

DATE: March 13, 2006

In Re:

[Redacted]

Claimant

)

Claims Case No. 06013001

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

In a conflict between enforcement of a state divorce decree and a federal military entitlement outside of military retired pay, federal law pre-empts state law.

DECISION

A former spouse (hereinafter "claimant") of a deceased member requests reconsideration of the November 30, 2005, Appeal Decision of the Defense Office of Hearings and Appeals (DOHA), DOHA Claims Case No. 05033105, in which our Office upheld the Defense Finance and Accounting Service's (DFAS) determination to disallow her claim for the Voluntary Separation Incentive (VSI) payments still owed to the deceased member.

Background

At the time the member separated from the Navy under the VSI program, he was married to the claimant, and they had two sons. The member subsequently designated the claimant as the 100 percent beneficiary of VSI payments still owed him in the event of his death. The member made this designation using DFAS-CL Form 1900/2, Voluntary Separation Incentive (VSI) Beneficiary Designation. In 1999 the member and the claimant divorced, and the separation and property division agreement incorporated into the final divorce decree issued by a family court in the State of Delaware specifically divided the VSI payments. [\(U\)](#)

The member remarried and purportedly drafted a handwritten document dated November 15, 2001, designating his new wife as 50 percent beneficiary and each of his sons as 25 percent beneficiaries of the payments still owed him in the event of his death. DFAS has reported to have received this document in November 2001. The member died in March 2004 whereupon his sons discovered his 2001 designation. DFAS's Retired and Annuity Pay unit accepted the 2001 designation and advised the member's sons and his wife of the specifics of the designation.

Claimant contested the 2001 designation on the basis that it failed to comply with relevant regulations and was contrary to the divorce decree. DFAS's Assistant General Counsel advised payment should be made in accordance with the 2001 designation. Claimant appealed to our Office. Our Office affirmed DFAS's disallowance of her claim. She now requests reconsideration. First, she states that her divorce decree is legally binding and should be honored by DFAS. She states that the member was aware of his obligation to share his VSI payments when he signed the divorce agreement. Therefore, if DFAS accepts the 2001 change of beneficiaries, she argues the member could only have made changes to his 50 percent share of the VSI payments. Second, in the alternative, she argues if DFAS does not comply with the divorce decree, the handwritten, faxed beneficiary changes should not be honored and the 1993 designation should be upheld, awarding her 100 percent of the VSI payments.

Discussion

In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981), the Supreme Court ruled federal law precluded state courts from dividing military retired pay under state community property laws in divorce proceedings. Congress reacted to this decision by enacting the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, which provided authority for state courts to treat disposable military retired pay as marital property subject to division. The USFSPA only permits states to divide disposable retired pay. To the extent that other types of military pay, compensation and benefits fall outside the USFSPA, *McCarty* is still valid law.

The Voluntary Separation Incentive program was established to encourage members of the active duty forces to voluntarily separate from active duty. (2) The VSI program is codified under 10 U.S.C. § 1175, and provides a variable-length annuity to members separating from active duty. Under the statute, the member is the only person who has the right to VSI payments. VSI payments are nontransferable; upon the member's death, they do not pass to the member's heirs by will or by intestate succession. However, the member has the right to designate whomever he wishes as beneficiaries to receive the balance of VSI payments still due him at death. (3) Under 10 U.S.C. § 1175, there is no mechanism for DFAS to make direct payment to the former spouse as there is for retired pay under the USFSPA.

As stated in the Appeal Decision, 10 U.S.C. § 1175 confers no entitlement to VSI payments upon the member's spouse. Although it appears that the claimant was receiving 50 percent of the VSI payments under the divorce decree while the member was living, these payments were not paid directly to her by DFAS. The member had a statutory right to designate beneficiaries to the incentive payments owed to him in the event of his death and to alter that choice at any time. Upon his death, DFAS accepted the 2001 change of beneficiaries following its normal practice and initiated payment to the member's wife and two sons.

As for DFAS accepting the 2001 designation, the claimant has failed to demonstrate that DFAS's interpretation or implementation of the VSI program was arbitrary, capricious or contrary to law. We find no error in the Appeal Decision.

Conclusion

We affirm the Appeal Decision.

_____/s/_____

Christine M. Kopocis

Acting Chairman, Claims Appeals Board

_____/s/_____

James B. Norman

Member, Claims Appeals Board

_____/s/_____

Catherine M. Engstrom

Member, Claims Appeals Board

1. "Husband is entitled to receive the sum of \$8,932.00 each year commencing with the first payment on August 31, 1998 until the year 2025 and the parties shall share said funds on an equal basis (50% each), however, Wife shall be responsible for Wife's tax obligation on said funds until the year 2025."

2. See the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290

(1991).

3. *See* 10 U.S.C. § 1175(f), "The member's right to incentive payments shall not be transferable, except that the member may designate beneficiaries to receive the payments in the event of the member's death."