

June 12, 1998

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In Re:

[Redacted]

Claimant

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Claims Case No. 98033020 **CLAIMS APPEALS BOARD DECISION**

## **DIGEST**

Under 31 U.S.C. § 3702(b) a claim must be submitted within six years of accrual. If it is not submitted within six years, the claim is barred and this Office does not have jurisdiction to consider it.

## **DECISION**

This is an appeal of a Comptroller General decision, 71 Comp. Gen. 398 (1992), which denied the claim of the widow of an Army retiree for a Survivor Benefit Plan (SBP) annuity.<sup>(1)</sup> The claim was denied because it was filed more than six years after the member's death. In 1992, the authority to settle SBP claims rested with the Comptroller General. Pursuant to Public Law No.104-316, October 16, 1996, title 31 of the United States Code, section 3702, which provides for the settlement of claims against the United States, was amended to provide that the Secretary of Defense shall settle claims involving uniformed services' members pay, allowances, travel, transportation, retired pay, and survivor's benefits.<sup>(2)</sup> The Secretary further delegated that authority to this Office.

### **Background**

The claimant and her late husband (the member) were married in 1972, three years after he retired from the Army.<sup>(3)</sup> He elected SBP coverage for her in late 1972. In August 1982, the member obtained an *ex parte* divorce without notifying the claimant, and he remarried soon thereafter. The member submitted a copy of the divorce decree to the Defense Finance and Accounting Service (DFAS). He and his new wife were killed in an automobile accident on December 5, 1982. DFAS has no record of receiving an SBP claim from the claimant until 1990.<sup>(4)</sup> DFAS denied the claim in 1990, stating that she was not his widow due to the divorce in 1982. The claimant then sought to overturn the divorce on the grounds that she had received no notice before the divorce was granted. In March 1991, the court which had granted the divorce declared the divorce void *ab initio*. As soon as the court overturned the divorce, the claimant filed a claim for SBP. Because more than six years had elapsed since the member's death, DFAS denied her claim. The Comptroller General upheld the denial.

Prior to Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), it had been the policy of DFAS and the Comptroller General to handle recurring payments such as SBP under the continuing claims theory. Under that theory, if the widow of a military retiree waited more than six years to file a claim for SBP and was otherwise entitled, her claim would be allowed, but retroactive payment would be limited to six years of benefits. In Hart, the court said that in such a situation the six-year statute of limitations on a widow's claim begins to run as soon as "all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Id.* at 817, quoting Kinsey v. United States, 852 F. 2d 556, 557 (Fed. Cir. 1988). The court said that the final event in the plaintiff's case was the retiree's death. The court found that the claim was barred because the plaintiff had not filed it within six years of the retiree's death. In Hart, the court said that Congress intended the six year limit to be strictly enforced so as not to burden agencies such as DFAS from having to maintain records for indefinite periods of time. In the case of claims for SBP, the court said that the continuing claims theory created an unwarranted exception to the Barring Act. The Comptroller General followed Hart in denying the claim which is now before us on appeal.<sup>(5)</sup>

As discussed above, the statute of limitations requires that a claim for SBP be presented within six years of accrual.<sup>(6)</sup> We recognize that at the time of the member's death, DFAS would have denied the claim before us because of the ex parte divorce which the member had obtained. However, a claim filed within six years would have stopped the running of the statute of limitations while the claimant sought to overturn the ex parte divorce. Significantly, the claimant did not apply to DFAS for the purposes of the Barring Act or initiate action to overturn the divorce until well after the sixth anniversary of the death of the member. Since she did not file a claim within six years of the member's death, her claim is barred. See B-260835, May 10, 1995. We are unable to make exceptions to the Barring Act. If a claim is not filed within six years, this Office does not have jurisdiction to consider it. See 71 Comp. Gen. 398 (1992).

This Office must base its decisions on the written record. See 4 C.F.R. § 31.7. While the claimant has submitted a copy of a letter she submitted to DFAS in June 1983, DFAS has no record of receiving a claim from the claimant until 1990. Moreover, as explained in footnote 4 above, that letter, even if received by DFAS, would not have stopped the running of the Barring Act.

### Conclusion

The claim is denied.

/s/

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Michael D. Hipple

Chairman, Claims Appeals Board

/s/

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Christine M. Kopocis

Member, Claims Appeals Board

/s/

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Jean E. Smallin

Member, Claims Appeals Board

1. See footnote 5, infra.

2. See also GAO decision B-275605, Mar. 17, 1997.

3. The divorce documents indicate the marriage took place in 1970, but the record contains a marriage license showing the year as 1972.

4. The claimant has submitted with her appeal a copy of a June 1, 1983, letter she wrote to DFAS to claim an SBP annuity. Under regulations pertaining to the Barring Act, 31 U.S.C. §3702(b), we may not give effect to that letter. Prior to June 15, 1989, claims were required to be filed with GAO in order to toll the Barring Act. As of June 15, 1989, claims could be filed with GAO or the agency involved. The change covered claims filed after June 15, 1983. See 54 Fed. Reg. 25,437 (1989). Since the claimant's letter to DFAS was written before the change occurred, it would not have tolled the Barring Act at that time even if DFAS had received it.

5. This claim was one of five SBP claims settled at the same time under Comptroller General decisions B-243146, B-243147, and B-243148, May 21, 1992, which were combined in one decision which became 71 Comp. Gen. 398. The DFAS had begun paying SBP annuities to three of the widows before the Hart decision was issued. The Comptroller General allowed those three widows to continue receiving SBP annuities, but denied the claims of the other two widows, including the one before us, whose claims had not been settled before the issuance of Hart.

6. In this case, the statute of limitations is the Barring Act, 31 U.S.C. § 3702(b).