135835

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sarah E. Tweedy - Survivor Benefit Plan - Annuity Reductions Based on Receipt of Veterans Administration Benefits

File: B-226888

Date: May 18, 1988

DIGEST

1. In Croteau v. United States, 823 F.2d 539 (1987), the Court of Appeals for the Federal Circuit held that the widow of two service members was entitled to a full, unreduced Survivor Benefit Plan annuity from the Army based on her second marriage, even though she was also drawing Dependency and Indemnity Compensation from the Veterans Administration on the basis of her first marriage. We will follow the court's judgment and overrule our prior contrary decision in Technical Sergeant John T. Baker, USAF (Retired) (Deceased), B-190617, Feb. 16, 1978. Individuals similarly situated to the plaintiff in the Croteau litigation are entitled to have their annuities adjusted upward retroactively, subject to the 6-year statute of limitations set out under 31 U.S.C. § 3702(b).

2. A provision of the laws governing the Survivor Benefit Plan, 10 U.S.C. § 1450(b), in certain circumstances requires a widow or widower who is eligible for more than one annuity, on the basis of more than one marriage, to elect which annuity to receive. While the provision uses the term "elect," its evident purpose is to give the individuals covered the highest annuity for which they are eligible. Hence, what is involved is not so much a matter of making an election as it is of simply determining which annuity provides the greatest benefit. There is consequently no basis for objection to the retroactive changing of such so-called elections, if that change will produce the greatest benefit for an annuitant in the retroactive recomputation of annuities necessitated by a new interpretation of the law under a court judgment.

DECISION

The Department of the Army has asked for our decision concerning the Survivor Benefit Plan entitlements of Mrs. Sarah E. Tweedy, who is the widow of two different

042183/135835

retired Army officers.1/ Her case presents the issue of whether we will follow the 1987 judgment of the United States Court of Appeals for the Federal Circuit in Croteau v. United States, 823 F.2d 539. There the Court of Appeals held that the widow of two service members was entitled to a full, unreduced Survivor Benefit Plan annuity from the Army based on her second marriage, even though she was also drawing Dependency and Indemnity Compensation from the Veterans Administration on the basis of her first marriage. We have decided to follow that judgment, and we are accordingly overruling our prior contrary decision in Technical Sergeant John T. Baker, USAF (Retired) (Deceased), B-190617, Feb. 16, 1978.

BACKGROUND

The Survivor Benefit Plan (SBP), 10 U.S.C. §§ 1447-1455, is an income maintenance program for the surviving dependents of deceased service members. Congress established the SBP program on September 21, 1972, with the enactment of Public Law 92-425, 86 Stat. 706.

A basic feature of the program which was incorporated in the legislation of 1972 is a requirement that the annuity of a surviving widow or widower be reduced in the amount of any entitlement to Dependency and Indemnity Compensation (DIC) from the Veterans Administration. See 10 U.S.C. § 1450(c). In our 1978 decision, Technical Sergeant John T. Baker, USAF (Retired) (Deceased), B-190617, supra, we concluded that this reduction was necessary in cases involving widows or widowers who had previously been married to two or more different service members, and whose DIC and SBP entitlements were not based on the same marriage. The conclusion reached in our 1978 decision was consistent with the interpretation of 10 U.S.C. § 1450(c) previously followed by the uniformed services from the time of the SBP's establishment in 1972.

In July 1985 Mrs. Gertrude M. Croteau filed suit in the United States Claims Court contesting the reduction made in her SBP annuity predicated on that longstanding

---

1/ This action is in response to a request for a decision initiated by Mr. P. B. Wolfsheimer, Special Disbursing Agent, U.S. Army Finance and Accounting Center. The request was forwarded here by the Assistant Secretary of the Army for Financial Management after it was approved by the Department of Defense Military Pay and Allowance Committee and assigned submission number DO-A-1473.

interpretation of 10 U.S.C. § 1450(c). Mrs. Croteau was the widow of a service member who had been killed in action in 1944. Several years later she married another service member, who subsequently died in 1979 after retiring from the service and electing to participate in the SBP. As the result of her second husband's death, she became entitled to an SBP annuity based on his election to participate in the SBP program, and she also became entitled to DIC payments based on her first husband's service-related death. In her lawsuit, she contended that 10 U.S.C. § 1450(c) should not be applied to reduce her survivor's annuity on account of her entitlement to DIC.

In August 1986 the Claims Court ruled against Mrs. Croteau.2/ She appealed to the Court of Appeals for the Federal Circuit, and in July 1987 the Court of Appeals reversed the Claims Court. The Court of Appeals held that Mrs. Croteau was entitled to an unreduced SBP annuity, notwithstanding the provisions of 10 U.S.C. § 1450(c) and her concurrent entitlement to DIC, since her entitlements to the survivor's annuity and to DIC were based on different marriages.3/ Petition was not filed for further review by the United States Supreme Court.

The case now presented by the Department of the Army is that of Mrs. Sarah E. Tweedy. Mrs. Tweedy is the widow of two retired Army officers.4/ Her first husband, Colonel Kenneth E. Sipes, had a service-connected disability and was also a participant in the SBP program. Following his death in 1977 she became entitled to DIC based on the disability. She also became entitled to an SBP annuity, which was payable at a reduced rate on account of her concurrent receipt of DIC. She subsequently married Colonel Walter K. Tweedy, and both her DIC payments and SBP annuity were suspended as the result of her remarriage. Colonel Tweedy was a participant in the SBP program, and when he died on July 31, 1985, she became entitled to an SBP annuity as his widow. She also became entitled to

---

2/ See Croteau v. United States, 10 Cl. Ct. 631 (1986).

3/ See Croteau v. United States, 823 F.2d 539, supra.

4/ Mrs. Tweedy is now also deceased. She died on August 23, 1986.

reinstatement of her suspended SBP annuity and DIC payments based on her first marriage and her status as Colonel Sipes' widow.

A provision of the SBP law, 10 U.S.C. § 1450(b), required that Mrs. Tweedy elect at that time whether to receive an annuity based on either her marriage to Colonel Sipes or to Colonel Tweedy, since she could not have both concurrently. She elected to have the SBP annuity based on her first marriage to Colonel Sipes reinstated because this produced the greater benefit to her under the SBP law as it was then construed.

However, under the construction placed on the SBP law in 1987 by the Court of Appeals in Croteau v. United States, 823 F.2d 539, supra, Mrs. Tweedy would have been eligible to receive DIC based on her marriage to Colonel Sipes and to elect to draw concurrently a full, unreduced SBP annuity based on her second marriage to Colonel Tweedy. The concerned Army officials have advised us that this would have been more beneficial for her than the election she actually made.5/

The Army officials therefore question whether we will follow the Court of Appeals' judgment in Croteau v. United States, 823 F.2d 539, supra, and if so, whether it would be proper to change Mrs. Tweedy's election retroactively to base her SBP annuity on her marriage to Colonel Tweedy rather than on her marriage to Colonel Sipes. In addition, the Army officials question how the 6-year statute of limitations of 31 U.S.C. § 3702(b) should be applied in cases of this nature.

ANALYSIS AND CONCLUSION

The Judgment in Croteau v. United States

We have traditionally accorded great weight to the judicial opinions of the federal courts in the administrative settlement of claims and adjustment of accounts.6/ With respect to the Court of Appeals' judgment in Croteau v. United

---

5/ In that regard we note that the SBP costs paid by Colonel Tweedy were nonrefundable regardless of the election made. See Rear Admiral Carroll B. Jones, USN, Retired, B-213101, Feb. 14, 1984.

6/ See, e.g., 49 Comp. Gen. 618 (1970); but compare 50 Comp. Gen. 480, 486 (1971).

States, 823 F.2d 539, supra, it appears that the issues were fully considered by the court, that further litigation would result in no material change in its interpretation of the law, and that there is no likelihood of review of the issue by the Supreme Court. Hence, we have decided to follow the Court of Appeals' judgment in the Croteau case, and we now overrule our prior contrary decision in Technical Sergeant John T. Baker, USAF (Retired) (Deceased), B-190617, supra.

Statute of Limitations

The Court of Appeals' judgment in Croteau v. United States, 823 F.2d 539, supra, constitutes an original construction of the law by that court which we have now decided to follow. As such, the ruling should be applied retroactively as well as prospectively for other SBP annuitants similarly situated, subject to the 6-year statute of limitations prescribed under 31 U.S.C. § 3702(b).7/

As to the date to be used in applying the statute of limitations, 31 U.S.C. § 3702(b) provides that claims against the government which are within the settlement authority of our Office must contain the signature of the claimant or an authorized representative, and must be received by the Comptroller General within 6 years after the claim accrues.8/ In that respect, we have held that the date of a court judgment upon which an administrative claim may be based has no effect on the running of the statute of limitations when the claimant was not a party to the litigation.9/ Hence, our conclusion is that additional retroactive annuity payments due to SBP annuitants on the basis of the Croteau judgment, except for Mrs. Croteau herself, may be allowed only for the 6 years prior to the date of the adjustment of their accounts at the appropriate military or naval finance center, in the absence of their submission of signed claims to our Office in the meantime.10/

7/ Compare 53 Comp. Gen. 94, 97 (1973).

8/ See, e.g., James W. Gregory, B-201936, Apr. 21, 1981.

9/ Llewellyn Lieber, 57 Comp. Gen. 856 (1978).

10/ See 61 Comp. Gen. 295, 296 (1982).

Retroactive Change in Election

Mrs. Tweedy's eligibility for retroactive SBP annuity payments based on the Croteau judgment is necessarily limited to periods following the death of her second husband on July 31, 1985. It thus appears that no part of her claim is barred by the 6-year statute of limitations prescribed under 31 U.S.C. § 3702(b).

As indicated, however, in 1985 Mrs. Tweedy elected under 10 U.S.C. § 1450(b) to receive an SBP annuity predicated on her marriage to her first husband, Colonel Sipes. Back payment of additional annuity monies to her as the result of the Croteau judgment will require that a retroactive change in that election be made to have the annuity instead be paid on the basis of her second marriage to Colonel Tweedy. Army officials question whether that retroactive change in her election is permissible. The question arises because under the laws and regulations governing the SBP, elections concerning participation in the program, and concerning the types and amounts of annuity coverage to be provided, etc., generally must be made personally and voluntarily, and those elections are subject to change only prospectively, and then only when it is determined that a change is necessary to correct an administrative error.11/

Our view is that the general rules governing SBP elections do not apply to the choice of annuities brought into question here.

Subsection 1450(b) of title 10, United States Code, requires a widow or widower who is eligible for more than one SBP annuity on the basis of more than one marriage in the circumstances there described, to elect which to receive. However, while the provision uses the term "elect," its evident purpose is to give the individuals covered the highest SBP annuity for which they are eligible under the law. Hence, what is involved is not so much a matter of making an election as it is of determining which annuity provides the greatest monetary benefit. Thus viewed, there would appear to be no sound reason to preclude the retroactive changing of the so-called elections made in cases of this nature, if such change will produce the greatest monetary benefit for an SBP annuitant under the

---

11/ See 10 U.S.C. § 1454; Department of Defense Directive 1332.27, § 705; 55 Comp. Gen. 158 (1975).

rationale of the court's opinion in Croteau v. United States, 823 F.2d 539, supra.12/

Accordingly, in the present case we conclude that the SBP annuity entitlements of Mrs. Sarah E. Tweedy should be recomputed based on the full, unreduced annuity payable to her as Colonel Tweedy's widow for the period from and after the date of his death on July 31, 1985.

Milton J. Socolar

Acting Comptroller General
of the United States

12/ Compare 30 Comp. Gen. 40, 48 (1950).