DATE: April 24, 2013

In Re:	)	
[REDACTED]	)	Claims Case No. 2012-CL-082003.2
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

Correction board action is implemented to correct an error or remove an injustice, and is final and conclusive on all officers of the United States.

DECISION

The Defense Finance and Accounting Service (DFAS) appeals the September 12, 2012, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-CL-082003. In that decision, this Office approved the claimant's request for a Survivor Benefit Plan (SPB) annuity.

Background

The member retired on January 1, 1992, and elected Survivor Benefit Plan (SBP) annuity coverage for his spouse and children. The member died on February 23, 2001; and his widow, the claimant, applied for an SBP annuity.[1] An SBP annuity was established and paid to her. The claimant also became eligible for Dependency and Indemnity Coverage (DIC) payments from the Department of Veterans Affairs (VA). Since the amount of her DIC payments exceeded the amount of her SBP payments, and thus completely offset them, her SBP annuity was terminated on December 1, 2001. The SBP premiums that had been deducted from the member's retired pay were refunded to her.[2]

In 2003, the claimant made multiple inquiries to the VA and the Defense Finance and Accounting Service (DFAS) about the effects to her benefits should she remarry before the age

[1] There were no longer any children of the member who were eligible for an SBP annuity.
[2] *See* 10 U.S.C. § 1450(e)(1).

of 55 years. She maintains that she was told that she could remain in the SBP by buying back into it, and that remarriage before 55 years of age would not be a factor. DFAS maintains they do not have any record of these conversations.[3] By letter to DFAS, dated November 21, 2003, the claimant advised that she was planning to remarry on January 31, 2004. Since that action would terminate her DIC payments, she asked to buy back into the SBP. On January 31, 2004, at 54 years of age, the claimant was married in North Carolina. She advised DFAS of the remarriage by letter dated February 26, 2004. The claimant turned 55 on March 5, 2004.

By letter to the claimant, dated March 16, 2004, DFAS advised her that her SBP coverage was being terminated because she had remarried before the age of 55. However, she was apparently later told that she could buy back into the SBP, and in August 2004 she paid $8,009.73 to reenter the SBP.[4] DFAS later ended her SBP coverage due to remarriage before the age of 55.[5] The claimant's payment was refunded to her, but only after Congressional intervention.

DFAS continued to deny the claimant relief, until she was eventually advised that she could petition the Air Force Board for Correction of Military Records (AFBCMR). The claimant petitioned the AFBCMR by DD Form 149, dated March 9, 2009. Under the authority of 10 U.S.C. § 1552(a) the AFBCMR, docket number BC-2009-01144, dated September 16, 2010, stated:

> THE BOARD CONCLUDES THAT:
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> 1. The applicant has exhausted all remedies provided by existing law or regulations.
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> 2. The application was timely filed.
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> 3. Sufficient relevant evidence has been presented to demonstrate the existence of error or injustice. The applicant has shown she was miscounseled repeatedly by the authorities who should have known enough about their program to properly advise her. She provided a letter from DFAS (in response to a Congressional inquiry) wherein DFAS apologized for their miscounseling and referred her to this Board for relief. In arriving at our decision, we are keenly aware the courts have held that correction boards have an abiding moral sanction to determine, insofar as possible, the true nature of an alleged injustice and take steps to grant thorough and fitting relief. Therefore, we recommend that the records be corrected as indicated below.
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> THE BOARD RECOMMENDS THAT:
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> The pertinent military records of the Department of the Air Force relating to APPLICANT be corrected (as an exception to policy) to show that his former spouse remarried on 6 March 2004, one day beyond her 55th birthday; that this correction is of

[3] This is in contrast to a letter provided to the AFBCMR in which DFAS apologized for the miscounseling.
[4] This was, in fact, $7,855.00 for the buy back into SBP, plus interest for the account being delinquent.
[5] The DFAS letter, dated March 16, 2004, makes reference to the claimant's letter dated February 26, 2004, in which she requested information concerning her SBP account, and informed them of her marriage.

limited scope so as to only affect his Air Force records for the sole purpose of affording the relief to rectify the injustice in this case; and that this correction will have no impact on the former spouse's civil records.

On November 10, 2010, DFAS (Retired and Annuity Pay Operations) informed the claimant that they had received the decision of the AFBCMR. They stated that the action the AFBCMR directed could not be accomplished, because the action by the Board was invalid. They stated that they use public records to determine if a former spouse was married prior to age 55. By letter to her Congressman, dated April 20, 2011, DFAS attempted to clarify their letter from their Retired and Annuity Pay Operations. DFAS stated that they acknowledge that the AFBCMR changed the military records to reflect his former spouse remarried after her 55th birthday. They clarified that they do not look to the military member's record to determine the official date of a marriage; rather, they look to the civil marriage record. DFAS stated this is because applicable case law unequivocally dictates that state law controls when a marriage is contracted. DFAS contended that since state law controls the contracting and recording of a marriage, and the state civil record still reflects that the claimant was married January 31, 2004, then she is not currently eligible for SBP benefits. DFAS continued to indicate that if the claimant's current marriage ended by death, divorce, or annulment, she would become an eligible SBP beneficiary entitled to receive annuity payments on the first day of the month after the marriage is ended.[6] DFAS provided a further response to the claimant's Congressman on September 2, 2011, essentially reiterating their previous position.

DFAS received a letter from the claimant on February 7, 2012, challenging their determination to deny a SBP annuity to the claimant. While the appeal to DFAS may appear to be untimely, DFAS treated the appeal as timely and forwarded it to DOHA for the following reasons. DFAS made their initial determination in this matter on November 15, 2010, when they denied payment. They then responded to subsequent inquiries from the claimant's Congressman in April 2011 and in September 2011. In the three responses provided by DFAS, the right to appeal the denial or the applicable time lines for appeal were never explained as required by 32 C.F.R. Part 282, Appendix D, subparagraph (a)(6)(ii). DFAS provided the administrative report, dated June 19, 2012, to the claimant on the same date with instructions on how to appeal to DOHA and to provide a rebuttal. When no rebuttal was forthcoming, DFAS forwarded the appeal to DOHA with their administrative report, and it was received in this Office on August 20, 2012. DOHA considered the appeal timely, based on the fact that appeal rights had not previously been provided.[7]

In the appeal decision dated September 12, 2012, DOHA accepted the record correction and allowed the claimant's request for an SBP annuity. DFAS requested reconsideration of the DOHA appeal decision on November 13, 2012. DFAS argues the Board's action was invalid because its implementation would conflict with DFAS' policies and procedures, state law was controlling under the circumstances, and DOHA's appeal decision went against case precedent.

[6] *See* 10 U.S.C. § 1450(b)(3).
[7] *See* DOHA Claims Case No. 2006-WV-072106.2 (April 7, 2011).

Discussion

As the DOHA adjudicator properly noted, it is a well-established rule that a claim may only be paid for an item authorized by statute or regulation. *See* Comptroller General decision B-205113, Feb. 12, 1982. When the language of a statute is clear on its face, the plain meaning of the statute will be given effect, and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 05021409 (March 30, 2005).

Under 10 U.S.C. 1552, the Secretary of a military department, acting through a civilian board, has broad authority to correct a military record if he considers it necessary to correct an error or remove an injustice. In the absence of fraud, proper correction of a record under this statute is final and conclusive on all officers of the United States. *See* 10 U.S.C. § 1552(a)(4).[8] This is an equitable remedy within the discretion of the service concerned. Generally, such a change can give rise to the accrual of new, previously noncognizable claims for military pay and other pecuniary emoluments. Our Office has jurisdiction to resolve administrative claims for military pay and other emoluments based on changes to a military record, under our general statutory responsibility to settle claims against the United States except those which are otherwise specifically provided for by law. *See* 31 U.S.C. § 3702. Therefore, our role is to apply the pertinent facts, as shown in the corrected record, to determine the claimant's entitlement. Since action by the Board is final and conclusive on officers of the United States, it is not subject to our review. *See* 55 Comp. Gen. 961 (1976); and B-205199, Jan. 28, 1992.

Under 10 U.S.C. § 1450(a)(1), the SBP annuity is payable upon the retired member's death to that member's "eligible surviving spouse." "Surviving spouse" is defined for SBP purposes by 10 U.S.C. § 1447(9) as "a widow or widower." "Widow" is defined by 10 U.S.C. § 1447(7) as "the surviving wife of a person who, if not married to the person at the time he became eligible for retired pay- (A) was married to him for at least one year immediately before his death; or (B) is the mother of issue by that marriage." The claimant would qualify for SBP on all counts of this provision as she was married to the retired member when he retired, they were married 33 years prior to his death, and there was issue of the marriage.

However, 10 U.S.C. § 1450(b) contains the provisions which allow for termination of the spouse annuity upon death or remarriage before age 55. If the surviving spouse remarries before reaching age 55 and that marriage is terminated by death, annulment, or divorce, payment of the annuity shall be resumed effective as of the first day of the month in which the marriage is so terminated.

Since the claimant remarried at the age of 54, she would not be entitled to an SBP annuity under 10 U.S.C. § 1450(b)(2). However, the claimant appealed to the AFBCMR to correct the record due to miscounseling she received from DFAS. Under 10 U.S.C. § 1552(a), "the Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. . . . [S]uch

[8]The procedures for making payments and the settlement of claims resulting from correction of military records are found under Chapter 10, Volume 7B of DoD 7000.14-R, the *Department of Defense Financial Management Regulation (DoDFMR), Military Pay Policy and Procedures – Retired Pay*.

corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. . . . Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States."[9]

Despite the statutory directive that the decisions of these civilian boards to correct a military record are final and conclusive on all officers of the United States, DFAS has refused to accept the correction of the record of the claimant's spouse, or rather they will correct the military record, but they refuse to accept the mandate of the AFBCMR that they then rely upon that record to accord the claimant SBP benefits. DFAS contends that the AFBCMR has exceeded their authority in attempting to mandate that DFAS must rely solely upon a military record to settle a claim, when the policies and procedures of DFAS require that the state record must be relied upon to determine the record of the claimant's marriage.

The analysis of the DOHA adjudicator noted that there are just two exceptions to the binding effect of a correction board action. The first exception, under 10 U.S.C. § 1552(a)(4), is if the record correction was obtained by fraud. Fraud has been neither alleged nor shown in the case at hand. The second exception is if the correction board did not actually change the facts in the records at issue, but merely recited them. *See* DOHA Claims Case No. 96121102 (August 22, 1997). In the case at hand, the facts were changed to correct the date of the claimant's second marriage. Such a correction of fact was within the broad authority granted to the Secretary of the Air Force under 10 U.S.C. § 1552 and is final and conclusive on all officers of the government. The rights of the member's widow are governed by the proper application of the statutes to the facts shown in the corrected record. The Board determined, as it was empowered to do under 10 U.S.C. § 1552, that the claimant was remarried on March 6, 2004. Since the corrected record shows that the claimant remarried on March 6, 2004, one day after her 55th birthday, she is entitled to the SBP annuity.

In response to the legal concerns that DFAS raised in their administrative report, the adjudicator noted that there were four points to allay them. First, the AFBCMR clearly stated that the record correction pertained only to the instant case. Second, the AFBCMR clearly stated they did not intend to intrude into the purview of the states over marriage records. Third, federal deference to that purview is not absolute and will not be followed if it threatens federal interests. *See Rose v. Rose*, 481 U.S. 619, 625 (1987). To ignore the lawful record correction by the AFBCMR in the instant case would threaten the ability of that Board and its counterparts to correct records in order to remove errors and injustices. Fourth, the appeal decision applies only to the instant SBP claim of the claimant and has no value as precedent regarding other SBP claims.

DFAS contends that legal precedent does not support DOHA's conclusion. Thus, it maintains that the appeal decision is in error because DOHA failed to consider that the AFBCMR exceeded their authority in attempting to mandate that DFAS must rely solely upon a corrected military record to settle a claim. They disagree with DOHA's conclusion that the

[9] *See also*, DoD Financial Management Regulation (DoDFMR) 7000.14-R, Volume 7B, Chapter 10, para 100101-100102.

application of 10 U.S.C. § 1552 in this case requires that a member's corrected military record preempts a state's record of a person's marriage date.[10]

Since DFAS has questioned the authority of the AFBCMR to correct a military record as it did here, we will review the authority of boards of corrections. Prior to 1946, disputes arising out of an individual's service to his country in times of war and peace were resolved by the passage of private bills by Congress. Due to the large number of requests from service members after World War II, Congress recognized a need to relieve itself of this burden. They created administrative boards for the correction of military records within each of the military services.[11] Within the first five years of operation, the correction boards processed over 15,000 claims, approximately 1,400 of which were acted upon favorably.[12] However, in 1948 the Comptroller General decided that appropriated funds could not be used to pay any claim arising from a correction in military records.[13] Congress quickly moved to mitigate the position of the Comptroller General by amending the Legislative Reorganization Act in 1951.[14]

During discussions of the amendments, a representative of the Comptroller General noted that the General Accounting Office (GAO) desired the authority to make final settlement of claims pursuant to the correction of military records, without regard to the boards' actions. The fundamental concern of GAO was that the language regarding the finality of the correction boards' actions would impair the Comptroller General's auditing authority.[15] Congress expressly denied the Comptroller General such broad authority, but permitted the GAO to retain its normal auditing functions.[16] In accordance with Congressional intent, the only inquiry the Comptroller General was permitted to make should payments result from a correction board

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[10] As to the second point, DFAS cites the following: (A) Congress did not positively require in 10 U.S.C. § 1552 that a changed military record should preempt a state's law to provide military benefits; (B) if Congress had so intended, it would have done so with force and clarity; (C) DFAS' reliance upon the state marriage record to determine military benefits does not conflict with express terms in the statute such that preemption is required; (D) DFAS' reliance upon the state marriage record does not injure the ability of a BCMR to correct errors or injustices; and (E) *Midgett v. U.S.*, 603 F.2d 835 (Cir.1979), is persuasive in finding that DFAS' reliance upon the state marriage record also does not interfere with important federal policies.

[11] *See* Glosser and Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 Am. U. L. Rev. 391 (1973). The Legislative Reorganization Act, ch.753, § 207, 60 Stat. 812, 837 (1946), provided: The Secretary of War [currently the Secretary of Defense], the Secretary of the Navy, and the Secretary of the Treasury [currently the Secretary of Homeland Security] with respect to the Coast Guard, respectively, under procedures set up by them, and acting through boards of civilian officers or employees of their respective departments, are authorized to correct any military or naval record where in their judgment such action is necessary to correct error or remove an injustice.

[12] *Hearings on H.R. 1181 Before the House Comm. on Armed Services*, 82d Cong., at 446 (1951).

[13] 27 Comp. Gen. 665 (1948). *See also*, Rosenberg, *The Relationship Between Military Correction Boards and The Comptroller General: Finality of Correction Board Decisions Under 10 U.S.C. Section 1552*, 22 Am. U. L. Rev. 222 (1972) (July 19, 1972).

[14] These amendments were introduced as H.R. 1181, 82d Cong., 1st Sess. (1951). The amendments were ultimately codified in 10 U.S.C. § 1552(c) (1970), which provided in pertinent part: "The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine of forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be."

[15] *Hearings on H.R. 1181 Before SubComm. No. 3 of the House Comm. on Armed Services*, 82d Cong., at 369 (1951).

[16] H.R. Rep. No. 449 (1951).

action was to ascertain whether the payment was mathematically accurate. The Comptroller General's auditing function is not involved here, but rather the claims settlement authority over which GAO, at that time, also had authority. However, the Comptroller General was, in effect, requesting the authority to choose whether to follow Board corrections. With regard to the settlement of claims, the principle is similar. The agency settling a claim on a corrected record, in this case DFAS, is to calculate the settlement on the record as corrected.

DFAS notes that while 10 U.S.C. § 1552 makes provision for the settlement of claims due as a result of the correction of a member's military records, the claim settlement to be made must be determined "solely upon a proper application of the pertinent laws and regulations to the facts shown by the corrected record."[17] DFAS believes that the natural progression of the Comptroller General's decisions that the correction boards' authority does not extend to determining the financial results of a record correction means that the boards cannot dictate which records should be used by DFAS in determining the date the claimant was remarried. DFAS states that it does not dispute the board's authority to effect relief by correcting military records to reflect factual fictions; however, it has determined that the correction board's authority does not extend to creating a fiction that ignores the requirement to rely on state law. In effect, DFAS is claiming the authority to choose which correction board actions it will follow, just as the Comptroller General tried to assert earlier. Congress settled the issue in 1951. As long as a correction board performs a genuine correction of a military record, DFAS' authority is limited to calculating the proper amounts due under the correction.

DFAS misconstrues the conclusions of the Comptroller General in the GAO decisions cited in the previous paragraph. (*See* footnote 17.) In those decisions, the Comptroller General gave effect to the BCMR actions which restored certain members to active duty. The decisions involved the calculation of the amounts due the members as a result of the corrections, particularly whether certain amounts had to be deducted from the amounts otherwise due. DFAS properly cites the Comptroller General's statement that a settlement should be determined "solely upon a proper application of the pertinent laws and regulations to the facts shown by the corrected record." More emphasis, however, should be placed upon the term "corrected record." Because the Comptroller General had already given effect to the BCMR actions and was discussing financial calculations to be made as a result of those actions, the "pertinent laws and regulations" to be applied were those dealing with financial entitlements which would accrue to the records as corrected. In this case, the record as corrected already contains the marriage date set down by the AFBCMR. That information is final and conclusive on DFAS.

Much of DFAS' appeal brief concerns a perceived conflict between federal and state interests in the case before us. There is no such conflict. First, the AFBCMR stated that they had no intent to create a conflict or change a state marriage record. Their intent was merely to correct an injustice. Second, the state has no legal interest at stake in this matter. The federal government generally uses state marital records as a convenience because states administer such records. As long as the AFBCMR does not ask the state to correct the date of the claimant's marriage in the state's records, there is no state policy or interest in jeopardy. If the state had an interest in this case, it would presumably favor the claimant's receipt of the benefits in issue.

[17] *See* 50 Comp. Gen. 180, 183 (1970); 49 Comp. Gen. 656, 660 (1970); 43 Comp. Gen. 235 (1963); 34 Comp. Gen. 7 (1954); and B-195558, Jan. 6, 1981.

In support of its argument regarding the conflict between federal and state interests, DFAS cites a number of court decisions. Since we find that this case raises no such conflict, we will not discuss the majority of those cases. However, the case of *McCarty v. McCarty*, 453 U.S. 210 (1981) deserves comment. *McCarty* examined the question of whether, upon dissolution of a marriage, federal law precluded a state court from dividing military non-disability retired pay pursuant to community property laws. In finding that the community property award was precluded by federal law, the Supreme Court found that the consequences of the community property right sufficiently injured the objectives of the federal program, *i.e.*, military retired pay, to require non-recognition. Once the judicial opinion was known, Congress remedied the numerous problems that *McCarty* had caused with the enactment of the Uniformed Services Former Spouses' Protection Act in September 1982.[18] The Act removed the *McCarty* prohibition and authorized courts to divide retired or retainer pay between a service member and his/her former spouse according to state laws dealing with marital property. By making the USFSPA effective the day before *McCarty* was issued, Congress legislatively overruled it. In doing so, Congress did not deviate from the general principle that federal laws and interests supersede state laws and interests. Congress' intent was not to give preeminence to state interests over federal interests in matters of family law, but to protect the fundamental property rights of both parties in divorce proceedings.[19]

DFAS contends that they are required to rely solely upon the state marriage record due to all the long-standing policies and procedures noted above. By changing the member's military records, they argue the AFBCMR is attempting to overcome DFAS' policy and procedures in determining whether a financial entitlement arises from the record correction by dictating that DFAS must rely upon a military record. DFAS argues they are the departmental paying authority, and since they may not pay an SBP annuity to a surviving spouse who remarries before the age of 55, they must deny the claimant's claim. They argue this is the intent of Congress under 10 U.S.C. § 1450(k)(1).

In making that argument, DFAS is ignoring the plain language of 10 U.S.C. § 1552 that correction board actions are "final and conclusive on all officers of the United States." DFAS is also ignoring the legislative history of the statute and the interactions between Congress and the Comptroller General on the issue of the finality of correction board actions as discussed above. It is true that Congress intended that SBP not be paid to a widow who remarries before the age of 55. However, in this case, the record as corrected by the AFBCMR indicates that the claimant married the day after her 55th birthday. In the records correction statute and related materials, Congress indicated very clearly that when a correction board acts to correct a record, that action is to be accepted and followed. Therefore, when the AFBCMR corrected the record to show that the claimant remarried on the day after her 55th birthday, DFAS was to implement that correction and calculate the claimant's SBP entitlement as of that time.

[18] Uniformed Services Former Spouse's Protection Act, Pub. L. No. 97-252, 1982 U.S. Code Cong. & Ad. News (96 Stat.) 730 (adding 10 U.S.C. § 1408 and amending 10 U.S.C. §§ 1072, 1076, 1086, 1447, 1448, and 1450).

[19] *See Developments in the Law – The Constitution and the Family*, 93 Harv. L. Rev. 1159 (1980).

It should be noted that, under 37 U.S.C. § 3702(a), this Office settles claims for SBP annuities. Prior to July 1, 1996, such claims were settled under that statute by the Comptroller General of the United States. Therefore, the authority of the Comptroller General in this matter has been transferred to this Office. This Office recognizes that, as a general proposition, the validity of a marriage is for determination under the laws of the jurisdiction where the marriage is performed. *See* DOHA Claims Case No. 96070219 (January 30, 1997). However, the decisions of the correction boards are final and conclusive on all officers of the United States unless procured by fraud, which is not alleged here. Our Office has given effect to this decision in our appeal decision. DFAS and its departments are to effectuate this correction and to afford relief to this claimant.

While the state record of a marriage is generally the most reliable, in this instance the correction board has ordered reliance upon the military record to correct an injustice. In this case, as the claimant wrote in her letter of November 20, 2012: "The DFAS general counsel office provides a lengthy argument that avoids addressing the authority of 10 U.S.C. § 1552(a)(1) which grants the Secretary of the Air Force, acting through the AFBCMR, **to correct an injustice**." This Office concludes that the AFBCMR has not exceeded their authority in correcting a record in this case and expecting the correction to be conclusive upon an agency of the Department of Defense. This Office does not conclude that any record or interest is being preempted. In this case, a particular record correction must be applied in order to correct an injustice. The corrected record is only required to be considered in this case, not any other case; and it has no affect upon the civil marital record of this claimant. This correction can cause no confusion in other cases, as it has no precedential value beyond the present case.

The correction board's action in this case causes no diminution of the authority of states over their own marriage records or of the role of state marriage records in DFAS' determinations. To ignore the lawful record correction of the AFBCMR in this case would threaten the ability of that board and its counterparts to correct records in order to remove errors and injustices. The other issues raised have either been answered earlier in the text or have not risen to the level to require an answer.

Conclusion

The request for reconsideration is denied. The appeal decision of September 12, 2012, is affirmed. In accordance with the Department of Defense Instruction 1340.21 ¶ E7.15, this is the final administrative action of the Department of Defense.

///Original Signed///

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Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

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William S. Fields
Member, Claims Appeals Board

///Original Signed///

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Natalie Lewis Bley
Member, Claims Appeals Board