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DECISION

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

FILE: B-190617

DATE: February 16, 1978

MATTER OF: Technical Sergeant John T. Baker,
USAF (Retired) (Deceased)

DIGEST: When the surviving spouse of a survivor benefit plan (SBP) participant is also entitled to Dependency and Indemnity Compensation (DIC) from the Veterans Administration, the SBP annuity must be reduced (or eliminated) by the amount of DIC entitlement under 10 U.S.C. 1450(c), even though the DIC payment is predicated on the survivor's marriage to another member who died of service related causes. The reduction is required whether or not the spouse upon whose service the DIC payment is predicated could have participated in SBP.

This action is in response to a letter dated September 26, 1977, with enclosures, from Mr. Ernest E. Heuer, Deputy Accounting and Finance Officer, Headquarters Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of making payment on a voucher in favor of Mrs. Marie T. Baker, in the amount of \$227.89, representing an annuity payment under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455, for September 1977, as the surviving spouse of the late Technical Sergeant John C. Baker, USAF, in the circumstances described in that letter. That request was forwarded here by letter dated November 1, 1977, from the Acting Assistant Director, Accounting and Finance, Department of the Air Force, and has been assigned Air Force Submission No. DO-AF-1278, by the Department of Defense Military Pay and Allowance Committee.

The question raised involves the requirement of 10 U.S.C. 1450(c) that an SBP annuity otherwise payable be reduced by the amount of Dependency and Indemnity Compensation (DIC) to which the surviving spouse is entitled under 38 U.S.C. 411(a). Specifically, whether the annuity of the surviving spouse of a retired member who was covered by SBP must be reduced by the amount of DIC to which such spouse is entitled as the result of a prior marriage,

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particularly where the earlier marriage was terminated by the spouse's death before the SBP was enacted.

The submission states that Sergeant Baker retired from the Air Force on July 31, 1974, and elected an SBP annuity for his spouse, Marie T. Baker, on a reduced base amount of \$300. He died in retirement on February 14, 1977, and monthly annuity payments of \$227.89, were made to Mrs. Baker through August 31, 1977. The payments were stopped at that time because it was discovered that Mrs. Baker was receiving monthly Dependency and Indemnity Compensation (DIC) from the Veterans Administration (VA) in an amount in excess of her SBP annuity entitlement.

The submission goes on to state that the DIC payment was not being made to Mrs. Baker incident to the death of Sergeant Baker, since he did not die of a service-connected cause. Rather, it appears that at the time of her marriage to Sergeant Baker in 1946, she was the widow of a member or former member of the service, Mr. J. B. Tyler, who died of a service-connected cause. The DIC payments which she currently is entitled to receive from the VA are solely as a consequence of her marriage to Mr. Tyler.

The question centers around the meaning of 10 U.S.C. 1450(c) which provides:

"(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation."

That subsection does not specifically provide that DIC entitlement must be predicated upon the service of the spouse whose death results in the SBP payment in order for the restriction to be applied. Nevertheless, we have

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reviewed to history of that provision to see if Congress might have intended that result. We find nothing in that history which discusses the applicability thereof in a situation such as this where a surviving spouse is entitled to benefits on account of more than one deceased spouse. The descriptions of the effect of that section treat only the more usual situation where benefits are derived from one deceased spouse.

It is clear, however, that Congress did not intend that a surviving spouse should receive multiple benefits because he or she is the surviving spouse of more than one member. In that connection 10 U.S.C. 1450(b) provides that a surviving spouse who would otherwise be entitled to more than one SBP on account of two spouses who died while covered thereby must elect which SBP benefit to receive.

It is noted further that the purpose of SBP was to provide a minimum income for the surviving spouse of a military retiree. That minimum was set at 55 percent of the member's retired pay unless a lower basic amount was selected by the retiree. Thus, benefits provided and deductions required from retired pay are not predicated upon a fixed annuity payable regardless of circumstances. In the circumstances we cannot impute to Congress an intent to limit the DIC payments referred to in 10 U.S.C. 1450(c) to those payable as a result of the member upon whose death the SBP annuity becomes payable.

Accordingly, it is concluded that the limitation on SBP payments arising from entitlement to DIC must be applied even if the DIC entitlement is based upon the surviving spouse's status as survivor of an individual other than the one on whose death SBP becomes payable.

The voucher submitted is retained. However, if otherwise due, Mrs. Baker may be refunded amounts contributed by Sergeant Baker for SBP coverage under 10 U.S.C. 1450(e).


Deputy Comptroller General
of the United States.