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

FILE: B-212005 **DATE:** November 29, 1983

MATTER OF: Chief Warrant Officer Donald R. Bethel, USA (Deceased)

DIGEST: A former military member who retired prior to the enactment of the Survivor Benefit Plan elected coverage under the Plan for his spouse and minor children during the 1981 "open enrollment" period. He died 8 months after the effective date of his election. The total amount deducted from his retired pay on account of his Survivor Benefit Plan election is not payable to either his lawful wife or the individual he designated on his election form as his spouse, in the absence of evidence that he was ever legally married to her. Rather, the deductions are payable to his two dependent children whom he also designated as his beneficiaries under the Plan.

This action responds to a request submitted by Mr. J. E. Boone, an authorized certifying officer of the Department of the Army, for an advance decision in the case of Chief Warrant Officer Donald R. Bethel, USA, Retired (Deceased). The request was approved by the Department of Defense Military Pay and Allowance Committee and assigned control number DO-A-1420.

We find that the amount deducted from Mr. Bethel's retired pay as coverage costs for Survivor Benefit Plan election is payable only to his surviving children.

Mr. Bethel retired from the Army on October 1, 1969, with 22 years, 11 months, and 23 days of service for basic and retired pay purposes. The case record contains a certificate of marriage which shows that on October 1, 1955, Mr. Bethel married Mary E. Swanson in Colorado Springs, Colorado. The record also contains a certificate of the marriage of Donald R. Bethel and Patcharee Boonmanich on January 28, 1972, in the District of Phra Khanong in Bangkok, Thailand. Both

Mary Bethel and Patcharee Bethel claim to be the surviving spouse of Donald R. Bethel. Patcharee has indicated that she can produce no records to prove that Mr. Bethel's marriage to Mary was ever dissolved, and no evidence otherwise has been provided that his marriage to Mary was ever terminated by divorce.

Shortly after the enactment of Public Law 92-425, 86 Stat. 706, approved September 21, 1972 (10 U.S.C. § 1448 et seq.), which created the Survivor Benefit Plan, Mr. Bethel was offered the opportunity, pursuant to section 3(b) of the act, to elect coverage under the Plan. However, in November 1972 he executed a Survivor Benefit Plan Election Certificate in which he stated that he was married and had dependent children, but he declined election of coverage. He later elected to participate in the Plan during the open enrollment period authorized by Section 212 of title 2, Public Law 97-35, August 13, 1981, 95 Stat. 383. On December 6, 1981, he executed a Survivor Benefit Plan election form to provide an annuity based on his full retired pay for his spouse, whom he designated as Patcharee, date of marriage January 28, 1972, and for his two children, Eunice and Dewey, dates of birth April 30, 1971, and November 2, 1973, respectively.

His election was established at a monthly cost of $109.64, which was deducted from his retired pay payments, and became effective on January 1, 1982. On August 1, 1982, Mr. Bethel died. Under the 1981 open enrollment provision, if an individual who makes a Survivor Benefit Plan election based on that authority dies within a 2-year period after the date of his election, the election is void. In such instances the amount by which the individual's retired pay was reduced on account of his election "shall be paid in lump sum to that individual's beneficiary under the Plan (as designated under that election)." Pub. L. 97-35, Title II, § 212(c).

Since Mr. Bethel died only 8 months after the effective date of his election, no annuity is payable under the Plan and the total amount deducted from his retired pay to cover the cost of his participation in the Plan is payable to his beneficiaries under the Plan. The issue in this case is who are his legal beneficiaries under the Plan.

The Army disbursing officer has specifically asked the following questions:

> "a. Is Mary Bethel (lawful spouse) covered by the open season election for spouse and children or are we required to apply 57 Comp. Gen. 426 and hold that Public Law 97-35, Section 212, requires an affirmative election by name into the Plan?
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> "b. If the election is invalid for the spouse may we then establish the election for children or must we consider the election to be invalid in toto?
>
> "c. If the open season election is considered to be invalid in toto, would the cost be returned by making a payment to Mary as beneficiary of retiree's unpaid retired pay?"

The decision referred to in the first question above, Matter of Cline, 57 Comp. Gen. 426 (1978), involved a similar situation in which a former military member who retired prior to the enactment of the Survivor Benefit Plan elected coverage under the Plan. Having never legally terminated his first marriage, he designated as his spouse one to whom he was not lawfully married. We held that since the member in that case was retired prior to the effective date of the Survivor Benefit Plan, he was not automatically covered by the Plan but was required under Section 3(b) of Public Law 92-425 to make an affirmative election in order to participate in the Plan, and because he designated as his spouse and beneficiary under the Plan a person ineligible for such coverage, his election was defective and, therefore, invalid.

Although Mr. Bethel was already retired when the Survivor Benefit Plan was enacted, he elected coverage pursuant to the 1981 open enrollment provision. The general purpose of that provision was simply to allow certain individuals another opportunity to elect to participate (or to increase their level of participation) in the Plan in the same manner as was authorized

by section 3(b) of Pub. L. 92-425, as amended. See Pub. L. 97-35, Title II, Section 212(a)(3), 95 Stat. 384. Except for certain restrictions not pertinent to the issue here, an election under the authority of the 1981 open enrollment provision is subject to similar rules and conditions as those stipulated in Pub. L. 92-425.

Since there is no evidence that Mr. Bethel ever divorced Mary Bethel, it appears that he was never lawfully married to Patcharee Bethel whom he listed as his spouse on the SBP election form. The significance of the validity of the designation is evident in section 1450(a)(1) of title 10, United States Code, which provides in relevant part that the monthly annuity under the Survivor Benefit Plan shall be paid to "the eligible widow." See 10 U.S.C. § 1447(3). Because he was never legally married to Patcharee, she is not an eligible beneficiary under the Plan. Matter of Cline, cited above; Matter of Stratton, B-207625(1), September 22, 1982; see also Matter of Braxton, B-189133, September 21, 1977. Thus, the costs deducted from his retired pay for annuity coverage may not be paid to Patcharee. Also, since he filed an election for spouse coverage for someone other than his lawful spouse, his election was invalid as to election for spouse coverage. Matter of Cline, cited above, and Shaff v. United States, 695 F.2d 1138 (9th Cir. 1983), cert. denied, 52 U.S.L.W. 3262 (U.S. Oct. 4, 1983) (No. 82-1949). Thus, neither is Mary entitled to the costs deducted from his retired pay. Question "a" is answered accordingly.

Mr. Bethel also designated as his beneficiaries under the Plan his two minor children who we assume were born of his relationship with Patcharee. Under the provisions of 10 U.S.C. § 1450(a)(3), if the member elected to provide an annuity for his dependent children but not for his spouse, a monthly SBP annuity is payable in equal shares to the dependent children. For the purpose of the Survivor Benefit Plan, 10 U.S.C. § 1447(5), as amended, defines dependent child to include a "recognized natural child who lived with that person in a regular parent-child relationship."

Although Mr. Bethel's election in favor of Patcharee is invalid, in the absence of evidence to the contrary his election in favor of his two children,

Eunice and Dewey, appears to be valid under the applicable statutes. Compare Shaff v. United States, cited above. Therefore, as his beneficiaries under the Plan, they are entitled to payment, in equal shares. But since he did not survive 2 years after his election they are not entitled to an annuity. They may share equally the total amount deducted from his retired pay on account of his Survivor Benefit Plan election. Questions "b" and "c" are answered accordingly.

Milton J. Socolar
for Comptroller General
of the United States