

12634 PLM-II

DECISION



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

FILE: B-192470

DATE: January 24, 1980

MATTER OF: Chief Master Sergeant Allen J.
Gallagher, USAF Retired (Deceased)

DIGEST: A retired service member who elected survivor benefit plan (SBP) coverage and who later retires as a Civil Service employee may waive receipt of military retired pay in order to combine military with civilian service for purposes of computing his Civil Service annuity. It was held in B-192470, January 3, 1979, that an individual who waives military retired pay in those circumstances and accepts survivor coverage under Civil Service Retirement is not covered by SBP and upon his death no payment under SBP either to his widow or his surviving children may be allowed. This is true even where the individual had "child only" coverage under the SBP. On reconsideration that decision is sustained.

This action is in response to a request from the Director of Accounting and Finance, Headquarters United States Air Force, for reconsideration of our decision B-192470, January 3, 1979. The case involved the question of entitlement of Peggy A. Gallagher, a minor, to receive a Survivor Benefit Plan (SBP) annuity as the surviving dependent child of the late Chief Master Sergeant Allen J. Gallagher, USAF. DLG00012
Ref.

The request for reconsideration has been assigned Submission No. DO-AF-1300 by the Department of Defense Military Pay and Allowance Committee.

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The reported facts are that the member retired from the United States Air Force effective August 1, 1965, and elected dependent children coverage under the Retired Serviceman's Family Protection Plan (RSFPP). Thereafter, he was employed by the Federal Government in a civilian capacity. On May 21, 1973, he elected supplemental coverage under the SBP for his children only. On January 21, 1978, the member,

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preparatory to retirement from the Civil Service, waived receipt of military retired pay for the purpose of using his years of military service to increase his Civil Service annuity. Additionally, he elected a survivor annuity under the Civil Service retirement system. Sergeant Gallagher died April 23, 1978. For survivor annuity purposes, he was survived by his spouse, Mary, and one dependent child, Peggy, born April 23, 1961.

Mrs. Gallagher indicates that a Civil Service survivor annuity account was established in her favor effective April 24, 1978, but payments were reduced because she was entitled to receive Social Security benefits on behalf of Peggy, who at that time was under age 18. Effective the same date, Peggy became entitled to and apparently did receive an annuity under the RSFPP, which annuity continued through April 1979, the month of her 18th birthday. No SBP annuity payments were made to Peggy.

The question which was the subject of decision B-192470, January 3, 1979, was whether the language of 10 U.S.C. 1450(d) and 1452(e), was intended to bar payment of an SBP annuity only to a spouse or whether it applies equally to dependent children.

We concluded in that decision that 10 U.S.C. 1450(d) and 1452(e) bar payment of an SBP annuity to both spouse and dependent children in cases such as Sergeant Gallagher's. That is a retired military member who has elected SBP coverage, but retires from the Civil Service and waives military retired pay for the purpose of counting military time for Civil Service retirement purposes, has survivor benefits under Civil Service Retirement (unless that protection has been declined) and upon his death there is no spouse or child protection under SBP.

The arguments presented by Mrs. Gallagher are that Sergeant Gallagher elected child only coverage under

the SBP; that the language of 10 U.S.C. 1450(d) and 1452(e) refers only to declination of spouse coverage under the Civil Service survivor system; and that amendments made to the SBP by Public Law 94-496, provides for child coverage even if there is no spouse coverage. Further, she indicates we did not consider the importance of the amendment made by Public Law 94-496 in our decision. For these reasons she argues that Peggy is not barred from receiving an SBP annuity although Sergeant Gallagher provided coverage under the Civil Service survivor system based on both his civilian and military service.

Section 1 of Public Law 94-496, amended 10 U.S.C. 1448(a), 1450(a), and 1452(b) to permit a member to bypass his spouse for SBP annuity purposes and elect children only coverage. On page 6 of H.R. Rept. 94-458, Part 1, 94th Cong., 2d Sess., which accompanied H.R. 14773, and which became Public Law 94-496, the following statement regarding that amendment was made:

"Under the RSFPP which the Survivor Benefit Plan replaced a military member could elect to provide an annuity for 'children only' even though there was an eligible spouse. The Department of Defense directive which implemented the SBP provided procedures for such elections under the plan. The Comptroller General ruled that the language of Public Law 92-425 did not clearly authorize such elections but advised the Department of Defense that no objection would be interposed to continue such election pending submission of appropriate clarifying legislation to the Congress. H.R. 14773 contains appropriate language clearly authorizing such elections."

Thus, it is to be observed that the law was amended to clarify an ambiguity in the basic provisions authorizing elections of an SBP annuity. Notwithstanding that fact, we do not view the amendment as altering the scope and thrust of either 10 U.S.C. 1450(d) or 1452(e).

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Subsection 1450(d) of title 10, United States Code, provides:

"(d) If, upon the death of a person to whom section 1448 of this title applies, that person had in effect a waiver of his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, an annuity under this section shall not be payable unless, in accordance with section 8339(j) of title 5, he notified the Civil Service Commission that he did not desire any spouse surviving him to receive an annuity under section 8341(b) of that title.

And subsection 1452(e) provides:

"(e) When a person who has elected to participate in the Plan waives his retired or retainer pay for the purposes of subchapter III of chapter 83 of title 5, he shall not be required to make the deposit otherwise required by subsection (d) as long as that waiver is in effect unless * * * he has notified the Civil Service Commission that he does not desire any spouse surviving him to receive an annuity under section 8341(b) of title 5."

The language at issue in those subsections is notification to the Civil Service Commission that the member does not desire "any spouse surviving him to receive an annuity under section 8341(b) of title 5."

Under the Civil Service survivor annuity plan, children coverage is not optional. Unlike the SBP, Civil Service survivor annuity coverage is an all or nothing proposition. The employee may not elect coverage for dependent children and exclude his spouse nor may he have spouse coverage and exclude dependent children. If the employee accepts Civil

Service survivor coverage, both his spouse, if he has one, and dependent children, if any, are automatically included in the coverage. The amount deducted from his Civil Service annuity as a cost charge for survivor coverage is for the combined coverage. Therefore, since the retiring employee cannot elect spouse coverage and reject children coverage, to permit continued children coverage under the SBP after the employee waives receipt of military retired pay for Civil Service purposes would be tantamount to providing children with a double benefit.

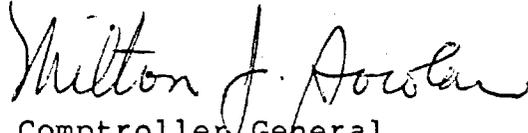
The argument has been also raised that within the SBP an annuity payment to children is not diminished by payments of Dependency and Indemnity Compensation (DIC). Therefore, such other entitlement as they may have should not diminish that entitlement either. The point of the matter is that the provisions of law governing SBP annuities recognize and take into account that DIC payments which might be payable to a survivor of a military member are part of the package of benefits payable under the SBP program. The SBP and the Civil Service retirement and survivor annuity plan, however, are separate and distinct. Subsection 1450(d) of title 10, United States Code, requires the transfer from the SBP to the Civil Service survivor annuity plan where an individual waives receipt of military retired pay for Civil Service retirement computation and accepts survivor coverage under the latter plan. So long as that waiver is in effect and the individual is providing survivor coverage under the Civil Service plan, that transfer is complete. We are not aware of any provision of law whereby a surviving spouse or dependent children of a Civil Service annuitant in these circumstances may receive or be put in the position to receive survivor benefits under both plans at the same time.

Regarding the reduction in Civil Service retirement benefits required by 5 U.S.C. 8332(j) when the beneficiary is receiving Social Security benefits, payments of Civil Service Retirement annuities and survivor benefits thereunder are for determination by the Office of

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Personnel Management and not by this Office. Accordingly it would be inappropriate for us to comment on the appropriateness of reductions in survivor benefits made under that provision.

Accordingly, on reconsideration, our decision B-192470, January 3, 1979, is sustained.

A handwritten signature in cursive script that reads "Milton J. Fowler".

For the Comptroller General
of the United States