

Second Edition 1994

**Military
Personnel Law
Manual**

**Title IV —
Survivor Benefit
Plan**



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Foreword

This is Title IV of the Second Edition of the Military Personnel Law Manual. The Manual is prepared by the Office of General Counsel, U.S. General Accounting Office (GAO). The purpose of the Manual is to present the legal entitlements of members of the uniformed services including an overview of the statutes and regulations which give rise to those entitlements, in the following areas: Title I—Active Duty Pay and Allowances; Title II—Travel; Title III—Retired Pay, Separation Payments, and Death Benefits; and Title IV—Survivor Benefit Plan.

This edition of the Military Personnel Law Manual is being published in loose leaf style with the introduction and four titles separately wrapped. The Manual generally reflects decisions of this Office issued through September 30, 1992. The material in the Manual is, of course, subject to revision by statute or through the decision-making process. Accordingly, this Manual should be considered as a general guide only and should not be cited as an independent source of legal authority. This Manual supersedes the edition of the Military Personnel Law Manual which was published in June 1983 with revised pages issued May 1985, covering decisions through December 31, 1984.

We plan to issue regular supplements to be filed with this edition of the Military Personnel Law Manual. As always, we would welcome any comments that you may have regarding any aspect of the Manual.



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Contents

Foreword		1
Chapter 1—Participation in SBP	Subchapter I—Law Generally Subchapter II—Coverage of Beneficiaries Subchapter III—Participation in the Plan	1-1 1-2 1-17
Chapter 2—Annuities		2-1
Chapter 3—Annuity Adjustment		3-1
Chapter 4—Pre-Effective Date Retirees		4-1
Chapter 5—Waiver and Recovery by Setoff of Erroneous SBP Payments		5-1
Chapter 6—Former Spouse Coverage		6-1
Index	Chapter 1—Participation in SBP Subchapter I—Law Generally Subchapter II—Coverage of Beneficiaries Subchapter III—Participation in the Plan Chapter 2—Annuities Chapter 3—Annuity Adjustment Chapter 4—Pre-Effective Date Retirees Chapter 5—Waiver and Recovery by Setoff of Erroneous SBP Payments Chapter 6—Former Spouse Coverage	Index-1 Index-1 Index-1 Index-2 Index-3 Index-4 Index-5 Index-5 Index-5

Contents

Abbreviations

ADT	active duty training
AF	Air Force
AUS	Army of the United States
AFR	Air Force Regulation
BAS	basic allowance for subsistence
BAQ	basic allowance for quarters
cf.	compare
C.F.R.	Code of Federal Regulations
ch.	chapter
CIA	Central Intelligence Agency
CMA	Court of Military Appeals
COC	Office of the Comptroller of the Currency
COLA	cost of living allowance
Comp. Gen.	Decisions of the Comptroller General of the United States (published volumes)
CONUS	the continental United States
Ct. Cl.	Court of Claims
DIC	Dependency and Indemnity Compensation
DITY	Do-It-Yourself
DLA	dislocation allowance
DOD	Department of Defense
FDIC	Federal Deposit Insurance Corporation
FSA	family separation allowance
GAO	General Accounting Office
GTR	government transportation request
HHE	household effects
HHG	household goods
HPSP	Health Profession's Scholarship Program
IHA	interim housing allowance
JFTR	Joint Federal Travel Regulations, Vol. 1 (formerly Joint Travel Regulations, Vol. 1)
1 JTR	Joint Travel Regulations, Vol 1 (now Joint Federal Travel Regulations, Vol. 1)
JROTC	Junior Reserve Officers' Training Corps
LWOP	leave without pay
MADCOP	Marine Corps Associate Degree Completion Program
MH	mobile home
MIA	missing in action
MOS	military occupational specialty
MPLM	Military Personnel Law Manual

Contents

MSC	military sea command
MVTA-2	multiple unit training assembly-two
NAAA	Naval Academy Athletic Association
NATO	North Atlantic Treaty Organization
NROTC	Navy Reserve Officers' Training Corps
OCS	Officer Candidate School
para.	paragraph
paras.	paragraphs
PCS	permanent change of station
PDTATAC	Per Diem Travel and Transportation Allowance Committee
PHS	Public Health Service
POV	privately owned vehicle
Pub. L. No.	Public Law Number
ROTC	Reserve Officers Training Corps
RSFPP	Retired Serviceman's Family Protection Plan
SBP	Survivor Benefit Plan
SRB	selective reenlistment bonus
SROTC	Senior Reserve Officers' Training Corps
Stat.	Statutes at Large
TAD	temporary additional duty
"TAPER"	appointment temporary appointment pending establishment of a register
TDRL	Temporary Disability Retired List
TDY	temporary duty
TLA	temporary lodging allowance
UCMJ	Uniform Code of Military Justice
U.S.C.	United States Code
U.S.C.A.	United States Code Annotated
USMC	United States Marine Corps
USSDP	Uniform Service Savings Deposit Program
VA	Veterans Administration (now Department of Veterans Affairs)
VHA	variable housing allowance
vol.	volume
VIP	variable incentive pay
§	section
§§	sections

Participation in SBP

Subchapter I—Law Generally

The Survivor Benefit Plan (SBP), 10 U.S.C. §§ 1447-1455, established by Pub. L. No. 92-425, approved September 21, 1972, 86 Stat. 706, is an income maintenance program for the surviving dependents of deceased service members. The Plan has been modified substantially from time to time since then by amending legislation, including the provisions for supplemental spouse coverage, 10 U.S.C. §§ 1456-1460a. Accordingly, the user of the title is cautioned to undertake any necessary supplemental research deemed appropriate. The effective date of entitlement to annuity under section 4, Pub. L. No. 92-425, is the date on which the requirements of the law are met or on the effective date of the law, whichever is later. 54 Comp. Gen. 493 (1974).

Amounts of annuity payments due a beneficiary under section 4, Pub. L. No. 92-425, but unpaid at the beneficiary's death either because annuity checks were not negotiated or because payments had not been established, may be paid to the estate of the deceased beneficiary. 54 Comp. Gen. 493 (1974).

The Survivor Benefit Plan is an income maintenance program for the surviving dependents of deceased service members. Military retirees who elect to participate in the SBP program are assessed costs to defray the expenses of annuity payments. The SBP law prohibits any refund of properly assessed costs, except in limited circumstances when an SBP participant is survived by a widow or widower whose SBP annuity is reduced or eliminated because of a concurrent entitlement to Dependency and Indemnity Compensation (DIC) from the Veterans Administration. Hence, an Air Force sergeant who elected to provide SBP annuity coverage for his wife may not be allowed, based on the termination of their marriage by divorce, a refund of costs he paid for that coverage over an 11-year period. Master Sergeant Joseph A. Macrina, USAF (Retired), B-229438, Aug. 10, 1988.

Survivor Benefit Plan (SBP) elections are irrevocable, SBP participants who are determined by Veterans Administration to have a total service-connected disability for 10 consecutive years may, however, suspend previously elected SBP annuity coverage for a spouse and stop paying the cost of coverage. The reason for this is that the laws governing veteran's benefits give the surviving spouse of those SBP participants a vested entitlement to Dependency and Indemnity Compensation, so that the spouse's SBP entitlement is then either substantially reduced or totally eliminated. Until 10-year period has elapsed, the spouse's ultimate entitlement to Dependency and Indemnity Compensation remains uncertain, so that SBP coverage during that 10-year period provides

genuine and substantial income maintenance protection. Thus, an Air Force sergeant may not be allowed a refund of SBP costs he paid during such 10-year period on the basis of a theory that his payments “purchase[d] absolutely nothing.” Master Sergeant Joseph A. Macrina, USAF (Retired), B-229438, Aug. 10, 1988.

Spouses of military members who retired before 1972, when the Survivor Benefit Plan went into effect, were not entitled to notice that member-spouses had elected not to participate in the Plan. Chief Warrant Officer Glen N. Burbage, USCG (Retired), 71 Comp. Gen. 107 (1991).

The Survivor Benefit Plan (SBP) is an income maintenance program established under federal law for the dependents of deceased service members. The law governing the program identifies the eligible beneficiaries and specifies an order of precedence among them. The SBP law does not authorize service members to treat annuities as assets of their estates, or to designate annuitants in wills or other testamentary instruments, or to appoint guardians or trustees to oversee the disbursement of annuity payments. Hence, a retired Navy petty officer could not effectively in his will either designate an SBP annuitant or designate guardians to disburse the annuity, and the SBP annuity payable upon his death must instead be disbursed in conformity with the applicable provisions of federal law. Master Chief Petty Officer John W. Wood, USN (Retired) (Deceased), B-230824, Nov. 14, 1988.

Base amounts designated less than maximum coverage are not subject to modified cost-of-living adjustments to retired pay computation at time of retirement. 55 Comp. Gen. 1432 (1976). See also B-190908, Apr. 26, 1978, and June 26, 1980.

Subchapter II— Coverage of Beneficiaries

A. Children Coverage

1. Election requirement

When an eligible widow with dependent children is receiving an annuity under 10 U.S.C. § 1448(a) which is reduced under 10 U.S.C. § 1450(c) because of Dependency and Indemnity Compensation (DIC) entitlement and the

widow loses eligibility because of death or remarriage, dependent child is not entitled to an annuity unless coverage is elected and the additional costs for such coverage assessed. 54 Comp. Gen. 709 (1975).

2. Effect of election

If a member elects to have dependent child annuity coverage when he becomes a participant in the Plan, that coverage is not limited to children he has at the time of the election, but extends automatically and involuntarily to any child he thereafter acquires. Hence, annuity coverage automatically extended to the son acquired by birth in 1981 following a remarriage by a retired Army officer who had elected to have dependent child coverage when he became a Plan participant in 1973. 62 Comp. Gen. 553 (1983).

3. Irrevocability of election

The election made by a retired service member who is married and has dependent children to participate in the Survivor Benefit Plan with full spouse and dependent child annuity coverage is binding and may not be unilaterally revoked by him. Thus, a retired Army officer who elected to have such coverage in 1973 could not, after divorce and remarriage, withhold dependent child annuity coverage from a son he acquired in 1981 even though by that time the only dependent child he had in 1973 was no longer eligible for an annuity. 62 Comp. Gen. 553 (1983).

4. Dependency and indemnity compensation (DIC) effect

Where child coverage is elected, the dependent children are entitled to the full annuity selected even though the annuity of the surviving spouse had been permanently reduced by the amount of DIC received. 55 Comp. Gen. 1409 (1976).

5. Children of prior marriage

A service member who elected spouse and children coverage under the Survivor Benefit Plan at retirement was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify for annuity purposes as his eligible widow at his death, she was pregnant. In view of the 10 U.S.C. § 1450(a) provision that payment of the annuity will begin "the first day after the death," an annuity may be paid to his surviving dependent children of the prior

marriage but must terminate on the date that the surviving spouse qualifies under 10 U.S.C. § 1447(3)(B) for an annuity by the birth of his posthumous child. 60 Comp. Gen. 240 (1981).

6. Posthumous children

A service member who was married and had children, elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried, but died prior to the first anniversary of the remarriage. His surviving spouse who was pregnant when he died, later gave birth to his posthumous child. Not only does the birth to his posthumous child qualify the surviving spouse as the eligible widow for annuity purposes, but such child immediately joins his other children in the class stipulated in 10 U.S.C. § 1450(a)(2) as potential eligible beneficiaries to share the annuity should the eligible widow thereafter lose eligibility by remarriage before age 60 or death. 60 Comp. Gen. 240 (1981).

7. Foster child

A minor grandchild of a service member can qualify as a foster child, subject to support requirement and limitations on dependency contained in 10 U.S.C. § 1447(5)(A) and (B). 53 Comp. Gen. 461 (1974).

8. Military personnel—status

A child under 18 years of age and serving on active duty, or under 22 and attending a service academy, or enrolled in an institute of higher learning under a military subsistence scholarship program, is considered an eligible dependent within the meaning of 10 U.S.C. § 1447(5), even though he is provided quarters and subsistence by the government. 53 Comp. Gen. 420 (1973).

9. Full-time student dependents

Eligible beneficiaries under the Survivor Benefit Plan, an income maintenance program for the surviving dependents of deceased service members, include Plan participants' children between 18 and 22 years old who are full-time students. Children over 18 years old who are not attending school may become eligible for an annuity at any time until they reach the age of 22 by undertaking a full-time course of study, since the Congress in establishing the Plan indicated that children aged anywhere between 18 and 22 years old who are students should be regarded as

eligible dependents for purposes of annuity coverage. 65 Comp. Gen. 767 (1986).

10. Disabled adult child

a. When disability arises

Under the Survivor Benefit Plan, 10 U.S.C. § 1447 *et seq.*, eligible "dependent child," is defined by statute as including one who is incapable of supporting himself because of mental or physical incapacity incurred before his twenty-second birthday while pursuing a full-time course of study. Given this definition, a military officer's daughter who suffered a mental breakdown at the age of 19 during the summer vacation following the successful completion of her first year of college, and who was thus rendered incapable of self-support, may properly be considered a "dependent child" eligible for an annuity under the Plan. 62 Comp. Gen. 302 (1983).

b. Child secures employment

The adult daughter of a deceased Navy officer received a Survivor Benefit Plan annuity under 10 U.S.C. § 1447(5)(B)(iii) based on a determination that she was incapable of self-support because of physical incapacity. She was quadriplegic as the result of childhood polio. Despite this disability, she later secured full-time government employment in a grade GS-5 position. This does not warrant suspension of the annuity on the basis that she is no longer incapable of self-support, even though a grade GS-5 salary would normally be sufficient to cover the living expenses of physically fit person, since that salary is not sufficient for her own personal needs. 62 Comp. Gen. 193 (1983).

c. Recurring loss of self-sufficiency

A deceased military officer's daughter, considered eligible for a Survivor Benefit Plan annuity on the basis of mental illness making her incapable of self-support, then recovered from her illness to the extent that she was able to support herself for 6 months through gainful employment. She subsequently suffered a relapse requiring rehospitalization. The annuity may properly be suspended during the 6-month period of employment. It may be reinstated during the following period when she was again incapable of self-support because of the original disabling condition, since the applicable laws governing military survivor annuity plans do not

preclude reinstatement in appropriate circumstances. 62 Comp. Gen. 302 (1983).

d. Mental patient's power of attorney

Under the rules of agency, a known mental incapacity of the principal may operate to vitiate the agent's authority even in the absence of a formal adjudication of incompetency. Hence, Survivor Benefit Plan annuity payments may not be made to an agent designated in a power of attorney which was signed by an annuitant known to be suffering from mental illness but not adjudged incompetent, since in the circumstances the validity of the power of attorney is too doubtful to serve as a proper basis of a payment from appropriated funds. 62 Comp. Gen. 302 (1983).

e. Payments to mental patient

Survivor Benefit Plan annuity payments in the case of an adult beneficiary known to be suffering from mental illness, but not adjudged incompetent, may be made directly to the beneficiary if by psychiatric opinion the beneficiary is considered sufficiently competent to manage the amounts due and to use the annuity properly for personal maintenance. Otherwise, the amounts due should remain unpaid and credited on account until a guardian authorized to receive payment is appointed by a court. 62 Comp. Gen. 302 (1983).

11. Reinstatement of coverage when child's marriage annulled

As a general rule, a valid marriage entered into by a Survivor Benefit Plan participant's child terminates the child's annuity eligibility for all time, because a valid marriage operates to end a child's dependence on his or her parents, and the relationship of dependency cannot be renewed by a subsequent divorce. Nevertheless, if the marriage is ended not by an ordinary divorce but rather by an annulment, or there is otherwise a judicial decree rendered by a court of competent jurisdiction declaring the marriage void, then there would be a proper basis for concluding the marriage was invalid, and the child's annuity coverage could be reinstated. 65 Comp. Gen. 767 (1986).

12. Dependent may not receive dual annuities

Retired military member who has waived military retired pay in order to increase civil service annuity cannot use both military and civilian service to provide a double survivor benefit or annuity for a dependent child. Since by operation of law the dependent child of a civil service employee will receive a civil service survivor annuity, the child may not be a beneficiary for military Survivor Benefit Plan annuity. B-225897, Sept. 25, 1987.

13. Dependent adopted by someone else but adoption set aside

A retired Air Force sergeant elected to provide Survivor Benefit Plan annuity coverage for his daughter. The daughter was subsequently adopted by her stepfather following her mother's divorce and remarriage. The adoption proceeding was set aside by a later state court order. Questions about the soundness of the later court order setting aside the adoption do not overcome the presumption in favor of its validity. Therefore, the daughter remained eligible for an annuity under the Plan as the member's dependent child beneficiary. Kimberly Lee Hall, 67 Comp. Gen. 138 (1987).

14. Illegitimate children

Claims for Survivor Benefit Plan annuities submitted by the mothers of illegitimate children of two deceased retired service members are denied because neither child lived with her father in a regular parent-child relationship, as required by 10 U.S.C. § 1447(5). Claim by illegitimate children of deceased Air Force members, 70 Comp. Gen. 25 (1990).

15. Child living with former spouse

The Survivor Benefit Plan annuity created by 10 U.S.C. § 1448(d)(2) may be paid to the dependent child of a deceased retirement-eligible member of the uniformed services living with the surviving parent who is the deceased member's former spouse. The annuity may be paid for periods commencing on or after March 1, 1986. LaVonne M. Sanchez and Jeffrey L. Cole, 71 Comp. Gen. 125 (1991).

16. Child living with surviving parent

Law providing Survivor Benefit Plan annuity to dependent child of retirement-eligible deceased service member, where child lives with surviving parent who is not deceased's surviving spouse, states that it applies to "claims arising on or after March 1, 1986." The referenced date only limits the time period for which a qualified dependent may make a claim, not the underlying entitlement, so that it is not relevant to the dependent's entitlement that the member died before March 1, 1986. LaVonne M. Sanchez and Jeffrey L. Cole, 71 Comp. Gen. 125 (1991).

B. Spouse Coverage

1. Eligible spouse beneficiary defined

The meaning of the phrase "eligible spouse beneficiary" as used in 10 U.S.C. § 1452(a), as amended by section 1(5)(A)(ii) of Pub. L. No. 94-496, is to be defined in terms of the definition of "widow" or "widower" contained in 10 U.S.C. § 1447; that is, in order for a widow or widower to receive a survivor annuity on the death of the member in retirement, they must be the eligible spouse beneficiary immediately before the death. 56 Comp. Gen. 1022 (1977).

2. Spouse as a potential beneficiary—entitlement based on prior marriage

A retired naval officer seeks to have the deductions from his retired pay for the cost of spouse coverage under the Survivor Benefit Plan terminated. The basis of his request is that he has no eligible spouse beneficiary because his wife is entitled to a Survivor Benefit Plan annuity as a result of the military service of her previous husband who died while serving on active duty. The deductions from the officer's retired pay must continue because his wife is legally a potential beneficiary of an annuity provided by him and is, therefore, his eligible spouse beneficiary. B-213101, Feb. 14, 1984.

3. Spouse caused death of retiree—criminal charges

The wife of a deceased service member claims entitlement to an annuity under the Survivor Benefit Plan, where, in connection with his death, she was tried by jury and acquitted of all criminal charges. The claim may be allowed because the acquittal is sufficient indication of lack of felonious intent, absent further judicial proceedings or unusual circumstances tending to show that the claimant acted with felonious intent. B-215304, July 23, 1984.

Widow of a retired Army member claims entitlement to an annuity under the Survivor Benefit Plan and unpaid retired pay due at the time of his death. In connection with his death, she entered a plea of guilty to involuntary manslaughter but was not adjudged guilty, instead entering the state's first offender program. The claim, based on the argument that the widow was temporarily insane at the time of the incident, is disallowed because the record does not reasonably demonstrate the absence of felonious intent in light of the guilty pleas and the absence of any fact-finding proceedings establishing that the killing was accidental, in self-defense, or otherwise justifiable. Widow's claim for unpaid retired pay and survivor benefit plan annuity, B-233351, July 27, 1989.

4. Undissolved marriage—status

Where member marries a second wife without dissolving his first marriage, second wife is not legally married to him and does not qualify as the beneficiary of his SBP annuity. Since the first wife was legally married to him at the time of his death, she is his "widow" and is the proper beneficiary of the SBP annuity in spite of the second ceremonial marriage. B-194469, May 14, 1979; B-207592, June 23, 1982.

Army officer, having validly divorced his first wife in 1946, married again in 1960. When he then married a third wife in 1972 without dissolving his second marriage, his third wife was not legally married to him and therefore did not qualify as the beneficiary of his Survivor Benefit Plan (SBP) annuity. Since the second wife was legally married to the retired officer at the time of his death, she is his widow and is the proper beneficiary of the SBP annuity in spite of the third ceremonial marriage. Lieutenant Colonel John Tiernan Sharkey, USAR (Retired) (Deceased), 67 Comp. Gen. 561 (1988).

5. Multiple wives

a. First wife is legal widow

A claim for Survivor Benefit Plan annuity submitted by the first wife of a recently deceased, retired service member is authorized by our Office since the record indicates that the member never obtained a divorce from his first wife before entering into a ceremonial marriage with another woman. With no evidence of a marriage prior to that entered into with his first wife and no evidence of a divorce from his first wife, the member's first wife remains his legal widow. As such, she is entitled to an SBP

annuity when the member made an election for his surviving spouse. B-229157, Jan. 11, 1988.

b. Second wife is legal widow

Army officer, having validly divorced his first wife in 1946, married again in 1960. When he then married a third wife in 1972 without dissolving his second marriage, his third wife was not legally married to him and therefore did not qualify as the beneficiary of his Survivor Benefit Plan (SBP) annuity. Since the second wife was legally married to the retired officer at the time of his death, she is his widow and is the proper beneficiary of the SBP annuity in spite of the third ceremonial marriage. Lieutenant Colonel John Tiernan Sharkey, USAR (Retired) (Deceased), 67 Comp. Gen. 561 (1988).

c. Third marriage, to member, is valid

A woman, whose divorce from her first husband was not final, married a second husband. Her first husband subsequently died and her third marriage was to an Army member who later died. Her claim as the beneficiary of the member's (third husband) Survivor Benefit Plan annuity may be allowed since her second "marriage" was bigamous and legally invalid, her first marriage ended with the death of her first husband, and she did not contract any other legal marriages until she married the Army member. B-228766, Sept. 28, 1988.

6. Marriage to member of doubtful validity

a. Court of competent jurisdiction declares marriage valid

Annuity payments under the Survivor Benefit Plan may not be made to the surviving spouse of a deceased service member if their marital status at the time of the member's death was of doubtful validity, but such doubts may be resolved to the satisfaction of the accounting officers of the government if a court of competent jurisdiction renders judgment declaring the marriage valid. Hence, annuity payments may issue to a claimant on the basis of a declaratory judgment of an appropriate state court that she is the sole surviving spouse of a Navy officer, notwithstanding that shortly before his death the officer attempted to end the marriage in foreign divorce proceedings and otherwise attempted to disavow the marriage. B-217743, July 15, 1985.

b. Court of competent jurisdiction finds that member not married to claimant at time of death

A person who alleges that she was married to a deceased retired Navy officer prior to his death but who was determined not be his surviving spouse by a court of competent jurisdiction is not entitled to the spouse's annuity under the Retired Serviceman's Family Protection Plan. Neither is the person determined by the court to be the surviving spouse entitled to the annuity because she was not married to the officer at the time he retired or became entitled to retired pay. B-217743, July 15, 1985.

7. Foreign divorce

A member of the Reserve component of the Air Force was participant in the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, as amended by Pub. L. No. 95-397. Two women claim the annuity as widow. The member's first marriage was allegedly terminated by a Mexican divorce which the first wife has challenged. Since such divorces are not generally recognized by state courts a ruling by a court of competent jurisdiction as to the validity of the relationships involved is usually required (55 Comp. Gen. 533 (1975)). Since the first wife's suit asserting the continued validity of the first marriage was dismissed with prejudice she cannot question the validity of the second marriage. Accordingly, the claim of the second wife may be allowed. B-202149, Dec. 30, 1981.

8. Status uncertain

Claim for Survivor Benefit Plan annuity by the alleged fourth wife of a deceased former service member cannot be allowed. Absent a determination by a court of competent jurisdiction of the validity of the service member's foreign divorce from the third wife, the marital status of the service member who obtained the divorce in Mexico and subsequently married the claimant here is too uncertain to determine the proper recipient of the member's SBP annuity. In any event, even if the foreign divorce were validated so as to make the claimant the service member's lawful wife at the time of his death, she could not qualify for the SBP annuity, since the member listed his third wife as his spouse on the SBP form after his marriage to the alleged fourth wife. In that case, if the divorce is valid, the election to participate is nullified and no one receives an annuity. B-227505, Sept. 21, 1987.

9. Beneficiary is not member's lawful wife

A married Navy petty officer who retired prior to the effective date of the Survivor Benefit Plan (SBP), entered into a ceremonial marriage after attempting to dissolve his existing marriage through invalid foreign divorce proceedings, and he then elected SBP coverage for his alleged second spouse, listing her by name on the election form. Since his election into the SBP was under subsection 3(b) of Pub. L. No. 92-425, which required an affirmative election to participate in the SBP, and since the person for whom he elected the annuity was not his lawful wife, his election into the SBP was invalid and no annuity is payable. B-204367, Aug. 1, 1986.

10. Active duty marriages

A member remarries while serving on active duty and elects coverage for his newly acquired spouse. Upon his death after retirement, his spouse is fully qualified as an eligible widow under 10 U.S.C. § 1450(a)(1) since the marriage limitation contained in 10 U.S.C. § 1447(3)(A) applies only to post-retirement marriages. 53 Comp. Gen. 470 (1974).

11. Death on active duty

In the event a member dies while serving on active duty, under 10 U.S.C. § 1448(d) his widow is automatically entitled to an annuity regardless of the length of the marriage prior to the member's death. 53 Comp. Gen. 470 (1974).

12. Length of marriage qualification

Where member marries his second wife prior to validly divorcing his first wife and his marriage to his first wife was not dissolved until 8 months before his death, his second wife did not qualify as his "widow" under 10 U.S.C. § 1447(3)(A) as she had not been legally married to him at the time he became eligible for retired pay and had not been married to him for at least 1 year immediately before his death. B-189133, Sept. 21, 1977.

A person who is married to a retired Navy member for less than 1 year prior to his disappearance may not be considered his widow under the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, even though a state court determined that the date of death was later than 1 year from the date of marriage because the court's decision was not based upon a full presentation of the facts and because the United States was not a party to that action. Widow's claim is too doubtful to allow because there is no

showing that husband was alive after the disappearance of the ship on which he was sailing less than 10 months after the marriage. B-203903, Sept. 3, 1981.

13. Posthumous child qualifying widow

A service member elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify under 10 U.S.C. § 1447(3)(A) for any annuity at the time of his death because they had not been married at least 1 year, she was pregnant and later gave birth to his child. On that basis she qualifies as the eligible widow for annuity purposes effective the date of the child's birth. 60 Comp. Gen. 240 (1981).

14. Designation of surviving spouse as sole beneficiary

The mere fact that a retired officer designated his spouse as his sole beneficiary when he elected to participate in the Survivor Benefit Plan is not a valid basis for a claim for annuity under the Plan unless the surviving spouse meets the statutory qualifications of the Plan. Thus, a surviving spouse who did not qualify as an eligible widow for Survivor Benefit Plan purposes may not receive an annuity. B-203903, Feb. 11, 1985.

15. "Issue of marriage" qualification

Where a married member has a child by a woman who is not his wife, and nearly 17 years later, after divorcing his first wife, is validly married to the child's mother, she may not be considered the member's widow under 10 U.S.C. § 1447(3)(B) on the basis that she is the mother of "issue by that marriage," since the child was born long before the marriage. B-189133, Sept. 21, 1977.

16. Claim of common-law marriage to member

Where a surviving spouse does not qualify as a widow for Survivor Benefit Plan purposes because she and the retiree were married after he was retired but were not married for at least 1 year prior to the death of the retiree, a claim that they were married under common law prior to their official ceremonial marriage is not sufficient unless the common-law marriage has been proven. Where the parties allegedly held themselves out as husband and wife while residing in states where common-law marriages

may not be legally contracted—but traveled for visits to or passed through on an airplane trip jurisdictions where such marriages may be legally contracted—the existence of a common-law marriage is too doubtful for the Comptroller General to recognize. B-203903, Feb. 11, 1985.

The widow of an Air Force member claims a Survivor Benefit Plan annuity as his eligible widow. Since the claimant was not married to the member at the time he became eligible for retired pay, to qualify for an annuity she must have been married to him for at least 1 year prior to his death. Although the parties had entered into a ceremonial marriage only 7 months prior to the member's death, the widow offered evidence of a common-law marriage that allegedly was entered into at least 1 year before the member's death. The disallowance of the claim is sustained on grounds of doubt concerning whether the parties entered into a present agreement to be married at the time their relationship began, as required to establish a common-law marriage under the applicable state law. B-226114, Dec. 15, 1987.

17. Common-law remarriage after divorce

After entry of a final decree of divorce on November 6, 1975, the wife alleges that she and the member immediately resumed marital cohabitation and were husband and wife under the common law of Colorado when her husband died on November 21, 1975. While common-law remarriage after divorce is possible in Colorado, for SBP annuity purposes the existence of a common-law marriage on present record is too doubtful to authorize payment. B-194457, May 9, 1979.

18. Retirement eligibility

A spouse is not covered under 10 U.S.C. § 1448(d) as an eligible spouse beneficiary unless the member at the time of death would have been eligible to retire. 55 Comp. Gen. 854 (1976).

19. Second marriage annulled

Where a surviving spouse beneficiary loses annuity entitlement because of subsequent remarriage, but where that remarriage is annulled, annuity payments may be reinstated effective the first day of the month in which annulment decree was rendered. B-197601, Sept. 12, 1980. See also B-210542, Aug. 23, 1983.

C. Natural Person Coverage

1. Relationship limitation

An insurable interest is any pecuniary interest in the continued life of another, and no evidence of pecuniary interest is required of a near relative; however, an insurable interest based on a contract relationship would have to be proved. 52 Comp. Gen. 973 (1973).

2. Dependent child

Unmarried member at the time he becomes entitled to retired or retainer pay may elect an "insurable interest" annuity under SBP for child who is also dependent child, notwithstanding restriction that such election may be chosen only by member "without dependent child," since purpose of provision was to prevent exclusion of dependent child and not to preclude inclusion of such child under "insurable interest" provision. B-179465, July 19, 1974.

3. Limitation on numbers

Under 10 U.S.C. § 1448(b) coverage, only one person with an insurable interest may be named. 52 Comp. Gen. 973 (1973).

4. Surviving spouse's claim as person with insurable interest in member

A surviving spouse who does not qualify as an eligible widow for purposes of the Survivor Benefit Plan may not receive an annuity under the Plan on the basis that she had an insurable interest in her spouse, since coverage for her was available only as a spouse, not as an individual with an insurable interest. The member's election to participate in the Plan was made 5 years after his initial eligibility to participate in the Plan had expired, and was based on his later marriage. In such a case, he was eligible to elect coverage for his newly acquired spouse, not for a person with an insurable interest. B-203903, Feb. 11, 1985.

5. Listing of spouse for administrative convenience

The legal widow of a retired service member is entitled to a Survivor Benefit Plan (SBP) annuity even though the member named another woman as his spouse on his SBP election form. Since the member retired after September 21, 1972, the effective date of the SBP, the listing of his spouse on the election form is for administrative convenience. The fact that the

woman named was not actually the member's spouse does not preclude his surviving spouse from benefiting from the Plan. B-229157, Jan. 11, 1988.

6. Irrevocable election exception

While a Survivor Benefit Plan (SBP) election is irrevocable, SBP participants who are determined by the Veterans Administration to have a total service-connected disability for 10 consecutive years may, however, suspend previously elected SBP annuity coverage for a spouse and stop paying the costs of coverage. The reason for this is that the laws governing veteran's benefits give the surviving spouse of those SBP participants a vested entitlement to Dependency and Indemnity Compensation (DIC) so that the spouse's SBP entitlement is then either substantially reduced or totally eliminated. Until the 10-year period has elapsed, the spouse's ultimate entitlement to DIC remains uncertain, so that SBP coverage during that 10-year period provides genuine and substantial income maintenance protection. Thus, an Air Force sergeant may not be allowed a refund of SBP costs he paid during such 10-year period on the basis of a theory that his payments "purchase[d] absolutely nothing." Master Sergeant Joseph A. Macrina, USAF (Retired), B-229438, Aug. 10, 1988.

D. Incapacitation of Beneficiary

1. Aid in filing annuity application

Survivor Benefit Plan annuitants are not precluded from accepting assistance from other persons in completing and filing annuity application forms. There is consequently no basis for objection to the son of a retired Army colonel's widow filing an annuity application form on her behalf as her agent under a power of attorney, with the request that benefit payments be made directly to her, provided that she is not mentally incompetent. 65 Comp. Gen. 621 (1986), clarified. 66 Comp. Gen. 340 (1987).

2. Alzheimer's disease

While Alzheimer's disease can cause or lead to mental incompetence, persons diagnosed as having this disease may nevertheless remain competent to manage their personal financial affairs responsibly. There is no basis for objecting to Survivor Benefit Plan payments being made directly to an annuitant who has the disease unless it is established that the annuitant is actually incompetent, either in competency proceedings in a state court, or otherwise in a statement of professional opinion of a physician or psychologist that an annuitant is incompetent to manage

responsibly the amounts due. 62 Comp. Gen. 302, 307-308 (1983), clarified. 66 Comp. Gen. 340 (1987).

3. Handicap or disability does not establish incompetence

Survivor Benefit Plan annuitants should not be considered incompetent, and in need of a court-appointed guardian to manage their annuity payments, solely because they may have a physical handicap or disability. Thus, there is no basis for objecting to benefit payments being sent directly to an annuitant solely because of her impaired vision, since that alone would not render her incompetent to manage her personal financial affairs. 65 Comp. Gen. 621 (1986), clarified. 66 Comp. Gen. 340 (1987).

Subchapter III— Participation in the Plan

A. Elections

1. Election effect

Until a member is entitled to retired pay, any elections made are ambulatory and may be changed prior to that time and only the last election is binding as it is only then that the class of eligible annuitants is set. 53 Comp. Gen. 470 (1974).

2. Exceptions

A service member is bound by his last election prior to retirement unless he comes within the specific exceptions provided in 10 U.S.C. § 1450(f) governing after retirement marriages or acquisition of dependent children. 53 Comp. Gen. 470 (1974).

3. Reservists

Under provisions added to the Survivor Benefit Plan by Pub. L. No. 95-397, members notified of their eligibility (except for not having reached age 60) for non-regular retired pay under 10 U.S.C. chapter 67, may elect immediate coverage for dependents. If such a member becomes entitled to retired pay under another law the member loses eligibility for chapter 67 retired pay, but the Survivor Benefit Plan election remains effective until

the member actually retires. He is then covered by other provisions of the Plan and may make a new election. 61 Comp. Gen. 441 (1982).

4. Temporary disability retired list (TDRL) limitations

A service member made an election for the purpose of being placed on the TDRL. Subsequently, his name was removed from that list for the purpose of his resuming active duty for retirement for length of service. Any option exercised by the member with regard to the Plan and election made prior to placement on that list is limited to that purpose and such member may not be bound thereafter by those actions. The member must be treated as a new prospective participant and must be given the opportunity to fully review his future participation in the Plan. 53 Comp. Gen. 971 (1974).

5. Administrative error

Revocation of any election based upon "administrative error" is a Secretarial prerogative under 10 U.S.C. § 1454 and may be exercised to revoke or modify SBP coverage based upon a finding that the member received erroneous or insufficient information and that such information caused him to make an election he would not otherwise have made. 55 Comp. Gen. 158 (1975).

6. Guardian or committee election

Where a court of competent jurisdiction determined that a member was mentally or physically incapable of managing affairs under state law and a guardian or committee was appointed to manage all his affairs, an SBP election made by such guardian or committee before the member's death was valid and became effective when received by the Secretary concerned. 54 Comp. Gen. 285 (1974).

7. Initial eligibility expired—retiree must elect coverage within 1 year of marriage

A Navy officer retired in 1970, married in 1978, and 2 months later elected coverage under the Survivor Benefit Plan for his spouse. He died less than 1 year after the marriage. Since they were married less than 1 year before his death, the spouse does not qualify as an eligible widow for an annuity under the Plan. Claims that they had entered into a common-law marriage sometime in 1973-1975, prior to the 1978 ceremonial marriage, even if proven would not qualify her as the widow because the retiree must have

elected coverage under the Plan within 1 year after his marriage which, if the common-law marriage were valid, would have expired at the latest in 1976, over a year before he made the election. B-203903, Feb. 11, 1985.

8. Dependent child—filing deadlines

Under law providing Survivor Benefit Plan annuity to dependent child of retirement-eligible deceased member under prescribed circumstances, claim must be filed before October 1, 1988, only if death occurred between September 21, 1972, and October 1, 1985. Filing deadline is not relevant where member died after such period. LaVonne M. Sanchez and Jeffrey L. Cole, 71 Comp. Gen. 125 (1991).

A member who elected Survivor Benefit Plan (SBP) coverage for his wife when it became available in 1972, who was divorced in 1977 with a court order and incorporated agreement purporting to designate her as an SBP annuitant, and who failed to actually elect former spouse SBP annuity coverage when such coverage was authorized in 1983, cannot be “deemed” to have elected former spouse coverage if the Secretary did not receive a request for such an election from the former spouse before October 1, 1985, the statutory deadline. Constance L. Posner, 71 Comp. Gen. 478 (1992).

B. Administrative Requirements

1. Detailed explanation

The legislative history of the SBP discloses that administrative officers are required to fully explain the details and benefits of the Plan to retiring personnel and their spouses if full coverage is not selected. That responsibility implies the requirement to determine whether there is an eligible spouse or dependent child. 53 Comp. Gen. 192 (1973).

2. Records examination

Where a member states that he does not have a spouse or child eligible for an annuity, the service records of the member should be examined to verify that representation. If there is no contrary evidence, the member's election may be accepted. 53 Comp. Gen. 192 (1973).

3. Good acquittance

Where member's representations that he has no spouse or dependent child are supportable in service records and his election not to participate in SBP is accepted, the government has a good acquittance should it be posthumously discovered that the member had an eligible spouse or child at the time of retirement. 53 Comp. Gen. 192 (1973).

4. TDRL removal

When a service member's name is removed from the TDRL and is returned to the active list for any purpose, he is to be treated thereafter as a new prospective SBP participant and given the opportunity to review his future participation prior to retirement with positive action taken administratively to ensure that the details and costs are again fully understood by him. 53 Comp. Gen. 971 (1974).

5. Secretarial election—incompetent members

An election on behalf of a mentally incompetent member for coverage of a natural person with an insurable interest may be made by the Secretary concerned standing in place of the incompetent member. Under 10 U.S.C. § 1449, if, after careful consideration of the facts and circumstances, the Secretary believes that the retiree would elect to give up a substantial amount of monthly pay to provide for the annuity to the purpose, he is required to make the election. 52 Comp. Gen. 973 (1973).

C. Retired Pay
Reductions—Inception

1. Non-regular

Since 10 U.S.C. § 1448(a) provides that coverage commences when individual becomes entitled to retired pay, persons retired under 10 U.S.C. § 1331, who become entitled to retired pay when application for retired pay is filed with department concerned, receive coverage at that time and deductions from retired pay commence with the inception of coverage. 53 Comp. Gen. 832 (1974). However, see later amendments to SBP with regard to non-regular service election.

2. Fleet Marine Corps Reserve

If an active duty member is placed in retired or retainer pay status effective a day other than the first of a month and participates in the SBP, coverage charges begin on the first day of month following, unless

regulations pursuant to 10 U.S.C. § 1455 provide pro rata charges for part of month. B-196539, July 1, 1980.

D. Retired Pay Reductions—Termination

1. Spouse coverage

Under the SBP, (10 U.S.C. §§ 1447-1455) as amended by section 1(5)(A)(ii) of Pub. L. No. 94-496, effective October 1, 1976, where a member had elected spouse coverage but reduction of retired pay for spouse coverage is terminated because the member no longer has an eligible spouse beneficiary on the first day of the month, full reduction of retired pay for spouse coverage is required since charges are made on an indivisible monthly basis. 57 Comp. Gen. 847 (1977). See also B-195349, Jan. 10, 1980. Cf. B-196539, July 1, 1980.

2. Foreign Service survivor annuity elections

A retired service member who validly elects into the SBP may not voluntarily withdraw and shall continue to have his retired pay reduced (10 U.S.C. § 1452(a)) or make deposits for coverage (10 U.S.C. § 1451(d)), if not entitled to retired pay, notwithstanding fact that member was subsequently employed in the Foreign Service, retired therefrom and elected a survivor annuity under that system. B-188932, Dec. 23, 1977.

3. Civil service survivor annuity elections

A retired member, having elected coverage under the SBP, and thereafter retired from the civil service, waived receipt of military retired pay for civil service retirement purposes and did not decline survivor coverage under the civil service retirement system. Under 10 U.S.C. § 1452(e), SBP coverage charges are suspended so long as that waiver is in effect. B-192470, Jan. 3, 1979.

4. Effect of renunciation of United States citizenship

A retired member of the Armed Forces who becomes a citizen of a foreign country by naturalization and who voluntarily renounces his United States citizenship loses the right to retired pay since entitlement to retired pay depends upon the continuation of the individual's status as a retired member of the military service available for service as required and that status is incompatible with renunciation of United States citizenship. However, such a person who elected to participate in the Survivor Benefit

Plan and from whose retired pay the required deductions were being made for coverage under the Plan when he renounced his U.S. citizenship, may continue coverage under the Plan by making the required payments into the Treasury. B-212481, Feb. 2, 1984.

5. No refund upon divorce

The Survivor Benefit Plan (SBP) is an income maintenance program for the surviving dependents of deceased service members. Military retired who elect to participate in the SBP program are assessed costs to defray the expenses of annuity payments. The SBP law prohibits any refund of properly assessed costs, except in limited circumstances when an SBP participant is survived by a widow or widower whose SBP annuity is reduced or eliminated because of concurrent entitlement to Dependency and Indemnity Compensation from the Veterans Administration. Hence, an Air Force sergeant who elected to provide SBP annuity coverage for his wife may not be allowed, based on the termination of their marriage by divorce, a refund of the costs he paid for that coverage over an 11-year period. B-229438, Aug. 10, 1988.

E. Resumption of
Reductions

1. Post-election remarriages

Since section 1(5)(A)(ii) of Pub. L. No. 94-496 authorizes that reduction in retired pay for spouse coverage purposes is no longer required for any month in which there is no eligible spouse beneficiary, resumption of such reduction for spouse coverage in the case of post-election remarriages would not occur until the spouse on remarriage qualifies as an eligible spouse beneficiary by the happening of the earlier of the two requirements stipulated in 10 U.S.C. § 1447(3)(A) and (B) and (4)(A) and (B). 56 Comp. Gen. 1022 (1977). See also B-195349, Jan. 10, 1980.

2. Spouse coverage—first month following eligibility attainment

Under the SBP, as amended by Pub. L. No. 94-496, effective October 1, 1976, after spouse coverage is terminated due to loss of eligible spouse beneficiary and the member remarries, since reduction in retired pay for spouse coverage purposes is charged on an individual monthly basis, such reduction in retired pay would not resume until the first month following the date such spouse attains eligible spouse beneficiary status, unless such date is on the first of a month, then appropriate charges are to be made for that month. 57 Comp. Gen. 847 (1978). See also B-195349, Jan. 10, 1980.

F. Recomputation

1. Adjustment of participant's costs when dependent becomes eligible

If a Survivor Benefit Plan participant's child who is between 18 and 22 years old becomes a full-time student and thus becomes eligible for an annuity under the Plan, any resulting adjustment that may be necessary in the participant's cost for beneficiary coverage should be made effective on the first day of the month after the child has resumed school attendance, as costs for benefit coverage generally are assessed on a monthly basis and should be predicated on the beneficiary status in being on the first day of a month, for that month. 65 Comp. Gen. 767 (1986).

2. Child coverage—loss of spouse beneficiary

Under the SBP, as amended by Pub. L. No. 94-496, effective October 1, 1976, where the member had elected both spouse and children coverage and there is termination of reduction of retired pay for spouse coverage because of loss of an eligible spouse beneficiary, the previously elected child coverage is to be recomputed. The law governing the SBP requires such coverage to be determined on an actuarial basis and the loss of the eligible spouse beneficiary has increased the probability that an annuity would be payable to an elected dependent child. 57 Comp. Gen. 847 (1978).

3. Member's and child's age

Under the SBP, as amended by Pub. L. No. 94-496, effective October 1, 1976, dependent children coverage either alone or in combination with spouse coverage is to be determined on actuarial basis. In order to maintain the actuarial basis of the charge for children's coverage, upon the loss of spouse, the recomputation is to be based on the member's age and that of the youngest child beneficiary as of the day following loss of an eligible spouse beneficiary. 57 Comp. Gen. 847 (1978).

4. New-born child beneficiary

Statutory provisions of the Survivor Benefit Plan direct that costs of dependent child annuity coverage be assessed "by an amount prescribed under regulations of the Secretary of Defense." Consistent with express congressional intent, the regulations prescribe computation of those costs on an actuarial basis in which the ages of the Plan participant and his eligible dependents are used. When a Plan participant acquires a dependent child and he has no other children remaining who are eligible for an annuity, those costs are to be reinstated, computed under that

prescribed method based on the age of the newly acquired child. 62 Comp. Gen. 553 (1983).

5. Eligible spouse beneficiary reacquisition

Under the SBP, as amended by Pub. L. No. 94-496, effective October 1, 1976, where the cost of children coverage had been recomputed and charged following the loss of eligible spouse beneficiary, since children coverage is to remain on an actuarial basis, and since the gain of an eligible spouse beneficiary had reduced the probability that an annuity would be payable to an elected dependent child, the cost of such coverage should be further recomputed, based on the age of the youngest child and the ages of the member and the new spouse on the date the spouse qualified as an eligible spouse beneficiary. 57 Comp. Gen. 847 (1978). See also B-195349, Jan. 10, 1980.

G. Record Correction

Persons whose military records are corrected after September 10, 1972, to show entitlement to retired or retainer pay commencing after that date are automatically covered under SBP and may not be afforded a period of time thereafter to decline coverage or elect reduced coverage after award of retired pay. Their situation cannot be distinguished from members becoming entitled to retired or retainer pay without correction of their records and who do not receive an opportunity to elect reduced coverage or decline coverage after they become entitled to that pay. 54 Comp. Gen. 116 (1974).

Annuities

A. Member Death on Active Duty

1. No break in service

a. Annuity payment limitation

Service member, retired after passage of SBP, is immediately recalled to active duty and then dies while on that duty. Entitlement to annuity accrues only under the provisions of 10 U.S.C. § 1448(d). 53 Comp. Gen. 847 (1974), affirmed. B-179018, Aug. 6, 1976.

b. Spouse annuity

Where entitlement accrues under 10 U.S.C. § 1448(d) as the only basis for coverage, only the otherwise eligible surviving spouse would be entitled to an annuity. 53 Comp. Gen. 847 (1974).

c. Child annuity

A dependent child is not entitled to an annuity under 10 U.S.C. § 1448(d) since the legislative history of the SBP indicated such coverage was not intended. 54 Comp. Gen. 709 (1975).

2. Break in service

a. Alternative annuity

Where a retired member has elected SBP spouse coverage and, after a break in service, is on active duty and dies while serving on that duty, a surviving spouse who is eligible to receive the elected annuity under 10 U.S.C. § 1448(a) would have the alternate right to receive the annuity authorized under 10 U.S.C. § 1448(d), if it provides the greater benefit. 53 Comp. Gen. 847 (1974).

b. Dependent child entitlement

Service member elects coverage for spouse and children, is retired and recalled to active duty after a break in service, and dies while serving on that duty. Upon the death of the spouse who was receiving annuity under 10 U.S.C. § 1448(d), the children would have a right under 10 U.S.C. § 1448(a) to receive the annuity elected for the remainder of their dependency. 53 Comp. Gen. 847 (1974). 61 Comp. Gen. 441 (1982).

B. Qualifying Service Time

1. Missing in action (MIA) status

Active duty personnel who enter an MIA status and are subsequently determined to have died in that status, since time in an MIA status is treated as active service for pay, allowances and other benefits, such time shall count towards retirement years of service for the purpose of establishing an annuity under 10 U.S.C. § 1448(d). 53 Comp. Gen. 887 (1974).

2. Computations, including promotion in missing in action status

Survivor Benefit Plan annuity for the surviving spouse of member who dies while on active duty (when otherwise eligible to retire) is computed on grade and years of service as though member retired on the day he died. Computation includes limitations on grade for retirement purposes such as the 6-month in grade requirement. However, where a member who was missing in action is determined to have been killed in action, the 6-month in grade requirement does not apply since promotions received while in a missing status are "fully effective for all purposes," under 37 U.S.C. § 552(a). Colonel Elton L. Perrine, USAF (Deceased), 59 Comp. Gen. 276 (1980).

3. Retirement qualification

An annuity is not payable under 10 U.S.C. § 1448(d) in the case of a commissioned officer with over 20 years' service when he died on active duty, since he was not eligible for retirement under 10 U.S.C. § 8911 because he had less than 10 years of service as a commissioned officer and was not eligible for retirement under 10 U.S.C. § 8914 as an enlisted member since at the date of his death he was an officer. 55 Comp. Gen. 854 (1976).

C. Computation of Retired Pay

1. 10 U.S.C. § 1402(a) or (e)

Service member with over 20 years of service retired, was immediately recalled to active duty, and died while on such duty. For purposes of determining annuity authorized by 10 U.S.C. § 1448(d), retired pay is computed under 10 U.S.C. § 1402(a) or (e) to reflect later active duty. B-179018, Aug. 6, 1976.

2. Rates on TDRL

Member, whose grade was rear admiral (O-8) and who was serving as an admiral (O-10) when transferred to the TDRL, died before the Senate could confirm him as an admiral (O-10). Regardless of grade to which entitled on the retired list, under Formula No. 2, 10 U.S.C. § 1401, such member's retired pay while on the TDRL is computed on basic pay of an admiral (O-10) and SBP annuity is based on the basic pay of an admiral (O-10). 55 Comp. Gen. 667 (1976).

D. Annuity Inception Date

1. MIA members

The inception date for payment of an annuity under 10 U.S.C. § 1450 for MIA members is the day after the date the Secretary concerned makes a determination of death as long as such date of determination occurs after September 21, 1972, notwithstanding the fact that the date of death is determined to have occurred earlier than the date of determination. 53 Comp. Gen. 887 (1974).

2. Successive child benefits

When a member elects coverage under the SBP for his spouse and child, the child may not receive the annuity until the widow (or widower) dies or remarries prior to age 60, even though the widow is not receiving SBP benefits pursuant to 10 U.S.C. § 1450(c) as a result of her entitlement to DIC. B-191524, June 30, 1978.

Annuity Adjustment

A. Dependency and Indemnity Compensation

1. SBP reduction

a. Cost computation

Where widow's SBP annuity is reduced pursuant to 10 U.S.C. § 1450(c) by the award of Veterans Administration Dependency and Indemnity Compensation (DIC), in order to determine amount of refund due pursuant to 10 U.S.C. § 1450(e), computation of cost of reduced annuity is to be made on a monthly basis and include all cost-of-living increases in retired pay and all increases in DIC rates from the date of member's retirement until the date of his death. 56 Comp. Gen. 482 (1977). See also 57 Comp. Gen. 847 (1977); and 61 Comp. Gen. 287 (1982).

b. Delay in payment of DIC until first of following month

When upon a service member's death the surviving spouse is eligible for both a Survivor Benefit Plan (SBP) annuity and Veterans Administration Dependency and Indemnity Compensation (DIC), the amount of the SBP payment is reduced by the amount of DIC and a corresponding refund of the member's SBP contributions is paid to the beneficiary. Despite the fact that under 38 U.S.C. § 3011 DIC payments are not effective until the first of the month following the month of the service member's death, the beneficiary will be deemed eligible for, and in receipt of, DIC payments for the purposes of SBP annuity computation and refund of SBP contributions pursuant to 10 U.S.C. § 1450(c) and (e). B-214461, Aug. 20, 1984.

c. Spouse coverage only

Widow is entitled to refund of deductions from retired pay if the SBP annuity is reduced based upon receipt of DIC, however, such refund is only computed on retired pay reductions for spouse coverage and does not include retired pay deductions for dependent children coverage. 55 Comp. Gen. 1409 (1976). See also 61 Comp. Gen. 298 (1982).

d. Limitation on refund

Where the surviving spouse receives the full amount of selected SBP annuity for any period, because an award of DIC could not be made retroactive to date of death since recalculation of SBP annuity pursuant to 10 U.S.C. § 1450(c) and (e) is permitted only when annuity is reduced by DIC award effective "upon the death" of the retiree, no refund is due. 56 Comp. Gen. 482 (1977).

2. Loss of DIC

a. SBP reinstatement

Where annuity is either terminated or reduced in accordance with 10 U.S.C. § 1450(c) and (e) because of receipt of DIC, and spouse subsequently loses eligibility of DIC because of remarriage after age 60, such spouse would only be entitled to reinstatement of the annuity paid for and not refunded. 54 Comp. Gen. 838 (1975). But see 10 U.S.C. § 1450(k) as added by section 203 of Pub. L. No. 95-397, for annuities payable on and after October 1, 1978. See also 58 Comp. Gen. 626 (1979).

b. DIC eligibility lost and later regained

When upon a service member's death the surviving spouse is eligible for both SBP annuity and DIC, the amount of the SBP payment is reduced by the amount of the DIC and a corresponding refund of the member's SBP contributions is due the spouse. If DIC entitlement is subsequently lost due to remarriage of the spouse, SBP may be reinstated provided the refund is returned. However, no refund is payable once the benefit of the plan has been derived. Accordingly, when a refund is repaid and SBP payments are thereafter made, no additional refund is authorized should the spouse again become eligible for DIC. 62 Comp. Gen. 287 (1982).

c. SBP increase

Where reductions from retired pay are refunded pursuant to 10 U.S.C. § 1450(e) because spouse is receiving DIC, repayment of that refund for the purpose of acquiring increased SBP coverage when DIC is lost due to remarriage after age 60 was not authorized. 54 Comp. Gen. 838 (1975). However, pursuant to 10 U.S.C. § 1450(k) as added by section 203 of Pub. L. No. 95-397, the full SBP annuity may now be restored upon repayment of retired pay contributions the spouse received when the SBP annuity was reduced. However, under 210(a) of Pub. L. No. 95-397, the full annuity may not be paid for months prior to October 1, 1978. 58 Comp. Gen. 626 (1979).

d. Subsections 1448(a) and (d) comparison

When widow loses eligibility for DIC by reason of remarriage after age 60, an SBP annuity payable under 10 U.S.C. § 1448(d) should be reinstated in the same amount as the widow was receiving at the time loss of DIC occurred,

since the legislative history of SBP indicates that widows of members dying on active duty are accorded the same treatment as widows of other participants in the SBP with exception of cost free coverage. 54 Comp. Gen. 709 (1975).

e. SBP continuation

Widow who is receiving a reduced SBP annuity under 10 U.S.C. § 1448(d) and then remarries after age 60, thereby losing eligibility for DIC, SBP annuity may still be paid since restrictions in 10 U.S.C. § 1448(d) applying to eligibility for DIC have been construed as prohibiting payment of an SBP annuity only to the extent that the amount of the SBP plus the DIC payable would exceed the maximum annuity payable under SBP. 54 Comp. Gen. 709 (1975).

f. SBP termination

Where no SBP annuity is payable under 10 U.S.C. § 1448(d) because DIC is greater, spouse's entitlement terminates permanently, since spouse coverage under 10 U.S.C. § 1448(a) in the same circumstances is permanently terminated. It appears from the legislative history that Congress, while providing that widows of members eligible to retire who die while on active duty should not receive an annuity less than widows of members who did retire, did not intend only a temporary termination of benefit under these circumstances. 54 Comp. Gen. 709 (1975). However, see also 10 U.S.C. § 1450(k) as added by section 203, Pub. L. No. 95-397, and 58 Comp. Gen. 626 (1979).

g. Termination effect on child SBP coverage

A widow receiving Dependency and Indemnity Compensation (DIC) under 38 U.S.C. § 411(a) (now 38 U.S.C. § 1311) in an amount equal to or greater than an SBP annuity, and who is therefore precluded from participating in the SBP because of 10 U.S.C. § 1450(c), is not considered as being otherwise ineligible under 10 U.S.C. § 1450(a)(1) for the purpose of having the annuity succeed to the child under 10 U.S.C. § 1450(a)(2). B-191524, June 30, 1978.

h. SBP prohibition

Where a surviving spouse is eligible for an annuity under 10 U.S.C. § 1448(d), such language contained therein which relates to the eligibility to receive DIC payments, when considered in conjunction with the other

portions of subsection (d), must be construed only as prohibiting an SBP annuity if the VA benefits exceed the maximum annuity otherwise payable under 10 U.S.C. § 1448(d). 53 Comp. Gen. 847 (1974).

i. Widow of two service members—SBP and DIC

In Croteau v. United States, 823 F.2d 539 (1987), the Court of Appeals for the Federal Circuit held that the widow of two service members was entitled to a full, unreduced Survivor Benefit Plan annuity from the Army based on her second marriage, even though she was also drawing Dependency and Indemnity Compensation from the Veterans Administration on the basis of her first marriage. We will follow the court's judgment and overrule our prior contrary decision in Technical Sergeant John T. Baker, USAF (Retired) (Deceased), B-190617, Feb. 16, 1978. Individuals similarly situated to the plaintiff in the Croteau litigation are entitled to have their annuities adjusted upward retroactively, subject to the 6-year statute of limitations set out under 31 U.S.C. § 3702(b). Sarah E. Tweedy, 67 Comp. Gen. 408 (1988).

Based on our holding in Sarah E. Tweedy, 67 Comp. Gen. 408 (1988), which overruled our prior decision herein, we now hold that Sergeant Baker's widow is entitled to a full unreduced Survivor Benefit Plan annuity based on her marriage to Sergeant Baker, even though she was also entitled to receive Dependency and Indemnity Compensation from the Veterans Administration based on her first marriage to another service member. Her claim was timely filed and is payable from the day following Sergeant Baker's death in 1977 for the remainder of her unremarried lifetime. Reconsideration of Technical Sergeant John T. Baker, USAF (Retired) (Deceased), B-190617.2, Oct. 17, 1988.

j. "Election" by survivor when eligible for more than one annuity

A provision of the laws governing the Survivor Benefit Plan, 10 U.S.C. § 1450(a), in certain circumstances requires a widow or widower who is eligible for more than one annuity, on the basis of more than one marriage, to elect which annuity to receive. While the provision uses the term "elect," its evident purpose is to give the individuals covered the highest annuity for which they are eligible. Hence, what is involved is not so much a matter of making an election as it is of simply determining which annuity provides the greatest benefit. There is consequently no basis for objection to the retroactive changing of such so-called elections, if that change will produce the greatest benefit for an annuitant in the retroactive

recomputation of annuities necessitated by a new interpretation of the law under a court judgment. Sarah E. Tweedy, 67 Comp. Gen. 408 (1988).

B. Civil Service Survivor Annuity

1. SBP annuity when military retired pay waived

SBP annuity elected by retiree, who later waives military retired pay for use of military credits to increase his civil service retirement benefits, is not payable unless retiree elects not to participate in civil service retirement survivorship plan. 53 Comp. Gen. 857 (1974).

A retired member may waive participation in military survivor benefit program if he elects participation in the civil service survivor benefit plan and Survivor Benefit Plan (SBP) premiums need not be deducted from military retired pay. However, if waiver is no longer effective for any reason, previously elected military SBP participation is resumed and military retired pay is reduced. Thus, when member's civilian records were changed to reflect continued service rather than retirement, the existing waiver of retired pay and SBP participation was rendered ineffective for that period and SBP deductions were properly resumed. Captain Elias W. Covington, USA (Retired), B-244827, Sept. 9, 1992.

2. Eligibility for civil service survivor annuity

A retired Air Force sergeant who was employed in a civilian capacity for 15 years by the Postal Service following his military retirement, and who then waived his military retired pay in order to have his military service time added to his civilian service for civil service retirement purposes, is no longer eligible for military Survivor Benefit Plan (SBP) coverage for his wife, since under the applicable statutes his election to have civil service survivor annuity coverage for her based on his combined federal military and civilian service operated to preclude continued SBP coverage. B-224779, May 21, 1987.

3. SBP participation suspension

SBP participation is suspended during period that a member has in effect a waiver of military retired pay for civil service annuity purposes based on combining military service with civil service, but if waiver is no longer effective, previously elected SBP would be resumed and military retired pay reduced thereafter. 55 Comp. Gen. 1178 (1976). Cf. B-192470, Jan. 3, 1979; and 59 Comp. Gen. 225 (1980).

4. Reduced civil service annuity

A member who elects SBP coverage and who later elects to combine military service credits with civil service credits for civil service annuity purposes, may elect to participate in the civil service survivorship plan at a level lower than his SBP coverage. 55 Comp. Gen. 1178 (1976).

5. Refund of costs

Where member who elected SBP coverage waived retired pay to receive VA compensation, but informed Civil Service Commission that purpose of waiver was to have civil service annuity computed on basis of total federal service, we conclude that member waived his retired pay for purposes of increasing his civil service annuity even though service finance center was not so advised until after member's death. Accordingly, his widow is not eligible for SBP annuity; however, she is entitled to refund of costs paid by member after waiver. 55 Comp. Gen. 684 (1976).

6. SBP deposits not required

Deposits are not required to be made under SBP by retiree who elects to use military credits to increase civil service retirement benefits unless retiree elects not to participate in civil service retirement survivorship plan. 53 Comp. Gen. 857 (1974). See B-192470, Jan. 3, 1979; and 59 Comp. Gen. 225 (1980). Cf. B-188932, Dec. 22, 1977.

7. No refund of SBP payments

A retired Air Force sergeant provided Survivor Benefit Plan (SBP) coverage for his wife while he was in receipt of military retired pay. He later waived his military retired pay and relinquished the SBP coverage when he elected to apply his military service toward a civil service retirement. He is not entitled to a refund of amounts deducted from his retired pay to cover SBP costs during the period he had SBP coverage. During that period he had the protection of SBP coverage for his wife and he paid the appropriate costs. His later election to combine his military and civilian service for civil service retirement purposes, and his resulting conversion of SBP coverage to civil service survivor annuity coverage for his wife may not serve as a basis for a refund of the SBP costs. B-224779, May 21, 1987.

8. Previous waiver

An election by a retiree to participate in the SBP and cancel his RSFPP coverage, is of no force or effect in view of the limitation contained in 10 U.S.C. § 1450(d), where he had previously waived his retired pay in order to increase his civil service annuity and has survivor annuity coverage under the program, and the widow of such a member is to have her RSFPP coverage reinstated. B-183374, June 4, 1975.

C. Foreign Service
Survivor Annuity

1. SBP nontermination

A surviving spouse of retired military member, who validly elected into the SBP to provide spouse coverage and who later retired from the Foreign Service having validly elected spouse coverage under that retirement system, is entitled to payment of the elected SBP annuity as well as the Foreign Service survivor annuity. See B-188932, Dec. 22, 1977.

D. Social Security Setoff

1. Reductions in benefits before age 62 and 65

Computation of setoffs from Survivor Benefit Plan annuities which are required to be made in an amount equal to the retiree's social security benefit based solely on military service must take into account the reduction in social security benefits when the retiree received benefits before reaching age 65. Thus, where a widow's social security benefit is reduced because of the reduction in the retiree's benefit, the services may not calculate the offset against the Survivor Benefit Plan annuity as if the beneficiary were receiving an unreduced social security payment. 62 Comp. Gen. 471 (1983).

Where a widow elected to begin drawing reduced social security benefits at age 60, the reduction in her Survivor Benefit Plan (SBP) annuity required by statute at age 62 to offset her social security benefits was properly computed based on the social security benefits she would have been entitled to at age 62, rather than on the benefit level set at age 60. Because the widow would be entitled to receive 82.9 percent of her full entitlement had she elected to begin receiving social security benefits at age 62, the proper offset therefore reduced SBP payments to her by an amount equal to 82.9 percent of the portion of her social security entitlement attributable to her deceased husband's military earnings, rather than by an amount equal to 71.5 percent of that entitlement. Prior inconsistent decisions are overruled. This case overruled Lucille Eaton, 65 Comp. Gen. 813 (1986) and

Barbara Schlech, 69 Comp. Gen. 203 (1990). Jean K. Derr, 71 Comp. Gen. 490 (1992).

2. No claim made for social security benefits

An offset against the Survivor Benefit Plan annuity, computed solely on the military service of deceased spouse, is imposed when the annuitant reaches age 62. This offset may be reduced if the annuitant would have social security survivor benefits reduced because of work even though no claim has been made for social security benefits. B-202625, Dec. 31, 1981.

3. Effect of reduction of social security benefits for work

SBP annuity offsets, under 10 U.S.C. § 1451 because of social security entitlement, are computed when the annuitant reaches age 62. This offset may be reduced if the annuitant's social security entitlement is reduced because of work. If the SBP offset is reduced or eliminated because of work and the annuitant discontinues working and becomes entitled to social security benefits, the SBP offset is reinstated computed at age 62. B-202625, Dec. 31, 1981.

4. Military service only

Setoff of amount from annuity representing social security benefit payable to widow at age 62 and widow with one dependent child must be calculated on the basis of wages attributable to member's military service only and the formula used to calculate wages attributable to the military service may not include wages from nonmilitary employment. 53 Comp. Gen. 733 (1974). See also 58 Comp. Gen. 795 (1979); B-196569, July 8, 1980; and B-202625, Dec. 31, 1981.

5. Widow's vs. widower's benefit

For purposes of social security setoff widower's benefit is not subject to same reduction as widow's benefit when there is one dependent child since widower receives no benefit comparable to "mother's benefit" under social security laws. 53 Comp. Gen. 758 (1974).

6. Social security benefits for own work

A widow's Survivor Benefit Plan annuity payments were offset to the extent of the social security mother's benefit to which she would have been entitled based on the deceased service member's military social security coverage. However, she was actually receiving social security benefits based on her own work record and, therefore, received a reduced mother's benefit due to the benefits payable based on her own record. She is not entitled to reimbursement of the Survivor Benefit Plan annuity withheld for the difference between the mother's benefit to which she would have been entitled had the mother's benefit not been reduced in her case and the reduced mother's benefit which she actually received. 60 Comp. Gen. 129 (1980).

7. Offset based on actual amount of social security benefit payable to surviving spouse

Social security offset provisions were included in the SBP program because annuities are intended to complement social security coverage. In the case of a Navy petty officer's widow who was awarded a reduced social security survivor's benefit because of her entitlement to a civil service pension based on her own employment, the social security offset to be applied against her Survivor Benefit Plan annuity is to be based on the actual amount of the social security benefit determined to be payable to her rather than a greater amount that might have been payable were she not in receipt of the civil service pension. B-219162, Jan. 29, 1986.

The Survivor Benefit Plan (SBP) is an income maintenance program for the families of deceased service members. Social security "offset" provisions were included in this program because SBP annuities are intended to complement an SBP participant's social security coverage. No reduction of an annuity by this offset is appropriate, however, if the Social Security Administration determines that the annuitant is completely ineligible for social security survivor benefits. Therefore an annuity offset is not required in the case of an Army Reserve sergeant's widow who was determined ineligible for social security survivor benefits because of her receipt of a governmental pension based on her own employment. 64 Comp. Gen. 203 (1985).

8. Widow accepted retired pay after member's death

Over a 2-year period, the widow of a deceased Army sergeant erroneously received recurring monthly payments of retired pay, which should have

ceased at the time of her husband's death, amounting to \$24,403.60. During this period, she was entitled to the survivor benefit annuity equal to 55 percent of her husband's military retired pay. Although the annuity entitlement is retroactive to the date of his death, the widow may not be allowed additional payment for the period for which she received erroneous retired pay. Instead, the amount of her retroactive survivor's annuity entitlement should be applied toward the satisfaction of the debt owed by her as the result of her improper receipt of her husband's military retired pay, and the remainder of the debt should be either collected or waived in accordance with applicable law and regulation. 66 Comp. Gen. 260 (1987). See also B-221466, July 3, 1986.

**E. Cost-Of-Living
Adjustments**

All base amounts designated under 10 U.S.C. § 1447(2) upon which SBP annuities are based are subject to cost-of-living adjustments under 10 U.S.C. § 1401a(b). 55 Comp. Gen. 1432 (1976).

Pre-Effective Date Retirees

A. Spouse Coverage

1. Newly acquired—limitation

Member who was retired prior to the effective date of the SBP and who marries prior to the first anniversary of the Plan (September 21, 1973), may provide immediate coverage for his spouse regardless of the 2-year limitation under 10 U.S.C. § 1447(a)(A), provided such an election is made within the time limitation stated in subsection 3(b) of the act, as amended by section 804 of Pub. L. No. 93-155. 54 Comp. Gen. 266 (1974). See also B-190908, Apr. 26, 1978, and B-190908, June 26, 1980.

2. Expansion of coverage to include

Spouse of member retired prior to effective date of the SBP, who had divorced member prior to SBP effective date, but who had remarried member within time limit imposed under subsection 3(b) of Pub. L. No. 92-425, as amended, and where retired member, as a single person had previously elected SBP coverage for dependent child, such spouse immediately qualifies as an eligible surviving spouse if he elected to expand that coverage to include such spouse within the time limitation referenced in the fourth sentence of 10 U.S.C. § 1448(a). 54 Comp. Gen. 732 (1975).

B. Child Coverage—Selection Time Limit

Service member who married, had a dependent child and retired prior to effective date of SBP, who was subsequently divorced prior to March 21, 1974 (anniversary of effective date of Plan as extended by section 804 of Pub. L. No. 93-155), and who did not elect children coverage within 18-month time limitation stated in subsection 3(b) of act, is not eligible to elect children coverage thereafter in absence of further legislation reopening Plan to him. B-187279, Nov. 30, 1976. See also 56 Comp. Gen. 1022 (1977).

C. Elections

1. Timeliness

A member retired prior to the effective date of SBP, who executed a section 3(b) election to provide spouse coverage before anniversary date but died prior to the receipt of the election in the administrative office, made a valid election, where the election document had been witnessed and passed from his control prior to death, since section 3(e) requires only that an election timely made is effective when received by the Secretary concerned. 53 Comp. Gen. 519 (1974).

2. Recall to active duty during election period

A service member retired before enactment of the SBP and was entitled to elect SBP coverage for his spouse under the provisions of subsection 3(b) of Pub. L. No. 92-425, 86 Stat. 706, 711, as amended, during the 18 months after enactment of the SBP. Before he made an election, but during the 18-month period, he was recalled to active duty and was not returned to the retired list until after the close of the election period. In view of the purpose of the Plan—to include as many retirees as possible—and since the statutory provisions do not contain a rule applicable to this situation the election made at the end of the period of extended active duty which began during the 18-month period may be considered valid. B-201229, Aug. 24, 1981.

3. Divorce set aside after election period

A Navy warrant officer who retired prior to the effective date of the Survivor Benefit Plan was in a divorced status during the 18-month period to elect to participate in the Plan, but his divorce was later set aside by a court of competent jurisdiction. In those circumstances an election made by the retiree shall be considered valid if made within a reasonable period from the time that the voidance of the divorce decree properly established the previous existence of the marriage. For purposes of computing reduction of the retired pay, the effective date of the election is the first day of the first calendar month following the month in which the election is received by the Secretary of the Navy. The member's wife shall be considered an eligible spouse beneficiary from the time of the election. B-205173, June 9, 1982.

4. Effect of election

Member, retired prior to effective date of SBP, who as single person elects coverage for dependent child through subsection 3(b) of that act is at that point participating in the Plan to the same degree as post-effective date retirees and is subject to the post-participation election restrictions contained in 10 U.S.C. § 1448(a). 54 Comp. Gen. 732 (1975).

5. Void election—invalid marriage

A service member retired prior to the effective date of the Survivor Benefit Plan contracted a second marriage apparently without having dissolved his prior marriage. He thereafter elected spouse coverage as authorized by

section 3(b) of Pub. L. No. 92-425 in the name of the second spouse. Upon his death payment of an annuity to the second spouse may not be made unless it is established in a court of competent jurisdiction that his marriage to her was valid. Otherwise the election to participate in the Plan is void as having been made with the intention of providing an annuity to an ineligible beneficiary. If that be the case, the amount deducted from member's retired pay for coverage costs are to be paid to the eligible beneficiary under 10 U.S.C. § 2771. B-207625, Sept. 22, 1982. See also 57 Comp. Gen. 426 (1978); 63 Comp. Gen. 63 (1983).

6. Fourth sentence of 10 U.S.C. § 1448(a) elections

A pre-SBP effective date retiree who is unmarried with a dependent child on the first anniversary date of the Survivor Benefit Plan, may elect spouse coverage under the fourth sentence of 10 U.S.C. § 1448(a) upon marriage after the close of the 18-month election period authorized under subsection 3(b) of Pub. L. No. 92-425, as amended, notwithstanding fact that he could have elected coverage for his dependent child during that period and failed to do so. 57 Comp. Gen. 98 (1977). Compare B-187179, Nov. 30, 1976.

7. Revocation

Members who retired before SBP effective date and elected to participate under subsection 3(b) of Pub. L. No. 92-425, may not unilaterally revoke such elections during the 18-month period provided for such election or at any time thereafter. 53 Comp. Gen. 158 (1975).

D. Record Correction

1. Coverage not automatic

Person whose military record is corrected on or after September 21, 1972, to show entitlement to retired pay on date prior to September 21, 1972, is not automatically covered under SBP since purpose of record correction is to place member as nearly as possible in same position he would have occupied had he been retired at earlier date and in order to be automatically covered under SBP member must become entitled to retired or retainer pay subsequent to effective date of SBP. 54 Comp. Gen. 116 (1974).

2. Time limit to elect

Members, who become entitled to retired or retainer pay on date prior to effective date of SBP by virtue of record correction occurring after effective date of SBP, must be afforded an equal opportunity to elect coverage which in this case is 18 months from date of notification of records correction. 54 Comp. Gen. 116 (1974).

Waiver and Recovery by Setoff of Erroneous SBP Payments

A. Waiver

1. Blanket waiver

Automatic and blanket waiver of erroneous annuity payments under the SBP to a specific but unnamed class of annuitants, which erroneous payments were caused by a retroactive pay increase, is not authorized because waiver may only be granted where there is a showing of no fault by individual; that recovery would result in financial hardship or otherwise be contrary to purpose of Plan and therefore be against equity and good conscience. B-167266, Apr. 7, 1975. See 10 U.S.C. § 1453. Cf. B-133142/B-178696, Sept. 6, 1978.

2. Criteria

Waiver of erroneous payments under SBP pursuant to 10 U.S.C. § 1453 should be similar to the criteria for waiver under 5 U.S.C. § 5584, 10 U.S.C. § 2774, and 32 U.S.C. § 716, and therefore, although waiver may not be granted unless collection would be contrary to the purpose of the Plan and against equity and good conscience, proof of financial hardship will not be required if waiver is otherwise in order. 54 Comp. Gen. 249 (1974) and 35 Comp. Gen. 401 (1956), overruled. 55 Comp. Gen. 1238 (1976).

3. Waiver of participation in military SBP

A retired member may waive participation in military survivor benefit program if he elects participation in the civil service survivor benefit plan and Survivor Benefit Plan (SBP) premiums need not be deducted from military retired pay. However, if waiver is no longer effective for any reason, previously elected military SBP participation is resumed and military retired pay is reduced. Thus, when member's civilian records were changed to reflect continued service rather than retirement, the existing waiver of retired pay and SBP participation was rendered ineffective for that period and SBP deductions were properly resumed. Captain Elias W. Covington, USA (Retired), B-244827, Sept. 9, 1992.

4. Family protection plan

A retired serviceman's daughter continued to receive annuity payments under a Family Protection Plan after she was no longer eligible for them. Her request for waiver of her obligation to repay the excess amount she received is denied because she knew or should have known that she continued to receive the payments after she ceased to be eligible. Granting a waiver in this case would therefore be inconsistent with the provisions

of 10 U.S.C. § 1442 governing such waivers. Ms. Charlotte E. (Hargrove) Ladwig, B-246362, June 4, 1992.

B. Debts of Deceased Member

1. General

In view of limitations in 10 U.S.C. § 1450(i), since general debts of a deceased retired member are not the responsibility of his widow, such debts may not be set off against an SBP annuity payable to such widow. 54 Comp. Gen. 493 (1974). See also B-209306, Mar. 24, 1983.

2. Insufficient SBP cost charge

Where debt of a deceased retired member arises from insufficient reduction of retired pay to cover cost of annuities, annuities payments may be reduced to cover added cost. 54 Comp. Gen. 493 (1974).

3. Widowed spouse

Where the widowed spouse of a member was not notified that the member declined to participate in the Survivor Benefit Plan (SBP) and subsequently makes the election through a correction of the member's military records, the member's retired pay, to the extent it was not reduced by SBP premiums, was erroneous and subject to waiver. However, where the collection of such premiums is not against equity and good conscience by virtue of the protection afforded the spouse had the coverage been in effect, as of the date of the constructive election, neither the erroneous retired pay nor annuity payments may be waived and they should be offset against SBP benefits subsequently received by the spouse. Bonnie F. Harrison, B-243489, Oct. 2, 1991.

C. Underpayment of Annuities/Over-Reduction of Retired Pay

Amounts due members or beneficiaries for over-reduction of annuities due to computation of SBP based amounts should be paid to persons entitled thereto. 55 Comp. Gen. 1432 (1976).

D. Collection of Overpayment of Annuity

Collection of overpayment of an SBP annuity due to retroactive payment of DIC may be effected by withholding the amount of overpayment from the premium refund due upon recalculation of the SBP annuity as authorized by 10 U.S.C. § 1453 (1976). B-192223, Dec. 19, 1978.

Former Spouse Coverage

A. Generally

Under the original legislation, there was no authority for coverage of a former spouse and upon a divorce, a retiree's former spouse generally lost coverage. Pub. L. No. 97-252, September 8, 1982, 96 Stat. 718, 730, 735, amended the Plan to allow a member thereafter to make a voluntary election to provide for a former spouse, at the time the member became eligible to participate in the Plan.

The Plan was again amended by Pub. L. No. 98-94, the Department of Defense Authorization Act, 1984, September 24, 1983, 92 Stat. 652, providing eligible members with an additional option under certain conditions. A member who elected into the Plan by designating his spouse when he became eligible and later divorced the spouse could now elect to designate that former spouse as the Plan beneficiary, if the election was made within 1 year of the effective date of the act or within 1 year of the divorce if the divorce took place after the passage of the act. To make such an election, the member must provide the appropriate Secretary with a voluntary written election. Once a former spouse is validly designated the beneficiary under the Survivor Benefit Plan pursuant to a divorce decree, a subsequent change of beneficiary can only be made following the submission of a modifying court order to the Secretary concerned which permits such a change of election. James B. Haney, B-248353, Sept. 10, 1992.

B. Deemed Elections

1. Defined

After Pub. L. No. 98-94 was enacted in 1983, it was found that an agreement to provide an annuity to a former spouse could not be enforced even if the retired service member was eligible to elect coverage, since it was up to the member to make the election voluntarily on behalf of his former spouse. It was then concluded that while participation in the Plan remained a voluntary act of the retiree, since coverage under the Plan could become an item of negotiation in a divorce settlement, a former spouse should be entitled to rely on a written agreement to provide coverage.

As a result, Congress passed section 644 of Pub. L. No. 98-525, October 19, 1984, 98 Stat. 2492, 2548, to provide that, if a member had voluntarily agreed in writing to cover a former spouse under the Plan, the agreement was *incorporated, ratified or approved by a court order, and the member then refused or failed to make the election as agreed, the former spouse could make a request to the appropriate Secretary within a year of the passage of*

the Act or the date of the court order, whichever is later, and the Services would "deem" an election to have been made by the member. This amendment to the Plan concerning "deemed" elections was codified in 10 U.S.C. § 1450(f)(3).

Amendments made to the Survivor Benefit Plan in 1983 gave retired service members the option of voluntarily electing survivor annuity coverage for "a former spouse." A further amendment enacted in 1984 provides that if a retiree agrees in writing to elect annuity coverage for a former spouse and then "fails or refuses" to do so, the retiree nevertheless "shall be deemed to have made such an election." The determination of whether a written agreement may properly serve as the basis for a "deemed" election depends on the specific terms of the particular agreement submitted. In the case of a retired Army officer who agreed to continue annuity coverage for his wife "whether or not the parties . . . are married," an election to provide former spouse coverage may properly be deemed to have been made since those terms establish that the officer made a commitment to maintain annuity coverage for her following their divorce. Lieutenant Colonel William R. Bell, USA, B-230460, June 10, 1988.

Where divorce decree stated that member's former spouse was to be designated beneficiary under Survivor Benefit Plan (SBP) and both member and former spouse, under deemed election provisions, fail to take action to effect such election within 1-year period after divorce, subsequent court order holding member in contempt for failing to make such an election is without effect to extend or open a new 1-year period for such an election. Subsequent court order imposed no new obligation on member regarding SBP coverage. Master Sergeant George M. McClain, USAF (Retired) (Deceased), B-248017, Sept. 16, 1992.

2. Election on behalf of former spouse

a. Voluntary election irrevocable

A retired Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when in 1980 he was divorced. In the divorce settlement he agreed to provide Survivor Benefit coverage for his former spouse should the law ever be changed to allow it. He remarried, and a year later (1981) his new spouse was automatically covered under SBP. In September 1983, Pub. L. No. 98-94 was enacted authorizing a person in this situation to elect SBP coverage for a former spouse. He did so in December 1983 stating that the election was made pursuant to the divorce settlement. Such an election is

irrevocable; thus, a later attempt to revoke it is ineffective and the former spouse is the beneficiary of the SBP annuity upon his death. 65 Comp. Gen. 134 (1985).

b. Attempt to revoke election based on incompetence

A terminally ill retired officer made an irrevocable election of Survivor Benefit Plan (SBP) coverage in December 1983 for his former spouse pursuant to a clause in his divorce settlement agreeing to do so. Such election precluded his current spouse from SBP coverage. In February 1984 an affidavit was received from him with a letter from his current spouse's attorney attempting to revoke the election on the basis that he was too ill to have understood the implications when he made the election and stating that he wanted his current spouse to be covered. The former spouse election was made in proper form, the member was never adjudicated incompetent, and the great weight of medical and other evidence presented supports the former spouse's contention that he was mentally competent when he made the election. Thus, the election should be given effect. 65 Comp. Gen. 134 (1985).

3. Voluntary election

a. "Voluntary" determination

The determination of whether a written agreement, entered into prior to the effective date of the applicable law authorizing an election to provide Survivor Benefit Plan annuity coverage for a former spouse, may properly serve as the basis of a "deemed" election under 10 U.S.C. § 1450(f)(3)(A) depends on the terms of the particular agreement. Such determinations must be made on a case-by-case basis. 66 Comp. Gen. 687 (1987).

b. Agreement to maintain coverage

In the case of a retired Army officer who agreed to continue annuity coverage for his wife "whether or not the parties . . . are married," an election to provide former spouse coverage may properly be deemed to have been made since those terms establish that the officer made a commitment to maintain annuity coverage for her following their divorce. B-230460, June 10, 1988.

c. Agreement to “continue to maintain military benefits”

A retired Navy petty officer’s general agreement to “continue to maintain his military benefits” for his family, included in a separation agreement he executed in 1974, is not an agreement to elect to “provide an annuity” for his former wife under the Survivor Benefit Plan. Under the laws then in effect, military retirees could not provide survivor annuity coverage for a former spouse and consequently such general language in a separation agreement executed then may not be construed to include the election of annuity coverage for his former wife. Moreover, the agreement placed him under no obligation to provide annuity coverage for his former wife later when the laws were amended to permit military retirees voluntarily to elect coverage for a former spouse to the exclusion of a current spouse. Hence, after the petty officer died, his widow rather than his former wife was entitled to his Survivor Benefit Plan annuity. B-220546, Apr. 7, 1986.

4. Member fails or refuses to make the election

a. Member dies without being eligible

If a retiree dies without ever being eligible to provide annuity coverage for a former spouse, he cannot properly be considered to have ever failed or refused to elect such coverage, nor can he be “deemed” to have made the election under the terms of the Plan. Hence, a voluntary election to provide annuity coverage for a former spouse cannot be deemed to have been made in the case of a retired Navy officer who died before the effective date of a statutory amendment that would have permitted him to elect coverage for his ex-wife. 66 Comp. Gen. 687 (1987).

b. Former spouse’s request made prior to expiration of 1-year period

If a retiree voluntarily elects to provide a former spouse Survivor Benefit Plan annuity coverage within 1 year of his divorce, the effective date of the election is the actual date it is made. Alternately, if the retiree fails or refuses to make such voluntary election, the effective date of the “deemed” election is the first day of the month after the court order. Although the former spouse may request the deemed election prior to the expiration of the 1-year period, the deemed election may not be made until the year has expired, in the absence of an affirmative refusal or other event warranting a determination that the retiree “failed or refused” to make the election. 66 Comp. Gen. 687 (1987).

c. Former spouse's request after 1-year period

Where final divorce decree stated that member's former spouse was to be designated beneficiary under Survivor Benefit Plan and both member and former spouse, under deemed election provisions, fail to take action to effect such election within 1-year period after divorce, subsequent attempted election is without effect. Also, court-ordered election under 10 U.S.C. § 1450(f)(4) is without effect to extend or open new 1-year window for such election. Nawanna Driggers, 71 Comp. Gen. 475 (1992).

5. "Court order"

A court order other than the original decree of divorce, dissolution, or annulment may be used as a basis for a deemed election under 10 U.S.C. § 1450(f)(3). A valid legal document from a court of competent jurisdiction which modifies the provisions of previous court orders relating to the subject matter must clearly indicate that the member has voluntarily agreed to provide coverage under the Survivor Benefit Plan for the former spouse. 66 Comp. Gen. 687 (1987).

An order from a state court in 1991 after the member's death that purports to enforce a 1977 court order and incorporated agreement designating a former spouse as the SBP annuitant, is without effect as a basis for a deemed election on behalf of the former spouse since it does not modify the prior court order. A modification of a prior court order must for the first time order SBP coverage for the former spouse: where the former spouse already was entitled to coverage based on a voluntary agreement in the original decree, but neither the member nor the former spouse filed an election within the time periods allowed, the 1991 order does not give the former spouse a new 1-year period for filing for a deemed election. Constance L. Posner, 71 Comp. Gen. 478 (1992).

Where state court issues order modifying terms of prior final divorce decree (which was silent regarding Survivor Benefit Plan) and orders retired member to elect former spouse as beneficiary of Plan, action taken by service to make such designation following proper "deemed election" request by former spouse is not objectionable as 10 U.S.C. § 1450(f)(4) permits such action by court. Colonel William F. Magill, USA (Retired), B-247508, Sept. 2, 1992.

6. Type of coverage

The “deemed” election in 10 U.S.C. § 1450(f)(3) requires the election be deemed effective on the first day of the first month which begins after the date of the court order. Thus, in the case of a deemed election, the election of an annuity is based on the court order rather than the date of the deemed election and the type of coverage available the date of the court order would be applicable. Prior to 1985, members who participated in the Plan on behalf of a former spouse were charged for coverage at the higher rate charged on behalf of an individual with an “insurable interest” in the member. (See Pub. L. No. 99-145, § 722, 99 Stat. 583, 677 (1985).) 66 Comp. Gen. 687 (1987).

C. **Premiums to Be Paid on
Behalf of Former Spouse**

1. Current spouse vs. former spouse

If a member had voluntarily agreed to make an election of Survivor Benefit Plan coverage on behalf of his former spouse but fails to do so, and the former spouse requests the deemed election in compliance with 10 U.S.C. § 1450(f)(3)(A), the deemed election on behalf of the former spouse must be recognized. Collection must be made of any funds paid to the current spouse, subject to waiver provisions under 10 U.S.C. § 1453. 66 Comp. Gen. 687 (1987).

2. Costs may be assessed retroactively

The determination of whether a written agreement, entered into prior to the effective date of the applicable law authorizing an election to provide Survivor Benefit Plan annuity coverage for a former spouse may properly serve as the basis of a “deemed” election under 10 U.S.C. § 1450(f)(3)(A) depends on the terms of the particular agreement. Such determinations must be made on a case-by-case basis. In cases where the written agreement is determined to be effective for purposes of “deeming” an election, if the court order predates the statute, cost should be assessed retroactive to the effective date of the statute, otherwise the effective date is the first day of the first month which begins after the court order. 66 Comp. Gen. 687 (1987).

3. Collection of delinquent premiums

An Air Force officer had Survivor Benefit Plan (SBP) coverage for his spouse when he retired in 1978, but he was later divorced whereupon SBP deductions from his retired pay ceased. He remarried in 1980 and his new

spouse became automatically covered under SBP a year later. However, he failed to advise the Air Force of the remarriage so SBP deductions were not reinstated. In December 1983 he elected SBP coverage for his former spouse pursuant to their divorce settlement agreement, and he died in April 1984. The delinquent SBP premiums should be collected from the former spouse's annuity notwithstanding that they covered a period when the current spouse was covered under the SBP. 65 Comp. Gen. 134 (1985).

4. Court order

Since order of court ordering former spouse to be designated beneficiary of Survivor Benefit Plan and stating that former spouse is to pay the cost of such coverage is clear, GAO would pose no objection to an adjustment reflecting such premium cost to be deducted from former spouse's share of retired pay even though 10 U.S.C. § 1408(a)(4)(D) requires such deduction to be made in computation of "disposable retired pay," before division of retired pay is made, since the intent of the court is clear. Colonel William F. Magill, USA (Retired), B-247508, Sept. 2, 1992.

Index

Chapter 1— Participation in SBP		1-1
Subchapter I—Law Generally		1-1
Subchapter II—Coverage of Beneficiaries	A. Children Coverage	1-2
	1. Election requirement	1-2
	2. Effect of election	1-3
	3. Irrevocability of election	1-3
	4. Dependency and indemnity compensation (DIC) effect	1-3
	5. Children of prior marriage	1-3
	6. Posthumous children	1-4
	7. Foster child	1-4
	8. Military personnel—status	1-4
	9. Full-time student dependents	1-4
	10. Disabled adult child	1-5
	a. When disability arises	1-5
	b. Child secures employment	1-5
	c. Recurring loss of self-sufficiency	1-5
	d. Mental patient's power of attorney	1-6
	e. Payments to mental patient	1-6
	11. Reinstatement of coverage when child's marriage annulled	1-6
	12. Dependent may not receive dual annuities	1-7
	13. Dependent adopted by someone else but adoption set aside	1-7
	14. Illegitimate children	1-7
	15. Child living with former spouse	1-7
	16. Child living with surviving parent	1-8
	B. Spouse Coverage	1-8
	1. Eligible spouse beneficiary defined	1-8
	2. Spouse as a potential beneficiary—entitlement based on prior marriage	1-8
	3. Spouse caused death of retiree—criminal charges	1-8
	4. Undissolved marriage—status	1-9
	5. Multiple wives	1-9
	a. First wife is legal widow	1-9
	b. Second wife is legal widow	1-10
	c. Third marriage, to member, is valid	1-10
	6. Marriage to member of doubtful validity	1-10

a. Court of competent jurisdiction declares marriage valid	1-10
b. Court of competent jurisdiction finds that member not married to claimant at time of death	1-11
7. Foreign divorce	1-11
8. Status uncertain	1-11
9. Beneficiary is not member's lawful wife	1-12
10. Active duty marriages	1-12
11. Death on active duty	1-12
12. Length of marriage qualification	1-12
13. Posthumous child qualifying widow	1-13
14. Designation of surviving spouse as sole beneficiary	1-13
15. "Issue of marriage" qualification	1-13
16. Claim of common-law marriage to member	1-13
17. Common-law remarriage after divorce	1-14
18. Retirement eligibility	1-14
19. Second marriage annulled	1-14
C. Natural Person Coverage	1-15
1. Relationship limitation	1-15
2. Dependent child	1-15
3. Limitation on numbers	1-15
4. Surviving spouse's claim as person with insurable interest in member	1-15
5. Listing of spouse for administrative convenience	1-15
6. Irrevocable election exception	1-16
D. Incapacitation of Beneficiary	1-16
1. Aid in filing annuity application	1-16
2. Alzheimer's disease	1-16
3. Handicap or disability does not establish incompetence	1-17

**Subchapter III—
Participation in the Plan**

A. Elections	1-17
1. Election effect	1-17
2. Exceptions	1-17
3. Reservists	1-17
4. Temporary disability retired list (TDRL) limitations	1-18
5. Administrative error	1-18
6. Guardian or committee election	1-18
7. Initial eligibility expiration—retiree must elect coverage within 1 year of marriage	1-18
8. Dependent child—filing deadlines	1-19
B. Administrative Requirements	1-19

1. Detailed explanation	1-19
2. Records examination	1-19
3. Good acquittance	1-20
4. TDRL removal	1-20
5. Secretarial election—incompetent members	1-20
C. Retired Pay Reductions—Inception	1-20
1. Non-regular	1-20
2. Fleet Marine Corps Reserve	1-20
D. Retired Pay Reductions—Termination	1-21
1. Spouse coverage	1-21
2. Foreign Service survivor annuity elections	1-21
3. Civil service survivor annuity elections	1-21
4. Effect of renunciation of United States citizenship	1-21
5. No refund upon divorce	1-22
E. Resumption of Reductions	1-22
1. Post-election remarriages	1-22
2. Spouse coverage—first month following eligibility attainment	1-22
F. Recomputation	1-23
1. Adjustment of participant's costs when dependent becomes eligible	1-23
2. Child coverage—loss of spouse beneficiary	1-23
3. Member's and child's age	1-23
4. New-born child beneficiary	1-23
5. Eligible spouse beneficiary reacquisition	1-24
G. Record Correction	1-24

Chapter 2—Annuities

A. Member Death on Active Duty	2-1
1. No break in service	2-1
a. Annuity payment limitation	2-1
b. Spouse annuity	2-1
c. Child annuity	2-1
2. Break in service	2-1
a. Alternative annuity	2-1
b. Dependent child entitlement	2-1
B. Qualifying Service Time	2-2
1. Missing in action (MIA) status	2-2
2. Computations, including promotion in missing in action status	2-2
3. Retirement qualification	2-2
C. Computation of Retired Pay	2-2

1. 10 U.S.C. § 1402(a) or (e)	2-2
2. Rates on TDRL	2-3
D. Annuity Inception Date	2-3
1. MIA members	2-3
2. Successive child benefits	2-3

Chapter 3—Annuity Adjustment

A. Dependency and Indemnity Compensation	3-1
1. SBP reduction	3-1
a. Cost computation	3-1
b. Delay in payment of DIC until first of following month	3-1
c. Spouse coverage only	3-1
d. Limitation on refund	3-1
2. Loss of DIC	3-2
a. SBP reinstatement	3-2
b. DIC eligibility lost and later regained	3-2
c. SBP increase	3-2
d. Subsections 1448(a) and (d) comparison	3-2
e. SBP continuation	3-3
f. SBP termination	3-3
g. Termination effect on child SBP coverage	3-3
h. SBP prohibition	3-3
i. Widow of two service members—SBP and DIC	3-4
j. “Election” by survivor when eligible for more than one annuity	3-4
B. Civil Service Survivor Annuity	3-5
1. SBP annuity when military retired pay waived	3-5
2. Eligibility for civil service survivor annuity	3-5
3. SBP participation suspension	3-5
4. Reduced civil service annuity	3-6
5. Refund of costs	3-6
6. SBP deposits not required	3-6
7. No refund of SBP payments	3-6
8. Previous waiver	3-7
C. Foreign Service Survivor Annuity	3-7
1. SBP nontermination	3-7
D. Social Security Setoff	3-7
1. Reductions in benefits before age 62 and 65	3-7
2. No claim made for social security benefits	3-8
3. Effect of reduction of social security benefits for work	3-8
4. Military service only	3-8

	5. Widow's vs. widower's benefit	3-8
	6. Social security benefits for own work	3-9
	7. Offset based on actual amount of social security benefit payable to surviving spouse	3-9
	8. Widow accepted retired pay after member's death	3-9
	E. Cost-of-Living Adjustments	3-10
<hr/>		
Chapter 4— Pre-Effective Date Retirees	A. Spouse Coverage	4-1
	1. Newly acquired—limitation	4-1
	2. Expansion of coverage to include	4-1
	B. Child Coverage—Selection Time Limit	4-1
	C. Elections	4-1
	1. Timeliness	4-1
	2. Recall to active duty during election period	4-2
	3. Divorce set aside after election period	4-2
	4. Effect of election	4-2
	5. Void election—invalid marriage	4-2
	6. Fourth sentence of 10 U.S.C. § 1448(a) elections	4-3
	7. Revocation	4-3
	D. Record Correction	4-3
1. Coverage not automatic	4-3	
2. Time limit to elect	4-4	
<hr/>		
Chapter 5—Waiver and Recovery by Setoff of Erroneous SBP Payments	A. Waiver	5-1
	1. Blanket waiver	5-1
	2. Criteria	5-1
	3. Waiver of participation in military SBP	5-1
	4. Family protection plan	5-1
	B. Debts of Deceased Member	5-2
	1. General	5-2
	2. Insufficient SBP cost charge	5-2
	3. Widowed spouse	5-2
	C. Underpayment of Annuities/Over-Reduction of Retired Pay	5-2
D. Collection of Overpayment of Annuity	5-2	
<hr/>		
Chapter 6—Former Spouse Coverage	A. Generally	6-1
	B. Deemed Elections	6-1

1. Defined	6-1
2. Election on behalf of former spouse	6-2
a. Voluntary election irrevocable	6-2
b. Attempt to revoke election based on incompetence	6-3
3. Voluntary election	6-3
a. "Voluntary" determination	6-3
b. Agreement to maintain coverage	6-3
c. Agreement to "continue to maintain military benefits"	6-4
4. Member fails or refuses to make the election	6-4
a. Member dies without being eligible	6-4
b. Former spouse's request made prior to expiration of 1-year period	6-4
c. Former spouse's request after 1-year period	6-5
5. "Court order"	6-5
6. Type of coverage	6-6
C. Premiums to Be Paid on Behalf of Former Spouse	6-6
1. Current spouse vs. former spouse	6-6
2. Costs may be assessed retroactively	6-6
3. Collection of delinquent premiums	6-6
4. Court order	6-7

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