In Re:

[Redacted]

Claimant

DATE: May 16, 1997

Claims Case No. 96112101

CLAIMS APPEALS BOARD DECISION

DIGEST

The widow of a Reserve component service member who retired in 1952 and who died in 1964, is not entitled under Section 305 of the Army and Air Force Vitilization and Retirement Equalization Act of 1948, or Air Force Pamphlet 30-1-1 (1964), to receive monthly payments equal to her late husband's retired pay when she reaches age 60.

DECISION

[Redacted] , the claimant, appeals our Settlement Certificate in DOHA Claim No. 96091003, November 5, 1996. Our settlement denied her claim for monthly benefits based on her late husband's ([Redacted]) Reserve service.[(1)]

Background

The service member retired from the United States Air Force Reserve when he reached the age of 60, effective October 31, 1952; he died on August 24, 1964. The Defense Finance & Accounting Service - Denver Center reports that it is not known whether the late service member participated in either the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431-1446, (RSFPP) or its predecessor, the Uniform Services Contingency Option Act of 1953, ch. 393, 67 Stat. 501. The claimant says that she waited until she turned 60 in 1992 to apply for benefits on advice of Air Force officials.

In the November 5, 1996, Settlement Certificate, this Office thoroughly explained the legal basis for denial of any benefits based on irregular military service under title 10, United States Code. We will not elaborate further on that discussion except to address the errors cited by the claimant in her appeal.

Preliminarily, it is the claimant's position that by operation of law when her husband died, and upon her 60th birthday in 1992, she should receive any retired pay he would have received if he had continued to live. She maintains that it was not necessary for the service member to have enrolled in any annuity program in order for the claimant to collect such benefits. The claimant characterizes the service member's benefits as "old age benefits." [(2)] On appeal, the claimant asserts that the adjudicators committed various errors. For one thing, she says that her entitlement is not based on Sections 302 and 307 of the Army and Air Force Vitilization and Retirement Equalization Act of 1948,[(3)] rather it is based on the correct advice of certain Air Force officials, corroborated by section 22 of Air Force Pamphlet (AFP) 30-1-1 (May 1, 1964) and Section 305 of the 1948 Act "which makes old age benefits, viz. social security benefits part of the sum total of retirement pay." The claimant contends that in accordance with Section 305, old age benefits, or other benefits received on account of civilian employment, are to be included in the amount of retired pay. She says that because old age benefits are synonymous with Social Security benefits, "there should not have been a denial . . . [because] . . . such benefits are considered community property and a right to [a] surviving spouse . . ." Finally with regard to the finding that there was no evidence that the claimant's late husband participated in RSFPP or its predecessor, the claimant suggests that he may have been in one of those programs and contends that DFAS is trying to make itself non-liable for claims by destroying her late husband's pay records.

Discussion

Preliminarily, while the result in McCarty v. McCarty, 453 U.S. 210, 101 S.Ct. 2728 (1981) was largely overturned by

specific legislation after the decision, a central holding of McCarty is still valid Federal law. Absent specific legislation, the military retirement system confers no entitlement to retired pay upon the retired member's spouse, and does not embody even a limited "community property concept." Rather, the language, structure, and history of the statutes make it clear that retired pay continues to be the personal entitlement of the retiree. Id. at 2735-2741. The critical events involving this case had taken place long before 1981.

Section 22 of AFP 30-1-1 did not create a right to old age or any other benefit; it was intended to summarize what a service member or his/her dependent may be eligible to receive from Social Security if otherwise qualified. Subsections 22b and 22c clearly state that application for such benefits is made to the Social Security Administration, and that agency makes the final decision.(4)

Section 305 does not mention dependents or spouses; it refers only to "officers" and "enlisted" persons. The section has two purposes. First, it precludes officers or enlisted of the Reserve components from receiving retired pay under title III who are entitled to receive, or who are receiving, retired pay for military or naval service under any other provision of law. Second, Section 305 also provides that no period of service otherwise creditable in determining an officer or enlisted person's eligibility for, or amount of, benefits payable under any provision of law (including Social Security old age benefits) on account of civilian employment is to be excluded because the same period of service was used to determine the eligibility or amount of retired pay under title III. If anything, the second purpose of Section 305 makes it clear that, in this context, entitlement to Reserve component retired pay is mutually exclusive from entitlement to other benefits. The military Service determines the service person's eligibility (and the amount) under title III, and then the Social Security Administration determines what he/she may receive under old age benefits. This does not mean, as the claimant states, that Social Security old age or other benefits received on account of civilian employment are to be included into the amount of Reserve component retired pay.

We find no logical or legal basis for the claimant's jump between her obtaining benefits on account of her late husband's Social Security account and the proposition that the surviving spouse somehow also substitutes in for her late husband's title III retired pay when she attains 60 years of age just because something similar appears to result under Social Security. The claimant has not and cannot cite a statutory basis for this, nor does she cite any judicial precedent.

The claimant suggests that her late husband's military records as they pertain to the possibility that he may have participated under the Uniformed Services Contingency Option Act of 1953 or the RSFPP may have been conveniently misplaced to avoid her claim. It is well established that allegations and speculation are not evidence. We cannot authorize payment on mere speculation as to the facts involved or on the basis of the vague assertions of entitlement made by a claimant. See Edward A. Quijano, B-217935, Apr. 30, 1986. The burden is on the claimant to establish the liability of the United States and her right to payment. The settlement of a claim is based on the written record only. See 4 C.F.R. 31.7. It is also well established that if an official record that can be used to prove a claim cannot be produced from government files or elsewhere, the claim must be disallowed. See B-241592, Mar. 13, 1991. Finally, even if the service member had participated in one of these two programs, the claimant may now be time-barred. Compare 71 Comp. Gen. 398 (1992).

Conclusion

Accordingly, we affirm the prior settlement.

\s\ Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

\s\ Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

\s\ Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. At one point in the claim process, the claimant was represented by Alisa Frazone-Davis, Esq., but the claimant appealed under her own signature. We do not know whether the claimant is still represented by counsel in this matter.

2. See counsel's letter dated February 8, 1996 to DFAS-Denver.

3. See title III of Pub. L. No. 810, 80th Congress, approved June 29, 1948, ch. 708, 62 Stat. 1081, 1087.

4. Even if claimant can demonstrate (which she did not) that certain Air Force officials had promised her a monthly payment based on her late husband's retired pay, the Supreme Court has held that payments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee to a benefits claimant cannot estop the Government from denying benefits not otherwise permitted by law. See OPM v. Richmond, 496 U.S. 414, 110 S.Ct. 2465, 2469-2476 (1990), reh'g denied, 497 U.S. 1046.