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Donald Guritz

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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: D-187179

DATE: NOV 30 1976

MATTER OF:

Department of Defense Military Pay and Allowance
Committee Action No. 530 - Survivor Benefit Plan

DIGEST:

Service member who was married and retired prior to effective date of Survivor Benefit Plan, who was subsequently divorced but had dependent child on March 21, 1974 (anniversary of effective date of Plan as extended by section 804 of Public Law 93-155), and who did not elect to participate in Plan within 18-month time limitation stated in subsection 3(b) of act, is not eligible to elect participation in Plan after expiration of such time limitation, in absence of further legislation reopening Plan to him.

This action is in response to a letter dated August 10, 1976, from the Acting Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the eligibility of a retired member to elect coverage for his spouse under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455, as added by Public Law 92-425, effective September 21, 1972, 86 Stat. 706, in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 530, enclosed with the submission.

The question is as follows:

"May a member who (a) was married and entitled to retired pay on September 21, 1972, (b) was granted a divorce on March 6, 1974, (c) had a dependent child prior to and on March 21, 1974, for whom he did not elect coverage, and (d) was remarried on June 7, 1974, elect SBP coverage in favor of the new spouse effective November 11, 1974?"

In the case presented by the question posed in the Committee Action, the member was entitled to retired pay on September 21, 1972, but apparently did not elect to participate in the SBP by March 21, 1974, i.e., within the 18-month period granted by subsection 3(b) of Public Law 92-425. As the discussion in the Committee Action indicates, it appears that based on the clear language of the fourth sentence of subsection 3(b), the member in question could not thereafter elect to participate in the Plan because he was, in fact, married and had a dependent child on September 21,

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1973, the first anniversary of the effective date of Public Law 92-425.

The discussion in the Committee Action indicates further, however, that subsection 3(b), as originally enacted, provided a one-year limitation within which a pre-effective date retiree who had a spouse or dependent child might elect into the SBP, and also provided that a retiree who had no spouse or dependent child at the end of the one-year period might elect into the SBP at a later date under 10 U.S.C. 1448(a). Amendments to the SBP contained in section 804 of Public Law 93-155 extended the time limitation within which a retiree with a spouse or dependent child might effect an election into the SBP from one year to 18 months. No change was made in the provision authorizing a retiree without a spouse or dependent child on the first anniversary of Public Law 92-425 to later elect into the SBP under the provisions of 10 U.S.C. 1448(a). As a result, the discussion states that because of such change a distinction is drawn between those pre-effective date retirees without a spouse or dependent child on the first anniversary of enactment of the law and those who had a spouse or dependent child on that date for the purpose of election eligibility thereafter.

The Committee Action goes on to state that the purpose of subsection 3(b) was to allow members who were entitled to receive retired pay on the effective date of the act 12 months to elect to participate. For such members who had no spouse or dependent child on the first anniversary date, it was intended that they be permitted to elect to participate in the SBP at a later date under 10 U.S.C. 1448(a) should they acquire a wife or dependent child. It is suggested in the Committee Action that a literal interpretation of the amendment provides inequality of treatment among such retirees where none existed previously and the view is expressed that it is unreasonable to ascribe to Congress such an intention in the absence of specific indication in the legislative history to the contrary.

Basically, the SBP, as enacted by Public Law 92-425, was to provide survivor protection to dependent families of members of the military service who would be retiring on and after the effective date of the SBP (September 21, 1972), and was to completely replace the then current survivor annuity program under the Retired Serviceman's Family Protection Plan contained in 10 U.S.C. 1431-1446. In addition, coverage under the SBP was made available

to military personnel who were retired prior to the effective date of the SBP by virtue of subsection 3(b) of Public Law 92-425. Under that subsection as originally enacted, a member with spouse or dependent child and who was entitled to retired pay on September 21, 1972, was given the option of electing to participate in the Plan, provided that such election was made within one year of the enactment of Public Law 92-425. That one-year period was later extended to 18 months, or to March 21, 1974, by section 804 of Public Law 93-155, November 16, 1973, 87 Stat. 605, 615.

For those pre-effective date retirees who had no spouse or dependent child, the fourth sentence of subsection 3(b) provided that:

"A person who is not married or who does not have a dependent child on the first anniversary of the effective date of this Act, but who later marries or acquires a dependent child may elect to participate in the Plan under the fourth sentence of section 1448(a) of that title."

The fourth sentence of 10 U.S.C. 1448(a) provides that:

"(a) * * * a person who is not married when he becomes entitled to retired or retainer pay but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child * * *."

Under the statutory design thus established, a member who was married or had a dependent child and was entitled to retired pay on September 21, 1972, could have elected to participate in the SBP within 18 months, or by March 21, 1974. In addition, a member who was not married or did not have a dependent child on the first anniversary of the Act (September 21, 1973), was given the opportunity of electing into the SBP under 10 U.S.C. 1448(a) thereafter, if he later married or acquired a dependent child.

The legislative history of Public Law 92-425 indicates the purpose of subsection 3(b) was to assure that the rules for the participation of pre-enactment retirees would be "consistent with the rules for participation established for the future retirees."

See S. Rept. No. 92-1089, September 6, 1972, at page 29. Thus, subsection 3(b) as originally enacted granted pre-effective date retirees 12 months within which to elect participation in the Plan and such retirees who had no spouse or dependent child at the end of that 12-month period were authorized to elect participation at a later time under the provisions of 10 U.S.C. 1448(a). See in this connection, 53 Comp. Gen. 818 (1974), as extended by the answer to question 2 of 54 Comp. Gen. 266 (1974).

Consequently, on the first anniversary of Public Law 92-425 (September 21, 1973), under the provisions of subsection 3(b) as originally enacted, those pre-effective date retirees who had a spouse or dependent child and who had not elected into the SBP lost their eligibility to participate in the SBP. On the other hand, those retirees who had neither a spouse nor a dependent child at that time became eligible to elect participation in the SBP at a later date under the fourth sentence of 10 U.S.C. 1448(a) if they later married or acquired a dependent child. Thus, in the basic SBP legislation, a rational distinction was made between retired members who had spouses or dependent children and those retired members who did not.

Such was the status of pre-effective date retirees relative to the SBP when it was amended by section 804, Public Law 93-155, effective November 16, 1973. Those amendments reinstated the eligibility of those retirees who had a spouse or dependent child who had failed to participate in the SBP by September 21, 1973, granting them an additional period of time (until March 21, 1974) in which to effect an election. The purpose of the amendments was to allow such retirees additional time to reconsider their decision regarding SBP participation. 53 Comp. Gen. 393 (1973). However, there was no need to amend the rules pertaining to pre-effective date retirees who had no spouse or dependent child on the first anniversary date of Public Law 92-425, since those retirees had remained eligible to elect participation under 10 U.S.C. 1448(a) if they married or acquired a dependent child thereafter.

Thus, section 804 of Public Law 93-155, November 16, 1973, simply gave retirees who had already lost their eligibility to elect participation in the SBP by virtue of expiration of time, an additional period in which to consider their choice.

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In the case posed by the question, the member was married and entitled to retired pay on September 21, 1972. He thus became eligible to participate in the SBP on that date under the provisions of subsection 3(b) of Public Law 92-425. He was still married on the first anniversary of the law, September 21, 1973, and having failed to elect into the SBP, his right to so elect expired. On November 16, 1973, subsection 3(b) was amended, granting him an additional period of time to March 21, 1974, in which to effect an election into the SBP. During this additional period he obtained a divorce, but as the facts showed, he still had a dependent child. Despite this, he chose not to participate in the SBP, on behalf of that dependent child. As a result, his eligibility to effect an election expired on March 21, 1974. It is our view, therefore, that since the law assimilated pre-effective date retirees with spouses or dependent children into the program, thereby permitting them to participate on the same basis as future retirees who have spouses or dependent children at the time of retirement, the rules regarding such participation are to be consistently applied. Under the Plan, a member who can participate but fails to do so timely, in the absence of additional legislation to reopen the Plan to him, is precluded from electing into the Plan thereafter.

Accordingly, the question is answered in the negative.

R.F. KELLER

Deputy Comptroller General
of the United States