



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Charlotte S. Neal--Survivor Benefit Plan--
Former Spouse Coverage
File: B-221968
Date: December 29, 1987

DIGEST

Amendments made to the Survivor Benefit Plan in 1982 and 1983 gave retired service members the option of voluntarily electing survivor annuity coverage for "a former spouse." A further amendment enacted in 1984 provides that if a retiree agrees in writing to elect annuity coverage for a former spouse and then "fails or refuses" to do so, the retiree nevertheless "shall be deemed to have made such an election." If a retiree dies without ever being eligible to provide annuity coverage for a former spouse, however, the retiree cannot properly be considered to have ever failed or refused to elect such coverage nor can the retiree be "deemed" to have made the election under the terms of the 1984 amendment. Hence, a voluntary election to provide annuity coverage for a former spouse cannot be "deemed" to have been made in the case of a retired Navy officer who died before the effective date of a statutory amendment that would have permitted him to elect coverage for his ex-wife.

DECISION

Mrs. Charlotte S. Neal questions the correctness of action taken by the Department of the Navy in denying her claim for a Survivor Benefit Plan annuity, based upon her status as the divorced wife of Lieutenant Commander Michael D. Christian, USN (Retired) (Deceased). In light of the facts presented, and the applicable provisions of law, we conclude that the Navy acted correctly in denying her claim.

BACKGROUND

Mrs. Neal married Michael D. Christian on November 8, 1958. On February 1, 1978, he retired from the Navy in the grade of lieutenant commander. Upon retirement he elected to participate in the Survivor Benefit Plan with spouse coverage, thus electing to receive retired pay at a reduced rate

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in order to provide an annuity for a surviving spouse, if he died while married and was survived by a widow.

On August 19, 1983, Commander Christian and Mrs. Neal were divorced. Their separation agreement, which was incorporated in the divorce decree, contained this provision:

"8. Husband agrees to assist wife in obtaining any and all benefits to which she might become due as a result of existing or proposed legislation to provide benefits to ex-dependents of retired servicemen, should such legislation become law. In addition, husband agrees to name wife as beneficiary under his Armed Forces Survivor Benefit Plan."

Commander Christian died on September 4, 1983. Mrs. Neal subsequently submitted a claim to the Department of the Navy for a Survivor Benefit Plan annuity on the basis of the divorce decree and her status as Commander Christian's former spouse. The Navy has denied her claim for the annuity, however. The Navy's position essentially is that under the federal laws governing the administration of the Survivor Benefit Plan, Commander Christian was not eligible to elect annuity coverage for Mrs. Neal as his former spouse between the time of their divorce on August 19, 1983, and the time of his death on September 4, 1983, so that their separation agreement cannot serve as a basis for allowing her claim for the annuity.

Mrs. Neal questions the correctness of the action taken by the Navy in denying her claim.

ANALYSIS AND CONCLUSION

The Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, was established by Congress in 1972 as an income maintenance program for dependents of deceased members of the uniformed services. See Public Law No. 92-425, September 21, 1972, 86 Stat. 706. Under the original legislation, there was no authority for coverage of a former spouse and upon a divorce, a retiree's former spouse generally lost coverage. The Plan originally provided a monthly annuity to be paid to:

- "(1) the eligible widow or widower;
- "(2) the surviving dependent children * * *; or

"(3) the natural person designated [with an insurable interest in the member] * * *."

See Public Law No. 92-425, September 21, 1972, 86 Stat. 706, 708, codified at 10 U.S.C. § 1450 (Supp. II 1972, superseded). The provision has been modified a number of times, and a brief history of the relevant modifications follows.

Public Law No. 97-252, September 8, 1982, 96 Stat. 718, 730, 735, title X, the Uniformed Services Former Spouses' Protection Act, amended the Survivor Benefit Plan to allow a member thereafter to make a voluntary election to provide an annuity for "a former spouse," at the time the member became eligible to participate in the Plan. Previously, annuity coverage for a former spouse could have been elected only if the former spouse had qualified as a "natural person" having an "insurable interest" in the service member. See, generally, S. Rep. No. 502, 97th Cong., 2d Sess. 5, reprinted in 1982 U.S. Code Cong. & Ad. News 1596, 1599.

The Plan was again amended by section 941 of Public Law No. 98-94, the Department of Defense Authorization Act, 1984, September 24, 1983, 97 Stat. 614, 652. Under this amendment, a member who elected into the Plan by designating his spouse when he became eligible and later divorced the spouse, could now elect to designate that former spouse as the Plan beneficiary. This was designed to modify the restriction imposed by the Uniformed Services Former Spouses' Protection Act, described above, under which a member could only elect to provide an annuity for "a former spouse" if he had a former spouse at the time he became eligible to participate in the Plan. See S. Rep. No. 174, 98th Cong., 1st Sess. 255, reprinted in 1983 U.S. Code Cong. & Ad. News 1081, 1145.

After Public Law No. 98-94 was enacted in 1983 it was found that an agreement to provide an annuity to a former spouse could not be enforced even if the retired service member was eligible to elect coverage, since it was up to the member to make the election voluntarily on behalf of his former spouse. It was then concluded that, while participation in the Plan should remain a voluntary act of the retiree, a retiree should not be permitted to renege on a written agreement to provide coverage. As a result, Congress passed section 644 of Public Law No. 98-525, October 19, 1984,

98 Stat. 2492, 2548.^{1/} This provided that, if a member had voluntarily agreed in writing to cover a former spouse under the Plan, the agreement was incorporated, ratified or approved by a court order, and the member then refused or failed to make the election as agreed, the former spouse could make a request to the appropriate Service Secretary within a year of the passage of the Act or the date of the court order, whichever is later, and the Service would "deem" an election to have been made by the member. This amendment to the Plan concerning "deemed" elections was codified in 10 U.S.C. § 1450(f)(3) (Supp. III 1985).

Under these amendments to the Survivor Benefit Plan, a military retiree who is a Plan participant may now voluntarily elect annuity coverage for a former spouse. Also, if the retiree agrees to make an election for a former spouse under the terms of a divorce decree but subsequently "fails or refuses" to do so, such election may nevertheless be "deemed" to have been made under 10 U.S.C. § 1450(f)(3). We have expressed the view, however, that if a retiree is and always has been ineligible to provide annuity coverage for a former spouse under the provisions of law governing the Survivor Benefit Plan, the retiree cannot properly be considered to have ever "failed" or "refused" to elect such coverage nor can the retiree be "deemed" to have made the election under 10 U.S.C. § 1450(f)(3). See DOD Military Pay and Allowance Committee Action Number 560, B-221968, Sept. 28, 1987, 66 Comp. Gen. ____. Hence, we have specifically held that if a retiree dies before the effective date of the statutory amendment that would have permitted him to elect his former spouse as a Plan beneficiary, he cannot be considered to have "failed" or "refused" to make such voluntary election, and there can be no "deemed" election under 10 U.S.C. § 1450(f)(3). DOD Military Pay and Allowance Committee Action Number 560, 66 Comp. Gen. ____, supra.

In the present case, therefore, it appears that when Commander Christian retired from the Navy in 1978, he was eligible to participate in the Survivor Benefit Plan with annuity coverage for a spouse, but under the laws then in

^{1/} See S. Rep. No. 500, 98th Cong., 2d Sess. 222 (1984). See also H.R. Rep. No. 1080 (Conference), 98th Cong., 2d Sess. 301, reprinted in 1984 U.S. Code Cong. & Ad. News 4258, 4280.

effect he could not have elected to provide annuity coverage for a former spouse in the event of a divorce.^{2/}

The Survivor Benefit Plan was amended by Public Law No. 97-252 on September 8, 1982, to permit service members to elect annuity coverage for "a former spouse," if they had a former spouse at the time they became eligible to participate in the Plan. See 10 U.S.C. § 1448(b)(1) (1982 ed.). At that time Commander Christian did not have a "former spouse," however, and it is consequently our view that he was not eligible to elect coverage for a "former spouse" under the 1982 amendment.

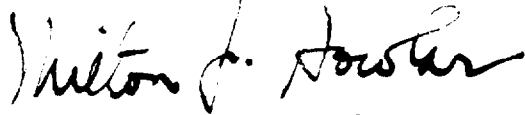
The further amendment of the Survivor Benefit Plan by Public Law No. 98-94 on September 24, 1983, gave service members the additional option of electing annuity coverage for a "former spouse" in the event of their divorce after they became Plan participants with spouse coverage, even though they may not have had a "former spouse" at the time they initially became participants in the Plan. See 10 U.S.C. § 1448(b) (Supp. I 1983). In our view, Commander Christian could have elected annuity coverage for Mrs. Neal as his "former spouse" under this amendment if he had lived until the date it went into effect. However, since he died on September 4, 1983, prior to the enactment of this amendment provided by Public Law No. 98-94, our view is that he never had an opportunity to elect "former spouse" coverage for Mrs. Neal.

Public Law No. 98-525, enacted on October 19, 1984, again amended the Survivor Benefit Plan to authorize elections for former spouse coverage to be "deemed" in the case of service members who agreed to make such an election in a divorce settlement but who subsequently refused or failed to make the voluntary election as agreed. In this case, however, Commander Christian never had an opportunity to

^{2/} Prior to the amendment of the Survivor Benefit Plan in 1982, annuity coverage for a former spouse could only be elected under 10 U.S.C. § 1448(b)(1) (1976 ed.), which provided: "A person who is not married and does not have a dependent child when he becomes entitled to retired or retainer pay may elect to provide an annuity to a natural person with an insurable interest in that person." See DOD Military Pay and Allowance Committee Action No. 560, 66 Comp. Gen. _____, supra. It has not been suggested, nor does it appear from the facts presented in the records of this case, that Commander Christian could have elected annuity coverage for Mrs. Neal under this provision.

elect annuity coverage for Mrs. Neal as his "former spouse," so that we are unable to conclude that he ever "refused" or "failed" to make such a voluntary election under the terms of Public Law No. 98-525. See DOD Military Pay and Allowance Committee Action No. 560, 66 Comp. Gen. _____, supra. Hence, our conclusion is that he cannot now be "deemed" to have made the election under Public Law No. 98-525.

Accordingly, we conclude that the Department of the Navy properly denied Mrs. Neal's claim for a Survivor Benefit Plan annuity.

for 
Comptroller General
of the United States.