DATE: July 17, 2014

In Re:	)	
[REDACTED]	)	Claims Case No. 2013-CL-110501.2
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

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

Pursuant to a final divorce decree and absent anything in the court documents indicating that it was issued by the state court without proper legal authority, the Defense Finance and Accounting Service (DFAS) was obligated under the Uniformed Services Former Spouse Protection Act (USFSPA) to make payments to a member's former spouse. Absent facial invalidity, the government is not liable with respect to payment made under authority of this Act.

DECISION

A retired member of the U.S. Army requests reconsideration of the January 31, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-CL-110501.

Background

On July 19, 1983, the member was married. On December 27, 1983, the member entered active duty with the U.S. Air Force. On January 21, 1994, the member signed a Judgment of Dissolution ("divorce decree'). The divorce decree was signed by his wife on January 28, 1994, and approved by the Superior Court of California, County of Los Angeles, on February 22, 1994. On March 17, 1994, the divorce decree went into effect. The divorce decree provided:

> Retirement Benefits: It is further ordered that Petitioner pay Respondent, as a further equitable division of their property rights, twenty-five percent (25%) of his net retirement pay from his service with the U.S. Air Force; said payment shall be made to Respondent if and when the Petitioner receives said retirement pay and shall be made to the respondent until the respondent or the petitioner dies. If Petitioner gets out of the service prior to retirement and receive[s] an incentive bonus, Respondent will receive 25% of that bonus.

On October 29, 1995, the member separated from the Air Force. On October 30, 1995, the member entered Army Warrant Officer Candidate School, and graduated on January 25, 1996. On January 26, 1996, the member began his career as a Warrant Officer in the Army. On January 30, 2013, the member's former spouse filed a DD Form 2293, *Application for Former Spouse Payments from Retired Pay*, with the Defense Finance and Accounting Service (DFAS) requesting direct payment from the member's retired pay in the amount specified in the divorce decree under the Uniformed Services Former Spouses' Protection Act (USFSPA). In the application, the former spouse attached a certified copy of the divorce decree. In a letter dated February 27, 2013, DFAS informed the member that it had received the application for a portion of his retired military pay and that it was required by law to pay the member's former spouse 25% of his retired pay. The letter went on to explain:

> If the enclosed court order has been amended, superseded, or set aside, it is your responsibility to notify us within 30 days of this letter and provide court-certified copies of the pertinent documentation. Submission of such documents constitutes consent to the disclosure of such information to the former spouse or the former spouse's attorney. Unless we received such notice, we will honor your former spouse's application. Payments will begin within 90 days after you retire and begin receiving retired/retainer pay.

On March 3, 2013, the member retired from the Army with 29 years, two months and four days of creditable military service. On March 18, 2013, the member objected to his former spouse's application for payment of a portion of his retired pay. The member stated that the divorce decree clearly indicates that payment to his former spouse was to be made only if he remained in the Air Force until retirement, or if he separated from the Air Force and received a separation incentive payment, his former spouse would be entitled to 25% of that payment. The member stated that since he did not retire from the Air Force, nor did he receive a separation incentive payment, there was no legal basis for DFAS to make payment to his former spouse. The member further contested the divorce decree. He asserted that the divorce decree was incomplete because Page 3 of the decree was the same as Page 1. In addition, the member asserted that DFAS should not honor his former's spouse's application because the divorce decree awarded her "twenty-five percent (25%) of his net retirement pay," and not his disposable retired pay.

On March 21, 2013, DFAS responded to the member's objections and advised him that upon further review, DFAS rejected his former's spouse's initial application under the USFSPA because DFAS did not receive all of the four pages attached to the divorce decree (Page 1 was

received in duplicate). DFAS advised the member that they requested his former spouse to submit the divorce decree including attachments in its entirety.

On June 4, 2013, the former spouse resubmitted her application. In her resubmission, she explained the attachment pages were numbered incorrectly when they were originally scanned by the courthouse which explains why there is a duplicate page. She resubmitted a full set consisting of four pages. The fourth page is a *Nunc Pro Tunc* Order which deleted the date of marital status termination as February 22, 1994, and substituted the date as March 17, 1994.

On July 5, 2013, DFAS contacted the member and explained that after his former spouse's resubmission, they determined that her application met all legal requirements and approved her case. They advised the member that the first payment to his former spouse would be issued on September 1, 2013, in the amount of $1,281.50 (25% of his disposable retired pay). DFAS also addressed the member's objections. DFAS advised the member that any legal objections that he has with the court order need to be addressed with the state court that issued the divorce decree. In response to the member's first objection on the basis that the divorce decree reflects that payments to his former spouse were to be made only if he remained in the Air Force until his retirement, DFAS disagreed and found that the divorce decree was valid. DFAS stated that the member's former spouse is entitled to receive "twenty-five percent (25%)" from his service with the Air Force. DFAS found that since the member was receiving military retired pay which includes his service with the Air Force, the language in the divorce decree was valid. DFAS reasoned that in order for the member's argument to be accepted, his divorce decree would have to specifically state that his former spouse is only entitled to receive a portion of his retired pay if he retires form the Air Force and not from any other military component. Next, DFAS addressed the member's second objection on the basis that the language in the divorce decree is ambiguous with regard to the amount awarded to his former spouse because it states that she is entitled to 25% of his net retired pay and DFAS cannot calculate the amount of future taxes. DFAS directed the member's attention to the Department of Defense Financial Management Regulation (DoDFMR), paragraph 2090601.D of Chapter 29, Volume 7B, Military Pay Policy – Retired Pay, which reflects that DFAS will "construe all percentage awards (such as a percentage of gross retired pay) as a percentage of disposable retired pay, regardless of the language in the order." As for the member's assertion that the divorce decree was incomplete, DFAS explained that even though there were duplicate pages included, the pages contain the award to the former spouse of 25 percent of the member's retired pay. DFAS explained to the member that he could provide them with an order that he believes is correct.

On July 27, 2013, the member appealed DFAS's determination. He continued to assert that DFAS's interpretation of the language in the divorce decree is not legally supportable. He stated that DFAS should not pay his former spouse a portion of his retired pay because the divorce decree clearly reflects that payments to his former spouse would only be made if he remained in the Air Force until his retirement. He maintained that remaining in the Air Force was a condition precedent to his former spouse receiving a portion of his retired pay. He stated that since he did not retire from the Air Force but transferred to the Army, and retired from the Army, the condition listed in the court order was not met. However, he stated that in order to lay the matter to rest, he is willing to agree to a division of retired pay but only for those creditable

months of his service with the Air Force. He stated that he would agree that his former wife should receive 10.085% of his gross retired pay before taxes.

DFAS issued an administrative report responding to the member's appeal. DFAS looked at the law of the state where the divorce decree was issued and found the definition of condition precedent in the California Civil Code § 1436. Under 1436, a condition precedent is defined as "one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." DFAS found that California law clearly holds that "the rule is that provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such a construction." *Rubin v. Fuch*, 1 Cal. 3d 50, 53 (1969). DFAS determined that since there was no limiting language in the divorce decree, such as "when, if, unless, until, in the event, before, etc.," the decree does not plainly inform the parties, or the court, that the former spouse is only entitled to receive a division of property from the member if he retires form the Air Force and no other military branch. In addition, DFAS examined the USFSPA and its implementing regulations set forth under the DoD Financial Management Regulation. DFAS noted that neither the statute or implementing regulations make a distinction among the different services for retired pay purposes. Finally, DFAS found that with respect to the member's position that he will pay his former spouse 10.085% of his military retired pay, DFAS had no authority to change a court order. DFAS stated that only the state court which issued the order can modify a division of property award.

The DOHA appeal decision upheld DFAS's denial of the member's claim. In the member's reconsideration request, he asserts that DFAS's interpretation of the statutory provisions and implementing regulations is arbitrary, capricious and contrary to law. He states that DFAS has failed to follow regulations and omitted critical and necessary language of the court order. He continues to assert that there was a condition precedent to his former spouse receiving a portion of his retired pay. He states that in his original appeal, his main objection was that DFAS has no legal basis to pay his former spouse because he did not retire from the Air Force. He states that he later conceded that although he did not retire from the Air Force, his former spouse was entitled to receive a portion of his retired pay based on the amount of time he served with the Air Force. He states that the divorce decree was prepared and finalized while he was still on active duty. Therefore, he states that the division of his retired pay became conditional on if and when he was to receive retired pay from his service with the Air Force. Thus, he contends that 25% of his retired pay applies only to his creditable service with the Air Force. He believes that the proper interpretation of the divorce decree is that his former spouse would receive 25% of the fraction of 142 (months of creditable Air Force service) over 352 (total months of creditable military service) for a total of 10.085% of his gross military retired pay. He takes issue with the DOHA appeal decision because he does not believe his service with the Air Force and the Army are intertwined. He states that there is no Air Force Specialty Code associated to the prerequisite duty of becoming an Attache Technician. He states that it is categorized as special duty in a joint service environment that was well beyond the scope of his previous Air Force experience as a noncommissioned officer. He states that the experience gained and subsequent decision to transition to the Army Warrant Officer program was established well after his divorce. Therefore, he states his former spouse has no claim to any portion of his retired pay resulting from his service with the Army. The member also raises a new argument for the basis of his contention that DFAS erred in honoring the divorce decree.

He states that since he was on active duty at the time of his divorce, the divorce decree had to reflect that his rights under the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940 (50 U.S.C. Appendix §501 *et. seq.*) were complied with.

Discussion

Under DoD Instruction 1340.21 (May 12, 2004), the claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed. 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. 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 an agency charged with their execution, and the implementation of them by means of a consistent administrative practice, is to be sustained unless shown to be arbitrary, capricious or contrary to law.

The USFSPA gives state courts the authority to treat a member's disposable retired pay either as property of the member or as the property of the member and his spouse, in accordance with the law of the jurisdiction of such court. *See* 10 U.S.C. § 1408(c)(1). The USFSPA also directs the government, subject to certain limitations, to withhold and make direct payments to the former spouse in the amount specified in the court order. All valid court orders directing payment of a portion of retired pay to the former spouse must be honored if the divorcing couple was married for at least 10 years during which the member was in service. Absent facial invalidity of the court order, the government is not liable with respect to any payments made in conformity with a state court order under authority of the USFPSA. *See* DOHA Claims Case No. 2013-CL-062801.2 (October 31, 2013); DOHA Claims Case No. 06050122 (May 31, 2006); DOHA Claims Case No. 99122104 (March 16, 2000); and Comptroller General decision B-221190, Feb. 11, 1986

The member has not demonstrated that the divorce decree is irregular on its face. The USFSPA provides:

> A court order is regular on its face if the order –
>
> (A) is issued by a court of competent jurisdiction;
> (B) is legal in form; and
> (C) included nothing on its face that provides reasonable notice that it is issued without authority of law.

Here, the divorce decree is regular on its face, and government officials followed the procedures established under the USFSPA and the applicable regulations by accepting the former spouse's s application and honoring the California decree. The decree was issued by the Superior Court of California for Los Angeles County. It contains the signatures of the member and his former spouse. It is signed by the presiding judge and contains the filing date and

corresponding case number. Additionally, it is stamped by the clerk of the court certifying that it is a full, true and correct copy of the original on file in the clerk's office. The member has failed to identify any deficiencies in the divorce decree that would render it irregular on its face. Therefore, the divorce decree signed by the member and his former spouse satisfies the requirements of 10 U.S.C. § 1408(b)(2).

The member continues to argue that there was a condition precedent to his former spouse's entitlement to a portion of his retired pay. He also argues that DFAS should have interpreted the language in the divorce decree to limit his former spouse's portion to only his Air Force years of service. However, a member's retired pay is based on his Total Active Federal Military Service (TAFMS), *i.e.*, service creditable for retirement. Under the USFSPA, creditable years of service for retired pay means years and full months of military service with no distinction between services. The language contained in the USFSPA does not create a distinction between service in the Air Force and service in the Army for purposes of service creditable in determining the member's eligibility for retired pay. In order to receive the direct payments from DFAS, the USFSPA merely requires a former spouse to have been married for a period of 10 years while the member performed the same number of years of creditable service. *Cf.* DOHA Claims Case No. 08020701 (February 28, 2008) (DOHA found no distinction under the USFSPA or regulations between active duty and reserve duty service for purposes of service creditable). In addition, service creditable for voluntary or mandatory retirement for warrant officers includes all active service in the Uniformed Services. *See* ¶ 010204 of Ch.1, Vol. 7B of the DoDFMR.

As for the member's argument that his service in the Air Force and Army were not intertwined, we note that the member could not have enlisted in the Army at the rank and with his years of service without serving in the Air Force. In addition, he could not have retired at his rank and years of service without his service in the Air Force.

The member states that he was divorced before he became entitled to receive retired pay. If a member is not retired and divorces, the retired pay award may be expressed as a formula or hypothetical retired pay award in accordance with provisions in the DoDFMR. However, this was not the case in the member's divorce decree. As DFAS explained to the member, if he believes that the divorce decree should be interpreted to either award nothing to his former spouse or a smaller percentage based on his service in the Air Force, he must provide documentation from the court reflecting this. We note that the divorce decree appears to have incorporated a Property Settlement Agreement signed by the member and his former spouse. However, we do not have a copy of this document. If the Property Settlement Agreement supports the member's position, he should submit this to DFAS. The member's remedy lies with the court of jurisdiction in the matter. He may obtain a modification or amendment to the decree through the issuing court. DFAS has no authority to go behind a court order, nor can it modify or amend the court order. In addition, DFAS found that there was no condition precedent. If there had been a condition precedent, DFAS would have no authority to honor the court order. DFAS cannot honor a court order that makes the former spouse's payments conditional on the occurrence of some other event. *See* ¶ 290613 of Ch. 29, Volume 7B of the DoDFMR. In addition, DFAS cannot honor awards based on the value of what has accrued because military retired pay does not accrue over time. Military retired pay is not a pension, it is a statutory

entitlement computed at the time the member retires, and it is based on the member's rank and total years of service at the time of retirement, or the member's high-3 and total years of service. *See* ¶ 290614 of Ch. 29, Vol. 7B of the DoDFMR. DFAS also cannot honor an award of a percentage of the marital portion of a member's retired pay unless the court order provides instructions on how to calculate the marital portion, and all variables necessary for the calculation. *See* ¶ 290615 of Ch. 29, Vol. 7B of the DoDFMR.

The member is asking us to strictly construe the language of the divorce decree to limit the calculation of his former spouse's portion of his retired pay to time he spent in the Air Force alone. Although DFAS has no authority to go behind a court order, we will comment on the court's intention in awarding the member's former spouse a portion of his retired pay. Absent a showing that the California court intended to restrict the former spouse's share of the member's retired pay to the time he spent in the Air Force once he retired, we have to presume the intention of the court was to include all the member's military service. At the time the divorce decree was issued, there was no indication that the court considered another service to be involved in the overall retired pay calculation. Therefore, we believe the court's use of the word "Air Force" simply referred to his active duty military service known at the time. We believe the court's use of "Air Force" was not intended to specify the member's future retirement was limited to Air Force service alone. We further believe the court's language was not meant to include other types of nonmilitary retirement.

As for the member's new argument that the court denied him his rights under the SSCRA, now named the Servicemembers Civil Relief Act (SCRA), codified at 50 U.S.C. App. § 501 *et. seq.*, 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. Although there are no compelling circumstances in this case which obligate us to entertain this new argument, we will briefly comment on it. We see no evidence that reflects that the court denied the member his rights under the SCRA. The member was the petitioner in the proceedings of divorce. The member signed the Judgment of Dissolution on January 21, 1994. The Judgment of Dissolution states that both the petitioner and respondent have already signed a Property Settlement Agreement and are requesting that the judgment be signed and granted upon filing of the document. Since the member was present during all phases of the divorce proceedings, it does not appear that his rights in the divorce action were prejudiced because of his military service. Finally, to the extent that the member takes issue with whether or not he was afforded his SCRA rights in the California court, that matter should be raised in that jurisdiction and is not within the purview of this Board. Under the USFSPA, DFAS had no obligation to go beyond the face of the court order. *See* DOHA Claims Case No. 06050122, *supra*; 61 Comp. Gen. 229 (1982); and B-221190, *supra*. Absent anything on the face of the order indicating that it was issued without proper legal authority, DFAS is obligated to make payment under 10 U.S.C. § 1408(b)(1)(D). DFAS determined the divorce decree was regular on its face and determined payment should be made in accordance with the decree. We find no error with DFAS's actions.

Conclusion

The member's request for reconsideration is denied, and we affirm the January 31, 2013, appeal decision in DOHA Claim No. 2013-CL-110501 disallowing the claim. In accordance with DoD Instruction 1340.21 ¶ E7.15.2, 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