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Matter of: Survivor Benefit Plan Annuities for Reserve Component Members -

File: Department of Defense General Counsel Opinion:
DoD/GC #97-3

Date: March 11, 1997

DECISION

The Director, Defense Finance and Accounting Service (DFAS), has requested an advance decision under 31 U.S.C. § 3529 on the claim for annuity benefits under the Survivor Benefit Plan (SBP) of , the surviving spouse of , a deceased Air Force Reserve member. The request was submitted to the General Accounting Office (GAO) on July 16, 1996; 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 the claim of Mrs. may be allowed.

FACTS

, who was born on June 18, 1930, completed the years of service necessary to qualify for non-Regular (Reserve) retirement under the provisions of 10 U.S.C. § 12731 (formerly 10 U.S.C. § 1331) in 1972. On August 29, 1979, subsequent to establishment of the Reserve Component Survivor Benefit Plan (RCSBP) program, he was mailed his RCSBP election package. He did not return the election form to make an RCSBP election, and DFAS reports that there are no documents in the member's records indicating that his spouse was ever notified of his non-election under the RCSBP.

died on June 27, 1981, prior to reaching age 60. In April 1994, the member's surviving spouse, , requested coverage under the RCSBP program. On October 13, 1994, the Air Force Board for the Correction of Military Records (AFBCMR) corrected the member's records to show that on November 20, 1979, he elected spouse coverage under the SBP, and that on July 25, 1981, his widow submitted a claim for the annuity. The Record of Proceedings in the correction case indicates that the AFBCMR's action was based on its belief that had an SBP entitlement under the Barber holding.



BACKGROUND

The SBP annuity entitlement of members' surviving spouses arising under the holding in Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982), has been discussed in detail in two Comptroller General decisions. (See 71 Comp. Gen. 398 (1992); B-260207, April 18, 1995 (74 Comp. Gen. ____).) Those decisions concluded that the claims of certain surviving spouses were barred by the 6-year statute of limitations in 31 U.S.C. § 3702(b) because they were not timely filed.

The cases considered in the cited Comptroller General decisions concerned potential entitlement to annuities under the provisions of the regular SBP program as it relates to the survivors of members who were entitled to receive retired pay at time of death. This case involves an annuity claim arising under the RCSBP from the survivor of a Reserve component member. Because of differences in the SBP and RCSBP programs, DFAS is uncertain whether the holding of the cited decisions is applicable to RCSBP cases.

ANALYSIS

Public Law No. 95-397, September 30, 1978, established the RCSBP for Reserve members who have completed the 20 years of satisfactory service necessary to qualify for Reserve retirement but who have not yet reached age 60. At the time of enactment, the RCSBP provisions stated that if a Reserve member who is married does not elect to participate in the RCSBP at the maximum level, or elects to provide an annuity for a dependent child but not for the spouse, the member's spouse "shall be notified of that election." (See Pub. L. No. 95-397, § 202(a), amending 10 U.S.C. § 1448(a)(3)(B).) (In 1985, the notification provision was amended to require a spouse's concurrence in the member's election of less than maximum spouse coverage or of coverage for only a child.)

Under the holding in Barber and subsequent related cases, if a spouse was not notified of a member's failure to elect maximum spouse coverage, the spouse was automatically entitled to an SBP annuity at the member's death. In 71 Comp. Gen. 398, the Comptroller General concluded that, since annuity coverage was automatic in Barber-type cases, action by a correction board in such cases does not create a new entitlement to an annuity. Therefore, the statute of limitations in Barber cases begins to run as of the date of the member's death, and a claim must be filed within 6 years of that date, or it is forever barred, under the ruling in Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990). Further, in B-260207, April 18, 1995 (74 Comp. Gen. ____), the Comptroller General held that a correction board's attempt to overcome the expiration of the statute of limitations by changing

records to show submission of a claim by a widow at an earlier date was ineffective to create an annuity entitlement.

Although it might appear at first glance that the rationale underlying the holding in the SBP cases discussed in the above paragraphs would be equally applicable to RCSBP cases, DFAS notes in its submission that there are significant distinctions between the two programs that may necessitate a different outcome. Under the SBP, a member retiring subsequent to the enactment of the program is an automatic participant at the maximum level, unless the member, before the effective date of retirement, makes a valid election to participate at another level or to not participate. In the Barber cases, it was concluded that, where the notification requirement was not met, a married member's election of other than maximum spousal coverage is invalid, and the spouse was automatically entitled to full SBP coverage at retirement.

Under the RCSBP program, on the other hand, participation is not automatic. At the time a member becomes eligible to participate in the RCSBP program, the member may make an election of RCSBP coverage, or the member may decide not to participate at that time and instead to wait until reaching age 60 and then participate in the SBP. Thus, participation in the RCSBP requires an affirmative election into the program. In addition, the RCSBP notice provision required notice to a spouse only if the member made an election of less than maximum spouse coverage or of child coverage; it did not require notice to the spouse if the member made no election at all.

We agree with DFAS' view that a widow such as does not have an automatic entitlement to annuity coverage under the RCSBP as a result of the Barber cases. In such circumstances, the action taken in 1994 by the AFBCMR created an entitlement that did not previously exist, and the statute of limitations for filing a claim for annuity benefits would begin to run as of the date of the AFBCMR action, rather than at the time of the member's death. Consequently, the widow's claim for annuity benefits is not barred, and she is entitled to payment of an RCSBP annuity effective as of the date of her husband's death. (The fact that the AFBCMR may have corrected the member's records based on the erroneous belief that the member had an annuity entitlement under Barber does not affect the outcome of this matter; regardless of the underlying reason for the correction action, the widow's present annuity entitlement is based on the record as corrected by the AFBCMR.)

DFAS also raises the question of whether the rationale applicable to the Barber case would also apply in a case where a married Reserve member made an election of less than maximum RCSBP spouse coverage or of coverage for a child but not for the spouse, and where, contrary to the statutory notice provision, the spouse was not notified of that election. Since there is no automatic coverage under the RCSBP, it appears that the holding

of the Barber cases would also not be applicable to this situation; notwithstanding the fact that the statutory notice requirement was not met. Consequently, action by a correction board to change a member's records to show an election of RCSBP spouse coverage would give the spouse an entitlement not present before, so that the statute of limitations in such cases would not begin to run until the date of the correction board action.

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