

DECISION

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

SHANKS
PLM I

120284

FILE: B-207143

DATE: December 30, 1982

MATTER OF: Joe Marvin (Deceased)

DIGEST: Unpaid compensation of former employee (deceased) claimed by his daughter on behalf of herself and her brother and sister of the whole blood may not be paid to her in the absence of proof or a determination by a court of competent jurisdiction that her father was not married at the time of his death and that the class of children on whose behalf she claims constitutes all those entitled to payment.

This action is in response to the appeal by Mrs. Josephine Marvin Smith, through her attorney, of the settlement of our Claims Group, issued May 14, 1981, which denied her claim for unpaid compensation due her deceased father, Joe Marvin. The settlement of the Claims Group is sustained because the evidence of record is insufficient to establish the claimant's entitlement to payment. Mr. Marvin was an employee of the Veterans Administration Hospital, Montgomery, Alabama, at the time of his death on January 1, 1981. He had not designated a beneficiary for his unpaid compensation at the time of death. Initially, claims for Mr. Marvin's unpaid compensation were submitted by Mr. Marvin's ex-wife, Mrs. Ruby Cheatham Marvin, and by Mrs. Smith on behalf of herself, her brother, Joe Marvin III, and her sister, Dorothy J. Thomas, as children of the deceased.

The controlling statute, 5 U.S.C. § 5582(b) (1970), provides that money due an employee at the time of death shall be paid in the following order of precedence:

"First, to the beneficiary or beneficiaries designated by the employee in a writing received in the employing agency before his death.

"Second, if there is no designated beneficiary, to the widow or widower of the employee.

"Third, if none of the above, to the child or children of the employee and descendants of deceased children by representation.

"Fourth, if none of the above, to the parents of the employee or the survivor of them.

"Fifth, if none of the above, to the duly appointed legal representative of the estate of the employee.

Sixth, if none of the above, to the person or persons entitled under the laws of the domicile of the employee at the time of his death."

The Claims Group denied payment to Mrs. Marvin on the basis that she was not a designated beneficiary or married to Mr. Marvin at the time of his death since the record shows that they were divorced on August 19, 1955. Payment was denied to Mrs. Smith on the basis that the claim was too doubtful for payment because of the indication in the record that Mr. Marvin may have been married to Mary Jean Jackson. Specifically, a Security Investigation Data Form dated July 25, 1960, and signed by Mr. Marvin lists "Mary Jean Jackson Marvin" as his spouse, date and place of marriage being given as March 5, 1949, Montgomery, Alabama. Thus, in the absence of evidence to the contrary, if Mary Jean should file a claim for Mr. Marvin's unpaid compensation, her claim would take precedence over that of his children.

In an effort to provide evidence showing that Mary Jean Jackson was not married to her father, Mrs. Smith, through counsel, has forwarded to this Office two Certificates of Failure to Find Record,

issued by the Alabama Department of Public Health, Bureau of Vital Statistics. The certificates state that a diligent search of state records covering the periods from 1946 to 1953 and from 1953 to 1981 revealed no record of the marriage of Joe Marvin and Mary Jean Jackson in the State of Alabama. In addition we have been furnished the affidavit of a former friend and neighbor of the deceased in which she states that she had no knowledge of the existence of Mary Jean Jackson.

However, this evidence is insufficient to establish entitlement on behalf of Mr. Marvin's three children in view of the indication of record that he fathered a son, Ernest Lee, by Mary Jean Jackson in 1954 and his representation in 1960 that he was married to her. These circumstances are suggestive of a continuing relationship between Mr. Marvin and Mary Jackson, and, therefore, give rise to the possibility that they may have had a common-law marriage, which is recognized under Alabama law. Rogers v. McLeskey, 225 Ala. 148, 142 So. 526, 527 (1932).

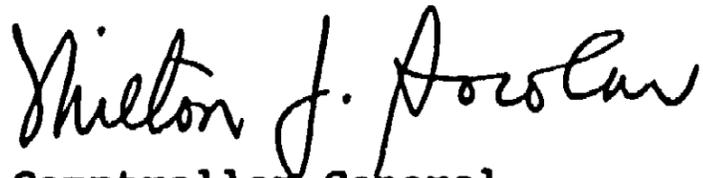
We note further that several of Mr. Marvin's signed personnel documents show that in addition to his children, Josephine, Dorothy, and Joe III, he listed as his child one Ernest Lee Marvin (otherwise referred to in the record as Ernest Jackson), born on April 16, 1954. That representation would appear to constitute his acknowledgement of Ernest as his son. The record further shows that Mr. Marvin's ex-wife, Ruby, and the children of their union acknowledge having "heard of" Ernest but express doubt that he is "legally a Marvin." In concert with recent Supreme Court and Federal Court decisions, we have held that where there is uncontroverted evidence that a claimant is the natural child of a deceased employee, for the purpose of entitlement to unpaid compensation no distinction will be made on the basis of the child's status as illegitimate under state law. 54 Comp. Gen. 858 (1975); Jimenez v. Weinburger, 417 U.S. 628 (1974).

Therefore, where it appears that Mr. Marvin acknowledged Ernest as his child, whether he is "legitimate" or "illegitimate," he would appear to be a member

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of the class of children of the deceased and as such stands in a position to take along with Mr. Marvin's legitimate children should he file a claim.

It is our view that on the basis of the present record there is too much uncertainty as to the marital status of the decedent and as to the class of his children who may be entitled to payment to justify certification of this claim. Therefore, we conclude that the claim of Mrs. Smith for the unpaid compensation of her deceased father may not be allowed in the absence of clear and convincing evidence of her contentions or a decision on the issues by a court of competent jurisdiction. See 38 Comp. Gen. 97 (1958). However, if the issues now in doubt remain unresolved for 3 years after the death, that is until January 1, 1984, the claim may be presented for reconsideration by this Office. See 4 C.F.R. 33.6(d)(6) (1979).

for 
Comptroller General
of the United States