

KEYWORDS: SBP claim

DIGEST: The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. The claim must also be filed within the time limit specified by law.

CASENO: 2012-CL-030102.2

DATE: 7/19/2012

DATE: July 19, 2012

In Re:)
 [REDACTED]) Claims Case No. 2012-CL-030102.2
)
Claimant)

**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 claim must also be filed within the time limit specified by law.

DECISION

The claimant, the daughter a former member of the Philippine Army and his deceased widow,¹ requests reconsideration of the March 27, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-CL-030102. In that decision, this Office denied the claimant's claims for an old age pension and a Survivor Benefit Plan (SBP)

¹In the appeal decision, the DOHA adjudicator examined the claim based on the assumption that the claimant was who she purported to be, the daughter of a former member of the Philippine Army and his deceased widow.

annuity incident to her father's service during the Second World War.

Background

In the appeal decision, the DOHA adjudicator determined that the claimant failed to state and prove a claim incident to her father's active duty service in the Philippine Army from November 24, 1941, through October 23, 1944.² He also explained that even if she had a valid claim, payment would be prohibited under the "Barring Act," 31 U.S.C. 3702(b).³

A representative of the claimant has requested reconsideration. The representative requests that our Office refer to the provisions of mustering-out pay. In addition, the claimant requests insurance payments.

Discussion

The burden of proving the existence of a valid claim against the United States is on the person asserting the claim. *See* DOHA Claims Case No. 2011-CL-100714.2 (January 20, 2012) and DOHA Claims Case No. 08112402 (November 26, 2008). A claimant 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. The adjudicator correctly explained why the claimant did not prove her claims. He also explained the application of the "Barring Act," 31 U.S.C. § 3702(b). *See* DoD Instruction 1340.21 (Instruction) ¶ E5.7 (May 12, 2004). The adjudicator specifically explained that a claim for a pension based on old age is not among the types of claims cognizable under 31 U.S.C. § 3702(a)(1). In regard to her claim for an SBP annuity, the adjudicator explained that even if it was not time-barred, her claim would still not be allowed because her father could not have participated in SBP. He died sometime between 1941 and 1944. Therefore, he could not have participated in SBP because it was enacted in 1972, nor could he have participated in any other SBP-like programs such as the Uniformed Services Contingency Option Act (USCOA), or the Retired Serviceman's Family Protection Plan (RSFPP), because they were enacted in 1953 and 1961, respectively.

As for the new claims for mustering-out pay and insurance payments she raises in her reconsideration request, all relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered. *See* Instruction ¶ E5.7. In

²The record reflects that the member entered active duty on November 24, 1941. From December 8, 1941, through December 22, 1941, his status was determined to be "beleaguered." His status was listed as missing from December 23, 1941, until October 23, 1944, when he was presumed dead.

³Any claim for pay for her father's service in the U.S. Army would be barred by the six-year statute of limitations established by 31 U.S.C. § 3702(b)(1), popularly known as the "Barring Act."

this instance, even if this Office were to examine the record for mustering-out pay, it would also be prohibited under the “Barring Act,” 31 U.S.C. § 3702(b). Even if the claim for mustering-out pay was not time-barred, her claim would still not be allowed because she is not eligible under the law. The Mustering-Out Payment Act of 1944 provided that only those members of the Armed Forces who were engaged in active service during World War II and who were discharged or relieved from active service were eligible to receive mustering-out pay under the Act. The death of the member while on active duty was not a discharge or relief from active service for the purposes of the Act. Thus, the member’s death did not give him a right to mustering-out pay. *See* B-172191, Apr. 9, 1971.⁴ As for the claim for insurance payments, the claimant has not presented any evidence that the United States is liable to her for insurance payments.⁵ We further note that insurance payments are not among the types of claims cognizable under 31 U.S.C. § 3702(a)(1).

Finally, the adjudicator advised the claimant that she may request reconsideration of the appeal decision, but under ¶ E7.13 of the Instruction, DOHA had to receive such a request within 30 days of the date of the decision, March 27, 2012. The adjudicator also advised the claimant that this deadline may be extended for up to an additional thirty days for good cause shown, and no request for reconsideration may be accepted after this time had expired. A fax number was provided to the claimant to assist in meeting the deadline.⁶

⁴We further note that mustering-out pay could be paid to the heirs of a member if he died after a right accrued upon his discharge from the service.

⁵The record reflects that the claimant’s mother received payments characterized as insurance from the U.S. Department of Veterans Affairs (VA). However, there is a letter from the VA addressed to the claimant dated July 16, 2004, concerning burial expenses for her mother who died on January 14, 2004. In this letter, the claimant was advised that her mother’s entitlement to benefits stopped on the last day of the month prior to the month in which her mother died, *i.e.*, December 31, 2003. The claimant may continue to pursue her claim through whatever process is provided by the VA. However, this Board does not have authority to review the decisions of the VA.

⁶DOHA received the request for reconsideration on July 16, 2012, with no request for additional time or good cause shown.

Conclusion

The claimant's request for relief is denied, and we affirm the March 27, 2012, appeal decision. In accordance with DoD Instruction 1340.21 ¶ E7, this is the final administrative action of the Department of Defense 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board