

DIGEST: A surviving spouse's failure to submit an application for the annuity within six years of the member's death, bars her SBP claim under 31 U.S.C. § 3702(b).

KEYWORDS: SBP

CASENO: 2017-CL-052301.2

DATE: 8/31/2017

DATE: August 31, 2017

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2017-CL-052301.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A surviving spouse's failure to submit an application for the annuity within six years of the member's death, bars her SBP claim under 31 U.S.C. § 3702(b).

DECISION

The surviving spouse of a deceased member of the U.S. Air Force requests reconsideration of the July 20, 2017, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-CL-052301. In that case, this Office denied the spouse's claim for the member's Survivor Benefit Plan (SBP) annuity because it was filed more than six years after the member's death.

Background

At the time the member retired from the Air Force in September 1972 he was married but elected not to participate in SBP. In October 1992 he was divorced. The member remarried in November 1992. During an SBP Open Season in March 1993, the member elected SBP for his spouse. The member's request was not processed due to an administrative error, and SBP premiums were not deducted from his retired pay. When the member died on July 3, 2007, his surviving spouse became eligible for the SBP annuity. His spouse was not notified by the Defense Finance and Accounting Service (DFAS) of her eligibility. As a result, the spouse did not file a claim for the SBP annuity until March 2015. DFAS denied her claim because it was not filed within the six years as required under 31 U.S.C. § 3702(b), also referred to as the Barring Act. On appeal, DFAS advised her that she could request a waiver of the Barring Act through the Assistant Secretary of the Air Force (ASAF). DFAS further advised her that a debt had been established against her husband's account in the amount of \$22,731.24 for nonpayment of SBP premiums during the period March 1993 through June 2007. Therefore, the debt would be deducted from any amount she was able to recover through waiver of the Barring Act.

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 spouse of another available remedy under 10 U.S.C. § 1552. Under this statute, the Secretary concerned, 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 her request for reconsideration, the spouse states that due to no fault of her husband or her own, DFAS failed to process the member's SBP election. After the death of her husband, DFAS never notified her of her eligibility for the SBP annuity.

Discussion

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of retired military members. Under 31 U.S.C. § 3702(b), a survivor has six years to file a claim for an SBP annuity. All the events giving rise to the government's liability to make SBP payments to a survivor occur at the date of the member's death, and the survivor has six years from that date to file her claim. Claims filed more than six years after a member's death 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's spouse was covered under SBP from the time he elected spouse coverage during the SBP Open Season. At the time of the member's death in July 2007, all events arose which fixed the liability of the government, and entitled the spouse to make a claim. She failed to make a claim until approximately seven years after it arose. Although we recognize that the spouse may have been given erroneous information from the U.S. Department of Veterans Affairs concerning her eligibility and DFAS never notified her of it, we have no authority to allow her claim for the SBP annuity.

As explained by the attorney examiner in the appeal decision, the surviving spouse may request waiver of the Barring Act under 31 U.S.C. § 3702(e), through the ASAF. Under 31 U.S.C. § 3702(e), waiver shall only be granted to allow payment up to a maximum of \$25,000.00.¹ As previously stated, any amount recoverable would be set-off by the debt in the amount of \$22,731.24. In addition to being limited to \$25,000.00, less the amount of deducted for the debt, the spouse would not be awarded the SBP annuity prospectively. As explained above, the spouse 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 she wishes to pursue this remedy, she 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>.

Conclusion

For the reasons stated above, the claimant's request for reconsideration is denied, and we affirm the appeal decision dated July 20, 2017.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

Signed: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

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.