



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

Decision

Matter of: Survivor Benefit Plan Annuities and the Barring Act

File: B-260207

Date: April 18, 1995

DIGEST

Three claims for Survivor Benefit Plan annuities arising under holding in Barber v. United States, but filed more than 6 years after the members' deaths, are barred by 31 U.S.C. § 3702 (b) under Hart v. United States. Actions by the cognizant boards for the correction of military records to show that members had elected spousal coverage were ineffective because the corrections did not create new entitlements in these cases, and did not overcome the expiration of the applicable statute of limitations. Further, action by one of the boards seeking to change records in 2 of the claims to show timely filing is ineffective.

DECISION

The Director, Defense Finance and Accounting Service (DFAS), has requested an advance decision under 31 U.S.C. § 3529 on several claims for Survivor Benefit Plan (SBP) annuities which raise questions on the application of the Barring Act, 31 U.S.C. § 3702 (b), to such claims.¹ For the following reasons the claims are barred and may not be considered.

The request from DFAS presents the cases of three widows who filed claims for annuities under the ruling in Barber v. United States, 676 F.2d 651 (Ct. Cl. 1982), asserting they were not notified of the member's failure to elect maximum spousal coverage. Prior to March 1, 1986, the SBP law required that a member's spouse be "notified" if the member did not elect maximum SBP coverage for the spouse. 10 U.S.C. § 1448(a)(3).² In Barber, the Court of Claims held that if a spouse was not notified of the member's failure to elect maximum spousal coverage, the spouse was entitled to an SBP annuity upon the member's death. The claims here at issue, each filed more than 6 years following the member's death, were considered under 10 U.S.C. § 1552 by the cognizant correction of

¹The request has been assigned DFAS control number 95-1-M.

²Effective March 1, 1986, the law was changed to require that the spouse must concur in such an election, rather than only be notified.

records boards. The respective boards corrected the deceased member's records in each case to show that the member had elected full SBP coverage for his spouse.

In Hart v. United States, (910 F.2d 815 (Fed. Cir. 1990)), the Court of Appeals for the Federal Circuit overruled a United States Claims Court case allowing a claim arising under Barber, where, on the basis of the "continuing claim"³ doctrine, the widow filed her claim more than 6 years after the member's death. The Court of Appeals found that annuity claims generally accrue at the time of the member's death, that such claims are not "continuing claims," and that they therefore do not delay the running of the applicable 6-year statute of limitations in 28 U.S.C. § 2501.⁴

The Court in Hart stated further that courts are not free to engraft exceptions on the statute of limitations so as to allow claims to be asserted beyond the 6-year time limit set forth in section 2501. The Court emphasized that claims of this type first accrue and the 6-year statute begins to run "when all the events have occurred which fix the liability of the government and entitle the claimant to institute an action." 910 F.2d 815, 817. In cases arising under Barber, the court held, all such events have occurred as of the day after the death of the member.

Section 2501 and its counterpart, 31 U.S.C. § 3702 (b), governing our consideration of claims, are intended to put a limit on the time period for which the government must remain prepared to defend actions brought against it. The government's obligation to defend against claims arising under Barber is turned into an impossibility for government agencies such as DFAS which normally destroy records in individual cases after 6 years if no claim has been filed, and are unable to document that they notified the spouse of the decline of maximum spousal coverage. Thus, even if proper notice had been sent to a spouse at the time of the SBP election, agencies such as DFAS would be unable to prove they had done so. This is the precise problem which both the 28 U.S.C. § 2501 and the Barring Act were enacted to avoid.

³The "continuing claim" doctrine stands for the proposition that, where the government owes plaintiffs a continuing duty, a new cause of action arises with every breach of that duty. Under the doctrine, a plaintiff would be permitted to sue the government for each benefit (monthly annuity payment) wrongfully denied as it came due, regardless of whether the grounds for refusal occurred more than 6 years prior to plaintiff's filing of the action.

⁴The purposes of the Barring Act 31 U.S.C. § 3702(b), which limits our jurisdiction to consider claims to those that are filed within 6 years after they arise are essentially the same as those of 28 U.S.C. § 2501 addressed in Hart. We noted in 71 Comp. Gen. 398 that the two statutes should be similarly applied by GAO and the courts in the resolution of claims against the government.

In the cases before us, the cognizant military records correction boards have sought to avoid the statute of limitations by correcting the records of the respective members to show that each had elected full SBP spousal coverage. However, in a previous decision, 71 Comp. Gen. 398 (1992), in which we considered similar records correction efforts, we found that the board actions fell short of achieving their intended effects. In that case, five widows with Barber-type claims had submitted annuity claims more than 6 years after the members' deaths. The records of two of the deceased members had been corrected by the cognizant boards to show that the member had elected spousal coverage at retirement. We found that the correction board actions did not create new entitlements, noting that the entitlements of the affected spouses had already been established under Barber upon the death of the members, as a result of the government's failure to notify the spouse that SBP had not been elected. In effect, the spouses had been automatically covered, and the actions of the corrections boards were without effect, since they sought to achieve what had previously been accomplished. The statute of limitations thus began to run at the time of death and expired 6 years later. As we stated in 71 Comp. Gen. 398, while the corrections boards can change facts in order to give rise to a claim, it cannot, by changing facts, resurrect a claim on which the statute of limitations has run. Only if the correction gives rise to a new entitlement will the statute of limitations begin to run on the date of the correction.

In two of the cases now before us, one further issue is presented. Knowing that a records correction to show an appropriate election of spousal coverage by the members would be insufficient in light of Hart and 71 Comp. Gen. 398, the Air Force Board for Correction of Military Records (AFBCMR), which addressed the claims in these cases, has taken the additional step of establishing a record showing that the surviving spouses submitted claims within the 6-year period. The issue thus presented is whether the filing of an annuity application or claim by a widow after the death of a member is a correction of a military record as contemplated in 10 U.S.C. § 1552, and if so, whether it establishes a basis for the payment of the requested annuities. Section 1552 provides, in pertinent part:

"The Secretary of a military department . . . may correct any military record of that department when he considers it necessary to correct an error or to remove an injustice."

In our view the Board's action that it corrected the member's records to show that the widow submitted a claim for survivor benefits was ineffective. The submission of a claim by a third party does not involve the correction of a member's records reflecting his service or actions he took while a member of a uniformed service.

LIGHTLE

Charles H. Lightle retired from the Air Force on September 1, 1975, and declined spouse coverage under the SBP even though he was married to Bobbie W. Lightle. The member died on June 5, 1985, and in 1993, his widow requested a correction of his records to

obtain an SBP annuity on the basis she had not been advised of his declination at the time of his retirement. On June 15, 1994, the Air Force Board for Correction of Military Records (AFBCMR) corrected the member's records to show that he elected maximum spouse coverage at the time of his retirement. In addition, the AFBCMR corrected his records to show that his widow submitted a claim for survivor benefits on July 3, 1985.

In its decision on the correction of records in this case, the AFBCMR recognized our holding in 71 Comp. Gen. 398 and stated:

"While the Comptroller General may choose to limit himself by the application of Barring Act principles to the administrative decision process, we have every reason to believe that this Board is not similarly limited. Congress wisely provided this Board with the specific authority to waive timeliness and consider an application on its merits when we find it to be in the interest of justice."

The timeliness to which the Board is referring, however, is the 3-year limit in 10 U.S.C. § 1552(b) for timely filing for correction with the boards, which the boards may waive in the interest of justice. It does not affect the application of the Barring Act to actions of this Office.

This matter is settled, as discussed above, by our decision in 71 Comp. Gen. 398, as it applied the opinion Hart. The Board's effort to avoid these decisions by creating a record to show that Mrs. Lightle submitted a claim for survivor benefits shortly after the member's death is ineffective.

Accordingly, we find that Mrs. Lightle's claim for an SBP annuity is barred.

DYSON

James L. Dyson retired from the Air Force on January 1, 1978, and elected maximum "child only" SBP coverage even though married to Sarah Dyson at the time. The member died on February 10, 1980. Ms. Dyson requested a correction of the member's records and on June 14, 1994, the AFBCMR corrected the member's records to show that on December 31, 1977, he elected maximum spouse and child coverage and that on March 9, 1980, his widow had submitted a claim for an annuity.

The facts involved in the correction of Mr. Dyson's records are similar to those in the correction of Mr. Lightle's records except the Board corrected the records here to show the submittal of a claim by the widow on March 9, 1980, a date prior to the date after which filing a claim with the agency involved rather than our Office to toll the statute

(June 15, 1983) was permitted by the change in the regulations implementing the Barring Act.⁵

Since, in our view, the creation of records to reflect the submittal of a claim by a widow is not a correction of the member's military records, it is clear that the Board's finding here gave no right to a new cause of action, especially in view of the fact that the date involved would require a finding that the claim had been filed at our Office in 1980 rather than with the Air Force.

Accordingly, we find that Mrs. Dyson's claim is barred. While the documents submitted by DFAS and Mrs. Dyson's attorney appear to be inconsistent it does not effect her right to an annuity. DFAS states that the widow first inquired about an SBP annuity in a February 20, 1987, letter. Mrs. Dyson's attorney has submitted documentation showing that Mrs. Dyson had inquired about SBP in either late 1980 or early 1981 and received, through her Congressional representative, a letter from the Air Force dated March 4, 1981, which stated that her husband had only elected child coverage. The fact that Mrs. Dyson's claim accrued in 1980, prior to the June 15, 1983, date in the amended regulations, precludes consideration of filings with other than our Office to toll the Barring Act. Janie B. Lopez, B-249968, Feb. 16, 1993.

WISECARVER

Thomas L. Wisecarver retired from the Navy on May 1, 1980, and declined SBP coverage. He was married to Althea Wisecarver at the time of his retirement and he died on March 9, 1984. In 1992, Mrs. Wisecarver made a claim for an SBP annuity on the basis that she was never advised of the member's declination of spouse coverage. On January 19, 1993, the Board for the Correction of Naval Records (BCNR) corrected the member's record to show that he had elected maximum spouse coverage on April 1, 1980. When DFAS reviewed the matter, it concluded that, based on 71 Comp. Gen. 398, the correction of records did not create any new entitlement and that the claim was barred by the Barring Act.

Because the correction of records did not create any new entitlement, this claim for an annuity is also barred under Hart.

/s/ Robert P. Murphy

⁵The regulations implementing 31 U.S.C. § 3702 (b)(1) were revised on June 15, 1989, to provide that the requirements of the statute will be satisfied by timely filing with the agency involved as well as with this Office. However, the regulation precludes consideration of any claims which were barred prior to June 15, 1989, i.e. accrued prior to June 15, 1983.

for **Comptroller General
of the United States**

B-260207

The Honorable Jerry F. Costello
Member, United States
House of Representatives
1363 Niedringhaus Ave.
Granite City, IL 62040

Dear Mr. Costello:

This is in regard to your expression of interest in the Survivor Benefit Plan (SBP) annuity claim of Mrs. Vasiliki Pride which she is pursuing with the Defense Finance and Accounting Service.

Enclosed is a copy of our decision of today in Survivor Benefit Plan Annuities and the Barring Act in response to a request for an advance decision regarding similar SBP claims.

Sincerely yours,

Comptroller General
of the United States

Enclosure

B-260207

The Honorable Owen Pickett
Member, United States
House of Representatives
2710 Virginia Beach Blvd
Virginia Beach, VA 23452

Dear Mr. Pickett:

This is in regard to your expression of interest in the Survivor Benefit Plan annuity claim of Mrs. Althea E. Wisecarver which she is pursuing with the Defense Finance and Accounting Service.

Enclosed is a copy of our decision of today in Survivor Benefit Plan Annuities and the Barring Act in response to a request for an advance decision regarding similar SBP claims.

Sincerely yours,

Comptroller General
of the United States

Enclosure