November 30, 2005

In Re:

[REDACTED]

Claimant

Claims Case No. 05033105

CLAIMS APPEALS BOARD

APPEAL DECISION

DIGEST

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

2. When provisions of a state divorce decree conflict with a scheme adopted by Congress for administering a Federal military entitlement, the state divorce decree must yield to the Federal scheme to the extent that it conflicts with the Supremacy Clause of the U.S. Constitution.

DECISION

The claimant, the former spouse of a deceased former service member of the United States Navy, appeals the initial determination of the Defense Finance and Accounting Service (DFAS) disallowing her claim for the balance of the Voluntary Separation Incentive (VSI) payments still owed to the deceased member.

Background

The record shows that the member and claimant were married in 1983 and had two children. The member separated from the Navy in 1992 under the VSI program. On January 31, 1993, the member completed a Voluntary Separation Incentive (VSI) Beneficiary Designation, DFAS-CL Form 1900/2, designating the claimant as a 100 percent beneficiary of the balance of his VSI payments in the event of his death.

The member and claimant divorced in 1999, and the divorce decree indicates that the parties were to split the annual VSI payment of $8,932 in equal shares until the year 2025, when the member's eligibility for payments terminates. The member remarried. Notwithstanding the terms of the divorce decree, the member submitted to DFAS a handwritten letter dated November 15, 2001, that designated his new wife as a 50 percent beneficiary, and each of his two children as 25 percent beneficiaries, in the event of his death. The 2001 designation was not notarized and was reportedly received in DFAS in November 2001, although no date stamp or other indication of date of receipt is on it. The member died of natural causes in March 2004. The children became aware of the 2001 designation when they examined the member's belongings after his death.

By separate letters dated July 30, 2004, DFAS's Retired and Annuity Pay unit advised each of the children that each would receive 25 percent of the member's future VSI payments in the form of annual payments of $2,245.99 on August 30th of each year through 2025. By letter dated July 30, 2004, DFAS similarly advised the member's second wife that she would receive 50 percent of the member's future VSI payments in the form of annual payments of $4,491.97 on August 30th of each year though 2025.

By letter dated August 11, 2004, to DFAS, the claimant sought all future VSI payments. The claimant contended that

the November 2001, designation was invalid because it failed to comply with the requirements for beneficiary designations as set forth in the Department of Defense Financial Management Regulation (DoDFMR) in that it was not on the VSI Beneficiary Designation Form and was not notarized. The claimant also argued that it was contrary to the divorce decree. On December 10, 2004, DFAS's Assistant General Counsel advised that payment should be made in accordance with the member's 2001 designation. The Assistant General Counsel noted that DFAS's informal policy had been to honor handwritten designations, and VSI recipients had been informed that beneficiary modifications may be in the form of handwritten letters, such as the one that the member had submitted. Additionally, the Assistant General Counsel noted that the notarization requirement for beneficiary changes was removed effective with Interim Change 01-03 to DoDFMR, Vol. 7C paragraph 010401.C (January 2003). Furthermore, there is no prohibition against the use of substitutes for the DFAS-CL Form 1900/2; the statute that established the VSI does not require the use of a particular form or notarization; and the divorce decree, issued under state law, has no affect on a payment made under Federal law.

The claimant appealed DFAS's decision to our Office, and in her October 19, 2005, rebuttal to the DFAS Administrative Report the claimant also argues that the 2001 designation was sent by fax transmission and questions whether it was submitted by the member. She also contends that the 2001 designation had to comply with the then applicable 1998 version of the DoDFMR because the 2003 version had no retroactive provision.

This matter is before our Board due to the complex nature of the legal issues raised in the appeal.

Discussion

The validity of the 1993 VSI beneficiary designation, executed on a DFAS-CL Form 1900/2, has not been challenged. The issue here is whether the 2001 designation was valid and modified the 1993 designation, even though the 2001 designation was contained in a handwritten letter that was not notarized.

VSI was established by Federal law at 10 U.S.C. § 1175. Among the provisions of the statute that are relative to the issues here is subsection (f), which states:

(f) The member's right to incentive payments shall not be transferable, except that the member may designate beneficiaries to receive the payments in the event of the member's death.

As DFAS noted, 10 U.S.C. § 1175 is silent as to the requirements of a valid VSI beneficiary designation, except that subsection (i) states:

(i) The Secretary of Defense and the Secretary of Homeland Security may issue such regulations as may be necessary to carry out this section.[(1)]

The implementing regulation for the designation of VSI beneficiaries is the Department of Defense Financial Management Regulation (DoDFMR), volume 7C, paragraph 010401. The pertinent version of the regulation applicable to the 2001 designation paragraph 010401 dated June 1998,[(2)] states:

010401. Designation of Beneficiaries

A. Service members may designate beneficiaries to receive VSI installments which remain unpaid after the death of the member.

1. The VSI recipient should make designations using the VSI Beneficiary Designation Form. The VSI recipient may designate different percentages to be received by multiple recipients. In the event percentage elections are not made, divide payments evenly among the designated beneficiaries.

2. The member's servicing personnel activity will administer the form at time of separation. Send the completed form to the DFAS-Cleveland Center, Code FRCBC, within 30 days of the election.

3. After separation, the VSI recipient may change his/her beneficiary information by sending a notarized VSI Beneficiary Designation Form to the DFAS-Cleveland Center.

B. The DFAS-Cleveland Center will maintain beneficiary forms for all VSI accounts until the end of the VSI entitlement period, or until the person's death.

The statute does not require that beneficiary designations be made on a particular form or that they be notarized. Paragraph 3 of the implementing regulation states that a member "may" change his beneficiary designation after separation by using "a notarized VSI Beneficiary Designation Form." This language could be interpreted to mean either: (a) the member may change his beneficiary designation, but if he does, he must do so in every instance by using "a notarized VSI Beneficiary Designation Form;" or (b) the member may change his beneficiary designation and may [but is not required to] use "a notarized VSI Beneficiary Designation Form." We construe claimant's appeal as urging us to adopt the first interpretation. However, in this case, DFAS, the agency charged with interpreting both the statute and regulation, and implementing the VSI program, chose to interpret the regulation to mean that a member "may" change his beneficiary designation and may do so using the VSI Beneficiary Designation Form, but he is not required to use that form. This interpretation is supported by the language in paragraph 1 of the regulation which provides that the "VSI recipient should [but is not required to] make designations using the VSI Beneficiary Designation Form." DFAS then implemented this interpretation by following a consistent administrative practice of honoring handwritten designations and advising VSI recipients that they may change their designations in handwritten letters similar to the member's. It is a well-settled rule of statutory construction that the interpretation of a statutory provision by those charged with the execution of the statute is to be sustained unless shown to be arbitrary, capricious or contrary to law. *See*, *e.g.*, DOHA Claims Case Nos. 02101611 through 02101635 (December 12, 2002). In this case, the claimant failed to demonstrate that DFAS's interpretation or implementation of this aspect of the VSI program was arbitrary, capricious or contrary to law.

The claimant contends that the 2001 designation is invalid because it conflicts with the divorce decree.[(3)] The claimant offers no legal support for this statement. Our review of the legal issue here indicates that under 10 U.S.C. § 1175 Congress established a "right to incentive payments" to encourage the recipient to voluntarily separate from military service, and the right to these payments "shall not be transferable, except that the member may designate beneficiaries to receive the payments in the event of the member's death." *See* subsection 1175(f) *supra.* Even if we assume, solely for purposes of this appeal, that the language of the divorce decree also required the member to make the claimant a 50 percent death beneficiary through 2025, it does not follow that the member's inconsistent conduct would invalidate a beneficiary designation that was proper under Federal law. Congress explicitly provided that the member's right to the payments "shall not be transferable," except as provided in the statute, *i.e.*, by beneficiary designation. Congress could have provided for the payment of VSI in accordance with state court orders in the same manner as it did "disposable retired pay" in 10 U.S.C. § 1408, but has not done so. Invalidation of a proper beneficiary designation on the basis that it violates a state divorce decree would appear to conflict with the Supremacy Clause of the U.S. Constitution. In this regard *see Wissner v. Wissner,* 338 U.S. 655 (1950) and the line of decisions following it, including *Ridgway v. Ridgway,* 454 U.S. 46 (1981)(the decision cited by DFAS).

Finally, the claimant suggests that the November 2001 beneficiary designation may have been fraudulent because there is no proof that it was written or faxed by the member. The burden of establishing fraud rests on the party alleging it and must be proven by evidence sufficient to overcome the presumption in favor of honesty and fair dealing. We will not infer fraud if the circumstances are as consistent with honesty and fair dealing as with dishonesty. *See* DOHA Claims Case No. 97050704 (August 27, 1997) and DOHA Claims Case No. 96070226 (September 5, 1996). Here, the designated beneficiaries, the member's current spouse and two children, would be the individuals who the member would have most likely selected as his beneficiaries, and there is no evidence that the member was under duress or disability at the time he made the election.

Conclusion

The claimant failed to demonstrate that DFAS's disallowance of her claim based on its interpretation and implementation of 10 U.S.C. 1175 and DoDFMR volume 7C, paragraph 010401, is arbitrary, capricious or contrary to law. The disallowance is affirmed.

Either party may request reconsideration of our Appeal Decision in accordance with Department of Defense Instruction

(DODI) 1340.21, Enclosure 7. Under paragraph E7.13 of the Instruction, our Office must actually receive the request within 30 days of the date of the Appeal Decision. We may extend this period for up to an additional 30 days for good cause shown, if the request for an extension of time is actually received within the original 30 days. The request must otherwise conform to DODI 1340.21, paragraphs E7.3 and E7.12 through E7.14. No request for reconsideration may be accepted after this time limit has expired. A request for reconsideration must be sent to our Office at the following address: Defense Office of Hearings and Appeals, Claims Division-Reconsideration, P.O. Box 3656, Arlington, VA 22203-1995. If the end of the 30-day period is near, to assure receipt within 30 days, the appealing party may fax a signed copy of its request for reconsideration to us at 703-696-1843 and then immediately transmit the original by first class mail. Unless specified otherwise, we will immediately process that request for reconsideration for a decision when we receive it even though 30 days have not elapsed between the date of the appeal decision and the date we receive your request for reconsideration. The complete DODI 1340.21 may be found on-line at: www.dtic.mil/whs/directives/corres/html/134021.htm.

Signed: Michael D. Hipple

_____

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

_____

Jean E. Smallin

Member, Claims Appeals Board

Signed: William S. Fields

_____

William S. Fields

Member, Claims Appeals Board

1. Effective March 1, 2003, "and the Secretary of Homeland Security" replaced "and the Secretary of Transportation," which was added on October 5, 1994.

2. The DFAS Assistant General Counsel memorandum stated that Interim Change 01-03, January 2003, amended this paragraph to delete notarization. Nevertheless, the version of paragraph 010401 that is currently posted on the Internet is the June 1998 version that mentions notarization. *See* www.defenselink.mil/comptroller/fmr/07c/07c_01.pdf. In accordance with the advice it received from its Assistant General Counsel, we urge DFAS to post the Interim Change.

3. Claimant's position that she is entitled to 100 percent of the VSI proceeds also appears to be inconsistent with the divorce decree. To the extent that the decree may have attempted to provide her an entitlement as a beneficiary, she was limited to 50 percent, not 100 percent.