

DATE: March 20, 2014

In Re:)

[REDACTED])

) Claims Case No. 2012-CL-101006.3

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Claims against the government may be allowed only for expenses authorized by statute or regulation.

DECISION

A retired U.S. Army member requests reconsideration of the January 28, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2012-CL-101006.2. In that decision, this Office denied the member's claim for a refund of a Survivor Benefit Plan (SBP) monthly premium deduction in the amount of \$112.03, plus interest in the amount of \$976.87.

Background

The member was born on December 14, 1927, and retired from the U.S. Army on December 1, 1969. The member enrolled in the Survivor Benefit Plan (SBP) during an open season in 1981-82 and opted for coverage for his wife and then-dependent daughter. The member elected SBP on an election form that was signed and postmarked on September 30, 1982. This was the last day election for the program could be completed. This election form was received on October 5, 1982, in the United States Army Finance and Accounting Center (USAFAC), Fort Benjamin Harrison, Indiana. However, it was not until November 1982 that USAFAC established the member's SBP account.

In 1991, USAFAC was combined with the other Armed Services' finance centers to form the Defense Finance and Accounting Service (DFAS). In 1998, the SBP was amended so that

the deduction of the monthly premiums from a member's retired pay was terminated upon the later of (1) collection of 360 monthly premiums from the member and (2) the member having reached 70 years of age. The member turned 70 on December 14, 1997. By mid-2012, the deduction of the member's 360th and last SBP premium was approaching. The member wrote a letter to DFAS, dated June 1, 2012, and maintained that his 360th premium should be deducted from his retired pay payment of September 1, 2012, and not from his retired pay payment of October 1, 2012. DFAS advised the member that their count of 360 payments was correct. The member insisted that the October 1, 2012, payment was actually the 361st payment, and claimed the refund.

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 member elected to participate in SBP during the 1981-82 Open Season.¹ The member's election was received on October 5, 1982, with a postmark date of September 30, 1982. The authorization for the Open Season provided that an election was effective when received by the Secretary concerned.² The implementing guidance for the open season provided that "the postmark of the envelope could be used when beneficial to the member."³ The public law also provided in the case of a member making his first election into the SBP under the open enrollment, the deduction of premiums was to begin on the first day of the first month beginning after such election was effective.⁴

The member's election was processed during the entitlement month of November 1982. At that time, the effective date of coverage was correctly recorded as September 30, 1982, with premiums for the SBP beginning as of October 1, 1982 (the first day of the first month beginning after such election was effective). Since military retired pay is paid in arrears, the first premium deduction from the member's retired pay should have occurred on the payment dated November 1, 1982, for the entitlement month of October 1982. However, due to the delay in adding SBP coverage to the member's account, no SBP premiums were deducted from the payment dated November 1, 1982. The first SBP premium deduction in the amount of \$112.03 was made from the member's payment dated December 1, 1982; this payment was for the entitlement month of November 1982. A debt collection in the amount of \$112.03, representing the SBP premium due for the month of October 1982, was also deducted from the member's payment dated December 1, 1982. Thus, the member entered the SBP on September 30, 1982, and this date is currently

¹ *See* Pub.L. 97-35, 95 Stat. 357 § 212 (August 13, 1981).

² *See* Pub.L. 97-35 § 212(a)(3).

³ *See* Department of Defense Financial Management Regulation (DoDFMR), Volume 7B, Chapter 43, ¶ 430901.D, September 1999.

⁴ *See* Pub.L. 97-35, § 212(a)(3).

reflected on the member's military retired pay account as the effective date of coverage. Since military retired pay is paid in arrears, the first premium deduction from the member's retired pay should have been deducted from the payment dated November 1, 1982, for the entitlement month of October 1982. However, due to the delay in processing, deductions were taken as noted above. DFAS contends, after a thorough review of historical pay records, that because the member did not have SBP coverage until September 30, 1982, SBP premiums were not charged to him for any portion of the month of September 1982, to include the single day of September 30, 1982.

Due to the "paid-up" provision of the SBP,⁵ the member turned 70 on December 14, 1997, and on October 1, 2012, DFAS contends that he had paid into the SBP for 360 months. This contention is confirmed by the appeal decision issued by this Office on January 28, 2014. The record contains numerous audits and evidence provided by DFAS that the member paid into the SBP for 360 months as of October 1, 2012. We have previously held that with respect to disputed questions of fact, because the administrative office is in a better position to consider and evaluate the facts, we will accept the statement of facts furnished by the administrative office, in the absence of clear and convincing contrary evidence offered by the member or other claimant. *See* DOHA Claims Case No. 01060501 (June 20, 2001), *aff'd* Deputy General Counsel (Fiscal) (March 8, 2002), citing 57 Comp Gen 415, 419 (1978). The member has provided no clear and convincing contrary evidence.

The adjudicator determined that DFAS correctly collected 360 premiums from the member. Thus, he properly denied the member's claim for the first SBP premium, collected December 1, 1982.⁶ The adjudicator then focused on the last premium, collected October 1, 2012, which he denied, for reasons discussed in the previous paragraph. The Board affirms the adjudicator's denial of the member's claim for the refund of either the first or the last premium.

We now turn to the other portions of the member's claim, for interest on one or all of the SBP premiums deducted from his retired pay and for return of all premiums deducted. No interest is payable on a claim against the government unless the specific statute involved provides for the payment of interest. *See* DOHA Claims Case No. 2010-CL-042001.2 (August 30, 2010); and DOHA Claims Case No. 09051901 (July 16, 2009). Neither the SBP statute, 10 U.S.C. §§ 1447-1455, nor the relevant claims statute, 31 U.S.C. § 3702, allows for the payment of interest. Thus, even if the member's claim were allowed, no interest would be payable. Secondly, election of SBP coverage is generally irrevocable. *See* 10 U.S.C. § 1448. If election were revocable, the premiums already paid would not be refundable because the retired member would have had the benefit of coverage while the election was in place. *See* Comptroller General decision B-251519, Mar. 18, 1993. Finally, while we view DFAS' action with regard to the member's SBP election to be correct, we are limited to the authority granted us by statute and have no authority to consider "unjustified personnel actions." *See* DOHA Claims Case No. 97031401 (April 9, 1997) and Comptroller General decision B-195941, Oct. 18, 1979. The

⁵ *See* Pub.L. 105-261, 112 Stat. 1920, division A, title VI, § 641 (October 17, 1998), eff. October 1, 2008.

⁶ The adjudicator cited title 31, U.S.C., § 3702(b), popularly known as the Barring Act, which states that a claim must be received by the government within six years of its accrual, or it is barred from consideration. Therefore, the member's claim for a refund of a payment deducted in 1982 would be barred by statute.

claim for the one specific SBP payment with interest is denied, as well as the refund of all 360 SBP payments with interest.

Conclusion

For the reasons stated, the January 28, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-CL-101006.2 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.

Jean E. Smallin
Chairman, Claims Appeals Board

Gregg A. Cervi
Member, Claims Appeals Board

Natalie Lewis Bley
Member, Claims Appeals Board