

DECISION

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

Casterwood
PLM-II

29115

FILE: B-214461

DATE: August 20, 1984

MATTER OF: Master Sergeant William B. Farmer, USAF

DIGEST:

When upon a service member's death the surviving spouse is eligible for both a Survivor Benefit Plan (SBP) annuity and Veterans Administration Dependency and Indemnity Compensation (DIC), the amount of the SBP payment is reduced by the amount of DIC and a corresponding refund of the member's SBP contributions is paid to the beneficiary. Despite the fact that under 38 U.S.C. § 3011 DIC payments are not effective until the first of the month following the month of the service member's death, the beneficiary will be deemed eligible for, and in receipt of, DIC payments for the purposes of SBP annuity computation and refund of SBP contributions pursuant to 10 U.S.C. § 1450(c) and (e).

This case concerns the effect of a new provision of law, 38 U.S.C. § 3011, on the computation of Survivor Benefit Plan annuities and refund of participants' contributions to the Plan. The new provision delays payment of various Veterans Administration benefits from the date the beneficiary would otherwise be entitled to receive payment to the first of the following month. One of these benefits, Dependency and Indemnity Compensation (DIC), payable to a deceased service member's spouse, must be subtracted from the amount due the beneficiary under the Survivor Benefit Plan (SBP) to arrive at the SBP annuity amount. We find that while 38 U.S.C. § 3011 postpones DIC payment until the month after the service member's death, this does not change DIC eligibility or the amount of DIC offset to be used in computing SBP annuity under 10 U.S.C. § 1450(c), (e). Thus, the beneficiary will be deemed eligible for, and in receipt of, DIC payments for SBP annuity and refund of SBP contributions purposes.^{1/}

^{1/} Lieutenant Colonel William F. Flynn, Jr., USAF, Accounting and Finance Officer, United States Air Force Accounting and Finance Center, Denver, Colorado, submitted this matter in request for an advance decision. The request was approved by the Department of Defense Military Pay and Allowance Committee and forwarded as submission number DD-AF-1433, February 17, 1984.

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Background

When a service member retires, he may participate in the Survivor Benefit Plan (SBP) administered by his service. Deductions are made from his retired pay to cover his contributions to the Plan, and after the service member's death, a monthly annuity is paid to his beneficiary. When the beneficiary is a surviving spouse, eligibility under the Dependency and Indemnity Compensation program (DIC) and the amount of any entitlement must be determined. (The DIC program authorized by 38 U.S.C. § 411 is separate from the SBP program, and is administered by the Veterans Administration.) The amount the spouse is entitled to under the DIC program must be subtracted from the SBP annuity amount to arrive at the actual SBP annuity that is payable. 10 U.S.C. § 1450(c). If the monthly DIC amount is equal to or higher than the monthly SBP annuity, no SBP annuity is paid to the beneficiary. Instead, a refund to the surviving spouse is made of the service member's total contributions to the SBP program. 10 U.S.C. § 1450(e). If the monthly DIC amount is lower than the SBP annuity the difference between the DIC amount and the SBP amount is paid to the beneficiary in the form of an SBP annuity, and a partial refund is made of the member's SBP contributions. If the beneficiary is not entitled to DIC at the time of the service member's death, payment of the full SBP annuity begins and no refund of SBP contributions is then made.

Before October 1, 1982, DIC payment could begin effective the first day of the month in which the service member died. Thus, DIC payments would be made retroactive to this date, provided that DIC application was filed within 1 year from the service member's death. Under that procedure, the calculation of the SBP annuity and the refund of contributions based on a DIC award, as mandated by 10 U.S.C. § 1450(c) and (e), was based on entitlements during the month in which the service member died.

In 1982 Congress passed the Omnibus Budget Reconciliation Act of 1982,^{2/} section 401 of which added section 3011 to title 38, United States Code. Section 3011 postpones payment of many types of Veterans Administration benefits, including DIC awards, by requiring that the payments may not begin before the calendar month following the month the

^{2/} Pub. L. 97-253, September 8, 1982, 96 Stat. 763, 801-802.

award of the benefit became effective. However, no change has been made to 10 U.S.C. § 1450(a) which provides that the SBP annuity shall begin effective the first day after the death of the service member. Thus, questions arise as to how the set-off provisions of 10 U.S.C. § 1450(c) and the refund of contribution provisions of 10 U.S.C. § 1450(e) are to be applied.

The impact of new section 3011 on the administration of the SBP apparently was not considered by Congress when the section was enacted. The section does provide, however, that for all laws administered by the Veterans Administration, an individual shall be deemed to be in receipt of any monetary benefits payable by the Veterans Administration as of the effective date of the award of benefits even though payment may not begin until the first day of the following month. For the month of the service member's death, therefore, the beneficiary is "deemed to be in receipt" of a DIC award for Veterans Administration compensation purposes, although no DIC payment can actually be made for that month.

Facts

Master Sergeant William B. Farmer, USAF, after becoming eligible to retire, elected SBP coverage for his spouse in November 1972. Deductions from his retired pay were made accordingly. After Sergeant Farmer died December 23, 1982, his spouse was entitled to a monthly SBP annuity of \$344.06, and a monthly DIC payment of \$552. While under 10 U.S.C. § 1450(a) the SBP annuity was effective December 24, 1982, the DIC payment, because of 38 U.S.C. § 3011, could not begin until January 1, 1983. This higher DIC amount terminates eligibility to any SBP monthly annuity after that date.

Mrs. Farmer received \$80.28 in SBP annuity for the period December 24-31, 1982. Effective January 1, 1983, the Air Force discontinued SBP annuity payments and refunded her husband's total SBP contributions.

Laws

The pertinent provisions of law requiring reduction of SBP annuities by the amount of the DIC entitlement and resulting refund of SBP contributions are 10 U.S.C. § 1450(c) and (e) which provide in part:

"(c) If, upon the death of a person to whom section 1448 of this title applies, the widow or widower of that person is also entitled to compensation under section 411(a) of title 38, the widow or widower may be paid an annuity under this section, but only in the amount that the annuity otherwise payable under this section would exceed that compensation.

* * * * *

"(e) If no annuity under this section is payable because of subsection (c), any amounts deducted from the retired or retainer pay of the deceased under section 1452 of this title shall be refunded to the widow or widower. If, because of subsection (c), the annuity payable is less than the amount established under section 1451 of this title, the annuity payable shall be recalculated under that section. The amount of the reduction in the retired or retainer pay required to provide that recalculated annuity shall be computed under section 1452 of this title, and the difference between the amount deducted prior to the computation of that recalculated annuity and the amount that would have been deducted on the basis of that recalculated annuity shall be refunded to the widow or widower."

Pertinent provisions of the newly added 38 U.S.C. § 3011 governing commencement of DIC payments are:

"(a) Notwithstanding section 3010 of this title or any other provision of law and except as provided in subsection (c) of this section, payment of monetary benefits based on an award or an increased award of compensation, dependency and indemnity compensation, or pension may not be made to an individual for any period before the first day of the calendar month following the month in which the award or increased award became

effective as provided under section 3010 of this title or such other provision of law.

"(b)(1) Except as provided in paragraph (2) of this subsection, during the period between the effective date of an award or increased award as provided under section 3010 of this title or other provision of law and the commencement of the period of payment based on such award as provided under subsection (a) of this section, an individual entitled to receive monetary benefits shall be deemed to be in receipt of such benefits for the purpose of all laws administered by the Veterans' Administration."

Issues

1. Since 38 U.S.C. § 3011 requires that DIC payments begin in the month following a service member's death, is the beneficiary considered entitled, for purposes of 10 U.S.C. § 1450(c) and (e), to compensation upon the member's death?
2. If so, should the SBP annuity be paid in the amount that exceeds DIC entitlement, or, should the SBP annuity in the month of the member's death be paid in the amount that exceeds actual DIC payment for that month?
3. How does the delay in paying DIC affect the SBP cost refund required by 10 U.S.C. § 1450(e) as explained in 56 Comp. Gen. 482 (1977)?

We hold that, although DIC payment cannot be made for the month of the member's death, the beneficiary is deemed to be entitled to the full amount of DIC for SBP computation purposes. In this case, therefore, it was improper to pay any SBP annuity for the month of December, although a full refund of SBP contributions to the beneficiary was proper.

Prior to the addition of 38 U.S.C. § 3011, the effective date of a DIC award was generally the first day of the month in which the death occurred. See 38 U.S.C. § 3010(d). The legislative history of the new section 3011 shows that it was added to reduce costs to the Government by

delaying the effective date of the first payment to the first of the following month.^{3/}

We find no indication in the legislative history that the impact of 38 U.S.C. § 3011 on the administration of SBP payments was considered by Congress. However, Congress did consider the impact of section 3011 to other Veterans Administration benefits programs. It dealt with this by providing in section 3011(b)(1) that for the period between the effective date of the award of the benefit and the commencement of payment, the individual entitled to the benefit shall be considered in receipt of the benefit for all laws administered by the Veterans Administration. Thus, for Veterans Administration purposes, a beneficiary is still considered entitled to DIC in the month of a member's death, despite the prohibition on actual DIC payment until the first of the following month. We see no reason why section 3011 should be interpreted to fix the DIC entitlement date under 10 U.S.C. § 1450(c) and (e) differently than that for Veterans Administration purposes.

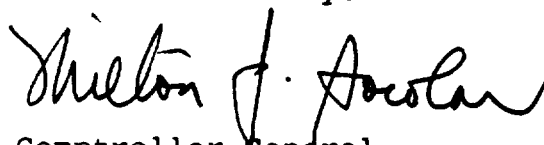
This view is supported by the consideration that if 38 U.S.C. § 3011 were construed to mean that there was no DIC entitlement at the time of death, 10 U.S.C. § 1450(c) and (e) would be inapplicable, and the full SBP annuity would be paid for the first month or part of a month. As explained in 56 Comp. Gen. 482, 486-487, when a beneficiary is not entitled to DIC at the time of the service member's death, SBP annuity payments must begin, and no refunds of contributions can then be made. See also Mary J. Hogsed, 61 Comp. Gen. 287 (1982).

This would mean that in a case such as Sergeant Farmer's, if DIC entitlement began the month after death, the SBP annuity would have to be paid for the month of death but further SBP annuities would be superseded by the larger DIC payment. Since the beneficiary could then not qualify under the refund provisions of 10 U.S.C. § 1450(e), Sergeant Farmer's SBP contributions could not be refunded to Mrs. Farmer. Such a result would be clearly at odds with congressional intent as manifested in both the establishment of the SBP program and the passage of 38 U.S.C. § 3011.

^{3/} See Sen. Rep. No. 97-504, 97th Cong., 2d Sess. 243-244, and H.R. Rep. 97-759, 97th Cong., 2d Sess. 82, both reprinted in 1982 in U.S. Code Cong. and Admin. News 1820-21, 1877.

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Accordingly, we find that while DIC cannot actually be paid for the month of the service member's death, for purposes of SBP recomputation pursuant to 10 U.S.C. § 1450(c) and refund of contributions pursuant to 10 U.S.C. § 1450(e), the spouse should be considered to be "entitled to" DIC. This means, then, that no change should be made in the present method of calculating SBP payments and refunds. And, in Sergeant Farmer's case, since his spouse is considered as entitled to DIC in December 1982, the partial SBP payment should not have been made to her since the DIC entitlement was greater than the SBP annuity.



Acting Comptroller General
of the United States