TESTIMONY RESPECTFULLY SUBMITTED

BEFORE THE

SUBCOMMITTEE ON PERSONNEL

OF THE

COMMITTEE ON ARMED SERVICES

UNITED STATES HOUSE OF REPRESENTATIVES

STATEMENT PREPARED FOR THE RECORD

EDITH G. SMITH

CITIZEN ADVOCATE FOR
DECEASED MILITARY RETIREES AND THEIR SURVIVORS

December 9, 2015

Not for Publication
Until Released
By the Committee

My name is Edith Smith and I live in Springfield, Virginia. Thank you for allowing me the opportunity to provide testimony for the record on the issue of Concurrent Receipt of Survivor Benefit Plan (SBP) and Dependency and Indemnity Compensation (DIC) before The Military Personnel Subcommittee of The Committee on Armed Services, United States House of Representatives, I have worked for the repeal of the SBP/DIC offset as a volunteer advocate since 1999, shortly after my husband's death. I represent no organization.

I believe Congress should provide SBP to eligible surviving spouses by fair and equal principles of traditional public policy over budget driven partisan politics. If even one disabled military retiree receives concurrent receipt of retired pay and disability compensation, all disabled and dead retirees should receive full retirement. Nothing about DEATH should deny any retiree the benefits of military service they worked to earn prior to their death. SBP was established by Congress to protect surviving spouses by ensuring that they receive a continuation of a portion of retired pay

PERSONAL BACKGROUND:

My late husband, LtCol. Vincent M. Smith, USMC, retired in 1981 with 21 years of service. I became a volunteer advocate when his service connected disability increased to the permanent degree of "too sick to work" and he qualified for Social Security Disability benefits. The Department of Defense (DoD) wasted no time in terminating his EARNED retired military health benefit of CHAMPUS and "cost shifted" him to Medicare. The DoD also gained financially by reducing the retired pay he EARNED dollar for dollar by the amount of Disability Compensation paid to him by Veterans Affairs (VA). DoD even reduced his EARNED retired pay by the small VA spousal allowance ($115/mo.) paid to him for me, citing dual compensation for the same service.

Ironically, it was my husband's post retirement employment that qualified him for Social Security Disability Income and Medicare, (20 of 40 quarters for Social Security eligibility must be earned in the 10 years prior to the date of disability.) not contributions made during his service in the Marine Corps. What is the logic for Congress to take CHAMPUS from the disabled military retiree (under age 65) and later require the purchase of Medicare Part B ($104/mo.) when working military retirees under age 65 have different and better benefits for themselves and their families. Working military retirees are not required to participate in employer provided health insurance; they have the free choice to keep TRICARE as their primary payer. Only the military disabled who have made such huge sacrifices for our freedom lose their own freedom to choose a health benefit they EARNED!

While DoD declares an SBP premium of 6 ½% of retired pay, service connected disabled retirees are charged on retired pay they may not receive. In my husband's case, he responsibly chose to provide for his family by voluntarily electing to purchase SBP ($169/mo.) at the time of retirement. His SBP premium increased from 6 ½% of his full

retired pay to 32% of the retired pay he actually received in 1998 ($516/mo.) when he was rated 100% Permanently &Totally disabled.

The egregious injustice applied to the disabled military retiree hit home with me when I learned, as his wife (who had not worked to earn Medicare under age 65), I would not endure the same discriminatory treatment with regard to military health benefits for a similar disabling condition. The DoD had no health benefit to "cost shift" me to, so CHAMPUS/TRICARE would continue to cover me as my primary insurance until age 65, regardless of my health status.

My husband died on September 3, 1998. I reported his death to Defense Finance and Accounting Service for termination of his retired pay. I applied for SBP. The SBP premiums he paid ($31,665) over 18 years were refunded to me proportionate to the SBP payment I received after the dollar for dollar DIC offset applied by DoD. Interest accrued on the premiums my deceased husband paid was left in the Military Retirement Trust Fund. The $22,000 refund was taxable to me even though my husband paid the SBP premiums from minimal income not taxable to us. There is an additional "caregiver" allowance paid to survivors whose spouse is 100% disabled for 8 or more years. That allowance of $266 is added to DIC to further reduced my SBP payment. It is the only VA allowance for survivors that is used to reduce the SBP. Assisting with my husband's care prevented me from following my plan to teach after the children graduated high school.

No other civilian or public sector employer is permitted by law to reduce their compensation to an employee who is disabled veteran.

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Survivor Benefit Eligibility

The President and the Congress of the United States, a Government "of the people, by the people and for the people," have previously determined eligibility of surviving spouses for the Department of Defense's (DoD) Survivor Benefit Plan (SBP). When SBP was created in 1972 as a premium-based survivor benefit of military retirement, those who died on active duty with 20 or more years of military service were equally recognized as "retirement eligible," and their surviving spouses were also eligible for SBP.

In 2001, within days of the 9/11 tragedy, Congress swiftly enacted legislation to expand eligibility for SBP to all surviving spouses of active duty deaths. Senator Kay Bailey Hutchison, TX, spoke the words quoted below on September 20, 2001, on the floor of the Senate to introduce her amendment to the Senate NDAA02:

> ***"On September 11, we were reminded of how real that sacrifice is, and how critical those contributions are... This is why I introduced legislation in June [S. 1037] to ensure that all military personnel who die in the line of duty, like those who died serving their country at the Pentagon, are able to receive retirement benefits they have earned. In the military, personnel are not vested in retirement benefits unless they have served 20 years or more, or unless the services medically retire them***

before death. Clearly, someone who dies in the line of duty cannot fulfill either of these requirements, meaning their families do not receive their pro rata share of retirement pensions. It is horrible enough for a family to lose a loved one–it is an even greater hardship for them to not receive these earned benefits..." Senator Hutchison, TX

The Congress realized the injustice of failing to provide the SBP to all surviving spouses of active duty deaths, and also recognized that those active duty service members who died the youngest paid the "highest price" and made the "greatest sacrifice." These surviving spouses soon realized that this expanded SBP eligibility was a hollow benefit to the younger widows because the DIC offset to SBP eliminated all or most of any benefit they should have received.

There are 62,094 surviving spouses (FY14) eligible for both SBP and DIC. About 4,580 surviving spouses are a result of active duty deaths. Surviving spouses receive an average SBP of $1,099 mo. The flat rate DIC paid in FY15 is $1,254.mo. 37,685 of these 62,094 surviving spouses receive an SBP benefit less than DIC which appears to profit DoD.

The SBP annuity for retirees is a premium based, voluntary election benefit with the retiree paying 64% of the premium; the government's contribution is 36% (FY14). In designing the original SBP benefit, Congress concluded "military surviving spouses should receive the same considerations as civil service surviving spouses." [House Report 99-718, p. 211, accompanying H. R. 4428, 99th Congress, 2nd Session (1986)] The Survivor Benefit, created like the Federal Civil Service Annuity, was the first military benefit sold to retirees and provided to "retirement eligible" Active Duty deaths without premiums in order to assure their surviving spouse a continued portion of retired pay. SBP eligible children and parents, and insured interest annuitants have no offset with DIC. The Federal Civil Service annuity has no offset with DIC.

Sen. Bill Nelson – SASC Testimony April 13, 2011

"...So, Mr. Chairman, I had a little bit of experience in insurance, before I came to the Senate, as the elected insurance commissioner of Florida. And this offset is troubling when somebody buys an insurance policy and there's another government program over here, called Disability Indemnity. <u>And I know of no purchased annuity that would deny payment based on the receipt of a different payment</u>."

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TRICARE RETIREE HEALTHCARE COSTS

37,685 Surviving Spouses have no SBP with which to pay the TRICARE fees because DIC wiped out the DoD's SBP payments: DoD's Survivor Benefit staff and DoD's Health Affairs staff should coordinate the unjust consequence of the offset. The SBP money the surviving spouse should use to pay these costs is not there.

- TRICARE STANDARD 25% co-pay $3,000 catcap.
- TRICARE PRIME self - $282.60 yr. family - $565.20
- TRICARE Young Adult26 $306. mo. (47% increase - Jan, 2016)
- Delta Dental: self $37.39 family $133.59 (varies by zipcode)
- FEHBP absorbed cost of Young Adult coverage
- Federal Civilians receive full survivor annuity to pay FEHBP

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"The Military Takes Care of its Own" RECRUITMENT AND RETENTION

A time honored tradition: **"The Military Takes Care of its own..."** is a well -known and respected principle... America honors the "Fallen Heroes" for their courage and sacrifice. That inherent obligation is at the heart of America's total force team. Military leaders send healthy service members to retrieve dead bodies from the battlefield at risk of their own death and disability. No SERVICE MEMBER is ever left behind on the battlefield. Service members who perform these heroic acts of rescue often learn after the fact that they do so at their personal disadvantage, both physically and financially, leaving their families to earn the support they may not now be able to provide.

It is unthinkable that all service-related-death surviving spouses do not receive a full SBP compensation, an earned benefit of military service just the same as all non-service-related-death military widows.

Congress has repealed some former dual compensation benefits reductions. As a result, about 20% of DoD's senior leaders are military retirees. (DoD website, Oct, 2015) How can senior leaders support DoD's official opposition to surviving spouses receiving the SBP their deceased military spouses also earned and paid premiums for? Why is this double standard a status quo? How does a General earn "deferred compensation" of military retired pay for 39 years of military service while his son, a West Point graduate, lost an arm in war, had his career cut short (his life changed forever), and likely does not receive his pro rata share of retired pay earned while serving in a war?

In the 113th Session of Congress, policy makers wasted no time in restoring a 1% cola, funded with direct spending, to military retirees under age 62 (themselves.)

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THE Military Retirement Trust Fund

The Military Retirement Trust Fund (MRF) holds and disburses the Survivor Benefit annuity of $3.78 Billion annually to 274,259 surviving spouses (FY14) included in the total outlay of $56,620 Billion annually from the Trust Fund. The Congressional Budget Office estimates a cost of $500 Million a year to restore SBP to eligible DIC surviving spouses which is less than 1% of the total outlay of the MRF. The Trust Fund has absorbed the cost of the elimination of the SBP/DIC offset for remarried widows over age 57 and other new categories of active duty SBP eligibility since 9/11/01.

The GAO report [GAO-06-837-R], **"Actuarial Soundness of the DOD Survivor Benefit Plan,"** dated July 26, 2006, found that the Military Retirement Trust Fund will maintain actuarial soundness with the provision of SBP without offset by DIC to all military SBP eligible widows."

There has been a great reluctance on the part of Congress and the Administration to find the funding or to ask the taxpayer to make a small sacrifice in recognition of the greater sacrifice made by retirees who have died in service to their country. The taxpayer should bear all funding of a "Cost of War" to include equal payment of DoD's Survivor Benefit Annuity to all military widow(er)s without penalty of a military service related death.

DoD's Compensation Officials brief the annual public meeting for the Board of Actuaries (Military Retirement Trust Fund) each year,

- Board of Actuaries meeting, July 22, 2005: the Assistant Director of Compensation explained a "Philosophy Shift" in Congress in that DoD, VA, and Social Security Systems are becoming "additive" [to retired pay replacing the tradition "double dipping" rules.] He further stated that current duplication does not have a well-defined basis and may have inconsistencies and inequities that need to be addressed.
- Board of Actuaries meeting, August 28, 2009. Assistant Director of Compensation briefs on NDAA10, S. 1390, Section 652, Repeal of requirement of reduction of SBP survivor annuities by DIC Dependency and Indemnity Compensation. He explains that the repeal of SBP/DIC is opposed by OSD. The repeal would leave 540 thousand "second class" survivors who are not eligible for both SBP and DIC. How could a survivor feel "second class" if the retiree did not die of a military related cause?

"The Eleventh Quadrennial Review of Military Compensation" (p. 17) defines benefits of military retirement as *deferred compensation* earned while on active status. The deferred compensation is officially estimated at 28% of Regular Military Compensation by the Government Accountability Office (GAO).

Social Security/SBP Offset at age 62. Repealed in 2004. The cost for the repeal of the SS/SBP age 62 was a provision included in P. L. 108-375 and cost $14 Billion over 10 years. Why was the social security offset to SBP [eligible widow(er)s] of non-service connected deaths coordinated and passed with the provision of concurrent receipt for disabled retirees only instead of also adding surviving spouses of disabled retirees? SBP/DIC surviving spouses are at least equally deserving of their Survivor Benefit Annuity.

In my case, the DIC replaces the income we both would have earned had he not been disabled. The majority of the DIC eligible surviving spouses don't even receive the SBP annuity to benefit from the repealed offset by Social Security.

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Retention of DIC with Remarriage at age 57
SHARP, et al, vs United States

The Veterans Benefits Act of 2003 (H.R. 2297, Section 101) provided for DIC with remarriage after age 57. The Department of Defense failed to implement this provision informally citing that a retiree is not a "veteran." Rep. Henry E. Brown, Jr, SC, Chr., Subcommittee on Benefits, House Committee on Veterans Affairs expressed in a letter dated April 13, 2004, that the intent of Congress was to retain DIC with Remarriage at age 57 without a "**reduction in other federal benefits**" such as SBP.

DoD's refusal to implement the FY04 law eventually forced the widows to sue in "SHARP vs United States." The intent of "The Veterans Benefits Act of 2003" was affirmed by Chief Judge Haldane Robert Mayer, Federal Court of Appeals, on August 26, 2009.

> *"As recognized by the trial court, there are many plausible explanations for Congress' decision to repeal the DIC-SBP offset only for surviving spouses who receive DIC by reason of their having remarried after age 57. Perhaps Congress intended to encourage marriage for older surviving spouses.* ***Perhaps section 1311(e) simply represents a first step in an effort to eventually enact full repeal.*** *After all, the service member paid for both benefits: SBP with premiums; DIC with his life. Perhaps it was recognition that the political process is the art of the possible, and that prudence counseled against making the perfect the enemy of the good. Whatever the reason, the government has failed to make the "extraordinary showing of [Congress'] contrary intentions" that would permit this court to construe section 1311(e) in a way that eviscerates its plain language."*
>
> CONCLUSION
>
> "Accordingly, the judgment of the United States Court of Federal Claims is affirmed."
>
> AFFIRMED
>
> 2008-5105 10"

1,102 remarried spouses over age 57 (FY14) have applied for and received concurrent receipt of SBP and DIC.

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4 Attachments
:

(A) "Congress, DoD differ on restored widow benefits' scope," Tom Philpott, Jan.23, 2004
(B) - Letter, dated April13, 2004; Rep. Henry E. Brown, SC, Chairman, House Veterans Affairs Committee, Subcommittee on Disability
(C) "Widows left out of "Concurrent Receipt" Reforms," Tom Philpott, March 4, 2007 ,
(D) SHARP vs. United States; US Court of Appeals for the Federal Circuit; Appeal is Affirmed: August 26, 2009 10pp.

DISBILITY DISCRIMINATION IMPACTS SURVIVOR BENEFITS

- The Rehabilitation Act of 1973, Section 504 prohibits discrimination on the basis of handicap in Programs (SBP) and activities assisted or conducted by the Department of Defense.
- DoD Directive 1020.1
    - E1.1.2.21, Title 10, USC, Chapter 55, as implemented by DoD 6010.8.R, "Civilian Health and Medical Program of the Uniformed Services (CHAMPUS," January 10, 1977.
    - E3.2. PROHIBITIONS AGAINST EMPLOYMENT DISCRIMINATION BY RECIPIENTS
        - E3.2.2.3 Rates of pay or any other form of compensation and changes in compensation. [Retired benefits are considered "deferred compensation"]
        - E3.2.2.6. Fringe benefits available by virtue of employment, whether or not administered by the recipient.
- The Department of Defense Trust Funds are not identified as recipients in DoDD 1020.1. However, the trust funds are programs fully funded with Federal money. CHAMPUS is identified as a recipient that must be compliant with this Directive. I believe the laws prohibiting discrimination apply to the DoD Trust Funds as well.

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LEGISLATIVE HISTORY – HOUSE AND SENATE

Since 1999, Congress has passed about a dozen pieces of legislation that incrementally restored military retired pay and SBP to those who were affected by dual compensation laws.

In the House of Representatives, since the 107th Session of Congress, there have been 10 bills, 2 discharge petitions, and one motion to recommit the NDAA07 regarding the elimination of the SBP/DIC offset. The co-sponsors of these bills have numbered from 44 to 352 in different sessions of Congress. It is mind boggling to see the inconsistency with which elected officials support these bills by putting their name on the bill...so fearful of accusations of spending too much money rather than making laws based on traditional public policy. Loyal sponsors of the legislation have been Rep. Henry Brown, SC, Rep. Solomon Ortiz, TX, Rep. Chet Edwards, TX, Rep. Walter B. Jones, NC; and Rep. Joe Wilson, SC.

The NDAA08 included a provision to establish a Special Survivor Indemnity Allowance (SSIA) with an initial payment of $50/mo. the first year increasing $10/yr until the payment reached $100/mo. HASC Chairman Ike Skelton, MO, personally negotiated funds to increase the SSIA to $310/mo. and extend the time it ends to October, 2017.

In the Senate, Senator Bill Nelson, Fl. has remained a loyal champion since 2001 and the 107th Congress. He has introduced 8 bills and several Senate Amendments to the NDAA.

It is disappointing to watch the contradictions with the support of various Senators and Congressmen. Speaking about my own state of Virginia; 10 out of 11 Members of Congress have co-sponsored HR 1594. Representative Dave Brat, (VA-7th) is the only Member whose staff has not been responsive. Senators Tim Kaine and Mark Warner, representing the same citizens of Virginia have declined requests to co-sponsor S. 979. 82.4% of Virginians voted "YES" to provide a real estate tax waiver to fully disabled veterans in 2010. Virginians overwhelmingly support disabled veterans and their survivors! Senators Kaine and Warner worked quickly to find funding to reinstate the 1 % COLA for military retirees under age 62. My question is, do Virginia's Senators represent the same Virginia voters as do Virginia's Congressmen? Are Senators Warner and Kaine representing the people of Virginia or turning a deaf ear to surviving spouses and turning their backs on deceased service members who cannot now be their own advocates?

I testified before the Senate Veterans Affairs Committee on February 3, 2005. Newly elected Senator Barack Obama, IL, attended the hearing as a Member of the Committee. Senator Obama attended a Gold Star Wives Memorial Day reception in 2007 and his remarks recognized the significant sacrifices surviving families had made. It is so difficult to understand that President Obama has not adhered to his own beliefs I heard at the Senate Hearing of being inspired to follow through by his sense of our significant sacrifices. He co-sponsored S. 935 (05-24-07) and SA 4979 (06-24-08), bills to eliminate the SBP/DIC offset. He voted for the Senate Amendment to the NDAA09 even though it wasn't funded. The elimination of the SBP/DIC offset has never been included in the President Obama's budget even though the White House staff has convened meetings on the topic.

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CONCLUSION:

DEAD and DISABLED service members are a consequence of war. The surviving families of these American Heroes are the long term cost of war. The payment of SBP assures all surviving military spouses their pro rata share of earned retired pay (and clearly, someone who dies on active duty does not have the opportunity to pay SBP premiums).

To sum up, I believe that full SBP should be paid to all recipients without DIC offset.

I urge the Members of Congress to be mindful of their obligation to protect these surviving spouses just as their deceased service members have protected our Nation. Military Widows are reluctant to participate in the process of legislative change. Their lives have been about caring for others. They have made such great sacrifices all their lives in the tradition of military families. There is also an expectation that legislative officials will do their job.

Correcting this offset of the DoD's Survivor Benefit is a moral obligation which now stands before Congress and the President.

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BIO OF EDITH G. SMITH

Edith Smith is the widow of Lt. Col Vincent M. Smith, USMC, Ret., who had the misfortune to suffer a fully disabling heart condition in 1987, at age 49. Vince was soon switched from CHAMPUS, his earned military health benefit of retirement, to Medicare. With the special help of Senator John McCain, AZ, and Congressman Bill Young, FL, Edith set out in 1990 to change the law with another wife (residing in Florida), whose husband suffered a traumatic brain injury at about age 50. Within 10 months, legislation restoring CHAMPUS as second payer to Medicare was signed into law benefitting about 100,000 retired Medicare eligibles under age 65. A July 19, 1992, segment describing the mission of Terry Cox, FL and Edith to change the law ran on Tom Brokaw's NBC "Nightly News." Mr. Brokaw ended the segment with his comment: "Hell hath no fury like a woman scorned with a phone and a fax!"

Edith continued her role as an advocate for Disabled Military Beneficiaries. She has prepared and presented testimony many times since 1993 before various Congressional Committees as a volunteer citizen advocate working to correct problems that resulted with the implementation and integration of the dual Medicare/CHAMPUS/TRICARE benefit for those under age 65.

When the SBP/DIC offset was left out of "concurrent receipt" legislation, Edith pursued separate bills to eliminate the offset based on the same principled policies. Representing Gold Star Wives of America, Edith presented testimony regarding the elimination of the SBP/DIC offset to the Veterans Disability Benefits Commission in 2007. She also testified before the Senate Veterans Affairs Committee on February 5, 2005, the first Senate Hearing dedicated solely to survivor issues.

In 1998, The National Military Family Association honored Edith with its "Margaret Vinson Hallgren" Award for her efforts on behalf of the disabled members of the military community. In 2000, Admiral James Sears, TRICARE Management Activity Executive Director, invited Edith to serve on the TRICARE panel of military service organizations as an independent advocate for the disabled beneficiary. Her commitment to this beneficiary advocacy group continues today.

She joined Gold Star Wives of America shortly after her husband's death in 1998. Putting 10 years of Capitol Hill experience to use, she volunteered to assist as a member of the Government Relations Committee (2004-2014). She has received the Special Recognition and Shining Star Awards from Gold Star Wives.

She served on the Fairfax County Social Services Advisory Board for 7 years and was named Springfield's 1999 "Citizen of the Year." Fairfax County Board of Supervisors presented her with a Certificate of Recognition in March, 1999, for her efforts to persuade INOVA health systems to be participating provider in the newly created TRICARE program.

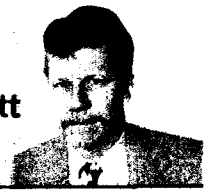
This year, the Secretary of Veterans Affairs invited Edith to serve as a member of the Advisory Committee on Cemeteries and Memorials.

A native Virginian, Edith graduated from Mary Washington College of the University of Virginia in 1962. She was married to Vince Smith for 35 years, staying at home to assist with his care during the years of his disability. They have two children; and two grandchildren.

DISCLOSURE STATEMENT

Edith Smith has not received any Federal Grant or contract, relevant to the subject matter of this testimony during the current or previous two fiscal years.

Congress, DOD differ on restored widow benefits' scope



Members and staff of the House Veterans Affairs Committee are confident they took a first step late last year toward ending a lesser-known "ban on concurrent receipt," the one that reduces survivor benefit payments to widows and widowers of military retirees.

Defense Department lawyers are just as confident, a Pentagon source said, that the bill's language missed its mark, and does not end for a small group of widows the dollar-for-dollar offset in military Survivor Benefit Plan payments mandated when widows also receive Dependency and Indemnity Compensation from the Department of Veterans Affairs.

At stake in how the new law is interpreted is an average of $9,204 in annual survivor benefits for about 400 widows of military retirees who died from service-connected disabilities. But Rep. Henry Brown Jr., R-S.C., said it's also a symbolic first step toward ending the DIC-triggered Survivor Benefit Plan offset for 44,000 dual-eligible surviving spouses of retirees.

Military retirees buy SBP coverage so their surviving spouses can continue to receive a portion of retired pay after retirees die. The widow of any veteran, including a military retiree, also can be eligible for Dependency and Indemnity Compensation, which pays at least $967 a month, if the veteran died from a service-related injury or illness. But widows of military retirees see their Survivor Benefit Plan reduced dollar for dollar by the amount drawn in tax-free dependency compensation.

The current controversy is over a provision in the Veterans Benefits Act of 2003, which was signed into law Dec. 16. For years, widows who remarried lost their dependency compensation entitlement. But Section 101 of the new benefit package allows veterans' surviving spouses who remarry at 57 or older to retain DIC. Indeed, widows who earlier remarried at 57 or older, and lost dependency compensation, have until Dec. 16, 2004 to reapply (Use VA Form 21-686c). More than 12,000 widows are said to qualify. An estimated 350 DIC-eligible widows a year remarry after age 56, and therefore stand to gain from the bill.

The controversy for widows of military retirees arises in paragraph B of Section 101. It says individuals made eligible for dependency compensation under the provision, by reason of their "status as the surviving spouse of a veteran," should see no reduction in other federal benefits as a result of this provision.

Brown, chairman of the House veterans' benefits subcommittee, said in a phone interview that the paragraph was added specifically to avoid a reduction in SBP benefit once dependency compensation is restored for these widows.

"We put a special paragraph in there to, basically, get (the Defense Department) to do that," Brown said.

"This was to get the camel's nose under the tent, sort of like we did with concurrent receipt" for disabled retirees. "We did the Purple Heart folks first and then we went back to address anybody with a (combat-related) disability. Then last year we said anybody up to 50 percent (disabled) even outside of combat" will be able, within 10 years, to draw both full retired pay and VA disability compensation.


Brown

Peter Dickinson, communications director for the House Committee on Veterans' Affairs, agreed that eliminating the offset in Survivor Benefit Plan for DIC-eligible widows who remarry after age 56 was the committee's intent.

"We wanted to make sure that this group did not see this new benefit come in, and then lose another benefit," he said.

The National Association of the Uniformed Services explained to its members in a Dec. 5 newsletter that the provision "in essence, eliminates the requirement for DIC to offset SBP annuities as required by current law."

But a Pentagon source said Defense pay officials and lawyers have reviewed the provision and found no impact on the Survivor Benefit Plan. If the intent was to end the SBP offset as dependency compensation is restored, the bill would have referred specifically to the spouse of "a military retiree" not of "a veteran."

Defense officials also are said to question the logic of eliminating cuts in the Survivor Benefit Plan only for these widows who remarry after age 56, leaving widows who don't remarry to continue to see the Survivor Benefit Plan reduced.

"It would be a totally incongruous result," said this Pentagon official. The department, therefore, isn't inclined to interpret the law as restoring the Survivor Benefit Plan to a small group of widows drawing dependency compensation, without clarifying guidance from the armed services committees, which have oversight responsibility for SBP.

Edith Smith, a long-time advocate for military widows, also is troubled by the prospect of remarried widows receiving more in combined benefits than other widows. But Smith said she applauds the House veterans' committee for taking a first step to end the SBP offset, and she argues that defense officials should apply the law as written.

If that happens, said Smith, she and service associations can press the armed services committees hard this year to end such an obvious disparity among retiree widows by passing legislation to grant full concurrent receipt of SBP and dependency compensation. In fact, Brown and Sen. Bill Nelson, D-Fla., have sponsored bills (H.B. 1726, S.B. 585) to repeal the SBP-DIC offset.

As of mid-January, the House committee had not officially discussed the intent of the provision known as "DIC 57" with Defense officials. That could happen soon.

"If there's a question of interpretation," Brown said, "I think we would try to get them to reconsider."

"SBP is not within scope of our jurisdiction," conceded committee spokesman Dickinson. "But DIC 57 was. And we merely wanted to ensure that it was a paid benefit for all those eligible."

Write to Military Update, P.O. Box 231111, Centreville, VA 20120-1111, e-mail milupdate@aol.com or visit the Web site at www.militaryupdate.com

Attachment A

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April 13, 2004

It's a Matter of Fairness--Repeal the SBP-DIC Offset For All Surviving Spouses: *Please cosponsor H.R. 1726!*

Dear Colleague,

Last year, the House passed H.R. 2297, the Veterans Benefits Act of 2003, by a vote of 399-0, and it was signed into law. Section 101 of that benefit package allows veterans' surviving spouses who remarry after the age of 57 to retain their VA Dependency and Indemnity Compensation (DIC), a benefit to survivors of veterans who died from service-related injury or illness. Included in that same section of the bill is language that states individuals made eligible for DIC by reason of their "status as the surviving spouse of a veteran," **should see no reduction in other federal benefits**. The most important federal benefit involved here is the Survivor Benefit Plan (SBP), an annuity voluntarily purchased by military retirees so their surviving spouses can continue to receive a portion of retired pay after the retiree dies. Although the Congress has clearly spoken on this issue, it is unclear whether the Department of Defense (DoD) will follow our intent to end this injustice and continue to make SBP payments without offset by DIC.

Except for those surviving spouses who remarry after age 57, the DIC benefit is offset against the SBP annuity under current law, and the proportionate SBP premium is refunded to the surviving spouse without interest. Now, it is a matter of simple fairness to eliminate this inequity by repealing the DIC offset from SBP annuities for all surviving spouses of military retirees. H.R. 1726 will do this for the more than 40,000 widows and widowers who face their own version of "concurrent receipt." They are often alone, and on a fixed income, so this purchased and rightful benefit is such a tremendous help.

As we continue our legislative business this year, please do not forget about military surviving spouses and all of the sacrifices that they have made to this great nation. Chairman Nussle has provided us with the headroom in the Budget Resolution to make this happen if the Armed Services Committee includes appropriate language that permits survivors to retain their rightful and voluntarily purchased benefits. For more information or to become a cosponsor, please contact Joe Glebocki at 5-3176.

Sincerely,

Henry E. Brown Jr.

HENRY E. BROWN, JR.
Member of Congress

Attachment B

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Widows left out of 'concurrent receipt' reforms

Army Sgt. Maj. Keith Witt had been a soldier 29 years when illness forced him to retire in 1993. The Department of Veterans Affairs rated him fully disabled with multiple sclerosis and later with cancer presumed to have been caused by exposure to the defoliant Agent Orange in Vietnam.

Witt had signed up for the military Survivor Benefit Plan for his wife, Kay. His retired pay was reduced by 6.5 percent a month for SBP premiums.

By 1997, Keith's conditions had worsened to a point that Kay retired early from her federal civilian career to be his fulltime caregiver. She estimates the decision reduced her pension by about half.

When Keith died in 2001,

Tom **Philpott**
MILITARY UPDATE

Kay became eligible for an SBP annuity equal to 55 percent of Keith's retired pay. Because Keith had died of service-connected illnesses, she also was eligible for Dependency and Indemnity Compensation (DIC) from the Department of Veterans Affairs.

Here, however, is the catch. To accept DIC, which pays a basic benefit now of $1,067 a month, the law requires an equal cut in SBP. Premiums paid on the portion of SBP that disappears are returned to the widow.

This so-called SBP-DIC offset impacts 59,000 military survivors and simply isn't fair, Witt and other widows told the Veterans' Disability Benefits Commission last week. The two payments have distinct purposes, they said.

DIC, which is tax free, compensates for a service-connected death and the resulting economic loss. SBP is like life insurance. Kay qualified for SBP only because her husband bought it for her with monthly premiums.

"It would be illegal if a civilian company did that — refunded your premiums,' without interest, and said, 'You know, we've changed our minds. We don't want to pay this,' " she told me.

The Veterans' Disability Benefits Commission is examining all facets of the veterans' disability system. A final report is due in October.

Witt and several other widows appeared briefly before the commission to describe how the offset has impacted them. A more detailed argument for ending it was presented by Bonnie G. Smith, a long-time advocate for military widows.

The commission staff presented three options for handling the SBP-DIC offset issue:

- Endorse the offset and continued partial refunds of SBP benefits.
- Recommend eliminating the offset for all recipients, including survivors of members who die in service.
- Recommend eliminating the offset only for survivors of retirees who paid SBP premiums before their death. Under this option, the offset would continue to impact SBP payments for deaths in service.

Smith, widow of a retired Marine officer who died in 1998 after many years disabled by a severe heart ailment, said Gold Star Wives strongly supports the second option and strongly opposes the others.

"To change nothing is unconscionable," Smith said. "And to eliminate the SBP-DIC offset for all survivors where the disabled retiree paid SBP premiums but not for survivors of in-service deaths, because no SBP premiums were paid, is not a fair and equitable solution."

The issue has had its champions. In the last Congress, Sen. Bill Nelson (D-Fla.) introduced the Military Retiree Survivor Benefit Equity Act and is expected to do so again this year.

Smith reminded commissioners that Congress paid almost $3 billion to fewer than 3,000 families who lost loved ones in the attacks of 9-11. Ending the offset merely would ensure that surviving military spouses "receive their pro rata share of earned retired pay," she said.

To comment, write Military Update, P.O. Box 231111, Centreville, VA, 20120-1111, e-mail milupdate@aol.com or visit www.militaryupdate.com.

Attachment C

United States Court of Appeals for the Federal Circuit

2008-5105

PATRICIA R. SHARP, MARGARET M. HAVERKAMP,
and IVA DEAN ROGERS,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

Edward R. Reines, Weil, Gotshal & Manges LLP, of Redwood Shores, California, argued for plaintiffs-appellees. With him on the brief were Michael R. Franzinger and Azra M. Hadzimehmedovic, of Washington, DC.

Douglas K. Mickle, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Michael F. Hertz, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and Bryant G. Snee, Assistant Director. Of counsel on the brief were Kelly L. McGovern, Personnel Branch, Army Litigation Division, United States Army, of Arlington, Virginia, and Scott Lafferty, Senior Associate Counsel, Office of the General Counsel, Military and Civilian Pay Law Directorate, Defense Finance and Accounting Service, of Cleveland, Ohio.

Appealed from: United States Court of Federal Claims

Judge George W. Miller

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Attachment (D)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5105

PATRICIA R. SHARP, MARGARET M. HAVERKAMP,
and IVA DEAN ROGERS,

Plaintiffs-Appellees,

v.

UNITED STATES,

Defendant-Appellant.

Appeal from the United States Court of Federal Claims in 07-CV-547,
Judge George W. Miller.

DECIDED: August 26, 2009

Before MAYER, CLEVENGER, and SCHALL, Circuit Judges.

MAYER, Circuit Judge.

The United States appeals the judgment of the United States Court of Federal Claims, which denied its motion to dismiss, and granted the motion for summary judgment of Patricia Sharp, Margaret Haverkamp, and Iva Rogers, permitting them to receive Survivor Benefit Plan ("SBP") payments unreduced by the amount of their reinstated Dependency and Indemnity Compensation ("DIC") payments. Sharp v. United States, 82 Fed. Cl. 222 (2008). Because the Court of Federal Claims correctly determined that 38 U.S.C. § 1311(e) partially repealed 10 U.S.C. § 1450(c)(1), we affirm.

BACKGROUND

The appellees (collectively referred to in the singular as "Sharp") are surviving spouses of deceased veterans and military retirees of the United States Armed Forces, each of whom remarried after age 57. This case centers on statutory interpretation and involves two benefit programs: SBP, which is administered by the Department of Defense, and DIC, which is administered by the Department of Veterans Affairs. SBP is an insurance-style program allowing eligible servicemembers and military retirees to elect to have premiums deducted from their pay in order to provide their spouses with additional benefits after their deaths. 10 U.S.C. § 1448 (2006). As the surviving spouse of a deceased military servicemember who chose to participate in SBP, Sharp is the primary beneficiary of annuity payments that became effective the first day after her spouse's death. Id. § 1450(a). DIC is a separate benefit, which is automatically paid to surviving spouses of veterans who died while on active duty or while suffering from a service-connected disability. 38 U.S.C. § 1310(a) (2006) ("When any veteran dies . . . from a service-connected or compensable disability, the Secretary shall pay [DIC] to such veteran's surviving spouse . . . ."). Sharp's spouse died while on active duty or while suffering from a service-connected disability. Thus, she is eligible to receive both SBP and DIC benefits.

Prior to 2003, surviving spouses receiving DIC payments became ineligible to continue receiving the benefit when they remarried. Congress responded by passing the Veterans Benefits Act of 2003 ("the Veterans Benefits Act"), which restored DIC benefits to surviving spouses who chose to remarry after age 57. Id. § 103(d)(2)(B) ("The remarriage after age 57 of the surviving spouse of a veteran shall not bar the

furnishing of benefits [relating to DIC] to such person as the surviving spouse of the veteran."). The Veterans Benefits Act also provided that, "notwithstanding any other provision of law," those remarried spouses who are simultaneously eligible for other benefits inuring to surviving spouses of veterans do not suffer a reduction in their benefits due to the DIC payments. Id. § 1311(e).[1]

The SBP and DIC benefit schemes, however, have contradicting provisions regulating offsets for those who receive both benefits. The SBP offset provision, which went into effect September 21, 1972, calls for reducing SBP payments by the amount the recipient receives in DIC benefits. 10 U.S.C. § 1450(c)(1) (2006) ("If . . . the surviving spouse . . . is also entitled to [DIC] under section 1311(a) of title 38, the surviving spouse . . . 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."). As stated above, however, the DIC scheme appears to prohibit a reduction in benefits, such as SBP payments, for widows like Sharp, notwithstanding provisions of law like the offset language in the SBP statute. See 38 U.S.C. § 1311(e) (2006). Nevertheless, the Department of Defense continued to enforce the SBP offset

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[1] The Veterans Benefits Act of 2003 provides in pertinent part:

> In the case of an individual who is eligible for dependency and indemnity compensation under this section by reason of section 103(d)(2)(B) of this title who is also eligible for benefits under another provision of law by reason of such individual's status as the surviving spouse of a veteran, then, notwithstanding any other provision of law (other than section 5304(b)(3) of this title), no reduction in benefits under such other provision of law shall be made by reason of such individual's eligibility for benefits under this section.

38 U.S.C. § 1311(e) (2006) (effective Jan. 1, 2004).

provision, and reduced Sharp's SBP payments by the amount she received in DIC benefits.

On July 19, 2007, Sharp filed suit in the Court of Federal Claims, asserting that the government improperly reduced her SBP payments by the amount of her DIC payments. The court granted summary judgment in her favor, holding that "section 1311(e) modifies or partially repeals 10 U.S.C. § 1450(c)(1) to the extent that SBP payments are not to be reduced by the amount of DIC payments to those surviving spouses who receive DIC by virtue of their having remarried after the age of 57." Sharp, 82 Fed. Cl. at 229. The government appeals, and we have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

We review the trial court's grant of summary judgment de novo, reapplying the same standard as the trial court. Palahnuk v. United States, 475 F.3d 1380, 1382 (Fed. Cir. 2007). Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Rule 56(c) of the Rules of the United States Court of Federal Claims; see also Palahnuk, 475 F.3d at 1382.

I.

The statutory provisions at issue, 10 U.S.C. § 1450(c)(1) and 38 U.S.C. § 1311(e), are at odds: the SBP scheme calls for reducing SBP payments by the amount the recipient receives in DIC benefits, whereas the post-2003 DIC scheme prohibits such reductions for surviving spouses who remarry after age 57. Sharp urges,

and the trial court held, that by its plain language section 1311(e) modifies or partially repeals section 1450(c)(1), so that surviving spouses who receive reinstated DIC by virtue of remarrying after age 57 receive their SBP payments unreduced by the amount of their DIC payments.

The government more restrictively reads the language of section 1311(e) as precluding the reduction of benefits by DIC payments only for those benefits that are paid to surviving spouses of veterans *solely* due to their status as surviving spouses. In order for a surviving spouse of a veteran to receive SBP, the veteran must have been eligible for retirement, 10 U.S.C. § 1448(a)(1), have chosen SBP coverage, id. § 1448(a)(2), and have paid premiums for the benefit, id. § 1452. Because eligibility for SBP benefits includes requirements additional to one's status as a surviving spouse of a veteran, the government concludes that SBP benefits are not included in the section 1311(e) ambit of protection.

We agree with Sharp and the trial court. To determine Congress' intent, we use the traditional tools of statutory construction, beginning with the text of the statute. Splane v. West, 216 F.3d, 1058, 1068 (Fed. Cir. 2000) (citing United States v. Gonzales, 520 U.S. 1, 4 (1997)). Where the intent is unambiguously expressed by the plain meaning of the statutory text, we give effect to that clear language without rendering any portion of it meaningless. Id. Here, Congress' intention to supersede all other laws (except a provision not at issue in this case), and prevent a decrease in some other benefit payment as a result of section 1311(e)'s restoration of DIC payments to surviving spouses who remarry after age 57, is plain on the face of the statute. 38 U.S.C. § 1311(e) ("[N]otwithstanding any other provision of law (other than

section 5304(b)(3) of this title), no reduction in benefits under such other provision of law shall be made by reason of such individual's eligibility for benefits under this section."). Because the "notwithstanding" clause applies to "any other provision of law," without relevant limitation, section 1311(e) cannot be given any effect unless its language is construed to modify or partially repeal the earlier-promulgated section 1450(c)(1) to the extent necessary to resolve the offset conflict.

To the government's unconvincing argument that the only benefits section 1311(e) was meant to protect from offset are those granted solely because of the recipient's status as the surviving spouse of a veteran, Sharp responds that the plain language of section 1311(e) supports the reading that the statute applies to benefits for which a recipient's "status as the surviving spouse of a veteran" is a necessary but not exclusive requirement. Sharp's reading of the statute is more persuasive because, inter alia, neither party has identified a statute that entitles one to benefits solely due to one's status as a veteran or a spouse of a veteran; benefits appear always to be otherwise conditioned, e.g., filing necessary paperwork. The government's position, on the other hand, makes it effectively impossible for any benefit to gain offset protection from section 1311(e). We therefore reject its interpretation, which would violate the canon that we must "give effect, if possible, to every clause and word of a statute" and should avoid rendering any of the statutory text meaningless or as mere surplusage. Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal quotation marks omitted).

The government continues that the statute does not pertain to SBP benefits because SBP is a *retirement* benefit and not a benefit that is conferred based on *veteran* status. Although the government correctly states that not all veterans are

retirees, it also concedes that a military retiree will always be a veteran.[2] Thus, Sharp's status as the surviving spouse of a military retiree unequivocally confers status as the surviving spouse of a veteran. Only military retirees and retirement-eligible servicemembers are permitted to participate in SBP, so an SBP beneficiary always is a surviving spouse (or dependent child) of a veteran. As such, the SBP offset provision, 10 U.S.C. § 1450(c)(1), represents "another provision of law" that makes benefits available to an individual "by reason of such individual's status as the surviving spouse of a veteran" as contemplated by 38 U.S.C. § 1311(e). Because Sharp's eligibility for SBP is predicated upon her status as the surviving spouse of a veteran, her SBP benefits are protected from offset.

II.

Even though we conclude that the plain language of 38 U.S.C. § 1311(e) unambiguously precludes the DIC-SBP offset of 10 U.S.C. § 1450(c)(1), we take a look at the legislative history "only to determine whether a clear intent contrary to the plain meaning exists." Glaxo Operations UK Ltd. v. Quigg, 894 F.2d 392, 396 (Fed. Cir. 1990). To overcome the plain meaning of the statute, the party challenging it by reference to legislative history must establish that the legislative history embodies "an '*extraordinary showing* of contrary intentions.'" Id. (quoting Garcia v. United States, 469 U.S. 70, 75 (1984)). The government has failed to present anything that comes close to satisfying this burden.

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[2] Title 38 defines a veteran as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2) (2006).

The government first points to the Congressional Budget Office ("CBO") cost estimate of the Veterans Benefits Act of 2003, which included the DIC-SBP offset in its calculation, as evidence that Congress intended SBP offsets to remain in place. We are unpersuaded. First, the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent. Second, Congress never ratified the CBO's interpretation, which was completed more than two weeks after Congress took final action on the bill. Finally, section 1311(e)'s "notwithstanding" clause, which repealed the DIC-SBP offset at issue, was not part of the bill's original text, but was added by amendment. As the trial court noted, the fact that the repeal was not included in the original text of the bill could have resulted in a CBO calculation error or oversight. In sum, the government's CBO argument is not "an extraordinary showing" that Congress intended the statute to mean something contrary to its unambiguous language.

To counter the government's position, Sharp contends that the legislative history of a bill considered by the preceding Congress and similar to the one that produced section 1311(e) demonstrates that Congress conveyed its actual intent to partially repeal the DIC-SBP offset. In 2002, Congress considered the Veterans' and Survivors' Benefits Expansion Act of 2002, which included language almost identical to the provision in the Veterans Benefits Act of 2003. A House Veterans Affairs Committee report discussing the 2002 legislation expressly stated that the provision at issue is applicable to SBP payments. H.R. Rep. No. 107-472, at 6 (2002), reprinted in 2002 U.S.C.C.A.N. 1020, 1022 ("[T]he Committee has included language so that [retained DIC payments] will be paid to all remarried surviving spouses, and that no reduction of other benefits to which the surviving spouse may be entitled, such as Survivor Benefit

Plan payments, would occur."). Although this committee report does not speak directly to the language of the Veterans Benefits Act of 2003, it at least confirms that the legislative history does not amount to an "extraordinary showing of contrary intention" required to interpret section 1311(e) as not partially repealing the DIC-SBP offset. "Surely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand . . . simply because the interpretation was given two years earlier." United States v. Enmons, 410 U.S. 396, 405 n.14 (1973); see also Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1347 n.1 (Fed. Cir. 2001) ("Congress did not release committee reports, but it is proper for us to look to the legislative history from the [previous] Congress for guidance in interpreting the [statute], because the language did not change.").

Finally, the government relies on post-2003 congressional activity in its attempt to prove that Congress did not intend a partial repeal of the DIC-SBP offset in 2003. Specifically, it points to ongoing legislative efforts to effect a total repeal of the DIC-SBP offset as evidence that if Congress had intended the Veterans Benefits Act of 2003 to silently repeal the offset, it would have done so expressly and for all surviving spouses, not just the narrow group of survivors who marry after age 57. This argument also is unavailing.

As recognized by the trial court, there are many plausible explanations for Congress' decision to repeal the DIC-SBP offset only for surviving spouses who receive DIC by reason of their having remarried after age 57. Perhaps Congress intended to encourage marriage for older surviving spouses. Perhaps section 1311(e) simply represents a first step in an effort to eventually enact full repeal. After all, the

servicemember paid for both benefits: SBP with premiums; DIC with his life. Perhaps it was recognition that the political process is the art of the possible, and that prudence counseled against making the perfect the enemy of the good. Whatever the reason, the government has failed to make the "extraordinary showing of [Congress'] contrary intentions" that would permit this court to construe section 1311(e) in a way that eviscerates its plain language.

CONCLUSION

Accordingly, the judgment of the United States Court of Federal Claims is affirmed.

AFFIRMED