

DATE: February 9, 2012

In Re:)
 [REDACTED]) Claims Case No. 2011-CL-101402.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law.

DECISION

A retired member of the United States Air Force (USAF) requests reconsideration of the November 8, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-CL-101402. In the appeal decision, a DOHA adjudicator disallowed the member's claim for the refund of Survivor Benefit Plan (SBP) premiums and the reimbursement of SBP-related legal expenses.

Background

The member entered military service on September 8, 1971. In December 1971 he was married and later had two children. On July 13, 1994, the member elected SBP spouse and child coverage. Effective October 1, 1994, he retired from the USAF. At that time, SBP spouse and child coverage began, financed by premiums deducted from the member's retired pay. On August 24, 2000, the member was divorced. The final judgment of dissolution of marriage

(divorce decree) incorporated a mediation agreement signed by the parties on May 22, 2000. The divorce decree awarded his former spouse a portion of his retired pay. In addition, the divorce decree ordered the member to provide former spouse SBP coverage to be paid in equal shares by deductions from his retired pay and the former's wife's share of his retired pay. Specifically, paragraph 9.A.9 of the divorce decree stated:

The husband shall elect Survivor Benefit Plan in the maximum allowable amount and shall maintain the wife as [sic] husband's beneficiary of the S.B.P. The parties shall equally split the cost for the coverage by equal deduction from husband's military retirement and from the wife's portion of his military retirement and these acts shall not automatically result in an increase in the award of alimony payable directly by him from other sources.

The court reserved jurisdiction for the entry of such orders as might be necessary to effectuate the provisions of this paragraph.

The member's former spouse requested a deemed election of SBP by letter dated October 29, 2000. This letter was received by the Defense Finance and Accounting Service (DFAS) in November 2000. However, her request was not reviewed, and no former spouse SBP coverage was established. DFAS now attributes that inactivity to an administrative oversight.

On March 30, 2002, the member remarried but did not advise DFAS at that time. On June 30, 2002, SBP premium deductions for child coverage ended. The member's retired pay statement dated December 3, 2002, included the following remark: "NO SBP ELECTION IS REFLECTED ON YOUR ACCOUNT." By letter dated September 15, 2003, the member advised DFAS that he had remarried. DFAS established SBP spouse coverage retroactive to March 30, 2003, the first anniversary of his second marriage, and SBP premium deductions from his retired pay were made.

On May 1, 2008, the member's former spouse through her attorney contacted DFAS concerning her former spouse SBP deemed election request and coverage. DFAS subsequently reviewed the member's SBP account and considered the former spouse's SBP deemed election request. DFAS concluded that paragraph 9.A.9 of the divorce decree was ineffective because SBP law requires that premiums be paid entirely by the retired member. However, on May 20, 2008, SBP coverage was revoked for the member's current spouse and established for the former wife. On May 28, 2008, DFAS informed the former wife's attorney that she was the SBP beneficiary and that SBP deductions from the member's USAF retired pay were in effect. On May 28, 2008, the member was advised of the changes in his SBP account. On September 8, 2008, DFAS advised the member that paragraph 9.A.9 of the divorce decree was defective, but that the order could be modified by returning to court. In November 2008, SBP coverage was switched from the former wife to the current wife.

The member's former wife returned to court seeking an amendment to the divorce decree

to modify the language in paragraph 9.A.9 that had precluded the establishment of former spouse SBP coverage. By an amended final judgment dated June 17, 2009, the court modified paragraph 9.A.9 to state that the former spouse and the member would equally split the cost of SBP coverage without reference to the USAF retired pay. By order dated July 21, 2009, the court denied the member's request to credit his SBP premiums and ordered him to pay the former wife the sum of \$18,363.00 for reimbursement of her legal expenses. The appellate court upheld the trial court's ruling. On November 2, 2010, the amended final judgment became final under state law.

On November 4, 2010, DFAS received the former spouse's request for former spouse SBP deemed election with the amended final judgment. Effective December 1, 2010, she was made the SBP beneficiary. On April 7, 2011, the member claimed (1) reimbursement for all SBP premiums paid by him for his current wife's SBP coverage, (2) all of his legal expenses, (3) all the money awarded to his former spouse for her legal expenses and (4) interest on all three items. DFAS disallowed the member's claim. DFAS determined that the member's former spouse had made a timely former spouse SBP deemed election request in 2000. DFAS stated that its failure to review the request at that time was an administrative oversight, that it discovered the deemed election request in the 2008 audit of the member's SBP account and that after reviewing the divorce decree in 2008, DFAS found it inadequate for establishing former spouse SBP coverage. DFAS stated that federal law allows a former spouse to return to court to obtain a modified divorce order and a former spouse SBP deemed election be made based on the order. DFAS also stated that there was no authority for it to pay civil litigation costs.

In the member's appeal of DFAS's decision to our office, he restated his position. In addition, he argued that DFAS's admission of error came too late to help him in court. He asserted that DFAS withheld evidence, and this made it impossible for him to properly defend himself in court. He further argued that his current wife did not have SBP coverage during the 2003-2010 period and that SBP premium deductions for that coverage were improper. Therefore, he claimed a refund for \$23,600.18 for SBP premiums collected from his retired pay during the period 2003-2010 when his current wife was his SBP beneficiary.

In the appeal decision, the DOHA adjudicator upheld DFAS's decision to deny the member's claim. The adjudicator found that effective March 30, 2003, the first anniversary of the member's marriage to his current wife, his current wife became his SBP beneficiary by default in accordance with 10 U.S.C. § 1448(a)(2)(A) since he had not elected to opt out of spouse coverage as set forth under 10 U.S.C. § 1448(a)(6)(A). The coverage for the current wife did not end until November 2, 2010, when the amended final judgment which implemented a valid court order for former spouse coverage became effective. During the period between those two events, the current wife had SBP spouse coverage that would have become an annuity paid to her if the member had died. Therefore, the adjudicator found that collection of the SBP premiums through retired pay deductions to pay for the coverage was proper. The adjudicator disallowed the member's claim for legal expenses because there is no authority for reimbursement of legal expenses of an SBP annuity. Further, the adjudicator explained that although interest on the three parts of his claim is rendered moot by their disallowance, there is

no authority for payment of interest on them even if the claim is allowed.

The member now seeks reconsideration of the appeal decision. He argues that his former spouse did not properly deem her SBP election in 2000 and cites the case, *Alston v. Alston*, 960 So.2d 879 (Fla. Dist. Ct. App. 2007) [hereinafter *Alston*]. He contends that DFAS acted unlawfully by withholding evidence in 2008 and 2009 despite a subpoena and numerous documented requests for the numbered archived copies from the 2000 SBP election. He further contends that DFAS still continues to cover up the truth by not providing him with documentation that he requested under the Freedom of Information Act (FOIA). He alleges DFAS is biased against him. He argues that the precedents used by the adjudicator in the appeal decision do not apply to his case. He requests that SBP coverage be immediately returned to his current wife and that DFAS and DOHA provide written assurance that his former spouse can never challenge this or obtain SBP coverage in the future. If this is done, he states that his claim for \$23,600.18 will be null and void. However, if this request is not met, he suggests as an alternative, his former wife can keep SBP coverage and he will continue to split the cost as before, if and only if, his claim for SBP costs of \$23,600.18 plus interest is paid to him. He still claims reimbursement of attorney's fees in the amount of \$41,316.10 plus interest. He states that if there is no mechanism for payment of these fees with interest within DFAS or DOHA, then DFAS or DOHA should send his claim to the proper channels. If his requests are met, he states that he will sign a release of all further claims regarding the matter.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. A member must prove by clear and convincing evidence on the written record that the United States Department of Defense is liable under the law for the amount claimed. *See* DoD Instruction 1340.21 (Instruction) ¶ E5.7 (May 12, 2004). Federal agencies and officials must act within the authority granted to them by statute in issuing regulations. Thus, the liability of the United States is limited to that provided by law (including implementing regulations). The interpretation of a statutory provision and implementing regulation by those charged with their execution, and the implementation of them by means of a consistent administrative practice, are to be sustained unless shown to be arbitrary, capricious or contrary to law. *See* DOHA Claims Case No. 05033105 (November 30, 2005); DOHA Claims Case No. 05021409 (March 30, 2005); and DOHA Claims Case Nos. 02101611 through 02101635 (December 12, 2002). Thus, a member must prove that DFAS's interpretation or implementation of its authority was arbitrary, capricious or contrary to law. *See* Instruction ¶ E7.3.4 and DOHA Claims Case No. 07032201 (April 4, 2007).

The SBP, 10 U.S.C. §§ 1447-1460b, is an income maintenance program for dependents of deceased members of the uniformed services, and it includes provisions whereby a member may elect coverage for a former spouse. *See* 10 U.S.C. § 1448(b)(3). In recognition of the fact that coverage under the SBP could become an item of negotiation in a divorce settlement, Congress concluded that a former spouse should be able to rely on and enforce an award of

survivors benefits by a divorce court by means of a “deemed election.” *See* 10 U.S.C. § 1450(f)(3); 66 Comp. Gen. 687, 691 (1987), and the legislative history cited therein. As a result, statutory provisions have been included to provide that, if a member elects to provide coverage for a former spouse, the member shall provide the Secretary concerned with a written statement setting forth whether the election is being made pursuant to a court order or to an agreement incorporated in, ratified, or approved by court order. *See* 10 U.S.C. § 1448(b)(5). If a member who is required by court order to make such an election, or has entered into such an agreement which has been incorporated in, or ratified or approved by, a court order, then refuses or fails to make the election as agreed, the former spouse may make a request to the appropriate service Secretary within a year of the court order, and the service shall then “deem” an election to have been made by the member. *See* 10 U.S.C. § 1450(f)(3).

In this case, as noted above, the member’s former spouse was covered under the SBP as the member’s spouse beneficiary from the time he retired in 1994 until such coverage ended with their divorce in August 2000. The member had agreed to provide SBP coverage for her under the terms of the mediation agreement, which was incorporated into the divorce decree. Under the terms of the mediation agreement, he had assured her that she was his SBP beneficiary. The member failed to take any action to accomplish this outcome with DFAS. However, by letter dated October 29, 2000, the member’s former spouse submitted a timely deemed election to DFAS. However, the member asserts that his former spouse did not properly deem her SBP election in 2000 and cites *Alston* in support of this assertion, but does not explain why he contends the deemed election was improper. We do not see any support for the member’s position that his former spouse did not properly deem her SBP election under *Alston*. In *Alston*, the former spouse did not request a deemed election.¹ In addition, the record reflects that the member has previously conceded that his former spouse is the former spouse beneficiary of his SBP.² As discussed above, a member must prove his claim by clear and convincing evidence on the written record and all relevant evidence to prove the claim should be presented when a claim is first submitted. Generally, we will not review a claim based on a theory of recovery which was not raised by the claimant until a reconsideration request is filed with this Office. Although the record reflects that the member has previously conceded this argument and has not presented

¹In *Alston*, the District Court of Appeal reversed and remanded the finding of the Circuit Court granting summary judgment in favor of a former spouse. The former spouse brought an unjust enrichment suit against her husband’s widow after she was denied SBP benefits by the Army. The former spouse claimed that the marital settlement agreement (MSA) incorporated into the final judgment of dissolution of marriage provided for such benefits and moved for summary judgment. The court granted summary judgment, and the widow appealed. The appellate court remanded the case because there were issues of fact as to whether the widow knew the nature and effect of her witness signature on a military survivor benefit transfer form. This case has no precedential value in the case before us because it is a state court decision and is not a final action.

²The member states in his rebuttal to DFAS’s administrative report that he has conceded SBP to his former spouse. He also states that his former spouse did elect SBP properly.

any evidence to support it or even a theory for his contention the deemed election was improper, we do note that during the year 2000, the law required that the former spouse submit a written request in the manner prescribed by the Secretary concerned. *See* 10 U.S.C. § 1450(f)(3)(A)(i). At that time, there was no requirement that the former spouse use a DD Form 2656-10, *Survivor Benefit Plan (SBP)/Reserve Component (RC) SBP Request for Deemed Election*.³ A short letter was sufficient to make such a request. *See Holt v. United States*, 64 Fed. Cl. 215 (2005). Further, there was no legal requirement for the former spouse to follow-up with DFAS to ensure her former spouse deemed election request was received and processed. Therefore, under 10 U.S.C. § 1450(f)(3)(A), the member's former spouse's request for a deemed election protected her entitlement to SBP coverage as dictated by the court order. When DFAS subsequently reviewed the member's SBP account and considered the former wife's SBP deemed election request, paragraph 9.A.9 in the divorce decree was found to be ineffective.⁴ When an award for former spouse SBP coverage fails, a former spouse has the right to pursue an enforceable order from the appropriate state court. If a court later modifies the divorce decree to give the former spouse rights to SBP coverage, a new one-year period arises during which the former spouse can become the member's beneficiary. In this case, the member's former spouse was able to obtain a new court order for SBP, which restarted the one-year deemed election period. On November 4, 2010, she timely submitted her request to DFAS for former spouse SBP deemed election using the DD Form 2656-10 and attaching the amended final judgment. Effective December 1, 2010, DFAS properly recognized her as the former spouse beneficiary of the member's SBP account.

The member claims reimbursement of \$23,600.18 for the refund of the SBP premiums collected by deduction from his retired pay during the period 2003-2010 when his current wife was his SBP beneficiary. As explained above, when the member was divorced, spouse SBP coverage was suspended. Premiums for child coverage were deducted through June 30, 2002. *See* 10 U.S.C. § 1452(a)(3).⁵ Under 10 U.S.C. § 1448(a)(2)(A), if a member ceases to have an

³The current version of the implementing regulations for SBP elections and election changes are found under Chapter 43, Volume 7B of DoD 7000.14-R, the Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures—Retired Pay. Under paragraph 430503.C, if a member fails to make an SBP election, then the member shall be deemed to have made such election if the Secretary of the Military Department concerned receives a completed DD Form 2656-10 from a former spouse or the former spouse's attorney on behalf of the former spouse within one year of the court order.

⁴DFAS concluded that paragraph 9.A.9 of the divorce decree was ineffective because SBP law requires that premiums be paid entirely by the retired member. *See* 10 U.S.C. § 1452(a).

⁵The prescribed reduction in retired pay for a member participating in the SBP shall not be applicable during any month in which there is no eligible former spouse or spouse beneficiary.

eligible spouse beneficiary and later remarries, he may decline coverage for the subsequent spouse if he does so within the first year of marriage. We have consistently held that 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. When he remarries, therefore, his new spouse becomes a beneficiary unless he formally declines coverage within the first year of marriage. *See* DOHA Claims Case No. 98060410 (September 30, 1998). Therefore, effective March 30, 2003, the member's current wife became his SBP beneficiary one year after they married because he did not decline SBP coverage within that year. This coverage did not end until November 2, 2010, when the amended final judgment which implemented a valid court order for former spouse SBP coverage became effective. Therefore, as explained by the adjudicator in the appeal decision, the member's current wife had SBP spouse coverage, and DFAS would have established an annuity paid to her in the event of his death. *See* DOHA Claims Case No. 08110601 (November 18, 2008); DOHA Claims Case No. 02120406 (December 19, 2002); DOHA Claims Case No. 98060410, *supra*; and B-249740, June 4, 1993. The collection of SBP premiums through deductions from the member's retired pay to pay for the coverage was proper at the time.⁶

The member has failed to demonstrate that DFAS's interpretation or implementation of the SBP program was arbitrary, capricious or contrary to law. In the appeal decision, the adjudicator properly applied analogous, precedential DOHA and Comptroller General decisions. We find no error in the appeal decision. As for the member's claim for reimbursement of legal expenses and interest, the liability of the United States is limited to that provided by law (including implementing regulations). *See* DOHA Claims Case No. 2010-CL-042001.2 (August 30, 2010) and DOHA Claims Case No. 09051901 (July 16, 2009). Therefore, absent such authority, there is no legal basis upon which we may authorize payment of the legal expenses and interest claimed. *See* DOHA Claims Case No. 97031401 (April 9, 1997) and decision B-195941 (Oct. 18, 1979). Although the member requests that his claim for these expenses be forwarded by our office to the proper channels for payment, we know of no authority within the Department of Defense for payment of these expenses. Any requests for documentation from DFAS under FOIA should be made through DFAS, as we have no authority to order DFAS to produce records. Although the member raises other issues, our authority is limited to the liability of the United States for the monetary claims the member has made.

Conclusion

For the reasons stated, the November 8, 2011, appeal decision of the Defense Office of

⁶On this issue, the member has been correctly advised by DFAS that the SBP coverage during that period was valid for his current wife. However, the member continues to demand a refund for premiums insisting that he was paying for his former spouse during this time frame.

Hearings and Appeals (DOHA) in DOHA Claim No. 2011-CL-101402 is affirmed. In accordance with Department of Defense Instruction 1340.21 ¶ E7.15.2, this is the final administrative action of the Department of Defense action in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board