

**DECISION**



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

PLM-2  
KNOX

118618

FILE: B-205400

DATE: JUN '7 1982

MATTER OF: Lieutenant Colonel Gene J. Petty, USAFR,  
Deceased

- DIGEST:
1. An Air Force Reserve officer elected Survivor Benefit Plan coverage for his children under new provisions added by Pub. Law 95-397 when he was notified of his eligibility (except that he had not reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67. Subsequently he became eligible for retirement under 10 U.S.C. § 8911 but was not retired. Later he was killed while on active duty for training. Although he lost eligibility for retired pay under chapter 67 upon becoming eligible for retirement under section 8911, his original election of coverage for his children continued in effect since he had not retired under section 8911 when he died. Therefore, the children are entitled to a Survivor Benefit Plan annuity under that election.
  2. Under provisions added to the Survivor Benefit Plan by Pub. Law 95-397, members notified of their eligibility (except for not having reached age 60) for non-Regular retired pay under 10 U.S.C. chapter 67, may elect immediate coverage for dependents. If such a member becomes entitled to retired pay under another law the member loses eligibility for chapter 67 retired pay, but the Survivor Benefit Plan election remains effective until the member actually retires. He is then covered by other provisions of the Plan and may make a new election.

This is in response to the request of the Deputy Chief, Accounting and Finance Division, Air Force Accounting and Finance Center, for an advance decision concerning the propriety of paying annuity payments under the Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455, to the children of Lieutenant Colonel Gene J. Petty, USAFR, Deceased. We find that the annuity payments may be made in this case.

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The matter has been assigned submission No. DO-AF-1379 by the Department of Defense Military Pay and Allowance Committee.

Colonel Petty, a Reserve officer, apparently was notified in 1979 that he had completed the years of service (but had not reached the age) required for retired pay under 10 U.S.C. chapter 67 (§§ 1331-1337), which provides for retired pay for non-Regular service. However, since he had not then reached age 60, as required to receive retired pay under chapter 67, he did not then begin receiving such pay. On October 3, 1979, Colonel Petty elected immediate coverage, for his children only, under the Reserve components provisions of the Survivor Benefit Plan which apply to members eligible for retirement for non-Regular service pursuant to 10 U.S.C. chapter 67. Thereafter, on January 3, 1980, he contacted the Air Reserve Personnel Center to determine whether he was eligible for retirement under 10 U.S.C. § 8911 which authorizes officers' retirement with 20 years' service. However, he was advised that he did not meet the qualifications for retirement under 10 U.S.C. § 8911 until January 10, 1980. On January 14, 1980, after having qualified for retirement under section 8911 but not having been retired, Colonel Petty was killed while on active duty for training. At the time, he did not have an eligible spouse beneficiary for the purposes of 10 U.S.C. § 1448(d), which provides a Survivor Benefit Plan annuity for an eligible spouse beneficiary (but not the children) of a member who dies on active duty, under certain circumstances. In light of the above, the Air Force submits two questions for our resolution.

1. Did Colonel Petty's election into the Survivor Benefit Plan under the Reserve components provisions become null and void when he qualified for retirement under [10 U.S.C. § 8911] a law other than 10 U.S.C. chapter 67, although he had not applied for or been granted retired pay?
2. Would the answer be the same if he had applied for and was receiving retired pay under a law other than 10 U.S.C. chapter 67?

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The qualifications for participation in the Survivor Benefit Plan are contained in 10 U.S.C. § 1448(a)(1) (Supp. III, 1979), which provides in part that the following persons are "eligible to participate:"

"(A) Persons entitled to retired or retainer pay.

"(B) Persons who would be eligible for retired pay under chapter 67 of this title but for the fact that they are under 60 years of age.

(2) The Plan applies--

"(A) to a person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he becomes entitled to retired or retainer pay, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay; and

"(B) to a person who (i) is eligible to participate in the Plan under paragraph (1)(B), (ii) is married or has a dependent child when he is notified under section 1331(d) of this title that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title, and (iii) elects to participate in the Plan (and makes a designation under subsection (e)) before the end of the 90-day period beginning on the date he receives such notification. A person described in subclauses (i) and (ii) of clause (B) who does not elect to participate in the Plan before the end of the 90-day period referred to in such clause shall remain eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A)."

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At the time Colonel Petty submitted his election to participate in the Plan in October 1979, he was eligible under section 1448(a)(1)(B) and the Plan applied to him under section 1448(a)(2)(B). That is, he was eligible for retired pay under chapter 67 except that he had not reached age 60. Although Colonel Petty subsequently became eligible for retirement under 10 U.S.C. § 8911 shortly before his death, he was not retired under that provision nor any other, and thus was not entitled to retired pay. Therefore, at the time of his death he was not eligible for participation in the Plan under section 1448(a)(1)(A).

Although Colonel Petty's election to participate was effective when he submitted it in 1979, the question arises as to whether it remained effective once he qualified for retirement in January 1980 under 10 U.S.C. § 8911. That is because upon qualifying for retirement under section 8911, although not retired, he was no longer eligible for retired pay under 10 U.S.C. chapter 67 since one of the criteria a member must meet in order to be entitled to retired pay under chapter 67 is that:

"he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve." 10 U.S.C. § 1331(a)(4).

See 41 Comp. Gen. 458 (1962), and B-161673, August 2, 1967.

The statutory provisions discussed here providing Survivor Benefit Plan coverage for a member eligible for retired pay under 10 U.S.C. chapter 67, except that he has not yet reached age 60, were added to the Plan in 1978. See Title II, Uniformed Services Survivors' Benefits Amendments of 1978, Public Law 95-397, September 30, 1978, 92 Stat. 843-848. The annuities provided and the charges to the member under the new provisions differ in amount from the other annuities and charges provided under the Plan. See 10 U.S.C. §§ 1451(a)(1)(B), 1451(b)(2), 1451(d), 1452(a)(2), and 1452(c)(2). Prior to the adoption of these provisions, a member eligible for chapter 67 retired pay

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could not provide Survivor Benefit Plan coverage for dependents until the member reached age 60 and began receiving retired pay.

Neither the statutory provisions nor the legislative history specifically address a situation such as is involved in Colonel Petty's case. However, it is clear that it was the overall intention to provide the opportunity for a member who meets the eligibility requirements for retired pay under chapter 67, except for age, to elect coverage for dependents before reaching age 60. In answer to the Air Force's two questions, it would not be in keeping with the legislative intent to hold that a member's election to participate, which was valid under 10 U.S.C. §§ 1448(a)(1)(B) and 1448(a)(2)(B) when it was made, becomes void when the member loses eligibility for chapter 67 retired pay by qualifying for retirement under another statute. Rather, it is our view that such an election remains effective until the member is actually retired and becomes entitled to retired pay under the other statute. At that time the member's eligibility for Survivor Benefit Plan protection would come under the provisions of 10 U.S.C. §§ 1448(a)(1)(A) and 1448(a)(2)(A). He should then be given the opportunity to make a new election under those provisions, just as would any other retiring member, since the amounts of and charges for annuities flowing from those provisions are different.

In accordance with the above since Colonel Petty had not been retired under 10 U.S.C. § 8911 at the time of his death, the Survivor Benefit Plan coverage he had elected for his dependent children remained in effect at the time of his death. Therefore, payment of the annuity to them is authorized, computed in accordance with 10 U.S.C. §§ 1451(a)(1)(B) and 1451(d).

The vouchers submitted are being returned for computation and payment in accordance with the above.

MILTON J. SOCOLAR

For  
Comptroller General  
of the United States