The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Chief Petty Officer Thomas B. Walker, USNR (Retired) (Deceased)--Survivor Benefit Plan - Reservist

File: B-229248

Date: December 19, 1989

DIGEST

A military reservist who irrevocably elects to participate in the Survivor Benefit Plan following completion of the requisite years of service for retirement purposes is considered to have been eligible at that time for retired pay for Survivor Benefit Plan annuity computation purposes in the event of his death before age 60. Survivor Benefit Plan eligibility attaches at that time. Statutory exemption providing an immediate Survivor Benefit Plan annuity for a widow married to a member for less than 1 year at the time he became eligible for retired pay therefore does not apply where a second spouse was married to a member when he began receiving retired pay but was not married to him when he completed the years of service required for retired pay and Survivor Benefit Plan eligibility.

DECISION

The question presented here is whether the Department of the Navy acted correctly in denying Karlie D. Walker's claim for a Survivor Benefit Plan annuity as the widow of a Navy reservist.1/ We conclude that the claim was properly denied.

BACKGROUND

Thomas B. Walker was a chief petty officer in the Navy Reserve. On September 16, 1979, he elected to participate in the Survivor Benefit Plan with an annuity coverage for his wife, Mattie Walker. He thus elected to receive military retired pay at a reduced rate in order to provide an annuity for her if she survived him.

1/ This action is in response to a request for a decision received from W. C. Simpson, Disbursing Officer, Navy Finance Center.

Chief Walker and Mattie Walker were divorced on November 24, 1982. On November 26, 1982, he married the claimant, Karlie D. Walker.

On January 16, 1983, Chief Walker attained the age of 60 years. He then applied for and began to receive monthly payments of military retired pay. Chief Walker died several months later on November 13, 1983.

Following Chief Walker's death, Karlie Walker claimed a Survivor Benefit Plan annuity as his widow. The Navy then commenced making monthly annuity payments to her.

In 1986 a review of the records relating to Mrs. Walker's account led Navy officials to suspend payment of the annuity. The basis for the suspension was the fact that she had not been married to Chief Walker for a 1-year period immediately before his death. Because of this, the Navy officials concluded that she had never been eligible for an annuity, and that she had received erroneous annuity payments totalling $8,176.37 during the period from November 14, 1983, to May 31, 1986. From this they subtracted $299.51 in annuity costs which had been erroneously deducted from Chief Walker's retired pay between January and November 1983. They then advised Mrs. Walker that she was indebted to the government in the net amount of $7,876.86 on account of the erroneous annuity payments she had received. Collection of the debt was subsequently waived upon Mrs. Walker's application under the provisions of 10 U.S.C. § 1453.

Mrs. Walker, through her attorney, argues that the Navy should not have suspended the annuity. Specifically, she points out that she was married to Chief Walker when he began to receive military retired pay following his 60th birthday, and maintains that under the terms of the Survivor Benefit Plan law she is therefore entitled to a survivor's annuity regardless of how long they were married.

ANALYSIS AND CONCLUSION

Congress enacted legislation establishing the Survivor Benefit Plan for military retirees in 1972.2/ The laws governing the Plan are currently codified in sections 1447 through 1455 of title 10, United States Code. Under 10 U.S.C. § 1447(3), the following definition is provided:

2/ Pub. L. No. 92-425, Sept. 21, 1972, 86 Stat. 706.

"(3) 'Widow' means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay--

"(A) was married to him for at least one year immediately before his death; or

"(B) is the mother of issue by that marriage."

Thus, military retirees can provide immediate annuity coverage for a spouse if they are married when they become "eligible" for retired pay, but a 1-year waiting period for annuity coverage is imposed for a spouse acquired thereafter. The 1-year marriage requirement is based on a similar provision of the civil service retirement laws. The legislative history indicates that the purpose of the requirement is to prevent lifelong survivor annuity payments to persons on the basis of brief marriages they may contract with older, retired service members.

Members of the Reserve components of the armed forces become eligible for military retired pay by performing 20 years of service. Unlike their active duty counterparts, however, reservists may not retire immediately with pay upon the completion of 20 years' service. Instead, the retired pay entitlement of reservists is deferred either until the date they are 60 years old, or until some later time if they defer their application for retired pay beyond that date. See 10 U.S.C. § 1331(a) and (b); 38 Comp. Gen. 146, 149 (1958).

In 1978 Congress amended the Survivor Benefit Plan to authorize reservists to become Plan participants at the time they established their eligibility for military retired pay upon their completion of 20 years of service.3/ Under the amendment, reservists are authorized to elect to have a survivor's annuity payable immediately upon their death regardless of their age, and under such election a reservist "who dies before becoming 60 years of age . . . shall be considered to have been entitled to retired pay" for annuity computation purposes. 10 U.S.C. § 1451(b)(2). Such an election is irrevocable. 10 U.S.C. § 1448(a)(4)(B).

3/ Pub. L. No. 95-397, Sept. 30, 1978, 92 Stat. 843. Previously, reservists had been authorized to participate in the program only when they filed an application for military retired pay, at age 60 or at some time thereafter. See 53 Comp. Gen. 832 (1974).

A memorandum dated January 21, 1981, concerning the application of this amendment was sent to the Department of Defense Office of General Counsel from the Office of the Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics. The memorandum advised that the Department of Defense Joint Retired Serviceman's Family Protection Plan/Survivor Benefit Plan Board had considered the situation of a married "Reservist who elects [SBP] coverage upon receipt of a 20-year notification letter, subsequently loses that beneficiary, and acquires another spouse after age 59 but before age 60." The Board concluded that the original irrevocable election could not be set aside in favor of a new election for the newly acquired spouse, so that there could be no annuity coverage for that spouse, and no assessment of costs, until the qualifying conditions of 10 U.S.C. § 1447(3) were met; that is, until the reservist was married at least 1 year unless a child of the marriage was born sooner. The Department of Defense Office of General Counsel concurred in this conclusion in a responding memorandum dated December 10, 1981. These conclusions have been incorporated in information papers issued by the uniformed services concerning the Survivor Benefit Plan.

As a general rule the construction of a statute by those charged with its execution is to be sustained in the absence of a showing of plain error.4/ Here, it is apparent that the officials of the Department of Defense having the primary responsibility for administering the Survivor Benefit Plan have consistently and uniformly construed the laws governing the Plan as requiring, in the case of a Plan participant who divorces and remarries, that annuity coverage for the second spouse cannot take effect until the participant has been married for at least 1 year unless there is an earlier issue from that marriage. This requirement has been construed as having equal application to Plan participants regardless of whether their eligibility for retirement with pay is based on extended active duty or on Reserve service.

We agree with the construction of the law by the Department of Defense. A reservist, such as Chief Walker, who irrevocably elects to participate in the SBP during the 90-day period following completion of the requisite years of service derives immediate benefits--should he die before

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4/ See Howe v. Smith, 452 U.S. 473, 485 (1981); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969); Colonel William N. Jackomis, USAF (Retired), 58 Comp. Gen. 635, 638 (1979).

reaching age 60 he will be considered to have been entitled to retired pay and his dependents, if any, will qualify for an annuity. He thus becomes "eligible" for retired pay for SBP purposes upon completing his years-of-service requirement because his entitlement to an SBP annuity in the event of his death before age 60 vests at that time. It follows, in our view, that the statutory exemption to the 1 year of marriage requirement for widows "married to the person at the time he became eligible for retired or retainer pay" refers to his spouse when his years-of-service requirement was fulfilled, not to his spouse when he later begins to receive retired pay at age 60. In Chief Walker's case, the claimant was not married to him at that time.

Accordingly, we are unable to agree that the claimant is entitled to an annuity because she was married to Chief Walker on his 60th birthday. Hence, we have no alternative but to sustain the denial of her claim.

Milton J. Socolar

for Comptroller General
of the United States