

This decision was affirmed by the DoD Deputy General Counsel (Fiscal) on December 21, 2001.

March 30, 2001

In Re:

[Redacted]

Claimant

Claims Case No. 01021401

CLAIMS APPEALS BOARD DECISION

DIGEST

A married service member who retired prior to the enactment of the Survivor Benefit Plan (SBP) entered into a purported second marriage without having terminated his first marriage. During an SBP open season, he elected coverage for his purported second spouse, designating her by name on the SBP election form. Since the member made an affirmative SBP election of a person who was not his spouse, his election was void, and neither his lawful widow nor the person he elected can receive an SBP annuity.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claims Case No. 00091917, dated January 16, 2001, which denied a claim by a purported wife/widow for a Survivor Benefit Plan (SBP) annuity based of the military service of a deceased retiree of the United States Air Force.

Background

The member married on June 20, 1946. Four children were born to that marriage. He retired from the Air Force on November 1, 1963. On April 13, 1965, he purportedly married the claimant, and two children were born to that purported marriage. SBP was created in 1972, and during an SBP open season in 1981, he elected "spouse and children" SBP coverage.⁽¹⁾ As spouse he listed his spouse from his purported 1965 marriage, and he listed his two children from the purported marriage.⁽²⁾ The member died on July 22, 1986. Both women applied for SBP. In a General Accounting Office (GAO) Settlement, the wife whom the member married in 1946 was denied SBP because the member's invalid election of his purported wife prevented payment of a spousal annuity.⁽³⁾ The GAO Settlement also indicated that the purported wife (the claimant before us now) was not an eligible beneficiary because there was no evidence that the 1946 marriage had been terminated before the member purportedly married her.⁽⁴⁾ Therefore, the Settlement said that she was not legally the member's widow, as is required by 10 U.S.C. § 1450(a)(1). The member's youngest child, from his purported 1965 marriage, who was born in 1978, was entitled to an SBP annuity while a minor. In August 2000, the member's purported wife again claimed an SBP annuity. As evidence of her claim, she provided a birth certificate for a child born in 1961, which purported to show that the woman who married the member in 1946 was already married to another man at the time of the 1946 marriage. In denying the claim in our Settlement issued in January 2001, we stated that the birth certificate was proof only that a woman who had the same name as the member's wife and who married in 1941 had a child in 1961, not that the child's mother was the member's wife. With her appeal of the Settlement, the

claimant submitted the same 1961 birth certificate along with another birth certificate for a child born to the same mother in 1959. The 1959 birth certificate contains the same father's name, but does not indicate the date of their marriage.

Discussion

The SBP, 10 U.S.C. §§ 1447-1460b, is an income maintenance program for the survivors of a retired military member. Under 10 U.S.C. § 1450(a)(1), a spousal annuity is to be paid to the member's "widow" as defined in 10 U.S.C. § 1447(7). *See Lieutenant Colonel John Tiernan Sharkey, USAR (Retired) (Deceased)*, 67 Comp. Gen. 561 (1988). If a member who retired prior to the enactment of SBP attempted to elect a spouse beneficiary who was not legally his spouse, his election was invalid, and neither the spouse nor the person elected could receive a spousal annuity. *See Chief Warrant Officer Donald R. Bethel, USA (Deceased)*, 63 Comp. Gen. 63 (1983); and *Staff Sergeant Roger A. Cline, USA, Retired (Deceased)*, 57 Comp. Gen. 426 (1978). A claimant has the burden of proving her claim. *See 4 C.F.R. § 31.7 (1996)*.

In the case before us, the record indicates that the member married in 1946 and that he purportedly married the claimant in 1965. The purported wife has not proved that she is legally the widow of the member. She has presented no evidence that the member's 1946 marriage was terminated and that her 1965 marriage to the member was valid. The information she submitted as evidence that the member's 1946 marriage was invalid is not conclusive. There is no evidence that the mother of the two children whose birth certificates she submitted is the same woman who married the member in 1946. If she is the same woman, she would have to have married one man at the age of 12 or 14, attempted to marry again five years later and had four children by the second man, and then returned to the first man and had children 18 and 20 years after the original marriage. In the absence of clear and convincing evidence, we are not persuaded that the mother of the children born in 1959 and 1961 is the same woman the member married in 1946. Since the claimant has not proven that she is legally the member's widow, she is not entitled to an SBP annuity based on the member's service.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/ _____

Jean E. Smallin

Member, Claims Appeals Board

1. The open season was pursuant to Pub. L. No. 97-35, § 212, 95 Stat. 383 (1981).
2. The four children from his 1946 marriage had already ceased to be minors.
3. That claim was denied in General Accounting Office Settlement Certificate Z-2869333, dated August 30, 1994.
4. The Philippine Civil Code of 1950 prohibited divorce.