proceeding. The claimant also provided a letter written by the member's former spouse dated January 27, 2016, to DFAS that concluded (emphasis in original): "**Plainly said, I do not want the DFAS Survivor Benefit Plan** and I relinquish all rights and claims to SBP." The DOHA adjudicator upheld DFAS's denial of the claim for AOP. The adjudicator found no record of the member's attempt to decline SBP coverage for his second spouse.

In the request for reconsideration, the claimant states that both the member's premarital agreement and the divorce decree did not mention the SBP annuity because the member had specifically terminated SBP coverage in 1998 when his first spouse died. The claimant asserts that the SBP annuity was not mentioned because neither attorney representing the couple considered it an asset. The claimant also contends that DFAS should not be able to hold the member liable for a debt which accrued because DFAS was unable to locate the documentation he submitted declining the SBP coverage. The claimant states that the member's estate should not be penalized in contravention of his directive to keep his financial affairs separate from his second spouse and take care of his children.

Discussion

Claims against the government may be allowed only for expenses authorized by statute or regulation. The claimant must prove by clear and convincing evidence on the written record, that the United States is liable to the claimant for the amount claimed. Arrears of retired pay payable to a member's beneficiaries upon his death is subject to collection for any debt owed on the account.

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for the survivors of deceased members of the uniformed services. *See* DOHA Claims Case No. 2011-CL-101402.2 (February 9, 2012); and DOHA Claims Case No. 99102801 (July 21, 2000). Once a member has made an election to participate in SBP, participation is irrevocable and cannot be waived by the member. *See* 10 U.S.C. § 1448 (a)(4). If the member ceases to have an eligible spouse beneficiary and later remarries, he may decline coverage for the subsequent spouse if he does so within the first year of marriage. *See* 10 U.S.C. § 1448(a)(6). Once a member is an SBP participant, he continues to be considered a participant, even during a period when he has no eligible beneficiary and no premiums are being deducted from his retired pay. Under 10 U.S.C. § 1452(a)(3), suspension of the collection of SBP premiums occurs in the absence of an eligible beneficiary, but it does not prevent the resumption of those deductions should the member acquire a new eligible beneficiary, nor does it or 10 U.S.C. § 1448(a)(2) terminate the member's participation in the SBP in the absence of an eligible beneficiary. When the member remarries, his new spouse becomes a beneficiary unless he formally declines coverage within the first year of marriage. *See* DOHA Claims Case No. 02120406 (December 19, 2002); and DOHA Claims Case No. 98060410 (September 30, 1998). There is no provision in 10 U.S.C. § 1448 or elsewhere in the SBP statutes for a beneficiary to renounce or forego an SBP annuity.

In the case before us, the member continued to be a participant in SBP after his first spouse's death. DFAS has no record of the member's attempt to decline coverage for his second spouse. Since the member did not decline SBP coverage within a year of his second marriage, under applicable law, the member's second spouse became his SBP beneficiary one year after they were married. The fact that the claimant has presented court documentation reflecting the member's intention to keep his finances separate and the member's civilian employment insurance policy expressly naming his children as his beneficiaries, does not change the mandatory requirement of the SBP statute to decline coverage within the first year of remarriage. *See* DOHA Claims Case No. 2016-CL-052003.2 (September 27, 2016). In addition, even though the second spouse submitted a letter dated after the member's death, stating she disclaimed the SBP coverage, if the member had died during their marriage, she would have received the SBP annuity, minus the amount of the uncollected premiums. *See* DOHA Claims Case No. 07030508 (March 13, 2007).

At the time of the member's death, he owed \$5,050.91 in unpaid premiums for SBP coverage for his second spouse. DFAS properly calculated the AOP as the member's final prorated retired pay in the amount of \$1,387.00. Arrears of retired pay upon a member's death is subject to collection for any debt owed on his account. As required by statute and regulation, DFAS used the AOP to offset his debt, completely consuming the AOP. *See* Volume 7B,

Chapter 30 of the Department of Defense Financial Management Regulation (DoDFMR); and DOHA Claims Case No. 206-CL-112901.2 (February 2, 2017).

Finally, the claimant requests the right to pursue other available remedies suggested by the adjudicator in the appeal decision, and then reserves the right to refile the claim for AOP. The claimant may pursue those options. However, DOHA has no involvement in those options and our decision in this matter under 31 U.S.C. § 3702, is a final action under our claims process.

Conclusion

The claimant's request for relief is denied, and we affirm the June 14, 2017, appeal decision to deny payment in the amount of \$1,387.00. In accordance with Department of Defense Instruction 1340.21, ¶ E7.11, this is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

Signed: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

Signed: Ray T. Blank, Jr.

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