

00936

J. Dean Mosher
Mil. Pers.

DECISION



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

FILE: B-186504

DATE: April 6, 1977

MATTER OF: Department of Defense Military Pay
and Allowance Committee Action No. 524

- DIGEST:**
1. Where widow's Survivor Benefit Plan (SBP) annuity is reduced pursuant to 10 U. S. C. 1450(c), by the award of Dependency and Indemnity Compensation (DIC) the computation of cost of the reduced annuity in order to determine amount of any refund due the widow pursuant to 10 U. S. C. 1450(e) is to be done on a monthly basis and shall include all cost-of-living increases in retired pay and all increases in DIC rates from the date of member's retirement until the date of his death.
 2. Where a surviving spouse receives the full amount of selected SBP annuity for any period because an award of DIC could not be made retroactive to the date of death, since recalculation of SBP annuity pursuant to 10 U. S. C. 1450(c) and (e) is permitted only when annuity is reduced by DIC award effective "upon the death" of the retiree, no refund is due.

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting a decision on several questions concerning the correct method of recalculating the cost of a Survivor Benefit Plan (SBP) annuity in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 524, enclosed with the letter.

The first question is:

"When a Survivor Benefit Plan (SBP) annuity is reduced by an award of Dependency and Indemnity Compensation (DIC) and a partial cost refund is due the widow or widower, what is the correct method

B-186504

of recalculating the cost of the reduced annuity so as to determine the amount of the refund payable to the widow or widower under 10 U. S. C. 1450(e)?"

The discussion in the Committee Action points out that in situations where the DIC award exceeds the elected SBP annuity, no SBP annuity is paid and the entire amount deducted from retired or retiree pay is refunded. The problem arises only when the DIC awarded is less than the SBP annuity and a partial cost refund is required. It is indicated that in those cases the services have not been uniform in their interpretation of the recalculation provisions of 10 U. S. C. 1450(e) and as a consequence, have used three different methods of recomputing the cost of the reduced annuity in order to determine the amount of the refund.

In all three methods, the services apparently agree that the amount of the reduced annuity due for the month in which the member died is determined by subtracting the amount of the DIC award from the full SBP annuity otherwise payable. This establishes both the adjusted base amount required to produce the reduced SBP payment and by applying the charge formula contained in 10 U. S. C. 1452(a), the actual cost of such coverage for that month. According to the description used in the Committee Action, the variance among the services relates to the method of recalculating the costs of reduced coverage for the period prior to the month in which the member died.

In the first method, only the prior cost-of-living (COL) percentages which would be used to establish the full SBP annuity are applied to the before-mentioned reduced base amount during the period the retiree participated in the plan in order to determine what the cost of coverage would be for any one month under that COL level. These various representative monthly costs are then multiplied by the number of months that those COL percentage increases were in effect and the resulting amounts are then added to produce the total recalculated cost of reduced coverage.

In the second method, both the prior COL percentages and changes in DIC rates are applied to the reduced base amount during the period the retiree participated in the plan. As a result, for each change in the COL percentages and DIC rates, a new recalculated monthly cost is determined. As before, these different recalculated monthly costs are then multiplied by the number of months they were in effect and when added, produce the total recalculated cost of coverage.

B-186504

In the third method, neither the prior COL percentages or changes in DIC rates are considered. Only the recalculated monthly cost for the reduced base amount as of the date of the retiree's death is used for this purpose. Under this method, that recalculated cost is simply multiplied by the number of months the retiree participated in the plan to produce the total recalculated cost.

The basic provisions governing SBP cost assessments are contained in section 1452 of title 10, United States Code, subsection (a) of which provides in part:

"(a) * * * the retired or retainer pay of a person to whom section 1448 of this title applies * * * shall be reduced each month by an amount equal to 2-1/2 percent of the first \$300 of the base amount plus 10 percent of the remainder of the base amount. * * *"

The provisions authorizing recalculation of cost assessments when an annuity reduced by a DIC award is payable, is contained in section 1450 of the same title and provides in pertinent 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, because of subsection (c), the annuity payable is less than the amount established under section 1451 of the 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

B-186504

on the basis of that recalculated annuity shall be refunded to the widow or widower."

In House Report No. 92-481, Committee on Armed Services, House of Representatives, to accompany H.R. 10670, at page 13, analyzing coverage for service-connected retiree deaths, it is stated:

"* * * If the DIC exceeds the amount of annuity under the plan and, therefore, no annuity is payable, the full amount that has been deducted from the person's retired pay because of participation in the bill's program would be refunded to the widow or widower. When part of the annuity is payable, the person's retired or retiree pay deductions will be recalculated to determine the amount that would have been necessary to provide that level of benefit from the survivor-annuity program; and the amount by which the retired pay deductions had exceeded this recalculated amount would be refunded to the widow or widower."

In this connection, on page 26 of the same report, the early evolution of congressional thinking regarding the provisions which eventually became 10 U.S.C. 1450(c) and (e) was stated:

"* * * The original language of the bill had provided that when the retiree died of service-connected causes and the surviving spouse or dependent child is thus entitled to DIC, the survivor could elect to receive either the DIC or the annuity under the bill; and if DIC was elected, a refund would be made of the retired pay deductions under the bill's program. The bill had provided that an annuity under the plan could not be paid if DIC was chosen. The Defense Department suggested a modification which provides for automatically paying the DIC to the survivor and, in cases where the annuity under the bill's plan would exceed DIC, to provide a supplemental payment from the Department of Defense to make up the difference. The survivor will receive a refund of any portion of the retired pay deduction which exceeds the

B-188504

percentage of total annuity that is based on military retired pay. The survivor would be spared the necessity of making a choice and thus situations would be avoided where a survivor might unknowingly choose the less beneficial plan. * * *" (Emphasis added.)

Clearly under the provisions of 10 U. S. C. 1452(a), supra, the basic reduction in retired pay to be charged a member to provide him with his elected SBP coverage is required to be calculated and charged to reflect all COL increases in the member's retired pay during his retirement period. See 55 Comp. Gen. 1432 (1976). It would seem that any recalculation of such changes "under section 1452" as required by section 1450(e) should also be on a monthly basis taking into account the COL changes which were applicable. It may also be recognized that DIC payments have been increased periodically changing the potential SBP benefits which would be payable to survivors who are entitled to DIC. These changes should also be used in recalculating the cost of SBP protection to survivors entitled to DIC.

We have reviewed the three alternatives proposed in the light of the quoted law and its legislative history and find that the most accurate, equitable and reasonable way in which refunds may be made is to relate the refunds to the amounts actually deducted from the retired member's monthly pay (including COL adjustments) and to the potential DIC at the time such deductions were made. If either of those factors is not recognized in the computation, the refund will not have an appropriate relationship to the deductions made or the potential SBP benefit at the time such deductions were made. Since neither the law nor the legislative history thereof provides a clear indication of which method should be used to calculate reimbursement we find that, to the extent possible, both COL increases and DIC increases which occurred between the member's retirement and his death should be taken into account in calculating the refund.

Question 1, therefore, is answered by saying that the proper method of determining the widow's or widower's 10 U. S. C. 1450(e) refund is by using computation method 2:

The second question asked is:

B-186504

"If DIC is awarded more than one year after the death of a retiree and the award is not made retroactive to the date of death, what is the correct method of computing the amount of the SBP refund payable to the widow or widower?"

Chapter 51 of title 38, United States Code, contains the general administrative provisions governing the filing of applications with the Veterans Administration for benefits, effective dates of such benefits and payments to be made. The effective dates for awards of DIC are contained in 38 U. S. C. 3010, subsection (d) of which provides that where an application is received within 1 year from the date of death, the effective date of DIC award shall be the first day of the month in which the death occurred. Veterans Administration regulations regarding effective date of DIC awards is more specific in that it provides that if an application is not received within the 1 year allowed, the effective date of DIC will be the date of receipt of a claim. See 38 CFR 3.400(c)(2).

In other words, a DIC award ordinarily is effective from the first day of the month in which the retiree died. However, if the application is not filed within 1 year following his death, the award will not coincide with the month of death. In such a situation, the earliest date that a DIC award could become effective would be the date of application or claim and would result in the widow or widower receiving, if otherwise eligible, the full amount of the selected SBP annuity for at least 12 months following the retiree's death.

Neither the language of the SBP provisions nor the legislative history thereof specifically treats a situation where, while DIC is ultimately awarded, such payments cannot be made retroactive to the date of death due to the statutory limitations imposed on awards by the Veterans Administration. However, 10 U. S. C. 1450, states in subsection (c) that "if, upon the death * * * the widow * * * is also entitled to" DIC, the annuity paid will be reduced by the amount of the DIC.

Since the basic right to receive an SBP annuity is automatic if the member elected coverage, the determination which is to be administratively made involves only the establishment of the amount of the annuity, subject to adjustment to reflect the amount of the DIC entitlement due "upon the death" of the retiree. If,

B-186504

because of other laws, no DIC is or can be payable at that time, the full amount of the annuity chosen must be paid.

It appears that recalculation of the SBP annuity pursuant to 10 U. S. C. 1450(e) for the purpose of determining the amount of refund to be paid the widow or widower occurs only when the SBP annuity payable is reduced by a DIC award effective upon the member's death. It is, therefore, our view that unless this statutorily recognized condition exists, there is no basis for recalculating to determine the amount of refund and no refund would be due. Question 2 is answered accordingly.

Acting

W. K. Miller
Comptroller General
of the United States