

DECISION



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

370

FILE: B-183848

DATE: MAR 9 1976

MATTER OF: Captain

✓ USAFR (Deceased)

DIGEST: Air Force officer who had over 20 years' service when he died while on active duty was not eligible for retirement under 10 U.S.C. 8911 (1970) because less than 10 years of such service was as a commissioned officer. Neither was he eligible for retirement under 10 U.S.C. 8914 (1970) which applies to enlisted members since at the date of his death he was an officer. Therefore, his widow is not entitled to an SBF annuity under 10 U.S.C. 1448(d) (Supp. II, 1972) since such annuity is contingent upon member having been qualified for retired pay.

This action is in response to a letter dated April 7, 1973 (RPTA), from Captain H. V. Starr, USAF, Accounting and Finance Division, Headquarters Air Force Accounting and Finance Center, Denver, Colorado, requesting an advance decision as to whether payment of a Survivor Benefit Plan (SBP) annuity under 10 U.S.C. 1448(d) (Supp. II, 1972) may be made to the widow of Captain , USAFR (Deceased). This request was approved by the Department of Defense Military Pay and Allowance Committee as submission No. DO-AF-1236, and forwarded to this Office by Headquarters United States Air Force letter dated May 1, 1973 (ACFA).

The submission indicates that Captain died on January 17, 1973, while serving on active duty as a commissioned officer in the Air Force. Under the provisions of 10 U.S.C. 1448(d), the spouse of a retirement-eligible member of an armed force is, under certain conditions, eligible for an SBF annuity when the member dies while serving on active duty. Subsection 1448(d) provides as follows:

"(d) If a member of an armed force dies on active duty after he has become entitled to retired pay, or after he has qualified for that

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pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 35 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died." (Emphasis added.)

The legislative history of 10 U.S.C. 1448(d) shows that it was included to provide protection for personnel still on active duty who are "eligible for retirement" so that a member who remains on active duty would not earn less survivor benefits than a member who retired at the "same grade and with the same years of service." See 53 Comp. Gen. 867/849 (1974). Therefore, in order for Captain [redacted] widow to be entitled to an SEP annuity, Captain [redacted] must have been eligible for retirement at the date of his death. See also 53 Comp. Gen. 867/889 (1974).

The submission shows that Captain [redacted] began his military service on January 3, 1955, in an enlisted status and continued in such status through September 9, 1970, when he was honorably discharged to accept a commission. He was commissioned a second lieutenant, effective September 10, 1970, and served as a commissioned officer until his death. At the date of his death Captain Macay had completed 20 years and 15 days of active military service, 4 years 4 months and 8 days of which had been active service as a commissioned officer.

Retirement for length of service for Air Force officers is authorized by 10 U.S.C. 8911/(1970), which provides as follows:

"The Secretary of the Air Force may, upon the officer's request, retire a regular or reserve commissioned officer who has at least 20 years of service computed under section 8926 of this title, at least 10 years of which have been active service as a commissioned officer." (Emphasis added.)

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While at the date of his death Captain had over 20 years of service, only 4 years 4 months and 8 days of such service was as a commissioned officer. Thus, he was not eligible or qualified for retirement under 10 U.S.C. 8911. X

As the submission indicates, retirement for length of service for Air Force enlisted personnel is authorized by 10 U.S.C. 8914 (1970), which provides in pertinent part as follows:

"Under regulations to be prescribed by the Secretary of the Air Force, a regular enlisted member of the Air Force who has at least 20, but less than 30, years of service computed under section 8925 of this title may, upon his request, be retired. * * *

As the submission indicates, if Captain had not vacated his enlisted status in 1970 to accept a commission, and if he had served in an enlisted status until his death in 1975, he apparently would have died while on active duty after having qualified for retirement under 10 U.S.C. 8914. X However, that was not the case--he was an officer, not "a regular enlisted member," at the time of his death and, therefore, he was not qualified for retirement under 10 U.S.C. 8914. X

In that connection it is our understanding that even if an SBP annuity were considered payable by reason of Captain prior enlisted status, his widow would not be entitled to additional payments. This is so because an SBP annuity may be paid only to the extent that it exceeds dependency and indemnity compensation (DIC) payable by the Veterans Administration under 38 U.S.C. 411(a), / and DIC payable in this case exceeds the SBP payments which would be allowable on the basis of the member's enlisted grade and total years of service.

Thus, under the facts of this case as provided in the submission, at the date of his death, Captain was not eligible for retirement under 10 U.S.C. 8911, X 8914, X or any other law of which we are aware, nor would any other officer have been eligible in the same situation in the "same grade and with the same years of service" as Captain . 53 Comp. Gen. 847, X supra. Accordingly,

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he was not entitled to or qualified for retired pay and, consequently, his widow may not be paid an SPP annuity under 10 U.S.C. 1448(d). X
The voucher enclosed with the submission will be retained in this Office.

R. F. KELLER

Acting Comptroller General
of the United States