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Riedinger,
M.P.

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20540

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FILE: B-190516

DATE: NOV 22 1977

MATTER OF: Lieutenant Colonel Donald K. Goss,
USA, Retired

DIGEST: A pre-SBP effective date retiree who is unmarried with a dependent child on the first anniversary date of the Survivor Benefit Plan, may elect spouse coverage under the fourth sentence of 10 U.S.C. 1448(a) upon marriage after the close of the 18-month election period authorized under subsection 3(b) of Public Law 92-423, as amended, notwithstanding fact that he could have elected coverage for his dependent child during that period and failed to do so. Compare B-187179, November 30, 1976.

This action is in response to a letter dated July 19, 1977, from Chief, Accounting and Finance Division, Air Force Accounting and Finance Center, which was forwarded to this Office by letter dated October 20, 1977, from the Directorate of Accounting and Finance, Headquarters United States Air Force, concerning the propriety of making payment on a voucher in favor of Lieutenant Colonel Donald K. Goss, USAF, Retired, in the amount of \$471.52, representing deductions from his retired pay for spouse coverage under the provision of the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455, in the circumstances described. The request has been assigned Air Force Submission No. DO-AF-1276, by the Department of Defense Military Pay and Allowance Committee.

The question presented is whether Colonel Goss was properly allowed SBP coverage for his spouse since he married her subsequent to the period for election and during that period had a dependent child for whom he could have elected coverage but did not do so.

The submission states that the member retired from the Air Force on August 31, 1965, under the provisions of 10 U.S.C. 8911. On September 21, 1973 (the first anniversary date of the SBP) and also on March 21, 1974 (the last date of the 18-month period granted by subsection 3(b) of Public Law 92-423, approved September 21, 1972, 86 Stat. 706, as amended, for pre-SBP effective

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B-120514

late retiree to elect into the Plan), he was unmarried, but he had a dependent child. Apparently the member chose not to elect SBP coverage for his dependent child because the child was approaching his 18th birthday.

On October 2, 1975, the member remarried and on September 13, 1976, elected SBP coverage for his new spouse. Based on that election, spouse coverage was established effective October 1, 1976.

Doubt is expressed in the submission as to the validity of the election based on our decision B-127179, dated November 30, 1976. The submission states that the decision in part seems to imply that a pre-SBP effective date retiree loses all rights to participate in the SBP if, on the first anniversary date of enactment of the SBP, he had either a spouse or a dependent child for whom he did not elect coverage.

In decision B-129179, supra, we considered the effect of a pre-SBP effective date retiree's failure to elect into the Plan within the prescribed period during which time he could have so elected. The facts in that case were that the member was married with a dependent child; he was divorced after the first anniversary date of the SBP (September 21, 1973), but before the close of the 18-month option period and failed to elect coverage for the dependent child during that time. We held therein that where such a retiree could have participated and failed to timely elect available coverage, he may not thereafter elect such coverage in the absence of additional legislation to reopen the Plan to him.

Under the provisions of subsection 3(b) of Public Law 92-425, supra, a pre-SBP effective date retiree who had a spouse or a dependent child on September 21, 1972, had the option of electing to participate in the Plan and had 18 months thereafter to so elect. For those pre-SBP effective date retirees who did not have a spouse or a dependent child, the fourth sentence of subsection 3(b) provided:

"A person who is not married or 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

B-190314

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), as it relates to pre-SBP effective date retirees, provides in pertinent part that:

"* * * a person who is not married * * * 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.* * *"

In S. Report No. 92-1009, Committee on Armed Services, United States Senate, dated September 8, 1972, to accompany S. 3905, portions of which became Public Law 92-425, it is stated on page 2 that:

"The language in S. 3905 as introduced would not permit a member who was unmarried at the time of his retirement but who had dependent children to cover a spouse married after retirement. The committee version would permit such coverage."

And on page 27 that:

"The committee revised the coverage for persons who are unmarried at retirement. It will permit an individual who is unmarried but had a dependent child at retirement to elect coverage for a spouse upon marriage after retirement. * * *"

In decision 54 Comp. Gen. 732 (1975), we noted that while the before-quoted language from the Committee Report on consideration of 10 U.S.C. 1448(a) did not specifically address itself to situations involving pre-SBP effective date retirees, they were being brought into the Plan generally on the same basis as post-SBP effective date retirees. On that basis we concluded that it was congressionally intended to permit any

B-190514

retired member who was not married at the time of his entry into the Plan but who had elected dependent children coverage, to expand that coverage for a later acquired spouse.

Decision B-189037, September 30, 1977 (56 Comp. Gen. _____), also involved a pre-SBP effective date retiree. The facts in that case showed that the member had a spouse and dependent children during the 18-month period for subsection 3(b) participation; that he elected spouse coverage but not dependent child coverage; and that following the close of the period, he divorced and remarried, acquiring dependent stepchildren. On the question as to whether he might at that later time add coverage for those children we concluded that since he could have elected coverage for that class of beneficiary during the 18-month period and failed to do so, he was precluded from so doing thereafter.

From the foregoing, it is to be observed that the limitation involving elections on later marriages or acquisition of dependent children is based on the existence or non-existence of such potential survivors on the last date that such member could have elected into the Plan. The SBP law clearly provides for later election of coverage by either pre or post-SBP effective date retirees, only when the member had no spouse or no dependent child on the last date they could have otherwise elected into the Plan. It is our view that a member's failure to elect SBP coverage for an eligible child should not preclude election of coverage for a later acquired spouse if there was no eligible spouse at the time his initial election of coverage was authorized.

In the present situation, while the member at all times during the 18-month option period had a dependent child, he was unmarried on the first anniversary date and on the last date of the 18-month period for subsection 3(b) participation. In accordance with the above it is our view that as a pre-SBP effective date retiree who was unable to elect spouse coverage under subsection 3(b) of Public Law 92-42), ~~1972~~, because he did not have a spouse, may elect coverage based upon a later marriage, as authorized by the fourth sentence of 17 U.S.C. 1448(a), notwithstanding the fact that he could have elected coverage for his dependent child during the 18-month period and did not do so.

B-193314

Since the submission states that the member elected spouse coverage within the stipulated 1-year period following his marriage, none of the amounts deducted from his retired pay for that coverage is required to be refunded, assuming that such deductions made were otherwise correct. The voucher submitted with the request will be retained here.

R. F. KELLER
Deputy Comptroller General
of the United States