

Mr. Reiding

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DECISION



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

[Reconsideration of Survivor Annuity Paym

pen II

FILE: B-190908

DATE: June 26, 1980

MATTER OF: Lieutenant Colonel John F. Delahanty, Jr, USA
Retired (Deceased)

DIGEST: The spouse of a member retired prior to the effective date of the Survivor Benefit Plan, for whom timely coverage was selected as authorized by subsection 3(b) of Public Law 92-425, is the proper recipient of annuity payments on his death, even though they were only married approximately 21 months at the time of the member's death. B-190908, April 26, 1978, sustained.

This action is in response to a request for reconsideration of our decision B-190908, April 26, 1978, a case involving Survivor Benefit Plan annuity payments due in the case of the late Lieutenant Colonel John F. Delahanty, Jr., USA, Retired. The ruling in that decision was that Colonel Delahanty's spouse, Carmen Delahanty, was the proper recipient of the annuity rather than his two dependent children by a former marriage.

That decision is challenged by Edward S. Rosenthal, Esq. on behalf of the two children on the basis that the member and Carmen had been married only approximately 21 months at the time of his death and the provisions of 10 U.S.C. 1447(3) at the time of the member's death, required a minimum of 2 years of marriage in order for a surviving spouse to qualify as an eligible widow for annuity purposes. As grounds for reconsideration it has been suggested that our interpretation of the law is contrary to its plain language, that our construction is clearly at variance with the Congressional scheme and purpose of the law, and that the rationale underlying the decision mandates results in specific instances that amount to an administrative nullification of Congressional intent.

Colonel Delahanty retired from the United States Army on February 1, 1970. On October 27, 1972, he elected into the Survivor Benefit Plan (10 U.S.C. 1447-1455) under the provisions of section 3(b) of Public Law 92-425, 86 Stat. 706, 711-712, selecting full coverage for spouse and dependent children. Listed was his wife, Carmen F.

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Delahanty, with the date of marriage shown as June 26, 1971. Also listed were two dependent children, James A. Delahanty, born March 25, 1962, and Suzanne M. Delahanty, born August 28, 1957, both of whom are apparently in the custody of the member's former spouse, Mrs. Geraldine T. Musgrave.

The basic provisions of the Survivor Benefit Plan are contained in section 1 of Public Law 92-425. As enacted, those provisions authorized the creation of an income maintenance program for surviving dependent families of members of the uniformed services, the purpose being to supplement such social security and other benefits as they may be entitled to, with primary emphasis on the families of those members who retire on and after the effective date of the act. However, under section 3 of the act those already entitled to retired or retainer pay prior to the effective date of the act were authorized to elect into the Plan if such election was made within 1 year of the date of enactment. (The 1-year period was later extended to 18 months (March 21, 1974) by section 804 of Public Law 93-155.)

Section 1447(3) of title 10, United States Code, defined "widow" as the surviving wife of a participant who, if not married to him when he became eligible for retired or retainer pay, was married to him for at least 2 years immediately prior to his death or is the mother of issue by that marriage.

That provision relates to a member retiring after the effective date of the Plan and the legislative history of the act refers to that limitation as being applicable to member not married at the time of retirement (who thus, had no basis to elect spouse coverage) but who later married. See H. Rep. No. 92-481, 92d Cong., 1st Sess., September 16, 1971, at pages 9 and 27. In this connection, S. Rep. No. 92-1089, 92d Cong., 2d Sess., September 6, 1972, at page 14, makes the following statement:

"All spouses and dependent children of those members retiring in the future (after enactment) will be covered automatically unless the member chooses otherwise."

It is evident that under the scheme of the law, Congress established that there was to be a delineation between spouses who married members before the members were initially eligible to participate in the Plan and those spouses who married members after they became eligible to participate following enactment of the Plan. Therefore, in 53 Comp. Gen. 470, 474 (1974), we concluded that under the basic provisions of the Plan, the 2-year marriage requirement imposed in the definition of widow and widower (10 U.S.C. 1447(3)(a) and (4)(a)) related only to marriages entered into by members after their release from active duty and entitlement to receive retired or retainer pay.

Concerning members who were already retired at the time Public Law 92-425 was enacted, the legislative history shows that its purpose was not only to permit members retired before the effective date of the act to participate in the Plan, but to encourage their participation. At page 14 of S. Rep. No. 92-1089 a statement similar to that involving future retirees was made regarding preeffective date retirees:

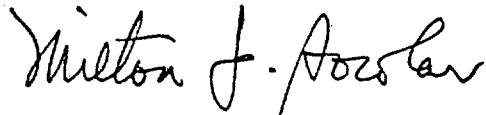
"Spouses and dependent children of members who are retired prior to the enactment of the bill are covered if the member chooses coverage for them within one year after enactment of the bill."

Accordingly, in 53 Comp. Gen. 818 (1974), which involved a situation similar to that involved in the present case, we held that spouses of those members become immediately eligible to receive an annuity upon the member's death, regardless of the length of marriage, so long as the marriage occurred prior to election. See also 54 Comp. Gen. 266 (1974) and 54 Comp. Gen. 732 (1975).

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In the present case, the member made a timely election of benefits for his wife and two dependent children. Since he married before Public Law 92-425 was enacted, upon his death his spouse became immediately eligible to receive an annuity regardless of the fact that they had only been married approximately 21 months at the time of his death.

Accordingly, on reconsideration, the action taken in decision B-190908, April 26, 1978, is sustained.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States