

VICKERS



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Chief Warrant Officer Glen N. Burbage, USCG
(Retired)
File: B-243829
Date: December 13, 1991

DIGESTS

1. Where there is no evidence that a military member died before a state court decree presumptively declaring his date of death to be 7 years from the date of his unexplained disappearance, claim of surviving spouse for undisbursed retired pay up to the court determined date of death is allowed. V 43 Comp. Gen. 503 (1964) and 58 Comp. Gen. 131 (1978) are modified accordingly.
2. Spouses of military members who retired before 1972, when the Survivor Benefit Plan went into effect, were not entitled to notice that member-spouses had elected not to participate in the plan.

DECISION

This action is in response to a request for decision from a United States Coast Guard certifying officer relating to the payment of the retired pay in the case of Chief Warrant Officer Glen N. Burbage, USCG (Retired), who has been reported missing since March 23, 1981. We find that the retired pay up to the date CWO Burbage was declared dead should be disbursed.

CWO Burbage retired on March 1, 1960. He took an airline flight on March 23, 1981 from Charleston, South Carolina to Atlantic City, New Jersey and picked up his luggage at the airport. He has not been seen or heard from since that date. On January 4, 1982, his wife, Doris H. Burbage, notified the Coast Guard that her husband was missing and at that time the member's retired pay was suspended. On July 31, 1990, the Charleston County Probate Court declared CWO Burbage dead and established the date of death as March 23, 1988, 7 years from the date of his disappearance.

Mrs. Burbage has made claim for her husband's withheld retired pay. The Coast Guard has computed this amount to be \$75,529.16 (\$81,984.10 for the period of March 1, 1981

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through March 23, 1988, less \$6,454.94 disbursed before notification that the member was missing).

The retired pay due a retired member of the armed services accrues only during his lifetime. When a retired member is missing and there is no information concerning him, his retired pay must be suspended from the date that he was last known to be alive. 62 Comp. Gen. 211 (1983). Therefore, the fact of the member's death and the date of death must be established before payment may be made on such claim.

Counsel for Mrs. Burbage argues that since the court order established March 23, 1988, as the date of death of CWO Burbage, Mrs. Burbage is entitled to the suspended 7 years of retired pay, citing Acosta v. United States, 162 Ct. Cl. 631 (1963). In Acosta, the Court of Claims stated that in pay claims against the government the absence or insufficiency of proof of death at an earlier date establishes a presumption that death occurred at the end of a 7-year period of continued and unexplained absence. In reaching that conclusion, the court pointed out the need for consistency in adjudicating the rights of survivors of missing persons and noted in that regard the statutory presumption of continued life applicable to claims for veterans benefits.

Our Office in the past has declined to apply the Acosta presumption because it was our opinion that the decision in fact did not establish a general rule but instead required each case to be decided on the basis of the particular facts involved. As a result, we have generally concluded that claims containing only a judicial determination of death are too doubtful to be settled by our Office. Concerning the precedential value of Acosta, we stated as follows in 43 Comp. Gen. 503, 504 (1964):

" . . . it is clear from the opinion that in the court's view each case must be decided on the particular facts involved. We do not think that the adoption of a general rule, in the settlement of future claims for retired pay involving missing retired military members judicially declared dead, . . . would be warranted."

Also see 58 Comp. Gen. 131 (1978).

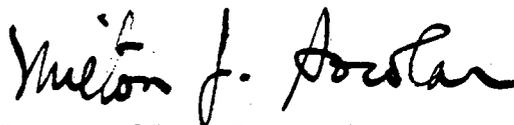
However, more recent cases have concluded that Acosta did establish a rebuttable presumption of continued life in the absence of evidence to the contrary where missing persons

have been judicially declared dead after a specified period of time. See, e.g., MacMurray v. United States, 15 Cl. Ct. 323 (1988) and Midgett v. United States, 603 F.2d 835 (Cl. Ct. 1979). In the MacMurray case, the Claims Court relied on Acosta in order to conclude that a missing SBP annuitant lived for 7 years after the date of her disappearance where a state court had applied a state presumption of death at the end of that time. Midgett cited Acosta as precedent for the presumption of continued life in the absence of contrary evidence.

In view of the clear position of the Court concerning Acosta's precedential effect, as indicated by later cases, we have changed our view that claims based on a presumed date of death must be considered by this Office as doubtful. Accordingly, in claims involving missing persons, where there is no credible evidence to the contrary, we will hereafter assume that death occurred on the presumed date. Our holdings in 43 Comp. Gen. 503, supra, and 58 Comp. Gen. 131, supra, are modified accordingly.

We therefore find Mrs. Burbage to be entitled to the 7 years of retired pay due her husband, assuming she is the legally appointed representative of his estate.

Mrs. Burbage's counsel requests that she receive an annuity under the Survivor Benefit Plan (10 U.S.C. §§ 1447-1455) because she never received notice or counseling when he chose not to participate in the plan. CWO Burbage retired in 1960 before the SBP went into effect in 1972. Persons who retired prior to 1972 were not automatically participating in the plan as were those who retired after 1972 and there was no requirement to give notice to spouses of members retired prior to 1972 who did not wish to participate in the SBP. File v. United States, 17 Cl. Ct. 823 (1989). Accordingly, Mrs. Burbage is not entitled to any benefits under the SBP.

for 
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