

DECISION

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

27401

FILE: B-213101**DATE:** February 14, 1984**MATTER OF:** Rear Admiral Carroll B. Jones, USN, Retired**DIGEST:**

A retired naval officer seeks to have the deductions from his retired pay for the cost of spouse coverage under the Survivor Benefit Plan terminated. The basis of his request is that he has no eligible spouse beneficiary because his wife is entitled to a Survivor Benefit Plan annuity as a result of the military service of her previous husband who died while serving on active duty. The deductions from the officer's retired pay must continue because his wife is legally a potential beneficiary of an annuity provided by him and is, therefore, his eligible spouse beneficiary.

This action responds to a request for an advance decision as to whether the deductions from a retired officer's retired pay for Survivor Benefit Plan participation may be discontinued because his wife has elected to forego the annuity for which he is paying costs, in favor of the annuity to which she is entitled as a consequence of her previous husband's military service.¹ We conclude that the deductions may not be discontinued.

Rear Admiral Carroll B. Jones, USN, retired from the Navy in March 1957. In September 1973, he elected to participate in the Survivor Benefit Plan (10 U.S.C. §§ 1447-1455) under the authority of Section 3(b) of Public Law 92-425, 87 Stat. 615 (10 U.S.C. § 1448, note). He chose spouse coverage, naming his wife, Estelline Jones, as

¹The request for advance decision was submitted by J. Guzzonato, Disbursing Officer, Navy Finance Center, Cleveland, Ohio. The request was approved by the Department of Defense Military Pay and Allowance Committee and assigned control number DO-N-1427.

his spouse beneficiary. In May 1975 Estelline died, and the Navy discontinued deductions from his retired pay for the cost of spouse coverage on October 1, 1976.²

In December 1975 Admiral Jones married Mildred Jones, the widow of Rear Admiral James H. Mini, USN, who died in 1963 while serving on active duty. Deductions from Admiral Jones' retired pay for the cost of spouse coverage under the Survivor Benefit Plan were resumed on January 1, 1977.³

Because Admiral Mini was eligible for retirement at the time of his death, under the provisions of Section 5(a) of Public Law 96-402, October 9, 1980, 94 Stat. 1707 (10 U.S.C. § 1448, note), his widow is eligible for a Survivor Benefit Plan annuity based on his years of service. Having been beyond age 60 when she married Admiral Jones, Mrs. Jones is entitled to the annuity based on Admiral Mini's service, even though she has remarried. 10 U.S.C. § 1450(b). Following her application therefor, she was awarded a survivor annuity, effective December 1, 1980, in the amount of \$1,297.80 per month, which subsequently has been increased pursuant to law.

The statute authorizing this annuity provides that if a widow who is eligible for an annuity under this act is also entitled to a Survivor Benefit Plan annuity based upon a subsequent marriage she may not receive both annuities, but must elect which one she will receive. Public Law 96-402, § 5(c). Because the amount of the survivor annuity

²Under 10 U.S.C. § 1452(a), as amended by Public Law 94-496, cost reductions were authorized to be discontinued beginning October 1, 1976. The relevant provisions of this statute are addressed later in this decision.

³This is the date on which, under 10 U.S.C. § 1447(3)(A) and 10 U.S.C. § 1452(a), Admiral Jones' spouse upon remarriage was qualified as his eligible spouse beneficiary for the purpose of resumption of deductions for Survivor Benefit Plan participation. See Matter of Metzler, 56 Comp. Gen. 1022 (1977), which is discussed in detail later in this decision.

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payments which Mrs. Jones receives based on Admiral Mini's service exceeds the potential benefits she would be entitled to receive as a result of Admiral Jones' participation in the Plan, she would not choose to receive the annuity based on Admiral Jones' participation should he predecease her.

Since Mrs. Jones can receive only one annuity and has chosen to receive the annuity based on Admiral Mini's service, Admiral Jones contends that she will not receive any benefits from the annuity for which he is paying coverage costs. Thus, he is of the view that under these circumstances, he has no "eligible spouse beneficiary" under the Survivor Benefit Plan.

As it relates to this case, 10 U.S.C. § 1452(a), as amended by Section 1(5)(A)(ii) of Public Law 94-496, October 14, 1976, which requires the reduction in the retiree's retired pay, provides in part as follows:

"(a) * * * The reduction in retired or retainer pay prescribed by * * * this subsection shall not be applicable during any month in which there is no eligible spouse beneficiary."

On the basis of this provision, Admiral Jones has requested that the deductions from his retired pay for the cost of spouse coverage be discontinued and that he be reimbursed for any coverage costs to which he is entitled.

The term "eligible spouse beneficiary" as used in this provision is not defined by the statute. As noted in the Navy's submission, in Matter of Metzler, 56 Comp. Gen. 1022 (1977), in which we considered a question concerning resumption of cost deductions for spouse coverage following a retiree's divorce and remarriage, we concluded that in 10 U.S.C. § 1452(a), the term "eligible spouse beneficiary" has the same meaning as the term "widow" as it is defined in 10 U.S.C. § 1447(3). That definition is:

"(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--

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

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

The relevant provisions of Section 5 of Public Law 96-402 (authorizing the annuity Mrs. Jones is receiving) are:

"(a)(1) The Secretary concerned shall pay an annuity to any individual who is the surviving spouse of a member of the uniformed services who--

"(A) died before September 21, 1972;

"(B) was serving on active duty in the uniformed services at the time of his death and had served on active duty for a period of not less than 20 years; and

"(C) was at the time of his death entitled to retired or retainer pay or would have been entitled to that pay except that he had not applied for or been granted that pay.

* * * * *

"(c) If an individual entitled to an annuity under this section is also entitled to an annuity under [the Survivor Benefit Plan] based upon a subsequent marriage, the individual may not receive both annuities but must elect which to receive.

"(d) As used in this section:

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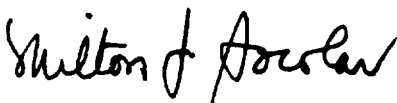
"(2) The term 'surviving spouse' has the meaning given the terms 'widow' and 'widower' in section 1447 of title 10, United States Code." (Emphases added.)

It is noted that, consistent with the conclusion reached in Matter of Metzler, cited above, this provision also adopts as the definition of "surviving spouse" the meaning given the term "widow" in 10 U.S.C. § 1447(3).

Since the surviving spouse--that is, the "widow"--is to choose between available annuities, it appears that this statute contemplates that the election required by Section 5(c) of Public Law 96-402 will be made at the time the available annuities have vested. Unless the retiree has elected not to provide spouse coverage, no provision under the Survivor Benefit Plan excludes a designated individual from spouse coverage if that person qualifies under the definition of 10 U.S.C. § 1447(3). Thus, even though Mrs. Jones may have decided that she will not choose to receive the annuity provided by Admiral Jones if she becomes entitled to it, she will not be precluded by law from receiving the annuity provided by him until that annuity has vested and she elects to continue receiving the annuity resulting from Admiral Mini's service.

In Matter of Metzler, the circumstances justifying the suspension of reductions in retired pay on account of the retiree's participation in the Survivor Benefit Plan are quite different from the circumstances in this case. In Metzler the cost reductions were suspended from the time of the retiree's divorce from his previous spouse until his spouse upon remarriage qualified under 10 U.S.C. § 1447(3), since during the interim period neither spouse was a potential beneficiary of an annuity provided by him. Thus, he had no eligible spouse beneficiary. See also Matter of Peniston and Burrough, 57 Comp. Gen. 847, 852 (1978). In the present case, however, under 10 U.S.C. § 1452(a) Mrs. Jones is an eligible spouse beneficiary of Admiral Jones because, having been married to him since 1975, she qualifies under 10 U.S.C. § 1447(3)(A) as a potential beneficiary who could receive the annuity provided by him upon his death if she so elects.

Therefore, we find that the reduction in Admiral Jones' retired pay for spouse coverage under the Survivor Benefit Plan may not be terminated on the basis that he has no eligible spouse beneficiary.

for 
Comptroller General
of the United States