

DATE: April 29, 2014

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In Re: )

[REDACTED] )

) Claims Case No. 2013-WV-053004.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Prior to his retirement, the member designated his former spouse and child as beneficiaries of his SBP in accordance with a 1997 divorce decree. Proper deductions for SBP premiums were subsequently deducted from the member's retired pay through May 31, 2005. Due to an administrative error, the member's former spouse SBP coverage was terminated, and the member was refunded the SBP costs that had been deducted from his retired pay. In addition, the member also was indebted for the costs of SBP coverage between June 1, 2005, and February 28, 2011. Waiver is not appropriate for premium amounts because the member was responsible under the divorce decree to provide SBP coverage for his former spouse.

**DECISION**

A retired member of the U.S. Army requests reconsideration of the February 21, 2014, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-053004. In that decision, DOHA upheld the Defense Finance and Accounting Service's (DFAS) denial of waiver of the member's indebtedness to the government in the amount of \$8,031.56.

**Background**

In 1975 the member was married. In November 1981 the member divorced. In May 1983 the member remarried his former spouse. On January 30, 1997, the member was divorced and the divorce decree stated that the member's former spouse was entitled to receive a portion of his retired pay. The divorce decree also stated that the member agreed to provide his former spouse with Survivor Benefit Plan (SBP) coverage. On March 24, 1997, the member's former

spouse submitted an *Application for Former Spouse Payments from Retired Pay*, DD Form 2293, to DFAS to have a portion of the member's retired pay paid directly to her under the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1). She attached a certified copy of the divorce decree to her submission. On May 1, 1997, DFAS informed the member that they had received the application for a portion of his retired pay and that deductions would begin approximately 60 to 90 days after he retired and began receiving retired pay. On May 1, 1997, DFAS also informed his former spouse that they had received her application. They also notified her that if the divorce decree specified that she is to be designated as a former spouse beneficiary for the SBP, she must make a "deemed election" for SBP coverage within one year of the date of her divorce directly to the DFAS Retired Pay Office. On April 7, 1999, the former spouse informed DFAS in writing that she was making a deemed election for SBP coverage under the provisions of her divorce decree.

On April 19, 1999, the member submitted a DD Form 2656, *Data for Payment of Retired Personnel*, and elected SBP coverage for his former spouse and dependent children.<sup>1</sup> On July 1, 1999, the member retired from the Army, and proper deductions for SBP premiums were subsequently deducted from the member's retired pay through May 31, 2005. In December 2000 the member remarried. On July 5, 2005, DFAS received a request from the member to change his coverage from former spouse to his current spouse. DFAS erroneously advised him at that time that he did not meet the one-year requirement.<sup>2</sup> However, due to an administrative error, on May 30, 2005, the member's SBP coverage was erroneously changed from former spouse and children to children only, retroactive to July 1, 1999. In addition, the costs for the former spouse SBP coverage were erroneously refunded to him for the period July 1, 1999, through May 31, 2005, in the amount of \$3,711.65. The member was later indebted for that amount. In addition, the member was indebted \$9,305.16 for former spouse SBP premiums which failed to be deducted from his retired pay from June 1, 2005, through February 28, 2011. Therefore, the member was overpaid \$13,016.81 (\$3,711.65 + \$9,305.16). It was determined that the member's former spouse had been overpaid her portion of his retired pay in the amount of \$4,985.25. As a result, the member's debt was reduced to \$8,031.56 (\$13,016.81 - \$4,985.25).

DFAS determined that waiver was not appropriate since it is not against equity and good conscience for a member who elects a benefit with a cost attached to it, to pay the cost for that benefit. The DOHA adjudicator upheld DFAS's denial of the member's request for waiver.

In his reconsideration request, the member asserts that his submission of the DD Form 2656 to elect SBP for his former spouse was substantially incomplete resulting in a defective election. He states that the DD Form 2656 specifies under Section VII, 28f, that a DD Form 2656-1, *Survivor Benefit Plan (SBP) Election Statement for Former Spouse Coverage*, must be

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<sup>1</sup>Specifically, the member checked box "f" under the beneficiary category for his SBP election, which stated, "I elect coverage for the person named in Item 30 who is my former spouse and dependent child(ren) of that marriage." Under Item 30, his former spouse's name was listed as his beneficiary.

<sup>2</sup>A member who is not married and has no dependent child upon becoming eligible to participate in the Plan but who later marries or acquires a dependent child may elect to participate in the Plan. However, the member's election must be received by the Secretary concerned within one year after the date on which the member marries or acquires that dependent child. *See* 10 U.S.C. § 1448(a)(5)(B).

completed. He contends that since this form was never completed, the former spouse SBP election was invalid. He also states that in 2005 DFAS took remedial action and terminated former spouse SBP coverage. He maintains that DFAS reimbursed him for all premiums from July 1999 through May 2005 despite his current wife being an eligible beneficiary. He states that any remedy for his former spouse to obtain coverage would require her to have submitted a deemed election, but she never submitted a deemed election. He states that DFAS erred in 1999 by instituting former spouse SBP coverage and DFAS failed to discover this error until 2005, which prevented his current spouse from enrollment as an SBP beneficiary. In regard to the adjudicator's denial of his waiver request, he takes issue with the adjudicator citing DOHA Claims Case No. 2011-WV-022302.2 (October 28, 2011), in her decision. He states that the government implies that he had in some way control over the overpayment by accepting the benefits. He states that DFAS administers SBP. He contends that Department of Defense Instruction (DoDI) 1340.23 ¶ E4.1.1, does not apply to his waiver request because he had no control over the creation of the debt. In addition, he states that he questioned his pay often, made Freedom of Information requests and requests for information through his congressman. He also alleges that in 2010, a DFAS pay technician worked in collusion with his former spouse and her attorney to illegally reinstate former spouse SBP coverage. His requests that the Board issue a decision vacating his former spouse as his SBP beneficiary; acknowledging his current spouse as his proper SBP beneficiary as of December 23, 2000; finding that SBP premiums since December 23, 2000, are current; and applying SBP premiums paid from July 1999 through December 2000 towards future SBP premiums.

### **Discussion**

We have the authority under 10 U.S.C. § 2774 to waive claims of the United States against members or former members of the uniformed services if collection would be against equity and good conscience and not in the best interests of the United States, and if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member, or any other person having an interest in obtaining a waiver of the claim. In applying for waiver, an applicant is not disputing his legal obligation to pay an indebtedness, but is arguing that as a matter of equity it would be inappropriate for the government to pursue collection in the circumstances of the case. The fact that a debt occurred as a result of administrative error does not by itself entitle the member to waiver. *See* DoD Instruction 1340.23 ¶ E4.1.3. Waiver of a debt which arises due to non-deduction of insurance or SBP premiums is not appropriate if the member received the benefit of the coverage. *See* DOHA Claims Case No. 2012-WV-072701.2 (October 18, 2012); DOHA Claims Case No. 07022009 (February 28, 2007); and DOHA Claims Case No. 02120406 (December 19, 2002).

The SBP, 10 U.S.C. §§ 1447-1455, is an income maintenance program for survivors of deceased members of the uniformed services. A member who has a former spouse upon becoming eligible to participate in the SBP may elect to provide an annuity to that former spouse. *See* 10 U.S.C. § 1448(b)(2)(A). The requirements for making such an election are found under 10 U.S.C. § 1448(b)(5). These include a written statement signed by the member and the former spouse setting forth whether the election is being made pursuant to the requirements of a court order, or pursuant to the conditions of a voluntary agreement as part of or incident to a

divorce proceeding. Once a former spouse is validly designated the beneficiary under the SBP pursuant to a divorce decree, a subsequent change of beneficiary can only be made pursuant to the submission of a modifying court order to the Secretary concerned which permits such a change of election. *See* 10 U.S.C. § 1450(f)(2)(A). An election to provide SBP coverage for a former spouse prevents payment of an annuity to a current member's spouse. *See* 10 U.S.C. § 1448(b)(2)(B).

In this case, the member was divorced from his former spouse prior to becoming eligible to participate in the SBP. He was required to provide his former spouse SBP coverage by the terms his divorce decree; and on April 19, 1999, he elected former spouse coverage. The record reflects that the documentation provided to DFAS by both the member and his former spouse contained sufficient information and conformed to the law so as to constitute a valid election of former spouse coverage.<sup>3</sup> *Cf.* B-258310, Dec. 28, 1994, (Former spouse election under SBP is valid even though the request for election was filed on an Open Season election form rather than forms for an SBP Election Change and Election Statement for Former Spouse Coverage because the submitted form contained all information required by 10 U.S.C. § 1448). Therefore, unless the member obtains a modification of the prior court order, the election of his former spouse as beneficiary is valid. The member designated his former spouse as his SBP beneficiary at retirement as he was obligated to do by court order, and the fact that the member's former spouse did not request former spouse SBP coverage within one year of the date of the divorce does not affect the validity of her beneficiary designation. *Cf.* B-248353, Sept. 10, 1992 (The fact that a former spouse did not file a consent form in a timely manner to change from insurable interest cost coverage to spouse cost coverage during an open season which allowed such a change did not affect the validity of her beneficiary designation). Finally, although DFAS erroneously refunded the costs for the former spouse SBP coverage to the member for the period July 1, 1999, through May 31, 2005, in the amount of \$3,711.65, the member is still indebted for this amount because refunds of properly assessed SBP costs are expressly prohibited. *See* 10 U.S.C. § 1452(f)(1).

Although we have discussed the SBP statutes in some detail to answer questions in the file, this is a waiver case under 10 U.S.C. § 2774. Under the waiver statute, the member should have expected to pay the premiums for the SBP coverage for his former spouse. Since the member knew he was obligated under the divorce decree to provide SBP coverage for his former spouse (for which she was apparently sharing the cost), and for whom he elected coverage in April 1999, waiver is not appropriate. *See* DOHA Claims Case No. 01010219 (March 19, 2001). The member was already participating in the SBP when he remarried in December 2000, and the premiums for former spouse and dependent child(ren) SBP coverage were properly being deducted from his retired pay. As stated on the instructions on the DD Form 2656, his SBP election made before his retirement was irrevocable after the date he became entitled to retired pay. Although DFAS erroneously advised him that he did not meet the one-year requirement to cover his current spouse, instead of advising him that she was not an eligible SBP beneficiary

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<sup>3</sup>The June 1993 DD Form 2656 used by the member to elect SBP coverage for his former spouse and dependent child(ren) of that marriage did state: "See Forms Completion Instructions and complete Former Spouse Election Statement." However, the Instructions for the form do not mention completing a Former Spouse Election Statement. The Instructions do state: "Any SBP election made before your retirement/transfer is irrevocable after the date of entitlement to retired/retainer pay." They also state that a photocopy of a final divorce decree which discusses SBP must be provided for former spouse coverage.

because he was already participating in the SBP, he knew by the terms of the divorce decree and his DD Form 2656, that he was responsible for providing former spouse SBP coverage. There is no evidence that the divorce decree was terminated or modified. Therefore, the retired member is liable for the premiums.

As discussed above, our authority in this matter is limited to a decision as to whether waiver is appropriate or not. We have no authority regarding the member's other requests. Likewise, we have no authority to entertain the allegations raised by the member concerning the conduct of the DFAS pay technician. He should raise his concerns with DFAS.

### **Conclusion**

The member's request for relief is denied, and we affirm the February 21, 2014, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense.

Signed: Jean E. Smallin

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board