June 18, 1998
L-98-16

TO: Beatrice M. Sutter
Supervisor, Bureau of Quality Assurance

FROM: Steven A. Bartholow
Deputy General Counsel

SUBJECT: Crediting of Military Service in Survivor Cases

This is in reply to your memorandum of March 17, 1998, requesting clarification of Legal Opinion L-96-27 regarding the use of military service in connection with the computation of survivor annuities and lump sum death payments.

That opinion concluded, essentially, that in computing the survivor tier II component and the lump sum death payment, the RRB should follow the decision regarding the use or non-use of military service in connection with the computation of the employee's annuity. In accord with your request, I will respond to your specific questions and then examine the explanations contained in the Retirement Claims Manual. Where you have grouped several questions as one number, I have identified each individual question by a letter designation for easier reference.

QUESTIONS

1. An employee filed a 1973 edition of the AA-1 and was paid under the 1937 Act. Military service was indicated on the application but was not claimed under the Railroad Retirement Act due to other Federal entitlement. (a) Can the military service be included in his annuity under the 1983 Amendments? (b) If the military service could have been included in his annuity, but it was not, can we now include it in the survivor annuity? (c) If the military service cannot be included in the employee's annuity, can it be used in the computation of the survivor annuity?

(a) As you know, the Railroad Retirement Act of 1937 ("the 1937 Act") contained a provision that if military service was used as the basis for an annuity under any other Act of Congress, the employee annuity which included credit for that same military service would be reduced. Similarly, section 2(h)(1) of the Railroad Retirement Act of 1974 (RRA) [45 U.S.C. §231a(h)(1)] formerly required the reduction of the railroad retirement annuity of an individual who was receiving a separate pension or

disability compensation or other Federal benefit based on the individual's military service if his military service was also used in the computation of his railroad retirement annuity. Section 414(a)(1) of Title IV of Public Law (P.L.) 98-76, enacted on August 12, 1983, repealed section 2(h)(1) of the RRA prospectively beginning with the month after the date of the enactment of P. L. 98-76. The precise wording of the statutory language which set the effective date of this amendment is determinative of the answer to your first question. Section 414(b) of P.L. 98-76 provided that: "The amendments made by this section shall apply with respect to months beginning after the date of the enactment of this Act." (Emphasis supplied.) This language contrasts with effective date provisions contained in other sections of Title IV of P.L. 98-76. Section 409(b), for example, stated that the amendment made by section 409 "shall be effective with respect to divorced wife annuities awarded on and after the date of enactment [August 12, 1983]." It is my opinion that the elimination of former section 2(h)(1) of the RRA applied to any annuity payable in September 1983 and in months thereafter, regardless of when the annuitant first became entitled to an annuity. It is therefore my opinion that the military service could be included in the annuity of the employee in your first question.

(b) Section 4(g)(1) of the RRA provides that the survivor Tier II component is based on the Tier II component which the employee would have been entitled to receive for the month the survivor's annuity begins to accrue. As concluded in response to question 1(a), the employee was entitled to receive an annuity amount which after 1983 included his military service in the computation. However, since that service was not so included, the question becomes whether administrative finality would apply so as to require computation of the survivor Tier II using the Tier II amount actually paid or the Tier II amount which could have been paid using the employee's military service. It is our opinion that the failure to re-compute the employee's annuity after the effective date of the 1983 amendment was not a decision to which administrative finality and reopening would apply. Rather, we would make a new decision with respect to the survivor benefit that would take into account a change in the law which occurred after the initial adjudication of the employee's annuity application. Once the deceased employee's Tier II is re-computed using the military service, the survivor's Tier II would be computed using the re-computed employee Tier II.[1]

[1]Although the employee's tier II would be recomputed, no accrual of employee tier II benefits would be payable.

(c) The answer to question 1(b) makes this question moot.

2. If the military service was determined to be used as wages to vest the employee [for a vested dual benefit] but the employee never received a windfall prior to his death, can military service, if creditable as compensation, be used in the calculation of the widow's annuity?

The decision to use military service as wages or compensation is a legal conclusion made pursuant to section 3(i)(2) of the RRA [45 U.S.C. §231b(i)(2)] as to where the military service would be most beneficial to the annuitant. Since such decision is not a finding of fact, section 261.9 of the Board's regulations (dealing with reopening factual findings in connection with a subsequent claim on the same earnings record) would not apply. Nor does any other provision of the regulations governing finality of agency decisions apply. As indicated in the discussion in the response to question 1(b), section 4(g)(1) provides that the survivor Tier II component is based on the Tier II component which the employee would have been entitled to receive for the month the survivor's annuity begins to accrue. Since military service was not used as compensation in the computation of the employee's Tier II component in this case where it was credited as wages, it cannot be used in the computation of the widow's annuity, even though the use of the military service as wages did not benefit the employee.

3. If the employee did not indicate military service on his application but proof was subsequently submitted by the survivor, can the military service be used in the computation of the survivor annuity?

It is our view in this case that there was no decision regarding the use of military service with respect to the computation of the employee's annuity. No decision was possible because the file contained no evidence of military service. Therefore, a decision to use the military service as compensation would be made when such evidence is presented in connection with the survivor annuity. Increased benefits would be payable only for the months following the month the new evidence is received. See 20 CFR § 261.10, 62 F.R. 45714 (August 29, 1997).

4. If retirement did not make a determination regarding the use of military service, and proof of military service was in file, in 1974 Act or 1983 Amendment cases, can survivors treat the case as if it was an initial "D" case and make a determination regarding the use of military service in the survivor annuity?

It is our view that there was no decision in this case, since no determination was made regarding the use of the military service which was contained as evidence in the file. It would therefore follow that military service would be used in the computation of the survivor annuity. [2]

5. Policy and Systems indicated that in L-96-27 they interpreted the "use or non-use" of military service to mean "use equals comp; non-use equals wages." BQA believes "use equals comp or wages and non-use equals M/S not used at all." Please clarify the meaning of use and non-use in your L-96-27.

Legal Opinion L-96-27 stated that:

> Since the survivor's tier II component is based on an extrapolation from the employee's actual tier II component, it necessarily follows that, in computing the survivor tier II component, the RRB is bound by the decision regarding the use or non-use of military service in connection with the employee's annuity. (Emphasis supplied.)

The phrase "use or non-use of military service" in the sentence quoted above was intended to refer to crediting military service as compensation or not crediting it as compensation for purposes of the employee's railroad retirement annuity. That phrase was not intended to mean that non-use of military service automatically means crediting military service as wages. This meaning is evident from an earlier sentence in L-96-27. Specifically, the first sentence of the second paragraph states that, "You point out that for retirement annuities a decision is made to use creditable military service as compensation or as wages, or to not use it, whichever alternative is most advantageous to the employee."

RETIREMENT CLAIMS MANUAL

The general statement preceding section 5.4.80 needs to be modified in light of the discussion in this memorandum. Section 5.4.80A.1, which states in part that where military service is used in the computation of the employee annuity, it is to be used in the computation of the survivor annuity, is correct.

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[2] No accrual would be payable based upon a recomputation of the deceased employee's Tier II for use in computing the survivor Tier II.

Section 5.4.80A.2 pertains to where military service is used as wages in connection with the employee annuity and states in part that "If the employee received a vested dual benefit (VDB), use the survivor Tier II without M/S. If the employee did not receive a VDB, use the survivor Tier II with M/S." This statement is not correct. If the employee military service was used as wages, then that military service may not be included in the computation of the survivor Tier II, whether or not the employee received a vested dual benefit. (See the discussion in our response to question 2.) Section 5.4.80A.3. should be modified, consistent with the discussion in this memorandum, to specify that where military service was not used as compensation or wages in the employee's benefit, it should be used to compute the survivor's Tier II.

Section 5.4.80B. concerns cases where military service was creditable as wages only and is generally consistent with the discussion in this memorandum. Where the military service was used as wages in the computation of the employee benefit, then it should be used as wages in the computation of the survivor benefit. Where military service was not used at all in the computation of the employee benefit, then it may be used in the computation of the survivor benefit, in accordance with the discussion in this memorandum.

The description in section 5.4.80C. regarding the computation of the lump sum death benefit requires that if military service was used as wages or compensation in the employee benefit, then it must be used in the computation of the basic amount. However, it provides also that if it was not used in the employee benefit, then it still should be used in the computation of the basic amount if the military service was for a period before January 1, 1975. This procedure would appear to be consistent with the responses discussed in this memorandum.