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

40352
JAN 18 1974

B-180407

The Honorable
The Secretary of the Navy

Dear Mr. Secretary:

Reference is made to letter dated January 9, 1974 (file reference Pers-7312-kmp), with enclosure, from the Chief of Naval Personnel, requesting an advance decision concerning the eligibility of a spouse to receive an annuity under the provisions of the Survivor Benefit Plan, 10 U.S.C. 1447-1455, as added by Public Law 92-425, effective September 21, 1972, in the circumstances described.

It is stated in the letter that the member, who is currently serving on active duty, and was a widower but without dependent children on the date of enactment of Public Law 92-425, submitted an election on December 15, 1972, to provide coverage on behalf of a natural person with an insurable interest under the provisions of 10 U.S.C. 1448(b). It appears that the member is contemplating remarriage and wishes to designate his newly acquired spouse as beneficiary effective the date of marriage provided that she would be fully qualified as of that date as an eligible spouse under the Plan to receive a survivor benefit annuity in the event of the member's death.

The Chief of Naval Personnel has expressed the view that under the provisions of 10 U.S.C.1450(f), the member may, (a) retain his present insurable interest election, or (b) change the insurable interest coverage in favor of the newly acquired spouse provided that such a change is submitted within one year of the date of marriage. Further, that should the member choose the second alternative procedure, the Chief of Naval Personnel expresses the opinion that such a change of election would be effective upon receipt by the Navy; that it could not be changed at any future date, and that under the provisions of 10 U.S.C. 1448(d) the newly acquired spouse would immediately qualify as an eligible annuitant in the event the member dies in an active duty status. However, the Chief of Naval Personnel indicates that there is a certain element of doubt as to the outcome following a change of election to provide coverage for a spouse, if the member is released to inactive duty and then dies, but prior to the lapse of two years from the date of marriage. He therefore asks the following questions:

1. If the newly acquired spouse was deemed to be an eligible annuitant under 10 U.S.C. 1448(d), would she

Inc

091966
-74277-

PUBLISHED DECISION
53 Comp. Gen.....

continue as an eligible annuitant in the event of his death regardless of the length of marriage?

2. Would such spouse cease to be an eligible annuitant on the date of his release from active duty until two years from the date of marriage, presupposing that no child is born of the marriage?

In this regard, the Chief of Naval Personnel takes the position that in providing eligibility for an annuity under 10 U.S.C. 1448(d), it appears reasonably clear that Congress intended to provide a benefit which was not available under the Retired Serviceman's Family Protection Plan and as a result it appears reasonable to conclude that once a spouse qualifies as an eligible annuitant under 10 U.S.C. 1448(d), such coverage should not be terminated by virtue of the member's voluntary or involuntary release from active duty. The view is also expressed that because of the apparent ambiguity of the law, it is conceivable that such a member could change his previously elected insurable interest coverage in order to provide coverage for his newly acquired spouse, be voluntarily or involuntarily released to inactive duty and die prior to the lapse of two years from the date of marriage and neither the insurable interest person nor the spouse would qualify as an eligible beneficiary on his death.

Subsection 1448(d) of title 10, United States Code, provides:

"(d) If a member of an armed force dies on active duty after he has become entitled to retired or retainer pay, or after he has qualified for that pay except that he has not applied for or been granted that pay, and his spouse is eligible for dependency and indemnity compensation under section 411(a) of title 38 in an amount that is less than the annuity the spouse would have received under this subchapter if it had applied to the member when he died, the Secretary concerned shall pay to the spouse an annuity equal to the difference between that amount of compensation and 55 percent of the retired or retainer pay to which the otherwise eligible spouse described in section 1450(a)(1) of this title would have been entitled if the member had been entitled to that pay based upon his years of active service when he died."

The legislative history of the above-quoted provision indicates that at the outset it was recognized that most if not nearly all survivors of active duty personnel receive some survivor benefit

payments through the dependency and indemnity compensation program administered by the Veterans Administration. However, it was further indicated that such program is weighted in terms of low-ranking and short-term personnel. As a result, for those in senior enlisted and officer grades and longer years of service, the level of available benefits falls off sharply in terms of its value as an income replacement.

Based on that finding, the Special Subcommittee on Survivor Benefits of the Committee on Armed Services, House of Representatives, in its Report, dated October 1, 1970 (H.A.S.C. 91-68), at page 9505, recommended to the full Committee that attention be given to increasing the survivor benefit levels for these personnel.

In discussing subsection 1448(d) on the floor of the House of Representatives at the time H.R. 10670 was being considered and which became Public Law 92-425, page H 9871, Congressional Record, October 21, 1971, Representative Pike stated in part that:

> "A special section of the bill provides that in the case of personnel still on active duty who are eligible for retirement on length of service whose potential survivor annuity would be more than the dependency and indemnity compensation paid to survivors of active-duty personnel of like grade and years of service, a supplemental annuity payment sufficient to make up the difference would be paid * * *. We added this section because we did not want a situation to occur where one who remains on active duty earns less survivor benefits than somebody who retired at the same grade and with the same years of service."

In Report No. 92-1089, Committee on Armed Services, United States Senate, dated September 6, 1972, on page 51, it is stated with respect to subsection 1448(d) that:

> " * * * the spouse of a service member, who is eligible to retire but dies on active duty, will be paid 55 percent of the member's earned retired pay. The payment will recognize that Dependency and Indemnity Compensation (DIC) may be payable by the Veterans Administration by offsetting any DIC payment from the 55 percent of retired pay."

Based on the before-quoted material, it would appear that by including such special provisions (10 U.S.C. 1448(d)) in Public Law 92-425,

it was the express intention of Congress to insure the fact that the spouses of all active duty personnel shall automatically be provided with coverage in the event of the member's death while serving on active duty, without the necessity of having to specifically elect that coverage.

Therefore, it is our view that in the case of a member to whom the Survivor Benefit Plan applies, who is unmarried but marries while serving on active duty and then dies while still serving on that duty, such spouse shall automatically be entitled to a survivor benefit annuity without regard to the length of marriage prior to the member's death.

With regard to the questions asked involving a member's death after being voluntarily or involuntarily placed in an inactive status and entitled to receive retired pay in the circumstances previously described, subsection 1448(a) of title 10, United States Code, provides in pertinent part:

> "(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. * * *"

and in this connection, subsection 1450(a) provides in part:

> "(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies, a monthly annuity under section 1451 of this title shall be paid to—
>
> "(1) the eligible widow or widower;"

For the purpose of the Survivor Benefit Plan, the term "widow is defined in 10 U.S.C. 1447(3), to mean:

> "* * * 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 two years immediately before his death; or
>
> "(B) is the mother of issue by that marriage."

Generally, the legislative history of the Survivor Benefit Plan provides for automatic coverage for a person who is married or has a dependent child at the time he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan prior to becoming so entitled to such pay. However, once a member becomes entitled to that pay, he is bound by his election made prior thereto, unless he falls within the specific exceptions provided for in subsection 1450(f), governing after retirement marriages or after retirement acquisition of a dependent child or dependent children. In this regard, it is noted that under certain of the provisions of section 1448(a), such elections are final and conclusive. However, until the member becomes entitled to receive retired or retainer pay, such elections which he may have made are ambulatory, that is, they may be changed and only the last election made prior to being entitled to retired or retainer pay is binding on the member as it is only at that time that the class of eligible annuitants is set.

Based on the specific language of the before-quoted provisions of subsection 1448(a) and overall purpose of the Survivor Benefit Plan as reflected in its legislative history, it is our view that the two-year limitation on the period of marriage prior to the death of the member to whom the Plan applies, as provided in 10 U.S.C. 1447(3,(A), relates only to a marriage entered into by a member after he has been voluntarily or involuntarily released from active duty and is entitled to receive retired or retainer pay.

Consequently, in the situation described, where a member to whom the Plan applies is still serving on active duty, marries and elects to provide coverage for a newly acquired spouse, is then voluntarily or involuntarily released to inactive duty and entitled to retired or retainer pay and then dies, it is our view that such spouse would be fully qualified as an eligible widow under 10 U.S.C. 1450(a)(1) to receive the monthly survivor benefit annuity elected by the member.

Your questions are answered accordingly.

Sincerely yours,

(SIGNED) [illegible] D. STAATS

Comptroller General
of the United States