

DATE: March 13, 2007

In Re:

[REDACTED]

Claimant

)

Claims Case No. 07030508

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

When the member retired, he elected Survivor Benefit Plan (SBP) coverage for his spouse and children. He subsequently divorced and remarried. He notified the Defense Finance and Accounting Service (DFAS) that he remarried and requested coverage for his new spouse. Under the law, his new spouse became his SBP beneficiary one year after their marriage. SBP premiums should have then been deducted from his retired pay, but they were not. If the member had died during the period when premiums were not being deducted, his wife would have become eligible for an SBP annuity. Since the member received the benefit of SBP coverage, waiver is not appropriate.

DECISION

A retired member of the United States Army requests reconsideration of the February 6, 2007, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07010813. In that decision, DOHA denied the member's application for a waiver of an indebtedness of \$41,817.80 that he incurred when Survivor's Benefit Plan (SBP) premiums were not withheld from his retired pay.

Background

The member retired from the United States Army on December 31, 1974. He elected SBP coverage for his wife and children. However, in 1976 the member divorced. On December 31, 1984, the member remarried. Because he did not decline SBP coverage for his new spouse, she became an eligible beneficiary effective one year from the date of their marriage. SBP premiums should have been withheld from the member's retired pay effective January 1, 1986. Due to an administrative error, no SBP premiums were withheld from his account. As a result, the member was overpaid \$41,817.80 from January 1, 1986, through July 31, 2006.

Our Office determined that it would not be against equity and good conscience to collect the overpayment from the member since the member's spouse would have been covered under SBP had he died during the period that no SBP premiums were deducted from his retired pay. In his request for reconsideration, the member states that he and his wife were repeatedly told by Defense Finance and Accounting (DFAS) personnel that his wife was not covered and was not eligible for coverage. He states that it is unfair for the government to have wrongfully accumulated a huge debt against him and then charge him thousands of dollars of interest on the debt when they continuously denied him the right to make premium payments. He cites three DOHA decisions in support of his position.

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 interest of the

United States. Waiver may not be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. The fact that a debt occurred as a result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting waiver. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.3., and DOHA Claims Case No. 02120406 (December 19, 2002).

The SBP, 10 U.S.C. §§ 1447-1460b, is an income maintenance program for survivors of deceased members of the Uniformed Services. If a member ceases to have an eligible beneficiary and later remarries, he may elect not to provide coverage for the subsequent spouse if he does so within the first year of marriage. *See* 10 U.S.C. § 1448(a)(6), and Paragraph 430701-A of Volume 7B of DoD 7000.14-R, DoD Financial Management Regulation, Military Pay Policy and Procedures - Retired Pay. ⁽¹⁾ Waiver of a debt resulting from the non-deduction of SBP premiums is not proper if the member received the benefit of coverage. *See* DOHA Claims Case No. 02120406, *supra*, and DOHA Claims Case No. 98060410 (September 30, 1998).

In the case before us, when the member retired, his spouse and children were covered under SBP. Spouse coverage ceased in 1976 when he was divorced. Coverage for his children continued. In 1984 the member remarried. He immediately notified DFAS of his marriage and requested SBP coverage for his new wife and children. He applied for dependent ID cards and registered his new spouse in the DEERS program. In 1995 he was notified by DFAS that his youngest child had reached an age when he was no longer eligible for SBP coverage; child coverage thus would cease and no SBP premiums would be deducted from his retired pay. The member immediately called DFAS because he thought coverage for his new spouse was in effect. The member states that he was told that DFAS never received his marriage certificate or letter requesting coverage and that his wife was ineligible for coverage because too many years had past. Although the member may have been given erroneous information concerning SBP coverage for his spouse, under applicable law the member's spouse became his SBP beneficiary one year after they married, because he did not decline SBP coverage within one year after his marriage. *See* DOHA Claims Case No. 02120406, *supra*. If the member had died during the period the premiums were not being deducted, January 1, 1986, through July 31, 2006, his wife would have become eligible for an SBP annuity, although DFAS would have deducted the outstanding premiums from her annuity. Since the member received the benefit of SBP coverage during this period, waiver of the unpaid premiums is not appropriate. *See* DOHA Claims Case No. 02120406, *supra*, and DOHA Claim Case No. 98060410, *supra*.

In the member's request for reconsideration he cites three DOHA decisions in support of his position, DOHA Claims Case No. 99091601 (November 29, 1999), DOHA Claims Case

No. 97092914 (November 26, 1997), and DOHA Claims Case No. 97012159 (April 10, 1996). In DOHA Claims Case No. 99091601, *supra*, waiver was granted for the portion of the overpayment occurring prior to the member requesting coverage for his spouse because the member was unaware that coverage was available to her. This case is distinguishable because the member in the present case actually requested coverage for his spouse immediately after his marriage. He notified DFAS of his marriage, provided them a copy of his marriage certificate, requested dependent ID cards, and registered his new spouse in the DEERS program.

In DOHA Claims Case No. 97092914, *supra*, the member elected Reserve Component SBP coverage for his children in 1979. When he remarried in 1981, he elected coverage for his spouse. When he became entitled to reserve retired pay, SBP premiums began to be deducted only for his children. He was not aware that DFAS had no record of his spousal election until later, and he had no prior premium amount to compare with to judge whether the amount deducted was correct. The Board for Correction of Air Force Records corrected his record to indicate he had elected coverage for his spouse as of 1991. DFAS recommended that collection of the retroactive premiums be waived for the period 1991 through when the member was alerted that his spouse was not covered. Our Office upheld DFAS's recommendation. In the present case, in contrast, the member informed DFAS of the existence of his remarriage after his retirement. He should have expected a significant increase in his SBP premiums, and therefore a corresponding decrease in his retired pay. ⁽²⁾

In DOHA Claims Case No. 97012159, *supra*, the unearned portion of a member's selective re-enlistment bonus (SRB) was not collected from his final pay. The member was erroneously advised that he would not have to repay this unearned portion. Our Office found it reasonable for the member to have relied on the erroneous information; therefore, the member was without fault in receiving the erroneous payment and waiver of the debt was thus proper. In the present

case, the member's debt arose from the failure to deduct SBP premiums from his retired pay. As stated above, we have consistently held that since the member received the benefit of coverage, repayment of the unpaid premiums may not be waived.

Conclusion

The member's request for relief is denied, and we affirm the February 6, 2007, decision to deny waiver in the amount of \$41,817.80. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom

Member, Claims Appeals Board

1. An election to participate in SBP generally continues unless specifically revoked even where there is no eligible beneficiary for a period of time. Therefore, when a member remarries, eligibility as a spouse beneficiary is automatically conferred on his new spouse. Thus, when he remarries, his new spouse becomes a beneficiary unless he formally declines coverage within the first year of marriage. *See* DOHA Claims Case No. 98060410 (September 30, 1998) and

B-249740, June 4, 1993.

2. The record shows that during the period January 1, 1986, through November 30, 1986, only \$13.71 was being deducted from the member's retired pay for child coverage. Since the member's wife became an eligible beneficiary effective January 1, 1986, an additional \$114.79 should have been deducted from his retired pay for her coverage during this period. His retired pay should therefore have been reduced accordingly.