



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Application of the Barring Act to Annuity Claims

File: B-243146, B-243147, B-243148

Date: May 21, 1992

DIGESTS

Five widows' annuity claims were submitted to us in light of Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990), which prohibited use of the continuing claim theory as an exception to the 6 year Claims Court statute of limitations in a situation where all events necessary to establish the claim had occurred more than 6 years previously. We will henceforth follow Hart in similar situations. In light of this change in statutory interpretation, we will not disturb the services' prior establishment of annuities in three of the cases. Two other claims must be denied.

DECISION

We have been asked to settle claims for annuities of five widows of deceased members of the uniformed services. Four of the claims are for Survivor Benefit Plan (SBP) annuities and one is for a Minimum Income Widow (MIW) annuity. Questions have arisen concerning the effect of the Barring Act, 31 U.S.C. § 3702(b), on these claims due to the recent Court of Appeals decision in Hart v. United States, 910 F.2d 815 (Fed. Cir. 1990). For the reasons presented below, three of the claims presented to us may be allowed, and two must be denied.

The SBP program was established in 1972 to provide income maintenance for dependents of deceased members of the uniformed services. Pub. L. No. 92-425, 86 Stat. 706 (1972). Participation in the program is automatic for members who are married at the time they become eligible for retired pay, unless they affirmatively elect not to participate in the program prior to that time. 10 U.S.C. § 1448(a). Should a member elect not to participate in the program, the statute requires that the government must notify the spouse of that fact. Id. If the spouse is not notified, the effect is to invalidate the election not to participate. Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982); Maureen S. Fearn, 65 Comp. Gen. 696, 698 (1986). MIW annuities are provided for certain widows who are not entitled to SBP annuities.

In Hart, the Claims Court allowed a widow's claim for SBP benefits that was filed 8 years after the death of her husband because of the government's failure to give the widow timely notice that her husband had opted out of the SBP program. The Court then addressed the question of the period for which benefits should be paid in light of the 6 year statute of limitations on claims imposed by 28 U.S.C. § 2501. It held that under its continuing claims doctrine benefits should be paid for the period beginning 6 years prior to the date the suit was filed. The continuing claim doctrine was fashioned by the court for suits for compensation due and payable periodically. When such a claim is filed, the claim is considered to involve multiple causes of action, each arising at the time the government fails to make the payment alleged to be due and separately subject to the 6 year statute of limitations. Burich v. United States, 366 F.2d 984, 986 (Ct. Cl. 1966), cert. denied, 389 U.S. 885 (1967).

On appeal the Court of Appeals for the Federal Circuit reversed, rejecting the Claims Court's reliance on the continuing claim doctrine and holding that the entire claim was barred by section 2501. The court said that all of the events fixing the government's liability to Mrs. Hart for SBP benefits had occurred when Sergeant Hart died and that she therefore had to claim the benefits within 6 years of his death or be forever barred from doing so. The court's decision characterizes the statute of limitation as protection for the government from the obligation to defend suits long after the events sued upon have occurred. It concludes that it would defeat this objective to allow Mrs. Hart to treat each month's SBP benefits as a separate claim with its own 6 year filing period. Hart, supra at 818.

Our statute of limitations is the Barring Act at 31 U.S.C. § 3702(b), which, like the Claims Court's, limits our jurisdiction to consider claims to those that are filed within 6 years after they arise. The threshold question is whether we should view the holding in Hart as equally applicable to the Barring Act.

In general we follow the decisions of the federal courts in our administrative settlements of claims where, as in Hart, the issues have been fully considered by the court. Ralph E. Marker, Jr., USA (Retired), 67 Comp. Gen. 436, 440 (1988).

Further, we think the purposes of the Barring Act are essentially the same as those of 28 U.S.C. § 2501, and that the two statutes should be similarly applied by GAO and the courts in the resolutions of claims against the government. We therefore intend to follow the holding in Hart in our

application of the Barring Act to cases involving similar situations to Hart. With regard to claims in which it is not as clear as in Hart as to when all the events have transpired necessary to file a claim, we intend to consider such claims on a case-by-case basis. With this in mind, we turn to the various SBP cases presented to us.

We consider first the claims of Susan E. Hunt and Gladys M. Morris, both of which are based on military records corrected more than 6 years after the members' deaths.

Master Sergeant George J. Morris, USAF, married Gladys M. Morris in 1956. When he retired in 1974, he elected not to participate in the SBP, but Mrs. Morris apparently was not notified of this election. He died in 1979, and Mrs. Morris filed a claim with the Air Force for an SBP annuity on October 24, 1989, 10 years after her husband's death. On January 18, 1990, the Board for Correction of Military Records (Board) corrected Sergeant Morris's record to show that he elected SBP coverage for his wife at the time of his retirement. An SBP annuity was paid to Mrs. Morris retroactive to January 19, 1984, but Air Force submitted the remainder of her claim for benefits for periods before that date to our Office. Specifically, the Air Force asked whether payment may be made based on an earlier date than January 19, 1984.

Master Sergeant James C. Hunt, USAF, married Susan E. Hunt in 1959. When he retired in 1974, he elected not to participate in the SBP program, but apparently Mrs. Hunt was not notified of this fact by the Air Force. Sergeant Hunt died in 1983, and his widow filed an SBP claim with the Air Force on April 26, 1990, 7 years later. The Board corrected Sergeant Hunt's record on May 23, 1990, to indicate that he elected full SBP coverage for Mrs. Hunt. The Air Force questioned Mrs. Hunt's entitlement to an annuity in light of Hart.

The claims of Mrs. Hunt and Mrs. Morris involve correction actions under 10 U.S.C. § 1552, which corrected the military records of their spouses to show that the spouses had elected SBP coverage. However, it is our view that these corrections did not give rise to a new claim.

The law is well established that when the service concerned does not notify the spouse of a member that he has declined coverage under the SBP, coverage under the SBP is automatic. Barber v. United States, 676 F.2d at 651. Each claimant, therefore, became entitled to an SBP annuity upon the death of her husband under the Barber rule. It follows that the Boards' actions were not necessary in order to create an SBP entitlement in either case. Such entitlements arose upon the death of each of the members as a result of the

government's failure to inform their spouses that SBP had not been elected. The entitlements then became subject to the barring act 6 years after they arose when neither widow applied for benefits within the time allowed by law.

In Haislip v. United States, 296 F.2d 469 (1961), the Court of Claims said on the question of a Correction Board decision purporting to resurrect an otherwise barred claim, that "Manifestly, [a claim] is barred, unless the 'decision' of the Correction Board gave plaintiff a right he had not had before." In these two cases the Correction Board actions did not provide rights that had not previously existed because each claimant had the right, prior to the running of the statute of limitations, to file for SBP benefits. While the Correction Board can change facts in order to give rise to a claim, it cannot, by changing facts, resurrect a claim on which the Barring Act has run.

Until Hart was decided by the Court of Appeals for the Federal Circuit on August 2, 1990, the state of the law, as represented by the lower court holding in Hart, was that SBP benefits in cases such as Mrs. Morris's and Mrs. Hunt's could be restored retroactively, not to exceed the 6-year period of limitations, regardless of when the member died. Thus, the Court of Appeals decision represents a changed interpretation of law. In such a situation we will apply the new interpretation of law only to future and pending cases. Prior cases will not be disturbed. 61 Comp. Gen. 408, 410 (1982).

We regard Mrs. Morris's claim as having been settled prior to the date Hart was decided, since an annuity had already been established for her by that date. The correct beginning date for Mrs. Morris's annuity under the continuing claims theory would have been October 25, 1983, 6 years prior to the date her claim was filed, rather than January 19, 1984. However, in view of Hart, the settlement may not now be reopened.

While Master Sergeant Hunt's records were corrected in May 1990 to indicate that he elected coverage for Mrs. Hunt, the Air Force delayed establishing an annuity for her because of procedural questions it submitted to us regarding records correction. Hart was decided before an annuity was established. We must therefore deny her claim. See 61 Comp. Gen. at 410.

We consider next the claim by Isabel Lawson. SFC Clifford P. Lawson, USA (Retired), married Isabel in 1972. He then elected SBP coverage for her. In 1982, SFC Lawson obtained an ex parte divorce in Texas from Isabel without giving her notice. He remarried in 1982, and he and his second wife

were killed in an auto accident later that year. On May 24, 1990, Isabel petitioned the Texas court to set aside the divorce decree. On March 12, 1991, the court declared the divorce void ab initio, and Mrs. Lawson filed her SBP claim immediately.

We have recognized that a claim dependent upon an event or contingency does not accrue until the event or contingency occurs. See Captain James E. Finigan, USAR, 62 Comp. Gen. 227 (1983). However, we do not think this rule may be applied to toll the running of the Barring Act in the case of Mrs. Lawson's claim. Mrs. Lawson was free to assert her claim as Sergeant Lawson's lawful widow immediately upon his death in 1982. The determination by the state court declaring the ex parte divorce void merely confirmed the validity of her claim, which first arose in 1982, when Sergeant Lawson died. Thus, her claim is barred at this time.

The next claim involves Deloris Struck. She married William W. Struck, USN, in 1965. She received an SBP annuity from the time of his death in 1975, until she remarried on June 22, 1979. That marriage ended in divorce on June 6, 1983. On November 30, 1989, Mrs. Struck applied to the Navy for reinstatement of her annuity under 10 U.S.C. § 1450(b). Her annuity was reinstated with retroactive payment from December 1, 1983. The Navy then contacted us to determine whether the effective date is correct.

Neither the Court of Appeals' decision in Hart nor our adoption here of its rationale in applying the Barring Act has any effect on previously settled cases. The Navy's reinstatement of Mrs. Struck's annuity predated Hart and should not be disturbed.

Last, TSgt George C. Province, USAF, married Wilma A. Province in 1959. He retired in 1965, and died in 1968. Mrs. Province filed a claim for a MIW annuity on May 13, 1987. The Air Force paid her annuity retroactive to May 13, 1981, and then forwarded the matter to our Office on July 8, 1987. Air Force now requests our decision regarding the correct date for beginning Mrs. Province's annuity, and asks whether the Hart case has any effect on her entitlement.

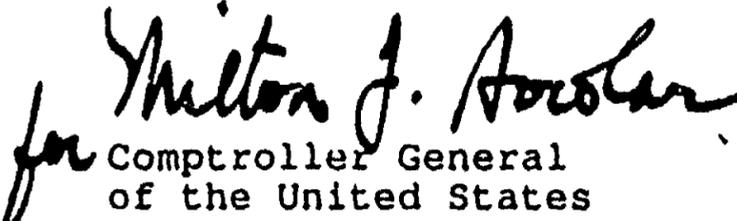
The provisions regarding MIW annuities were enacted as part of the SBP law. Pub. L. No. 92-425, supra, at § 4, 10 U.S.C. § 1448, note. To qualify for a MIW annuity, a widow must (1) have been married to a retiree who died before the enactment of SBP or within 18 months thereafter; (2) be eligible for a pension under certain other acts; and (3) must have an annual income less than a specified amount.

On the question of the starting date for Mrs. Province's annuity, we recognize that in 1987 a submission to GAO was necessary in order to toll the running of the Barring Act. Nevertheless, when her claim was filed with the Air Force, that agency was authorized to settle it as a non-doubtful claim without submitting it to GAO. Therefore, 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. See Transportation Systems Center, 57 Comp. Gen. 441, 444 (1978).

It appears that there was correspondence between the Province family and the Air Force prior to 1987, when the Air Force settled Mrs. Province's claim, and the Air Force apparently supplied erroneous information to the family in 1984. While it is unfortunate that Mrs. Province was not advised to file a claim prior to May 1987, we are prohibited by the Barring Act from considering her claim for periods prior to 1981, 6 years prior to the date it was filed with the Air Force. See B-204845, Dec. 5, 1981.

Concerning the impact of Hart on Mrs. Province's claim, as in the Struck case, the Air Force settlement action here predated the Court of Appeals decision in that case and therefore should not be disturbed.

These claims should be settled in accordance with the foregoing.

for 
Comptroller General
of the United States