

Vickers 150260



Comptroller General
of the United States

417249

Washington, D.C. 20548

Decision

Matter of: Sergeant Theopria James (Retired) (Deceased)--
Survivor Benefit Plan Beneficiary

File: B-252930

Date: September 24, 1993

DIGEST

Where there is no proof of divorce from alleged first wife and member during open season under Survivor Benefit Plan affirmatively elected coverage for current spouse, election was invalid and no annuity is payable. Annuity already paid is waived by Comptroller General under 10 U.S.C. § 1453 since there is no evidence of fault on part of recipient.

DECISION

Essie M. James has filed a claim to be declared the beneficiary of the Survivor Benefit Plan (SBP) annuity of Sergeant First Class (SFC) Theopria James, USA (Retired) (Deceased).

On March 3, 1978, SFC James was placed on the Temporary Disability Retired List (TDRL) and he declined SBP coverage and indicated that Essie James was his spouse. She was notified of the failure of SFC James to select SBP coverage. On March 31, 1982, during an open enrollment season under SBP, SFC James elected SBP coverage for his spouse based on full retired pay and again indicated that Essie James was his spouse and that they had married on December 24, 1965.

SFC James died on October 4, 1989 and an SBP annuity was established for Essie James effective October 5, 1989.

On October 25, 1989, Odessa James wrote to the Retired Pay Operations Section of the Defense Finance and Accounting Service, Indianapolis, stating that she was the widow of SFC James, that they were married on February 8, 1956, and to the best of her knowledge they had never divorced. A February 8, 1950, marriage certificate was included with the letters.

Since this information raised questions concerning the validity of his marriage to Essie James, she was advised of this information and asked to furnish a copy of her marriage certificate to SFC James and a copy of his divorce decree

from Odessa, Essie James forwarded a copy of the marriage certificate but stated that she was unaware of any prior marriage by SFC James and had no knowledge of a divorce decree.

Following a record search in three different jurisdictions that failed to show a record of any divorce between SFC James and Odessa James, the Retired Pay Operations section suspended the annuity of Essie James, effective December 1, 1991, pending receipt of proof of a divorce from Odessa.

In order to be eligible for an SBP annuity as a widow under 10 U.S.C. § 1450(a)(1), a claimant must meet the legal criteria of a widow, as defined in 10 U.S.C. § 1447(3). Section 1447(3) defines the term as follows:

"(3) 'Widow' means the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay--

(A) was married to him for at least 1 year immediately before his death; or

(B) is the mother of issue by that marriage."

Under the SBP, a retired member may provide an annuity for an eligible beneficiary to be paid following his or her death. Members retiring after the enactment of the SBP law in 1972 were automatically covered unless they specifically declined to participate.

Here, SFC James declined coverage when he retired in 1978 but enrolled during an open season in which he made an affirmative election of Essie James, designated as his spouse, to be his beneficiary. This we find shows a clear intent not to provide an annuity for Odessa James.

We have held that where a member is required to make an affirmative election to participate in the SBP and indicated an ineligible beneficiary, the election to participate is defective and must be considered invalid. 57 Comp. Gen 426 (1978).

Accordingly, since, at the present time, there is evidence which raises questions concerning the validity of SFC James marriage to Essie James, no SBP annuity should be paid to her. Additionally, Odessa James is not entitled to annuity due to the member's affirmative, albeit improper, election of coverage of Essie.

A question has been raised as to whether Odessa may be entitled to an annuity if she is the legal widow, because

she was not notified that SFC James had declined SBP coverage. Since the Army had no way of knowing that Odessa may have been his wife at the time, the fact that she was not notified would not afford a basis for her to receive the annuity.

If at a later date, Essie is declared the legal widow of SFC James by a court of competent jurisdiction, the annuity may be reinstated.

Regarding the annuity payments already received by Essie James, our Office would impose no objections to waiver of this debt to the United States under 10 U.S.C. § 1453 if the Secretary of the Army concurs as we do not find any fault on her part and that recovery would be against good conscience and equity.

Seymour E. Fros

for
James F. Hinchman
General Counsel