

KEYWORDS: Member Service Claim

DIGEST: A claim may be allowed only if it is for an item authorized by statute or regulation. Under the order of precedence established by 10 U.S.C. § 2771(a), the designated beneficiary has a claim superior to the late member’s surviving spouse.

CASENO: 2016-CL-092101.3

DATE: 11/17/2016

DATE: November 17, 2016

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In Re:)	
[REDACTED])	Claims Case No. 2016-CL-092101.3
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A claim may be allowed only if it is for an item authorized by statute or regulation. Under the order of precedence established by 10 U.S.C. § 2771(a), the designated beneficiary has a claim superior to the late member’s surviving spouse.

DECISION

The widow of a retired member of the United States Air Force (USAF) requests reconsideration of the October 19, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-CL-092101. In that case, DOHA denied her request for her husband’s arrears of pay (AOP).

Background

The member and his spouse were married on August 15, 1981, and at no time were they divorced. The member became eligible for retired pay on November 3, 2010. The member completed a DD Form 2656, *Data for Payment of Retired Personnel*, dated April 21, 2011. In

Section V, Designation of Beneficiaries for Unpaid Retired Pay, item 13, the member designated a woman not his wife to receive 100%. In Section VI, Federal Income Tax Withholding Information, item 14, Marital Status, he checked the box for single. In Section IX, Survivor Benefit Plan (SBP) Election, he checked item 20d to elect coverage for a person with an insurable interest in him and in item 28, he identified that person as the same woman not his wife as identified in item 13. In both items 13 and 28, the member identified the woman as his cousin.

The member died on September 2, 2015. The woman not his wife reported his death to the Defense Finance and Accounting Service (DFAS) on September 10, 2015. The widow reported his death by fax to DFAS on September 25, 2015, and included her marriage certificate and the member's death certificate. The widow alleged that the woman not his wife was committing fraud. In a letter to the widow, dated November 2, 2015, DFAS denied her claim for the AOP on the grounds that she was not the beneficiary. No mention was made of the SBP account. DFAS reconsidered the widow's claim in their Administrative Report dated August 16, 2016. In it, DFAS determined that the member's designation of the woman not his wife as his SBP beneficiary as a person with an insurable interest in him was invalid because he was married. Therefore, DFAS determined that the widow was his SBP beneficiary. This led to a retroactive correction to the SBP premiums that had been deducted from the member's retired pay and that correction created a refund of excessive premiums. That refund was included in his AOP account of \$5,665.03. However, DFAS concluded that the member's designation of the woman not his wife as his AOP beneficiary was valid. DFAS noted that a designated beneficiary has a superior claim to AOP over the surviving spouse under the order of precedence established by 10 U.S.C. § 2771(a). You appealed to DFAS and maintained that since you were married to the member until the day he died, he could not have designated the woman not his wife as his AOP beneficiary.

Discussion

There are two important rules in the adjudication of claims: (1) a claim may be allowed only if it is for an item authorized by statute or regulation, and (2) when the language of a statute is clear on its face, the plain meaning of that statute will be given effect and that plain meaning cannot be altered or extended by administrative action. *See* DOHA Claims Case No. 2012-CL-061105.2 (September 27, 2012).

DFAS determined that the member's designation of the woman not his wife as his SBP beneficiary as a person with an insurable interest in him was invalid because he was married. The adjudicator discussed this at length, citing Public Law 92-425, 86 Stat. 706, September 21, 1972, which is codified, as amended at 10 U.S.C. §§ 1447-1455. The decision to award the widow SBP benefits is not at issue in this reconsideration, and it is not necessary to reiterate.

The SBP benefits are relevant here only because the widow was due the SBP annuity rather than the woman not his wife, and DFAS had to recalculate the premiums retroactively. The SBP premiums deducted from the member's retired pay for the invalid insurable interest coverage were greater than the SBP premiums that would have been deducted for surviving spouse coverage. Excessive SBP premiums due to administrative error are to be refunded to the

member, as discussed in Department of Defense Financial Management Regulation (DoDFMR). Volume 7B, chapter 46, ¶¶ 461302 and 461303-C1, and table 46-3. Since the excessive SBP premiums had been deducted from the member's retired pay, the refund of those premiums is part of his AOP, *i.e.*, the retired pay unpaid as of his death.

The disposition of amounts owed by the Government to a deceased member of the armed forces are to be paid per these instructions at 10 U.S.C. § 2771(a) (emphasis added):

(a) In the settlement of the accounts of a deceased member of the armed forces, an amount due from the armed force of which he was a member shall be paid to the person highest on the following list living on the date of death:

(1) Beneficiary designated by him in writing to receive such an amount, if the designation is received, before the deceased member's death, at the place named in regulations to be prescribed by the Secretary concerned.

(2) Surviving spouse.

(3) Children and their descendants, by representation.

(4) Father and mother in equal parts or, if either is dead, the survivor.

(5) Legal representative.

(6) Person entitled under the law of the domicile of the deceased member.

A designated beneficiary has a superior claim to all other potential beneficiaries. *See* Comptroller General decision B-222066, June 26, 1986.

In the widow's appeal she contested that the AOP should go to the woman not his wife because the member misrepresented his marital status and he misrepresented the identification of the woman not his wife as his cousin. The widow contended that those misrepresentations invalidated her as the beneficiary. The adjudicator pointed out that neither misrepresentation invalidated the designation of the woman not his wife as the beneficiary of the AOP. There is nothing in 10 U.S.C. § 2771(a) that makes the designation of the beneficiary contingent upon that person's relationship with the member. As to the issue of married versus single, there is nothing in 10 U.S.C. § 2771(a)(1) concerning the member's marital status. In fact, the section of the DD Form 2656 that asks for the member's marital status is the section for federal income tax withholding, not AOP.

In her request for reconsideration, the widow again contends that the marital status of the member, specifically that he was married to her, invalidates any designation of the woman not his wife as the beneficiary. She contends that this Office has overlooked 10 U.S.C. § 2771(b), which states that designations and changes of designations of beneficiaries under subsection (a)(1) are subject to regulations to be prescribed by the Secretary concerned. The widow contends that the DD Form 2656 accurately reflects the regulations prescribed by the Secretary,

and she points to various sections to imply that the member was not allowed to unilaterally change his beneficiary. It is not necessary to go through them in detail as each of the sections listed which the member did not follow have to do with the requirements for SBP. To that extent, the widow is correct and that error has been corrected and she has been awarded the SBP annuity. As to the AOP, there is no requirement that a member choose any particular person. A member may choose to assign this benefit to anyone, which this member did. Any argument that the funds which were the excessive SBP premiums should go to any other person is overcome by the fact that the woman not his wife has a superior AOP claim in the order of preference over the surviving spouse, the widow.

Conclusion

The request for reconsideration is denied, and the appeal decision of October 19, 2016, is affirmed. In accordance with the DoD Instruction 1340.21 ¶ E7.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

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Chairman, Claims Appeals Board

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