



DEPARTMENT OF DEFENSE
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REDACTED COPY

Matter of: Survivor Benefit Plan Coverage - [REDACTED]

File: Department of Defense General Counsel Opinion:
DoD/GC #97-2

Date: February 28, 1997

DECISION

The Director, Defense Finance and Accounting Service (DFAS), has requested an advance decision under 31 U.S.C. § 3529 on several questions involving the Survivor Benefit Plan (SBP) account of [REDACTED], a retired Army member who remarried his former spouse whom he had divorced prior to retirement. The request was submitted to the General Accounting Office (GAO) on June 28, 1995; however, as a result of the transfer of functions from GAO to the executive branch mandated by Public Law No. 104-316, and in accordance with subsequent delegations, the matter has been transferred to this office for resolution. For the reasons set forth below, we conclude that [REDACTED] current spouse is entitled to immediate annuity coverage as his spouse beneficiary under the SBP upon remarriage.

FACTS

The member married [REDACTED] in 1978. They were divorced on November 24, 1992, in Hawaii. The divorce decree required that [REDACTED] enroll in full SBP coverage for the benefit of his former spouse and their minor child. The member retired from the Army on March 1, 1993, at which time he elected maximum former spouse and child coverage under the SBP. On December 20, 1994, the member and [REDACTED] were remarried. Subsequent to the remarriage, [REDACTED] requested that [REDACTED] be covered as his spouse beneficiary under the SBP.

ISSUES

DFAS presents the following questions in connection with this matter:

- a. Can the member convert his SBP coverage from former spouse to spouse, since the former spouse beneficiary is now his current spouse?



b. If the answer to the above question is "yes," does the member need a court order authorizing the election change?

c. If the answer to the first question is "yes," is Devita eligible for an annuity if the member dies within the first anniversary of their remarriage?

d. If the answer to the first question is "no," does Devita retain "suspended" coverage as the member's former spouse, despite the fact that she remarried the retired member before reaching age 55?

LAW

An election to participate in the SBP is generally binding and irrevocable, and may not be unilaterally changed by the member. (See 53 Comp. Gen. 470, 474 (1974); 62 Comp. Gen. 553, 556 (1983).) Under the provisions of 10 U.S.C. § 1450(f)(1), however, a member who elected former spouse coverage may change that election and provide an annuity to a spouse or dependent child. The change of election must be written, signed by the retired member, and received by the Secretary concerned within 1 year after the new spouse or dependent child is acquired. Further, if the former spouse election is required by a court order, the member must furnish a certified copy of a court order that modifies the provisions of the previous court order so as to permit the retiree to change the former spouse election. (See 10 U.S.C. § 1450(f)(2).)

For SBP purposes, the term "widow" is defined in 10 U.S.C. § 1447(7) to mean the surviving wife of a person who, if not married to the person at the time he became eligible for retired pay, was married to him for at least 1 year immediately before his death, or is the mother of issue by that marriage.

ANALYSIS

As noted above, the law permits a member, upon acquiring a new spouse, to change from former spouse to spouse coverage, if the change is requested in writing before the first anniversary of the marriage. Where the former spouse coverage is required by a court order, the law requires that the member submit a new court order that permits the change to coverage for the new spouse. In this case, [redacted] submitted a request to change from former spouse to spouse coverage within the required 1-year period following his remarriage. However, since the former spouse coverage is mandated by a court order, DFAS notes that a strict application of the statutory language would appear to require that the member obtain a modifying court order authorizing the change. DFAS questions whether such an interpretation is correct in cases such as this, where a member has remarried a former spouse beneficiary and, although a change in the type of SBP coverage is requested, there is no change in the identity of the annuity beneficiary.

It is our conclusion that a modifying court order is not required in this situation. In B-249740, June 4, 1993, a case involving a member whose former spouse beneficiary had died, the Comptroller General noted that once the former spouse beneficiary died, the court order requiring the member to provide the former spouse coverage "was no longer relevant or effective" and the former spouse was "no longer a beneficiary under the Plan." We believe a similar determination is appropriate in cases such as this one. Once the member and [REDACTED] remarried, she was no longer the member's former spouse, so he no longer had a former spouse beneficiary under the SBP. Consequently, the provisions of 10 U.S.C. § 1450(f)(1) and (2) are not applicable to this case, and the member did not need to obtain a modifying court order in order to elect annuity coverage for his new spouse. Question a is answered in the affirmative, and question b is answered in the negative.

With regard to the question of the effective date of spousal annuity coverage, the general rule is that when a member who is not married at retirement acquires a spouse after retirement and makes an election of spouse coverage, the spouse is not an eligible beneficiary until either the first anniversary of the marriage or the date that the spouse becomes a parent of issue by that marriage, whichever is earlier. (10 U.S.C. § 1447(7).) In B-195349, January 10, 1980, the Comptroller General held that when a member remarries a former spouse who had been married to the member at retirement and was initially provided spouse coverage under the SBP, such spouse upon remarriage is exempt from the 1-year waiting period. On the other hand, the Comptroller General concluded that, where a member was not married at the time of initial election into the SBP, but then marries and elects coverage for the new spouse and then divorces and remarries that same spouse, the spouse would be subject to the 1-year waiting period.

DFAS notes that the [REDACTED] situation does not exactly fit either of the scenarios discussed in the above paragraph. Since [REDACTED] was not the member's spouse at the time he became eligible to participate in the SBP, it would appear that, under the law and Comptroller General decisions, she would be subject to the 1-year waiting period upon remarriage. However, in view of the fact that [REDACTED] was the member's former spouse beneficiary immediately prior to their remarriage, DFAS questions whether she should be required to wait 1 year to regain annuity coverage as a spouse beneficiary.

We conclude that the 1-year waiting period is not applicable in this situation. The Comptroller General has stated in a number of decisions over the years that the purpose of the 1-year marriage requirement was to "prevent spouse survivors, who acquire such status only by virtue of a 'death bed' marriage, from automatically receiving the annuity upon the death of the member." (56 Comp. Gen. 1022, 1024 (1977); see also B-257180,

Sep. 29, 1994); B-205173, June 9, 1982; 54 Comp. Gen. 266 (1974).) In a case such as the . . . , there is no issue of a "death bed" marriage to acquire benefits, since the "new" spouse was already covered as the member's SBP beneficiary prior to the marriage. In similar circumstances, the Comptroller General has held that adherence to a strict interpretation of the SBP statutory language is not required when such interpretation would achieve a result clearly not intended by Congress. (See B-205173, June 9, 1982.) Consequently, . . . should be considered to have become the member's SBP spouse beneficiary upon the date of her remarriage to the member, and question c is answered in the affirmative.

In view of the affirmative answer to question a, no answer is required to question d.

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