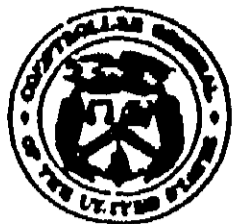


Smallin
149668



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Technical Sergeant Donald R. McRimmon, USAF
(Retired) (Deceased)--Conflicting Claims for
Arrears of Pay

File: B-251968

Date: July 22, 1993

DIGEST

Where evidence exists that a military member died on a particular date several years before the date of presumptive death declared by a state court, his arrears of pay only through the earlier date of suspected death are payable to his designated beneficiary under 10 U.S.C. § 2771.

DECISION

This is in response to a request by the Defense Finance and Accounting Service (DFAS), Denver Center, for an advance decision regarding the arrears of pay of Technical Sergeant Donald R. McRimmon, USAF (Retired) (Deceased).¹ For the reasons presented below, the amount of arrears payable is Sergeant McRimmon's unpaid compensation for the period of October 1 through October 26, 1984, and the payee for that amount is his designated beneficiary, Bettie W. Looney.

FACTS

Before Sergeant McRimmon's retirement from the Air Force in 1975, he had designated his spouse, Frances McRimmon, as his beneficiary for arrears of pay. However, he and Frances were divorced on January 15, 1982. On July 27, 1984, he executed an Air Force form to make Bettie Looney, with whom he was living near Forth Worth, Texas, his beneficiary for arrears of pay. Three months later, on October 26, 1984, one of Sergeant McRimmon's children reported to the police that he was missing. A police investigation revealed that he was last seen on that day near Forth Worth. According to the record, Sergeant McRimmon's truck was later located in Utah. Mrs. Looney's granddaughter confessed in Utah to Texas authorities that she and a friend had killed Sergeant McRimmon and put his body in a dumpster in Texas. She later recanted her confession and was prosecuted for

¹The submission was assigned DFAS control number 92-14-M.

perjury. A police investigation turned up evidence that Sergeant McRimmon was killed on October 26, 1984; however, his body was never located, and no one has been charged in connection with his death.

When DFAS learned of Sergeant McRimmon's disappearance and suspected death, it suspended payment of his retired pay and recovered all checks sent after October 1, 1984. His retired pay account remains in suspended status.

Under the terms of Sergeant McRimmon's 1982 divorce decree, Mrs. McRimmon did not receive any interest in his retired pay. However, in July 1985, after Sergeant McRimmon's suspected death, Mrs. McRimmon won a modification of the decree awarding her 47.71 percent of his retired pay. In November 1985 she applied to DFAS for direct payment to her of that percentage, and while DFAS approved her application, no payments have been made to her because Sergeant McRimmon's retired pay had already been suspended.

In June 1992, to help settle Sergeant McRimmon's estate, a Texas Probate Court decreed that he was presumed to have died on October 27, 1991, 7 years and 1 day after his disappearance. The court also determined his four children to be his heirs.

An attorney representing Mrs. McRimmon and the children wrote DFAS in June 1992 claiming 47.71 percent of Sergeant McRimmon's retired pay from October 1984 until October 27, 1991, on behalf of Mrs. McRimmon, and the balance (52.29 per cent) on behalf of the four children.

DISCUSSION

We will adopt a court's presumed date of death for a missing member only if there is no credible evidence that the member's death occurred on an earlier date. See Chief Warrant Officer Glen N. Burbage, USCG (Retired), 71 Comp. Gen. 107 (1991). Here, however, the record contains evidence that the missing member died on a particular date. An extensive police investigation turned up strong circumstantial evidence that Sergeant McRimmon was murdered on October 26, 1984. The police identified suspects, but because the body could not be located, prosecution did not proceed. In our view, these facts amount to credible evidence that Sergeant McRimmon died on October 26, 1984. Therefore, payment in this case may only be allowed until that date.

Payment of arrears of pay is governed by 10 U.S.C. § 2771, which provides that the person with the highest priority to receive a member's arrears of pay is the beneficiary designated by the member to receive it. In July 1984,

Sergeant McRimmon designated Betty Looney as his beneficiary for arrears of pay.²

Mrs. McRimmon claims 47.71 percent of her former husband's retired pay based on a 1985 modification of their divorce decree. Without commenting on the validity of the modification under the circumstances presented here, we point out that the judgment itself provides for division of retired pay from the date of modification forward only. The judgment is consistent with the applicable regulations, 32 C.F.R. § 63.6(h)(10), which provide for prospective payment only in such cases. DFAS approved her application for direct payment of retired pay effective February 1986. However, payment of Sergeant McRimmon's retired pay had already been suspended--properly so--in October 1984, because of his suspected death. Since no pay accrued to him after the date of the modification, no retired pay exists for the period covered by her claim; it must therefore be denied.

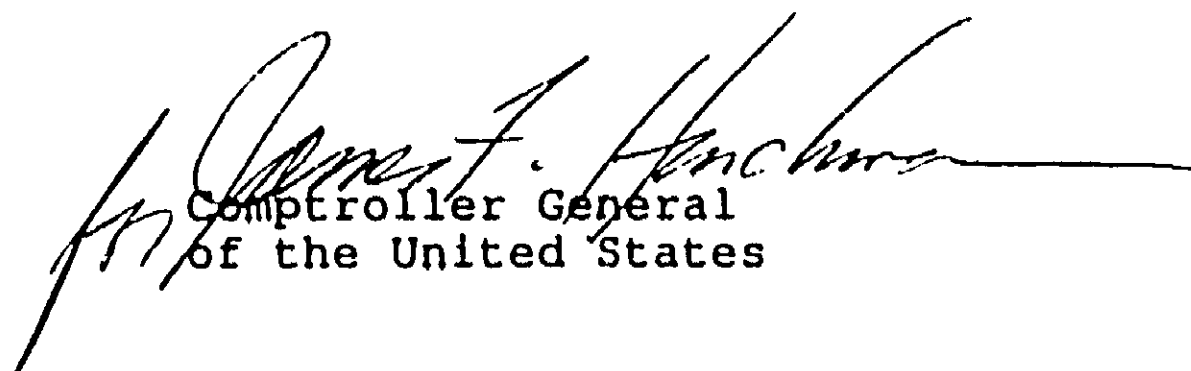
With regard to the claim of Sergeant McRimmon's children as his heirs for a share of any amounts payable, we point out that under 10 U.S.C. § 2771, the person with the highest priority to receive a member's arrears of pay is the beneficiary designated by the member. Again, because Sergeant McRimmon designated Bettie Looney as his beneficiary for his arrears of pay, according to a form he executed 3 months before his death, his children's claim for a share of the arrears is also denied.

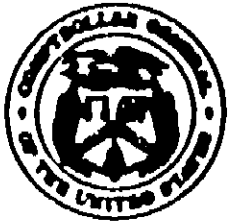
In sum, the amount of arrears payable is Sergeant McRimmon's unpaid compensation for the period October 1 through October 26, 1984, and the payee for that amount is his designated beneficiary, Bettie W. Looney.

DFAS poses a pair of additional questions at the close of its request to us. DFAS asks whether 10 U.S.C. § 1408(d)(4), which prohibits payment of retired pay to a spouse or former spouse after the death of the member, would prohibit a spouse or former spouse who was already receiving a portion of the member's retired pay before his account was suspended from receiving a final settlement of that portion after his death. In our view, the cited section would not prohibit payment of the spouse's portion of amounts which accrued before the member's death.

²While Sergeant McKimmon's children have challenged this designation, believing his signature on it to be a forgery, we find no basis in the record before us for rejecting it. Nor has DFAS rejected it.

DFAS also asks whether payments reflecting less than a whole month of retired pay, for the month in which the member dies, can be made to an eligible spouse or former spouse, in view of the practice of not making payments of members' retired pay until the end of the month. In our view, any amounts accruing before a member's death should be paid.


Comptroller General
of the United States



Comptroller General
of the United States

Washington, D.C. 20548

B-251968

July 22, 1993

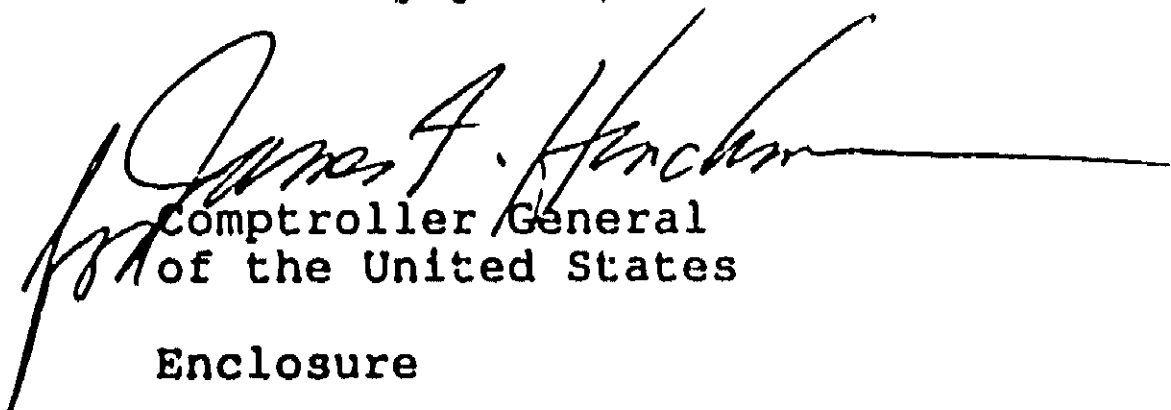
The Honorable Pete Geren
Member, United States
House of Representatives
Suite 500
100 East 15th Street
Fort Worth, Texas 76102

Dear Mr. Geren:

This is response to your inquiry of December 3, 1992, to the Defense Finance and Accounting Service, Denver Center, on behalf of Ms. Frances A. McRimmon, former spouse of Technical Sergeant Donald R. McRimmon, USAF (Retired) (Deceased), regarding her entitlement to a portion of Technical Sergeant McRimmon's unpaid compensation. Enclosed is a copy of our decision Technical Sergeant Donald R. McRimmon, USAF (Retired) (Deceased), B-251968, of today's date, in which we deny Ms. McRimmon's claim.

We regret a more favorable reply may not be made.

Sincerely yours,


Comptroller General
of the United States

Enclosure