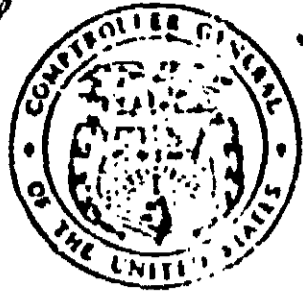


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DECISION



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

FILE: B-203950

DATE: March 19, 1982

MATTER OF: Master Sergeant Donald A. Rea, USMC  
Retired (Deceased)

- DIGEST:
1. A Survivor Benefit Plan (SBP) participant died leaving a widow and dependent child by a former marriage. Both widow and child became entitled to separate monthly Veterans Administration Disability and Indemnity Compensation (DIC), but since the child was living with the former spouse, widow's DIC was reduced below the rates set by 38 U.S.C. 411(a), because of 38 U.S.C. 3107(b), under which a portion of the DIC is paid to the child. The widow's DIC must be deducted from her monthly SBP annuity; however, in a case where a portion of the DIC is paid to the child, the annuity is to be reduced only by the actual DIC payment the widow receives.
  2. Where a widow's Survivor Benefit Plan annuity is reduced pursuant to 10 U.S.C. 1450(c), by the award of Dependency and Indemnity Compensation (DIC), the computation of the cost of the recalculated annuity for refund of cost of participation, is to be predicated on the actual monthly DIC payment the widow receives in her own right under 38 U.S.C. 411(a), as reduced by apportionment to a child under 38 U.S.C. 3107(b).

This action is in response to a request for decision from the Disbursing Officer, Marine Corps Finance Center, concerning the proper reduction to be made in the Survivor Benefit Plan annuity payable to Mrs. Joan Rea, as widow of the late Master Sergeant Donald A. Rea, USMC, Retired, on account of her entitlement to receive Dependency and Indemnity Compensation (DIC) from the Veterans Administration. We find that Mrs. Rea's annuity should be reduced only in the amount of the DIC payments she receives not including the portion of her DIC which is paid to Sergeant Rea's child.

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This matter has been assigned Control No. DO-MC-1364 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Rea was placed on the retired list of the Marine Corps on November 10, 1978, and enrolled in the Survivor Benefit Plan to provide an annuity based on his full monthly retired pay for his spouse and dependent children. He died in July 1979.

Following Sergeant Rea's death, the Marine Corps determined that Joan, as his surviving spouse, qualified as his eligible widow under the Survivor Benefit Plan and was entitled to receive a monthly annuity of \$479.50, pursuant to 10 U.S.C. 1450(a)(1). In addition, she became entitled to DIC from the Veterans Administration as authorized by 38 U.S.C. 411(a), which was increased by the amount authorized by 38 U.S.C. 411(b), since the deceased member's child qualified as his dependent.

Sergeant Rea's daughter, age 14, is a daughter by a former marriage, and does not live with the widow. As a result, the combined DIC award which would have been received by Mrs. Joan Rea, was apportioned pursuant to the authority contained in 38 U.S.C. 3107(b), thereby reducing the payment to Mrs. Joan Rea to an amount below the amount otherwise authorized to be paid her under 38 U.S.C. 411(a). The monthly payments made to her have been \$375 rather than \$388, during the period July 21 through September 30, 1979; \$412 rather than \$426, from October 1, 1979, through September 30, 1980; and \$471 rather than \$488, from October 1, 1980.

Based on the foregoing, we were asked whether the Survivor Benefit Plan annuity payable is the amount that exceeds the DIC payment as authorizing 38 U.S.C. 411(a), or whether the amount payable is to be predicated on the widow's DIC after the apportionment authorized in 38 U.S.C. 3107(b) has been made.

If the annuity payable is reduced by the apportioned amount of DIC and part of the cost of that annuity is refunded under 10 U.S.C. 1450(e), we are asked whether the apportioned amount should be used in calculating the refund.

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Section 1450 of title 10, United States Code, in requiring the reduction of the Survivor Benefit Plan annuity when the recipient also receives DIC, provides:

"(c) If \* \* \* the widow \* \* \* is also entitled to compensation under section 411(a) of title 38, the widow \* \* \* 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."

Section 411 of title 38, United States Code, provides:

"(a) Dependency and indemnity compensation shall be paid to a surviving spouse \* \* \*.

"(b) If there is a surviving spouse with one or more children below the age of eighteen of a deceased veteran, the dependency and indemnity compensation paid monthly to the surviving spouse shall be increased \* \* \* for each such child."

In conjunction with the provisions of 38 U.S.C. 411, section 3107 of the same title provides:

"(b) Where any of the children of a deceased veteran are not in the custody of the veteran's widow, the \* \* \* dependency and indemnity compensation otherwise payable to the widow may be apportioned as prescribed by the Administrator [of Veterans' Affairs]."

The concept of the law governing DIC payments is to provide some measure of financial support to surviving dependents of veterans who die of service-connected causes, one part for the personal maintenance of the surviving spouse and the other part for the personal maintenance of each child who qualifies as the deceased member's dependent. Under section 3107(b), it is recognized that a deceased veteran's dependent children

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may not reside with the surviving spouse. If any of the dependent children are residing elsewhere, the combined award of DIC otherwise payable to the surviving spouse is reduced, not by the specific amount of dependent child increase, but by a greater apportioned amount as determined under Veterans Administration regulations. As a result, the amount payable to the surviving spouse in such a case is reduced to an amount below that otherwise authorized to be paid her in her own right under 38 U.S.C. 411(a).

Payments under the Survivor Benefit Plan are not based on the same concept. Where a retired member elects spouse coverage only, she is the sole beneficiary of the annuity payments so long as she qualified as a widow under the Plan. If a member has both spouse and dependent children coverage (as was the situation in this case), so long as the surviving spouse remains qualified as the eligible widow under the Plan, the widow is entitled to the entire annuity, regardless of the number of dependent children and regardless of where they are living. During that time the children qualify only as potentially eligible beneficiaries, since their right to the annuity arises only upon the loss of eligibility by the surviving spouse. See 60 Comp. Gen. 240 (1981).

The legislative history of Public Law 92-425, September 21, 1972, 86 Stat. 706, which created the Survivor Benefit Plan, recognizes the essential difference between the composition and method of awarding DIC benefits and payments of annuities under the Plan. In S. Rept. No. 92-1089, September 6, 1972, to accompany S. 3905, which eventually became Public Law 92-425, the following observation regarding the matter was made on page 2:

"S. 3905 as introduced would permit an offset of not only the widow's DIC payment but also other DIC payments such as the aid and attendance payment and children's payment. The committee version defines precisely that the DIC payment to be offset is the widow's payment only."

On page 4 of the same report in which the principal elements of the Plan are described it is stated:

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"When Dependency and Indemnity Compensation (DIC) is payable to a widow it will be supplemented by a Defense payment to attain the desired 55 percent level."

And on page 28, it is stated that:

"S. 3905 requires a combination of payments under the proposed plan with those currently available under DIC from the Veteran's Administration. This provision \* \* \* is clarified to specify that the only DIC payment considered in the combination will be the widow's or the widower's payment. Without such a change it would be possible to consider as well DIC payments for children and payments made because the spouse requires aid and attendance. The committee felt that such a result was not intended."

The overall purpose of the SBP is to provide a basis whereby retired members may provide income protection for their surviving dependents at a level which they choose, but not to exceed 55 percent of their retired pay. It is our view that in accordance with this purpose and the legislative history of the Plan, when the annuity authorized to be paid under the Plan exceeds the DIC payment to the surviving spouse, that annuity is to be reduced only by the amount of the actual DIC payment to the surviving spouse in her own right, after apportionment, if so required. Therefore, in answer to the first question Mrs. Rea's monthly SBP annuity is to be reduced only by the amount of the monthly apportioned DIC payment which she receives as surviving spouse.

With regard to refund entitlement, 10 U.S.C. 1450(e) authorizes the recalculation of the annuity and its cost to the member when the annuity is reduced because of DIC payments. It also authorizes refund to the widow of the excess cost previously collected from the member's retired pay. In accordance with the answer to the basic question, the recalculation of the annuity for refund purposes is to be predicated on the amount of DIC paid to the widow in her own right, after

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apportionment, if so required. See in this connection, 55 Comp. Gen. 1409 (1976). For the method of computing that recalculated annuity, see 56 Comp. Gen. 482 (1977).

*for* *Milton F. Forster*  
Comptroller General  
of the United States