Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sarah Dyson—Survivor Benefit Plan Annuity Claim—Reconsideration

File: B-260207.2

Date: November 6, 1995

DIGEST

Prior decision that service member's widow was not entitled to Survivor Benefit Plan annuity where claim was filed more than 6 years after member's death and is barred by Barring Act is affirmed since inquiry by widow regarding annuity shortly after member's death was denied by the Air Force and had to be filed with our Office to toll the Barring Act, and the claim was not a non-doubtful claim at that time because the Court of Claims had not decided Barber v. United States, which held that widow was entitled to spousal coverage where member failed to elect such coverage and spouse was not notified of declination.

DECISION

Sarah Dyson requests reconsideration of our Office's denial of her claim for a Survivor Benefit Plan (SBP) annuity which was considered in our decision Survivor Benefit Plan Annuities and the Barring Act, B-260207, Apr. 18, 1995. We affirm our prior decision.

James L. Dyson retired from the Air Force on January 1, 1978, and elected maximum "child only" SBP coverage even though married to Sarah Dyson at the time. The member died on February 10, 1980. Ms. Dyson requested a correction of the member's records and on June 14, 1994, the Air Force Board for the Correction of Military Records corrected the member's records to show that on December 31, 1977, he elected maximum spouse and child coverage, and that on March 9, 1980, his widow had submitted a claim for an annuity.

The Defense Finance and Accounting Service (DFAS) had requested our decision on the claims of Ms. Dyson and two other widows who asserted they had not been notified of their spouses failure to elect maximum spousal SBP coverage and were now entitled to such coverage under the ruling in Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982). At the time of the members' retirements in all three cases, the

SBP law required that a member's spouse be "notified" if the member did not elect maximum SBP coverage for the spouse. 10 U.S.C. § 1448(a)(3). In Barber, the Court of Claims held that if a spouse was not notified of the member's failure to make such an election, the spouse was entitled to an SBP annuity upon the member's death. All three of the claims before our Office were filed more than 6 years following the members' deaths, which raised the question of the applicability of the Barring Act, 31 U.S.C. § 3702(b). That act requires that claims against the government be filed with our Office within 6 years of when the claims arose. All three of the claimants had also had the deceased members' records corrected by the applicable Boards for the Correction of Military Records to show that the member had elected full SBP coverage for his spouse.

In Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), the Court of Appeals for the Federal Circuit found that annuity claims generally accrue at the time of the member's death, that such claims are not "continuing claims",[1] and that they therefore do not delay the running of the applicable 6-year statute of limitations in 28 U.S.C. § 2501.[2]

In our April 18, 1995, decision, we found that the actions by the various Boards for the Correction of Military Records in correcting the members' records to show that at the time of retirement, the members elected full spousal coverage, were ineffective in overcoming the application of the Barring Act to the claims because they did not create a new entitlement. Under Barber, the spouses automatically had coverage upon the death of the members and the actions of the boards did not create a new entitlement because the spouses already had the coverage sought to be created by the record change.

We also held that the boards record corrections showing that the widows' had filed a claim with the service shortly after the members' deaths were also ineffective to overcome the Barring Act because the correction did not involve a member's service or actions he took while a member of a uniformed service.

Therefore, we found that the claims, including that of Ms. Dyson, were barred by 31 U.S.C. § 3702(b) since they were filed more than 6 years after the members' deaths. In the case of Ms. Dyson, however, we noted that there was an

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[1]The "continuing claim" doctrine stands for the proposition that, where the government owes plaintiffs a continuing duty, a new cause of action arises with every breach of that duty.

[2]In 71 Comp. Gen. 398 (1992), we noted that 28 U.S.C. § 2501 and 31 U.S.C. § 3702(b) have essentially the same purpose and should be similarly applied by GAO and the courts in the resolution of claims against the government.

inconsistency in the documents because DFAS records show that the first inquiry it received from Ms. Dyson was in a February 20, 1987, letter. We found that since Ms. Dyson's claim accrued in 1980, prior to June 15, 1983, the date in the amended regulations implementing the Barring Act, precluded consideration of filings with other than our Office to toll the Barring Act.[3]

In the request for reconsideration, Ms. Dyson contends that she asked the Air Force through her congressional representative in either late 1980 or early 1981 about SBP. She contends that the Air Force should have paid her under the ruling in Barber without any need to submit her claim to our Office as a doubtful claim. Citing 71 Comp. Gen. 398, at 402 (1992), she contends that her claim is not barred.

The critical fact here is that the Air Force did not pay the claim, regardless of the reason and therefore, to toll the Barring Act, a filing with our Office was necessary. In 71 Comp. Gen. 398, we stated that, where a Barring Act application is required on an agency-settled claim, the date of the agency's receipt of the claim is the proper date on which to base it. Moreover, we do not agree that Ms. Dyson's claim was non-doubtful at the time it was submitted to the Air Force in 1980 or 1981. The Barber case was not decided until April 7, 1982. Before that date, the consequences of the services' failure to notify a spouse of a member's failure to elect full spousal coverage had not been decided by a court so there was no guidance for the Air Force in these circumstances.

We affirm our prior decision.

/s/Seymour Efros
for Robert P. Murphy
General Counsel

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[3]The regulations implementing 31 U.S.C. § 3702(b) were revised on June 15, 1989, to provide that the requirements of the statute will be satisfied by timely filing with the agency involved as well as with our Office. However, the regulation precludes consideration of any claims which were barred prior to June 15, 1989, i.e. accrued prior to June 15, 1983.