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DECISION

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

[Entitlement to Survivor's Benefits of Deceased Military Member]

FILE: B-199978

DATE: February 9, 1981

MATTER OF: Staff Sergeant Martin P. Roberts, Jr., USA,
Retired, Deceased

- DIGEST: 1. A service member elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify under 10 U.S.C. 1447(3)(A) for any annuity at the time of his death because they had not been married at least 1 year, she was pregnant and later gave birth to his child. On that basis she qualifies as the eligible widow for annuity purposes effective the date of the child's birth.
2. A service member who elected spouse and children coverage under the Survivor Benefit Plan at retirement was thereafter divorced and remarried but died prior to the first anniversary of the remarriage. While his surviving spouse did not qualify for annuity purposes as his eligible widow at his death, she was pregnant. In view of the 10 U.S.C. 1450(a) provision that payment of the annuity will begin "the first day after the death", an annuity may be paid to his surviving dependent children of the prior marriage but must terminate on the date that the surviving spouse qualifies under 10 U.S.C. 1447(3)(B) for an annuity by the birth of his posthumous child.
3. A service member who was married and had children, elected spouse and children coverage under the Survivor Benefit Plan at retirement. He was thereafter divorced and remarried, but died prior

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to the first anniversary of the remarriage. His surviving spouse who was pregnant when he died, later gave birth to his posthumous child. Not only does the birth of a posthumous child qualify the surviving spouse as the eligible widow for annuity purposes, but such child immediately joins his other children the class stipulated in 10 U.S.C. 1450(a)(2) as potential eligible beneficiaries to share the annuity should the eligible widow thereafter lose eligibility by remarriage before age 60 or death.

[This action is in response to a request for advance decision on several questions concerning the eligibility of certain survivors of the late Staff Sergeant Martin P. Roberts, Jr., USA, Retired, to receive an annuity under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455. The request was submitted by the Disbursing Officer, Army Finance and Accounting Center, and submission number DO-A-1351 by the Department of Defense Military Pay and Allowance Committee.

[It appears that Sergeant Roberts retired from the Army effective December 1, 1973, under the provisions of 10 U.S.C. 3914. He elected to provide an SBP annuity based on his full retired pay in favor of his spouse Helen, and his two children, Tammy and Cheri, born September 15, 1961, and April 19, 1963, respectively.

On April 20, 1978, Sergeant Roberts and Helen were divorced. As a result, his election was changed to "children only" coverage effective May 1, 1978. On June 11, 1978, he married Donna L. Zalvidea and on September 26, 1978, he died. While Donna had not been married to him for a minimum of 1 year at the date of his death, she was pregnant when he died and on March 11, 1979, gave birth to a child, Martin P. Roberts III.

Effective September 27, 1978, an SBP annuity was established in favor of his two children by the former marriage. When it was determined that the birth of the child, Martin P. Roberts III, qualified Donna to receive the annuity, payment of the children's annuity was terminated effective May 31, 1979, and the annuity was established in Donna's favor, retroactively to April 1, 1979. Subsequent to that retroactive payment, it was determined that she was entitled to Dependency and Indemnity Compensation (DIC) from the Veterans Administration in an amount in excess of her monthly SBP annuity, and further SBP payments were discontinued.

The first Mrs. Roberts (Helen) questions the loss of the annuity by her two children. Since doubt is expressed as to the proper persons eligible to receive the annuity, the Disbursing Officer asks the following questions:

"a. Does a child born subsequent to the retiree's death meet the criteria of 10 U.S.C. 1447(3)(B) so as to qualify the mother as an eligible beneficiary for SBP annuity purposes?

"b. If the answer to a. is affirmative, may the annuity be established on behalf of eligible children from a prior marriage from the day after the retiree's death until the surviving spouse becomes eligible?

"c. If the answer to a. is negative, would the child born subsequent to the retiree's death be entitled to an equal share of the annuity payable on behalf of the eligible child beneficiaries?"

Subsection 1447(3) of title 10, United States Code, defines "widow", for the purpose of SBP annuity entitlement under 10 U.S.C. 1450, to mean:

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"* * * the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay--

"(A) was married to him for at least one year immediately before his death; or

"(B) is the mother of issue by that marriage."

Subsection 1447(4) similarly defines "widower."

The legislative history of the SBP, generally, shows that while the congressional purpose was to establish an income maintenance program for families of deceased service members, Congress sought to prevent spouses who become widows or widowers of SBP participants only by virtue of a short term marriage after retirement from automatically receiving an annuity. As a result, Congress established as a condition precedent to receiving an annuity that surviving spouses in cases such as this must have been married to the member for at least 1 year immediately before the member's death, or be the parent of issue by that marriage. See in this connection, 53 Comp. Gen. 470 (1974); *id.* 818 (1974); and 54 Comp. Gen. 266 (1974); compare B-190908, June 26, 1980. The requirement under 10 U.S.C. 1447(3)(B) is simply that the spouse is "the mother of issue by that marriage." There is nothing in the law or legislative history that suggests that the meaning of that phrase is limited only to children born prior to the member's death. Therefore, it is our view that that the birth of a posthumous child of the member's marriage qualifies the surviving spouse as the eligible widow for annuity purposes, and question a. is answered in the affirmative.

The second question asked involves the date on which payment of the SBP annuity to such eligible spouse begins. Section 1450 of title 10, United States Code, provides in part:

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"(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies, a monthly annuity under section 1451 of this title shall be paid to--

"(1) the eligible widow or widower;

"(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;"

Ordinarily, the eligibility of a surviving spouse to be a beneficiary is determinable when the member dies. In those cases where spouse coverage is elected, the vesting of the annuity in that spouse would occur immediately upon that death and would continue so long as she remains eligible. However, section 1450(a) provides that payment will begin "the first day after the death," with distribution to be made in the order of precedence stated. Donna Roberts had not qualified under the law as an eligible beneficiary on the date of the member's death since she had yet to give birth to the "issue by that marriage." It is our view that where a member has spouse and children coverage and the surviving spouse does not qualify as his eligible widow, an annuity may be paid to surviving dependent children effective the first day after the member's death. However, that annuity must be terminated effective the date that the surviving spouse qualifies for a survivor annuity in her own right, which in the present case is March 11, 1979, the date she became the mother of issue by her marriage to Sergeant Roberts. Accordingly, question b. is also answered in the affirmative.

With regard to question c., even though it is suggested that it does not require an answer if question a. is answered in the affirmative, we believe that the scope of the question is such that a response is desirable.

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Subsection (b) of 10 U.S.C. 1450 provides certain conditions under which a widow or widower may lose entitlement to an annuity as follows:

"(b) An annuity payable to the beneficiary terminates effective the first day of the month in which eligibility is lost. An annuity for a widow or widower shall be paid to the widow or widower while the widow or widower is living or, if the widow or widower remarries before reaching age 60, until the widow or widower remarries. If the widow or widower remarries before reaching age 60 and that marriage is terminated by death, annulment, or divorce, payment of the annuity will be resumed effective as of the first day of the month in which the marriage is so terminated. However, if the widow or widower is also entitled to an annuity under this section based upon the marriage so terminated, the widow or widower may not receive both annuities but must elect which to receive."

If the widow or widower should lose eligibility for the annuity, under 10 U.S.C. 1450(a)(2) the surviving dependent children would become entitled to the annuity. Compare B-191524, June 30, 1978. In the present case, at the time of Sergeant Roberts' death he had two dependent children who qualified as potentially eligible beneficiaries. Later the child posthumously born to Donna Roberts became eligible. The fact that this child was born after Sergeant Roberts' death, would not alter that conclusion. Therefore, if Donna Roberts subsequently becomes ineligible, all of Sergeant Roberts' children who then qualify as dependent children under 10 U.S.C. 1447(5), would share equally in the annuity for the remainder of their period of dependency. In that regard question c. is answered in the affirmative.

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