



The Comptroller General
of the United States

Washington, D.C. 20548

Mequie

Decision

Matter of: Elizabeth Collins
File: B-222190
Date: February 17, 1987

DIGEST

Over a 2-year period the widow of a deceased Army sergeant erroneously received recurring monthly payments of military retired pay, amounting to \$24,403.60, which should have ceased at the time of her husband's death. After Army officials learned of his death, they stopped the retired pay and calculated the Survivor Benefit Plan annuity payable to the widow. The widow was entitled to a survivor's annuity in an amount equal to 55 percent of her husband's military retired pay. Although the annuity entitlement is retroactive to the date of the retired soldier's death, the widow may not be allowed additional payment for the period for which she received erroneous retired pay. Instead, the amount of her retroactive survivor's annuity entitlement should be applied toward the satisfaction of the debt owed by her as the result of her improper receipt of her husband's military retired pay, and the remainder of the debt should be either collected or waived in accordance with applicable law and regulation.

DECISION

This action is in response to a request for an advance decision from the Army regarding the collection of erroneous payments of military retired pay received by Mrs. Elizabeth Collins after the death of her husband, Sergeant First Class Freddie Collins.^{1/} It is our view that the military retired pay erroneously paid to Mrs. Collins may be collected through setoff against the military Survivor Benefit Plan annuity payable to her following Sergeant Collins' death.

^{1/} The request was made by Mr. P. B. Wolfsheimer, Special Disbursing Agent, Retired Pay Operations, Army Finance and Accounting Center. The request was forwarded here by the Office of the Comptroller of the Army after it was approved by the Department of Defense Military Pay and Allowance Committee and assigned submission number DO-A-1459.

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BACKGROUND

Sergeant First Class Freddie Collins, USA, retired from the Army on November 1, 1968. He subsequently elected to provide Survivor Benefit Plan coverage for Mrs. Collins. Under this election Mrs. Collins became eligible for a survivor's annuity payable at the rate of 55 percent of the amount of Sergeant Collins' retired pay. Sergeant Collins died on December 18, 1982, but Mrs. Collins did not notify the Army of his death and continued to countersign and deposit the retired pay checks.

Sergeant Collins' death was discovered by a special inter-agency systems match of retired pay accounts, and the Army received a copy of his death certificate on December 12, 1984, in reply to a request for verification of his death. During the period between December 31, 1982, and November 30, 1984, Mrs. Collins erroneously received and negotiated checks for retired pay totaling \$24,403.60.

Mrs. Collins then applied for a Survivor Benefit Plan annuity. The service has established her entitlement from 1982. The question presented by the Army is whether the amount of the annuity entitlement under the Survivor Benefit Plan from December 1982 through November 1984 may be applied toward the satisfaction of the debt owed by Mrs. Collins for the same period. The entitlement of \$12,498.42 would be applied against the total debt of \$24,403.60, leaving a remaining debt of \$11,905.18. If this is found to be proper, the Army further questions whether the remainder of the debt, \$11,905.18, may also be collected through setoff against the continuing annuity payments accruing to Mrs. Collins' credit. If so, the Army also questions what procedures should be used, and whether interest charges may be waived.

The disbursing agent also notes that 10 U.S.C. § 1450(i) prohibits assignment of the Survivor Benefit Annuity and prevents execution, attachment, garnishment or other legal process against the annuity. He asks whether the provision would affect an administrative offset.

ANALYSIS AND CONCLUSION

We have held that in cases where a spouse receives overpayments of retired pay due to failure to stop payment of a retired service member's retired pay after his death, and the spouse is entitled to retroactive payment of a military survivor's annuity in a lesser amount for the same period, the amount of the annuity for the same period must be applied

toward the satisfaction of the debt.^{2/} The retired pay received is essentially treated in part as payment to the beneficiary of the Survivor Benefit Plan annuity properly due, and only the excess is treated as an erroneous overpayment. Hence, in the present case, the amount of Mrs. Collins' Survivor Benefit Plan annuity entitlement for the period from December 1982 through November 1984 should be applied toward the satisfaction of the total debt owed by her.

As to the remaining balance of the debt in this case, Mrs. Collins is eligible to apply for a waiver of collection under the provisions of 10 U.S.C. § 2774.^{3/} That statute generally authorizes the waiver of claims for the collection of overpayments of military pay and allowances, if collection action "would be against equity and good conscience and not in the best interest of the United States," and there is no indication of "fraud, misrepresentation, fault, or lack of good faith" on the part of the person applying for waiver.

Otherwise, collection procedures by administrative offset are found in 31 U.S.C. § 3716 and 4 C.F.R. Part 102, Standards for the Administrative Collection of Claims. Section 102.3 provides that debts may be collected through administrative offset at the discretion of creditor agencies, subject to certain procedural requirements. Thus, in this case if the remainder of the debt is not waived, it is under these procedures that collection by administrative offset against Mrs. Collins' Survivor Benefit Plan annuity would be pursued.

With regard to the issue of administrative offset against the annuity, it is our view that 10 U.S.C. § 1450(i) does not bar administrative offset. That provision provides in pertinent part:

"An annuity under this section is not * * * subject to execution levy, attachment or other legal process.

Each of these actions has a specific, legal meaning. Execution is defined as:

"* * * A writ of process for the enforcement of a judgment. A remedy afforded by law for the

^{2/} See Maureen S. Fearn, B-221466, July 3, 1986, 65 Comp. Gen. ____.

^{3/} See Maureen S. Fearn, 65 Comp. Gen. ____, supra.

enforcement of a judgment, which is not an action but is included in the phrase 'process in an action.'"4/

A levy is:

"* * * An imposition whether of a tax, a burden upon property as authorized by a writ, or compulsory military service. * * * A levy of attachment:--the seizure or taking of possession or custody of property under a writ of attachment by sheriff or other authorized officer. * * * A levy of execution:--an absolute appropriation of property of a judgment debtor to the payment of the judgment debt * * *."5/

An attachment is a:

"* * * provisional remedy for the collection of a debt, which is incidental to an action against the debtor, proceeding by a seizure, under legal process called a writ of attachment issued in the action, of property of the debtor for the purpose of having the property available in satisfaction under execution and sale upon a judgment obtained against the debtor in the action."6/

A garnishment is defined as a:

"* * * proceeding by a creditor to obtain satisfaction of the indebtedness out of property or credits of the debtor in the possession of, or owing by, a third person; the person instituting the proceeding being generally referred to as the creditor or plaintiff, the person indebted to the creditor being called the debtor or defendant, and the person holding the property of, or who is indebted to, the defendant being called the garnishee. In effect, an action by the plaintiff against the garnishee for the use of the plaintiff, or a suit by the defendant in which the plaintiff is subrogated to the rights of the defendant * * *."7/

4/ Ballentine's Law Dictionary, 3d Edition, Bancroft-Whitney Co., San Francisco, California, 1969.

5/ Id.

6/ Id.

7/ Id.

Finally, a legal process is a:

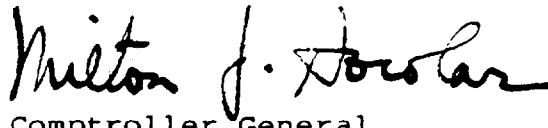
"writ, warrant, mandate or other process issuing from a court of justice, such as an attachment, execution, injunction, etc."^{8/}

In contrast, an administrative offset is "the withholding of money payable by the United States or held by the United States on behalf of the person to satisfy a debt owed the United States by that person."^{9/} The administrative offset does not involve the same judgments or actions as do these processes, nor is it similar in nature to the prohibited actions.

In addition, we note that in the analogous situation concerning civil service annuities, 5 U.S.C. § 8346(a) provides that such annuities are not "subject to execution, levy, attachment, garnishment or other legal process;" however, civil service annuities are subject to administrative offset as set out in 5 C.F.R. § 831.1801 et seq. Thus it is our view that the same language in 10 U.S.C. § 1450(i) does not prohibit administrative offset from Survivor Benefit Plan annuities.

With regard to the question of charging or waiving interest on the debt, 31 U.S.C. § 3717 requires that an agency charge interest on outstanding debts. However, § 3717(h) also provides for waiver of collection of interest pursuant to applicable waiver regulations, which are contained in 4 C.F.R. § 102.13. Under those regulations waiver of interest may be granted in certain circumstances, including those in which collection of interest "would be against equity and good conscience or not in the best interests of the United States." Waiver of interest could be considered on the basis of these standards prescribed under 4 C.F.R. § 102.13.

The questions presented are answered accordingly.

for 
Comptroller General
of the United States

^{8/} Black's Law Dictionary, 4th Edition, West Publishing Co., St. Paul, Minnesota, 1951.

^{9/} 64 Comp. Gen. 142 at 146 (1984).