

March 26, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 02082608

CLAIMS APPEALS BOARD DECISION

DIGEST

When a retired member of the Army Reserve died in November 1990, his wife became eligible to receive a Survivor Benefit Plan annuity. Because she did not submit an application for the annuity within six years of the member's death, her claim is barred.

DECISION

We have been asked to render a decision regarding the claim of the widow of a military member for a Survivor Benefit Plan (SBP) annuity. The Defense Finance and Accounting Service (DFAS) initially denied the claim because it was filed more than six years after the member's death.

Background

The member qualified for Reserve retired pay and began receiving retired pay as of his sixtieth birthday, August 14, 1981. He elected SBP coverage for his spouse and paid SBP premiums until his death on November 9, 1990. His widow thereupon became eligible for an SBP annuity, but she did not file a claim for the annuity until 1999. ⁽¹⁾ DFAS denied her claim because it was not filed within the six years as required under 31 U.S.C. § 3702(b). In appealing the denial,

her attorney submitted to DFAS evidence of the widow's mental incompetence at the time of the member's death and thereafter. He contends that her claim should be allowed under an exception to the judicial statute of limitations, 28 U.S.C. § 2501, which extends the time allowed for filing suit when the claimant is under a legal disability.

Discussion

The SBP, 10 U.S.C. §§ 1447-1460b, is an income maintenance program for the survivors of retired military members. Under 31 U.S.C. §3702(b), a survivor has six years to file a claim for an SBP annuity. Before May 1992, however, the Comptroller General treated a claim for an SBP annuity as a "continuing claim." Under the continuing claim theory, each periodic payment (*e.g.*, a monthly SBP payment) was treated as a separate claim. Therefore, if a claim for an SBP annuity was submitted more than six years after the member's death, under the continuing claim theory the claim for future payments could be allowed, and six years of retroactive payments could be paid. The only portion of the claim which would be barred would be the amounts payable more than six years before the claim was filed.

Prior to August 1990, the United States Claims Court applied the continuing claim theory to SBP claims filed more than six years after the member's death.⁽²⁾ In *Hart v. United States*, 910 F. 2d 815 (Fed. Cir. 1990), the court overruled the Claims Court and denied an SBP claim filed more than six years after the date of the member's death. Citing 28 U.S.C. § 2501, the court indicated that all the events giving rise to the government's liability to make SBP payments to the widow occurred when the member died and that his widow had six years from that date to file her claim. Claims filed more than six years after the member's death were barred.

In the settlement of claims, the Comptroller General accorded great weight to the judicial opinions of the federal courts. When the federal courts have thoroughly considered an issue and allowed the resulting claim, the Comptroller General often modified his position on the issue to comply with the courts' decisions. *See* 67 Comp. Gen. 436 (1988); and 67 Comp. Gen. 408 (1988). We agree with the Comptroller General's deference to judicial opinions.

In 71 Comp. Gen. 398 (1992), the Comptroller General accepted the court's decision in *Hart* and no longer applied the continuing claim theory to SBP claims filed more than six years after the member's death.⁽³⁾ In reaching his decision, the Comptroller General compared the judicial statute of limitations, 28 U.S.C. § 2501, with the comparable statute governing claims before the Comptroller General, 31 U.S.C. § 3702(b), stating that the statutes served the same purpose and should be similarly applied. One difference between the two statutes, however, is that 28 U.S.C. § 2501 includes an exception which tolls the statute for those under a legal disability, while 31 U.S.C. § 3702 does not. *See* B-255963, June 14, 1994; and 64 Comp. Gen. 155 (1984).

While the claimant's attorney argues that we should apply the legal disability exception in 28 U.S.C. § 2501 to the claim before us, we must apply our statute of limitations as written. The legal disability exception to the judicial statute of limitations was included in 28 U.S.C. § 2501 by Congress. If Congress intended 31 U.S.C. § 3702 to contain a similar exception, it could have amended that statute to include the exception. The statute of limitations is jurisdictional and must be applied strictly. *See* 70 Comp. Gen. 292 (1991); and 64 Comp. Gen. 155, *supra* .

While we must deny the claim, we note that the provisions of 31 U.S.C. § 3702(e) may be of some assistance. The claimant may pursue other remedies as she deems appropriate.

Conclusion

The claim is barred.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

William S. Fields
Member, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

1. The claim was filed by her attorney.
2. The Claims Court is now the United States Court of Federal Claims.
3. The Comptroller General's decision was reached on May 21, 1992.