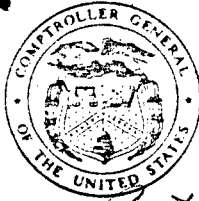


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DECISION



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

[Claim For Retired Pay]

FILE: B-201128

DATE: March 6, 1981

MATTER OF: Major Howard H. Boyles, USAF, Retired

- DIGEST:**
1. A retired service member was flying a nonmilitary plane over Laos in 1973 when it caught fire and crashed. His retired pay account was suspended effective the date of disappearance. Because his body was never found, a declaration of death was entered by a State probate court, based upon the State's statutorily authorized presumption of death after 5 years disappearance. A claim by the widow for accrued retired pay based on the court's determination of a presumptive date of death 5 years after disappearance may not be allowed since retired pay accrues only during the life of the service member, and such court decrees do not establish that the person involved actually lived for a fixed period after disappearance or that death did not occur at the time of disappearance.

 2. A retired service member was flying a nonmilitary plane over Laos in 1973 when it caught fire and crashed. The fact alone that his entire body was not found does not argue strongly in favor of continuation of life after the crash where there is independent and un rebutted evidence to support the conclusion that he died on the day of the crash, he has not been heard from since, and a State court has determined that he is presumed dead after the statutory period of absence. Therefore, computation and payment of accrued but unpaid retired pay may be made in accordance with 10 U.S.C. 2771 based on the determination that he died on the date of the crash, and a Survivor Benefit Plan annuity may be paid to the eligible survivor, effective the day after the crash.

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This action is in response to a request for decision from the Accounting and Finance Officer, Air Force Accounting and Finance Center, concerning the propriety of making payment to Mrs. Mary A. Boyles, as widow of Major Howard H. Boyles, USAF, Retired, of retired pay believed due for the period February 1, 1973, through February 9, 1978, and an annuity under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455, thereafter. This matter has been assigned Air Force Submission No. DO-AF-1354 by the Department of Defense Military Pay and Allowance Committee.

Major Boyles, who was retired from the Air Force effective February 1, 1965, elected to participate in the SBP on January 2, 1973, under the provisions of subsection 3(b) of Public Law 92-425, approved September 21, 1972, 86 Stat. 706, 711.

According to information in the file, subsequent to his retirement from the Air Force, Major Boyles was employed by Air America, Inc. in the capacity of a pilot, which employment was neither as a member of a uniformed service, nor as a civilian officer or employee of the Federal Government.

On February 9, 1973, he was flying an Air America aircraft over Laos when it was hit by gunfire from the ground, caught fire and crashed. Of the four occupants of the aircraft, one (a passenger) parachuted to safety and reported seeing no other parachutes. One body (that of another passenger) was recovered from the wreckage the day of the crash, but enemy fire forced rescuers from the area before the bodies of Major Boyles and the other crewmember could be located. An Air America rescue team succeeded in getting to the crash site in March 1973, but neither the body of Major Boyles nor that of his flight officer was found. The air rescue team did, however, recover some human bones from the crash site, which, according to the local inhabitants, were all that remained of two bodies which had been removed from the aircraft and burned.

Immediately after the crash report was received, Major Boyles was listed as missing and his retired pay account was placed in suspense. According to documents in the file, anthropological examination of some of the recovered bones established that they were those

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of a person of the approximate age, height and weight of Major Boyles. Based on that and other evidence found at the crash site a DA Form 3565, "Certificate of Death (Overseas)" was prepared in Major Boyles case on May 23, 1973, by an Army medical officer, finding that death occurred on the day of the crash, February 9, 1973. That finding was subsequently approved by a board of review, Armed Services Graves Registration Office, on November 1, 1973. Although Mrs. Boyles stated her disagreement with that determination, indicating instead that her husband may have been taken prisoner, there is nothing in any of the material accompanying the submission which suggests that such finding was erroneous.

On May 19, 1980, the Superior Court of the State of Arizona, in and for Maricopa County, conducted a hearing for the purpose of admitting Major Boyles' will for probate and the appointment of Mrs. Boyles as the personal representative of his estate. The United States was not made a party to that proceeding nor was it represented.

According to the order issued by the court, the presumptive date of death of Major Boyles was established as February 9, 1978, based on their finding that he had been absent for a continuous period of 5 years, in accordance with Arizona law, and that there was not satisfactory evidence determining that death occurred prior to that date. Based on that order Mrs. Boyles claims entitlement to receive Major Boyles' retired pay until February 9, 1978, and an SBP annuity thereafter.

The question presented is whether the court action which established February 9, 1978, as the presumptive date of death, may be used for the purpose of authorizing the payment of military retired pay for the entire suspension period. That question is answered in the negative for the following reasons.

The retired pay due a retired member of the armed services accrues only during his lifetime. 48 Comp. Gen. 706 (1969). Where it is determined that a retired member has died, such pay which has accrued but is unpaid at the date of death may be paid to his beneficiary as provided by 10 U.S.C. 2771. In this connection, we have held that retired pay may not be paid for any period subsequent to the last day on which the member

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is known to have been alive, when the date of death is not established by competent evidence. 14 Comp. Gen. 411 (1934) and 43 Comp. Gen. 503 (1964).

In cases involving judicial decrees which declare death using a presumptive date of death based on a statutorily authorized period of time following disappearance, such decrees do not establish that the person concerned actually lived for any fixed period following disappearance or that life did not end immediately upon disappearance. See Davie v. Briggs, 97 U.S. 628 (1878). Further, a statutory presumption of death does not purport to create a conclusive presumption that the individual died at the end of such period, nor does it preclude the introduction of evidence to support the proposition that death occurred at an earlier date. See Peak v. United States, 353 U.S. 43, 45-46 (1957). See also 43 id. 503, 504, and 58 id. 131 (1978).

In settling accounts in missing persons' cases, we have said that in the absence of a specifically applicable Federal statute, we will give great weight to determinations made by State courts applying State statutes, particularly where the United States has been represented in the court and the pertinent issues are presented to the court for resolution. See B-187165, September 16, 1976. However, where the only basis upon which payment of a claim for retired pay for a period beyond the last date a missing member is known to have been alive is a State court decree entered on the basis of a statutory presumption of death in a proceeding to which the United States is neither a party, nor is represented in the court, we have followed the rule that the United States is not bound by such a decree and the claimants are left to pursue their claims in the Federal courts. See Privett v. United States, 256 U.S. 201 (1921); United States v. Candelaria, 271 U.S. 432 (1926). See also, 58 Comp. Gen. 131; B-176008, September 18, 1972; and B-173649, August 31, 1971.

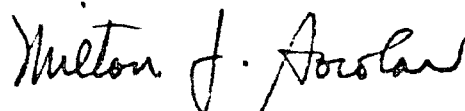
In this case, the fact that neither the entire body of Major Boyles nor that of his flight officer was recovered, does not argue strongly in favor of a continuation of life after February 9, 1973. In fact the opposite conclusion appears warranted based on the evidence collected by the service and the medical opinions presented. Those facts

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coupled with the fact that nothing further has been heard from Major Boyles and the Arizona court's determination lead us to the conclusion that the evidence of record is now sufficiently strong to warrant the determination that Major Boyles is dead and that he died at the time of the crash. Compare 27 Comp. Gen. 487 (1948).

In this case the claims for both retired pay and SBP are determined to have first accrued upon the date of the last event upon which the determination is based, the Arizona court's ruling on May 19, 1980. See 31 U.S.C. 71a (1976) and Acosta v. United States, 162 Ct. Cl. 631, 637 (1963). Thus, the accrued but unpaid retired pay due Major Boyles through February 9, 1973, may be paid in accordance with 10 U.S.C. 2771. Insofar as the SBP annuity is concerned, the file shows that Major Boyles elected full coverage for his spouse and dependent children. Since 10 U.S.C. 1450(a) authorizes payment of the annuity effective the first day after the death of the participating member, an annuity may be paid Mrs. Boyles effective February 10, 1973, if otherwise correct.

Accordingly, the voucher is being returned to the Air Force Accounting and Finance Center for modification and payment in accordance with the foregoing.



Acting Comptroller General
of the United States