

KEYWORDS: claim for SBP; Philippine Army

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-030104.2

DATE: 10/04/2012

DATE: October 4, 2012

In Re:)
 [REDACTED]) Claims Case No. 2012-CL-030104.2
)
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 widow of a former member of the Philippine Army (PA) during World War II requests reconsideration of the April 2, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-CL-030104. In that decision, this Office denied the widow's claims for an old age pension and a Survivor Benefit Plan (SBP) annuity incident to her husband's service in the PA.

Background

In the appeal decision, the DOHA adjudicator determined that the claimant failed to state and prove a claim incident to her husband's service in the PA. The record reflects that the member was born on April 30, 1917. He was commissioned as a Third Lieutenant in the PA on June 3, 1939. He was called to active duty in the PA on August 16, 1941. He was inducted into the United States Armed Forces-Far East (USAFFE) on September 1, 1941. The member was discharged on January 28, 1946. Since the member was discharged from the PA when it was under United States command, he was not a retired member of one of the uniformed services of the United States.¹ Therefore, he could not have participated in the SBP.

A representative of the claimant has requested reconsideration. The representative requests that we reexamine the claimant's right to a pension based on old age because she is 60 years old. In addition, the representative requests that our Office refer to the provisions of mustering-out pay.

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-100712.3 (May 17, 2012) and DOHA Claims Case No. 2011-CL-100714.2 (January 20, 2012). 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. *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 her husband could not have participated in SBP. He was discharged, not retired, in 1946. Under the SBP statute, an eligible participant must be entitled to retired pay. Therefore, he could not have participated in SBP because he was not entitled to retired pay.²

As for the new claim for mustering-out pay she raises in her reconsideration request, all portions of a claim and 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 this instance, even if this Office were to examine the record for mustering-out pay, it would be

¹Although there is evidence of the member's military service subsequent to his discharge, this service was in the Armed Forces of the Philippines (AFP).

²The SBP itself was not created until 1972. However, the adjudicator further explained that there was no evidence that the member participated in any other SBP-like programs such as the Uniformed Services Contingency Option Act (USCOA), and the Retired Serviceman's Family Protection Plan (RSFPP).

prohibited under the “Barring Act,” 31 U.S.C. § 3702(b).³ Since the member was discharged from military service on January 28, 1946, any claim that he had for mustering-out pay accrued on that date. The claim for mustering-out pay was not received here until September 27, 2012, more than 66 years after the date of his discharge. Thus, consideration of the claim for mustering-out pay is prohibited, and there is no further action this Office may take on such a claim. *See* B-171422, Jan. 4, 1971; and B-168909, Feb. 16, 1970.

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, April 2, 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.⁴

Conclusion

The claimant’s request for relief is denied, and we affirm the April 2, 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: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board

³Any claim for mustering-out pay would be barred by the six-year statute of limitations established by 37 U.S.C. § 3702(b)(1), popularly known as the Barring Act. At the time the member was discharged, the time limit was ten years. That limit has also not been met.

⁴DOHA received the request for reconsideration on September 27, 2012, with no request for additional time or good cause shown. Even with an extension, the latest date on which a request for reconsideration could be granted was June 1, 2012.