



The Comptroller General
of the United States

Washington, D.C. 20548

Suritz

Decision

Matter of: Mrs. Ruth B. Holmes - Survivor Benefit Plan -
Social Security Offset

File: B-230340.2

Date: March 24, 1989

DIGEST

The Survivor Benefit Plan (SBP) is an income maintenance program for the dependents of deceased military retirees, and it was designed to complement social security survivor benefits. The SBP law contains a provision requiring an annuity offset in the amount of the social security survivor benefit to which a widow or widower "would be entitled" predicated on the retiree's military service, regardless of the actual social security entitlement. Hence, the SBP annuity of an Army reservist's widow was subject to a social security offset based on 5 two-week periods of annual active training duty he performed between 1957 and 1961, notwithstanding that her social security benefits were actually based on the retiree's nonmilitary employment.

DECISION

In this case we conclude that the Survivor Benefit Plan (SBP) annuity of the widow of a retired Army Reserve officer was properly reduced on account of a "social security offset" provision contained in the SBP law.^{1/} We also

^{1/} This action is in response to a request for an advance decision received from Mr. P. B. Wolfsheimer, Special Disbursing Agent, Army Finance and Accounting Center, concerning the propriety of issuing payment on a voucher in favor of Mrs. Ruth B. Holmes in the amount of \$315.90, representing a refund of reductions made in her SBP annuity for the period from January 1 through September 30, 1987, on account of the "social security offset" provision of the SBP law. The request was forwarded here by the Office of the Secretary of the Army after it was approved by the Department of Defense Military Pay and Allowance Committee and assigned submission number DO-A-1482.

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conclude, however, that a waiver should be granted to relieve her of the obligation of refunding annuity overpayments she received before the reduction was established.

BACKGROUND

Captain John A. Holmes, Sr., was a member of the Army Reserve. He completed 20 years of creditable reserve service in 1962 and became entitled to military retired pay at age 60 in 1969. He elected to participate in the SBP program after it was established in 1972. He thus elected to receive military retired pay at a reduced rate in order to provide an annuity for his wife, Mrs. Ruth B. Holmes, if she survived him.

Captain Holmes died on November 12, 1983. The Army then commenced payment of an SBP annuity to Mrs. Holmes. Several years later Army officials determined in an audit that her annuity should have been reduced under the "social security offset" provision of the SBP law. As a result of that determination, her annuity was reduced in the amount of \$35.10 per month commencing on January 1, 1987. The Army also determined that she was indebted because of excess annuity payments she had received for the period from November 13, 1983, through December 31, 1986, when the social security offset had not been imposed due to clerical oversight.

ISSUE

Social security coverage was extended to active duty military personnel on January 1, 1957. The Army calculated the social security offset in this case on the basis of the social security survivor benefits to which Mrs. Holmes would have been entitled based on Captain Holmes' active duty service after that date. That consisted of 5 two-week active duty periods of annual reserve training he performed during the years from 1957 through 1961.

During his lifetime Captain Holmes also engaged in full-time civilian employment which was covered by social security. The Social Security Administration has advised that in the computation of Mrs. Holmes' social security survivor benefits "military service was considered but not used because it was not material." A question has arisen concerning the propriety of the imposition of a social security offset on her SBP annuity, since she gained no actual social security benefits from Captain Holmes' military service.

ANALYSIS AND CONCLUSION

Provisions of law governing the SBP program are contained in sections 1447-1455 of title 10, United States Code. The "social security offset" provision at issue is currently codified in 10 U.S.C. § 1451(e)(3), and it requires a reduction of an annuity payable to a widow or widower who is over 62 years old by:

" . . . the amount of the survivor benefit, if any, to which the widow or widower would be entitled under title II of the Social Security Act (42 USC 401 et seq.) based solely upon service by the person concerned" (Emphasis added.)

As indicated, the SBP program was established by Congress in 1972 as an income maintenance program for the surviving dependents of retirement-eligible service members.^{2/} The social security offset requirement was a fundamental feature of the original legislation. The legislative history of the provision reflects that SBP annuities were designed to complement social security benefits to which the annuitant "would be entitled" based on the retiree's military service. Congress intended that the SBP annuity of a surviving spouse be reduced at age 62 when the spouse became eligible for such social security survivor benefits.^{3/}

The social security offset provision requires a reduction in an SBP annuity in the amount of the social security survivor benefit to which a widow or widower "would be entitled" predicated on the retiree's military service regardless of the actual benefits. As a result there are a number of situations in which the offset is applicable even though no social security benefits are actually paid on the basis of the retiree's military service. This includes situations involving military reservists whose social security earnings are almost entirely nonmilitary.^{4/}

^{2/} Public Law 92-425, Sept. 8, 1972, 86 Stat. 706.

^{3/} S. Rep. No. 1089, 92d Cong., 2d Sess. 29, reprinted in 1972 U.S. Code Cong. & Ad. News. 3288, 3304, 3306.

^{4/} See Sec. 401, Department of Defense Directive 1332.27; Part 9, ch. 5, Department of Defense Military Retired Pay Manual; and Marjorie S. Nester, 58 Comp. Gen. 795 (1979).

The Uniformed Services Survivor Benefits Amendments of 1980 addressed this issue concerning military reservists.^{5/} It added a provision which, as revised and currently codified in 10 U.S.C. § 1451(e)(4)(B), reads as follows:

"(B) In the computation of any reduction made under paragraph (3), there shall be excluded any period of service described in section 210(1)(1) of the Social Security Act (42 U.S.C. § 410(1)(1))--

"(i) which was performed after December 1, 1980; and

"(ii) which involved periods of service of less than 30 continuous days for which the person concerned is entitled to receive a refund under section 6413(c) of the Internal Revenue Code of 1986 of the social security tax which the person had paid."

The legislative history of this provision contains the following explanation concerning its purpose:

"The Survivor Benefit Plan law requires a reduction in the survivor annuity by an amount equal to the amount of the social security benefits, if any, to which the surviving spouse would be entitled based solely upon the member's military service and calculated assuming that the member lived to age 65. In many instances of a Reserve Component member's career, the only periods of active duty are less than 30 consecutive days per year. Reserve Component members participating in the Survivor Benefit Plan are subject to the same social security offset provisions as are other members. At the survivor's age 62 there is a social security benefit attributable to those short periods of active duty.

"In most cases, a Reserve Component member's primary employment is the civilian career that is pursued on a full-time basis. Military service in the Reserve Components may be considered as secondary employment. Reserve members are subject to the social security tax at the same rate and on the same maximum amount of wages earned, if such

^{5/} Public Law 96-402, Oct. 9, 1980, 94 Stat. 1705.

wages are for covered employment. Correspondingly, the employer pays an equal amount of tax. If the social security tax paid from primary and secondary employment exceed the maximum amount of tax, the individual may receive a refund of that excess amount in the form of a deduction from annual income taxes. Consequently, the social security tax paid on military basic pay becomes an income tax deduction when the maximum amount of social security tax paid under primary employment exceeds or equals the maximum annual tax amount.

"Under these circumstances, the basis for social security entitlement is determined by the taxes paid on primary employment in the civilian sector. The taxes paid on military basic pay for Reserve service do not relate to the individual's social security entitlement or the survivor's entitlement to those benefits. In view of this, the Department of Defense supports the elimination of the social security offsets when the periods of service are less than 30 continuous days and the member is entitled to receive an income tax refund on the social security tax paid for that tax year."^{6/}

It thus appears that the Congress was fully aware that the SBP law required a social security offset in the amount of a hypothetical social security benefit to which a beneficiary "would be entitled" computed on the basis of a deceased reservist's active military service, even if the actual social security survivor benefit payable was based solely on the reservist's full-time nonmilitary employment. The amending legislation was designed to make the SBP program more attractive for reservists by reducing the social security offset in that situation. At the same time, however, Congress expressed the intent that, "There will be no reduction in the Social Security offset for periods of service prior to enactment of this bill."^{7/}

^{6/} S. Rep. No. 748, 96th Cong., 2d Sess. 8-9 (1980).

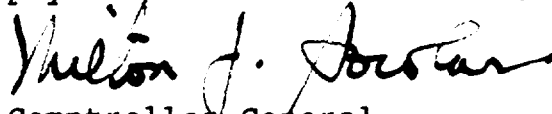
^{7/} S. Rep. No. 748, supra, at page 3. See also H.R. Rep. No. 1315, 96th Cong., 2d Sess. 5, 11, reprinted in part in 1980 U.S. Code Cong. & Ad. News 3721, 3722; and To Remove Certain Inequities in the Survivor Benefit Plan: Hearings on S. 91 Before the Subcomm. on Manpower and Personnel, Senate Comm. on Armed Forces, 96th Cong., 1st Sess. 30-31, 65, 95 (1979).

The legislation enacted, quoted above, limits the exclusion of reserve service from the offset computation to that "performed after December 1, 1980."

In the present case, therefore, we conclude that a social security offset should have been applied to Mrs. Holmes' SBP annuity. Although legislation was enacted in 1980 to alleviate the effects of the offset provision computed on the basis of short periods of reserve service, that legislation applies only to periods of service performed after December 1, 1980. Since all of Captain Holmes' service was performed prior to that date, our view is that Mrs. Holmes' annuity remained subject to the offset.

In view of the circumstances of this case, we also conclude, however, that under the authority of 10 U.S.C. § 1453 collection should be waived of the excess annuity payments Mrs. Holmes received prior to January 1, 1987. That provision of the SBP law authorizes waiver of the recovery of annuity overpayments when the recipient was without fault in the matter, and collection would be "against equity and good conscience" or contrary to the beneficial purposes of the SBP program. We find that Mrs. Holmes warrants relief under this standard.^{8/}

The question presented is answered accordingly. The voucher submitted for an advance decision may not be approved for payment and will be retained here.

for 
Comptroller General
of the United States

^{8/} Compare Kathryn H. Vandergrift, 55 Comp. Gen. 1238 (1976).