

DECISION

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

FILE: B-184874

DATE: SEP 9 1976

MATTER OF:

DIGEST:

Survivor Benefit Plan - DOD Military
Pay and Allowance Committee Action
No. 518

1. Base amounts designated under 10 U. S. C. 1447(2)(B) (Supp. II, 1972) upon which Survivor Benefit Plan annuities are computed when member elects less than maximum coverage are not subject to adjustment under 10 U. S. C. 1401a(d) or (e) (1970) which apply modified cost-of-living adjustments to retired pay computation at time of retirement.
2. All base amounts designated under 10 U. S. C. 1447(2) (Supp. II, 1972) upon which Survivor Benefit Plan annuities are based are subject to cost-of-living adjustments under 10 U. S. C. 1401a(b) (1970).
3. Amounts due members or beneficiaries for over reduction of retired pay or under payment of annuities due to computation of Survivor Benefit Plan base amounts under 10 U. S. C. 1447(2) (Supp. II, 1972) not in accordance with the rules stated in this decision should be paid to persons entitled thereto, and amounts due the United States are subject to collection or waiver under 10 U. S. C. 1453 or 2774 (Supp. II, 1972), as applicable.

This action is in response to a letter dated September 2, 1975, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision on several questions relating to the proper method of applying cost-of-living increases pursuant to 10 U. S. C. 1401a (1970) to the base amounts prescribed by 10 U. S. C. 1447(2) (Supp. II, 1972) upon which Survivor Benefit Plan (SBP) annuities are computed. The questions presented are contained in Department of Defense Military Pay and Allowance Committee Action No. 518, enclosed with the letter.

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Section 1447(2) of title 10 provides as follows:

"(2) 'Base amount' means--

"(A) the amount of monthly retired or
retainer pay to which a person--

"(i) was entitled when he became
eligible for that pay; or

"(ii) later became entitled by being
advanced on the retired list, performing
active duty, or being transferred from
the temporary disability retired list to
the permanent disability retired list; or

"(B) any amount less than that described
by clause (A) designated by that person on or
before the first day for which he became eligible
for retired or retainer pay, but not less than
\$300;

as increased from time to time under section 1401a
of this title. (Emphasis added.)

The Committee Action indicates that the provision in section 1447(2) requiring increases under section 1401a could be construed to mean that the base amount designated by a member (under clause (B)) is required to be adjusted on the date of his retirement by the increases applied under 10 U. S. C. 1401a(d) or (e), whichever is applicable, which are used in determining the member's initial retired pay. On the other hand, it is indicated, the provision may be construed to mean that such adjustments are not required in the designated base amounts, but rather it only requires that the designated base amounts be adjusted subsequent to the date of retirement by the increases applied to retired and retainer pay under 10 U. S. C. 1401a(b), which provides for increases in retired pay from time to time based on increases in the Consumer Price Index.

In this regard the Committee Action presents the following questions:

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"1. Do the provisions of section 1447(2) of title 10, United States Code, require the base amount designated by a member who elects to participate in the Survivor Benefit Plan (SBP) to be adjusted upon the date of retirement by the same cost-of-living (COL) increases applied under subsection 1401a(d) or (e) of title 10, United States Code, whichever is applicable, in determining the member's initial retired or retainer pay?

"2. If the answer to question 1 is in the affirmative, do the provisions of section 1447(2) require all designated base amounts to be adjusted by the same COL increases applied under subsection 1401a(d) or (e), whichever is applicable, in determining the member's initial retired or retainer pay, or do they require only those designated base amounts which equal the member's retired or retainer pay before the COL increases are applied to be so adjusted?

"3. If the answer to question 1 is in the negative, do the provisions of section 1447(2) require all designated base amounts to be adjusted by the same COL increases applied to retired and retainer pay under subsection 1401a(b) of title 10, United States Code, or do they require only those designated base amounts which equal the member's retired or retainer pay to be so adjusted?

"4. If the answer to question 1 is in the affirmative and the answer to question 2 is that all designated base amounts are to be adjusted by the same COL increases applied in determining the member's initial retired or retainer pay under subsection 1401a(d) or (e), how should the amount of the adjustments be calculated?

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"5. May any adjustments of base amounts, amounts deducted from retired or retainer pay, or annuity amounts which may be necessitated by the answer to any of the foregoing questions be made prospectively rather than retroactively?"

Concerning-question 1, the Committee Action indicates that a majority of the Military Pay and Allowance Committee favors the view that the provisions of section 1447(a) do not require a designated base amount to be adjusted upon the date of retirement by the same increases applied under 10 U. S. C. 1401a(d) or (e) in determining the member's initial retired or retainer pay. In support of that view the Committee Action states in part:

"* * * a review of section 1447(2) in conjunction with its legislative history indicates that Congress intended that the designated base amounts be adjusted only by the COL increases applicable to retired and retainer pay under subsection 1401a(b) subsequent to the members' date of retirement. In its report the Senate Armed Services Committee defined the term 'base amount' to mean 'the full amount of retired or retainer pay that an individual receives at retirement unless he designated a smaller amount * * *' (Emphasis added) S. Rep. No. 92-1089, 92nd Congress, 2nd Session 49 (September 6, 1972). In addition, the Committee stated that 'Consumer Price Index (CPI) adjustments will be made to the base amount whenever and in the same manner that retired pay is increased (section 1401a of title 10).' Ibid."

On the other hand, in support of the view that the provisions of 10 U. S. C. 1401a(d) or (e) are to be applied to designated base amounts under clause (B), the Committee Action indicates in part that it may be argued--

"* * * that the language of section 1447(2) does not restrict the adjustment of designated base amounts to COL increases authorized by subsection 1401a(b) subsequent to the member's date of retirement. Consequently, the increases contemplated by Congress when it enacted

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section 1447(2) may be said to include all of those COL increases authorized by the various subsections of section 1401a. Since it would appear that subsections 1401a(d) and (e) authorize COL increase adjustments in the retired or retainer pay of certain members on the date of their retirement, it may be argued that the base amounts designated by such members should also be adjusted by the same COL increases on the date of their retirement. To do otherwise, it is claimed, would be to create an unintended inequity in the SBP annuity which would be payable to the survivors of members who are similarly situated. For example, an enlisted member in the grade of E-9 with 20 years of service retired on February 1, 1973, and selected a base amount of \$400. Another enlisted member with the same grade and service retired on August 1, 1973, and also selected a base amount of \$400. Even though both members are receiving the same gross monthly retired pay because of section 1401a, the SBP annuity which would be payable to the widow of the first member is greater than that which would be payable to the widow of the second member. At the time of the second member's retirement, the first member's base amount would have already been adjusted to reflect the COL increase (3.6%) authorized by subsection 1401a(c) on July 1, 1973."

It is also indicated that one service currently applies subsection 1401a(d) or (e) to clause (B) designated amounts, while the other services do not.

Section 1447(2) provides for two basic types of initial base amounts. The first type under clause (A) is the entire retired or retainer pay to which the member is entitled, the computation of which is based on the statutes applicable to computation of retired or retainer pay and would include the application of 10 U. S. C. 1401a(d) or (e) to arrive at the amount of such pay. The other type, under clause (B), is any amount designated by the member

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which is less than full retired or retainer pay but not less than \$300. It is to those "base amounts" then, that the provision requiring the increases "from time to time under section 1401a" is to be applied. Thus, while it would be necessary to apply 10 U. S. C. 1401a(d) or (e) in computing the retired or retainer pay the member is entitled to receive (which amount is the base amount under clause (A)) that would not be the case in determining the base amount under clause (B) since that is an amount designated by the member. It is our view that the initial base amount under clause (B) is the actual amount designated by the member and not that amount as increased under 10 U. S. C. 1401a(d) or (e). We believe the language of the law and its legislative history support that view. While, as the example given in Committee Action shows, there may be some differences in base amounts (and in premiums deducted from retired pay) between members who retire at different times although they designated the same base amount, we do not view that fact as sufficiently persuasive to permit us to construe the law in a different manner. Accordingly, we agree with the majority of the Committee and question 1 is, therefore, answered in the negative.

In view of the answer to question 1, questions 2 and 4 require no answer.

Concerning question 3, the Committee Action indicates that the majority of the Committee is of the opinion that all minimum base amounts (\$300) and base amounts greater than the minimum but less than full initial retired or retainer pay are required to be adjusted for cost-of-living increases in the same manner and at the same time as the maximum base amounts are adjusted under 10 U. S. C. 1401a(b). It is indicated that all of the services currently make such adjustments. However, it is pointed out that such practice may be questionable for two reasons. First, a strict interpretation of the words "as increased from time to time under section 1401a of this title" in section 1447(2) would preclude its application to base amounts which are less than full retired or retainer pay since increases "under section 1401a" apply to retired and retainer pay and not to base amounts. Second, it is indicated that the legislative history of section 1447(2) provides some indication that Congress may have intended that designated base amounts which are less than full retired or retainer pay were not to be adjusted to reflect section 1401a increases. In this regard the following statement taken from the Senate Armed Services Committee Report on the SBP is cited in the submission:

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"A minimum base amount of \$300 is established for persons whose retired or retainer pay is in excess of that amount. Such a minimum participation level is desirable from an administrative point of view * * * [A] \$300 base amount, which produces a monthly benefit of \$165 at a monthly cost of \$7.50 is considered a reasonable minimum." S. Rep. No. 92-1089, 92d Congress, 2nd Session 65 (September 6, 1972)."

In addition it is noted that the Armed Services Committee Report at page 50, indicated that a member would not have "to participate beyond the minimum cost of the Plan."

While those arguments are not without merit, clearly the language of section 1447(2) requiring application of section 1401a increases applies to the entire section 1447(2). If it had been the congressional intent that such increases be only applied to maximum base amounts under clause (A) it is our view that a different arrangement of words would have been used. Further, it is consistent with the legislative history of this provision as we view it to hold that base amounts even though less than the full retired pay entitlement are subject to adjustment based upon cost-of-living increases under 1401a. Accordingly, in answer to question 3 all base amounts, including those established under 1447(2)(B), are subject to cost-of-living adjustments under section 1401a(b).

Concerning question 5, it is not entirely clear as to how adjustments which may be required by this decision could be made on a prospective basis only. It would appear that any amounts due as a result of this decision as additional annuities or as reduced reductions in retired pay (premiums) should be computed and paid to the persons entitled thereto. As to amounts due the United States due to overpayments of SBP annuities or under reductions in retired or retainer pay, such amounts would be subject to collection or consideration for waiver under 10 U. S. C. 1453 and 2774 (Supp. II, 1972), respectively. Question 5 is answered accordingly.

R. F. KELLER

Acting Comptroller General
of the United States