

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

99 M.S.P.R.653

MARGARET M. ALLEN,
Appellant,

DOCKET NUMBER
AT-0831-05-0202-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 15, 2005

(CSF 2 900 182)

Margaret M. Allen, Bokeelia, Florida, pro se.

Cynthia Reinhold, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) denying her application for a Civil Service Retirement System (CSRS) survivor annuity. For the reasons set forth below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision and ORDER OPM to grant the appellant's application for a CSRS survivor annuity.

BACKGROUND

¶2 The appellant's husband, Wayne M. Allen, retired from federal service effective February 8, 1986. Initial Appeal File (IAF), Tab 3, subtab 2D. At the time of Mr. Allen's retirement, he was married to Mary Allen and he elected to receive a reduced CSRS retirement annuity so as to provide for a survivor annuity for his spouse. *Id.* Mary Allen died on March 3, 1989, and Mr. Allen subsequently married the appellant on September 8, 1990. *Id.*, subtab 2B. Mr. Allen continuously received the reduced retirement annuity that would provide for a survivor annuity from the date of his retirement until he died on May 14, 2004. *Id.*, subtab 2D. The appellant filed an application with OPM for CSRS survivor annuity benefits following her husband's death. *Id.*, subtabs 2B, 2D. OPM issued a reconsideration decision denying the appellant's survivor annuity application on the ground that Mr. Allen had not filed an election to provide the appellant with a survivor annuity within 2 years of their marriage as required by 5 U.S.C. § 8339(j)(5)(C)(i). *Id.*, subtab 2A.

¶3 The appellant asserted on appeal that her husband had never received any notice from OPM informing him that he was required to make an election to provide a survivor annuity for her within 2 years of their marriage and, further, that his continuous receipt of a reduced retirement annuity to provide for a survivor annuity evidenced his intent to provide her with a survivor annuity. IAF, Tab 1. After conducting a hearing, the administrative judge (AJ) issued an initial decision in which she found that OPM had proven its compliance with its statutory obligation to provide annuitants with annual notice of their survivor annuity election rights and that any failure by Mr. Allen to receive those notices was due to his failure to update OPM on his mailing address during the relevant time period. Initial Decision (ID) at 2-5. Thus, the AJ affirmed OPM's reconsideration decision denying the appellant's survivor annuity application because Mr. Allen had failed to elect to provide a survivor annuity for the

appellant within 2 years of their marriage as required by 5 U.S.C. § 8339(j)(5)(C)(i). ID at 5.

ANALYSIS

¶4 The appellant asserts on review, in effect, that the AJ erroneously applied the law to the facts in this case and, further, the fact that her husband never elected to receive an unreduced annuity evidences his intent to provide her with a survivor annuity. Petition for Review File (PFRF), Tabs 1-2, 4, 6. For the reasons set forth below, we agree.

¶5 “Upon remarriage, a retired employee or Member who was married at the time of retirement ... may irrevocably elect during such marriage, in a signed writing received by the Office [OPM] within 2 years after such marriage ... a reduction in the employee’s or Member’s annuity under paragraph (4) of [5 U.S.C. § 8339(j)] for the purpose of providing an annuity for such employee or Member’s spouse in the event such spouse survives the employee or Member.” 5 U.S.C. § 8339(j)(5)(C)(i).¹ As relevant here, this section allows a retired employee to elect within 2 years following his remarriage to receive a reduced retirement annuity so as to provide for a survivor annuity for his current spouse. *Id.* There is no question in this case that since Mr. Allen’s retirement he had continuously received a reduced retirement annuity that would provide for a survivor annuity for his spouse. Thus, Mr. Allen continuously satisfied that portion of the statute. The statute also requires that the retired employee’s

¹ The election the appellant made at his retirement, i.e., to provide his spouse with a survivor annuity, was no longer effective after Mary Allen died. *See* 5 U.S.C. §§ 8339(j)(5)(A) (any reduction in an annuity for the purpose of providing a survivor annuity for the current spouse of a retired employee terminates for each full month after the death of the spouse or after the dissolution of the spouse’s marriage to the retired employee), 8341(b)(3) (a spouse acquired after retirement is entitled to a survivor annuity only upon election of a survivor annuity instead of any other survivor benefit to which the spouse maybe entitled).

election or reelection to provide for a survivor annuity be made within 2 years of his remarriage. 5 U.S.C. § 8339(j)(5)(C)(i). The issue in this case is whether OPM may refuse to provide a survivor annuity to the appellant because Mr. Allen failed to affirmatively make a new election to provide her with a survivor annuity within 2 years of their marriage.

¶6 OPM has a statutory obligation to notify each annuitant annually of the requirements under 5 U.S.C. § 8339(j) for electing a survivor annuity benefit. 5 U.S.C. § 8339 note (Section 3 of Pub. L. No. 95-317, as amended by Pub. L. No. 95-454, s 906(a)(2), (3), provided that: The Director of the Office of Personnel Management shall, on an annual basis, inform each annuitant of such annuitant's rights of election under sections 8339(j) and 8339(k)(2) of title 5, United States Code.) (internal quotation marks omitted); *see Hairston v. Office of Personnel Management*, 318 F.3d 1127, 1130 (Fed. Cir. 2003); *Brush v. Office of Personnel Management*, 982 F.2d 1554, 1559 (Fed. Cir. 1992). The fact that OPM proves that it sent annuitants a notice does not necessarily satisfy OPM's obligation to provide adequate notice. *See Simpson v. Office of Personnel Management*, 347 F.3d 1361, 1363-65 (Fed. Cir. 2003).

¶7 To show that it has fulfilled this mandatory notice obligation, OPM must do two things: OPM must prove that it actually sent the required notice and it must prove that the *content* of the notice was adequate to inform the annuitant of the specific election requirements under sections 8339(j) and (k)(2). *See id.* at 1365; *Brush*, 982 F.2d at 1560-61. “It is the statutory purpose of a notice to adequately inform an annuitant of the requirements that must be met for a spousal annuity to be provided.” *Simpson*, 347 F.3d at 1364-65. If OPM does not provide an annuitant with a sufficient notice, OPM cannot deny a survivor annuity based on the annuitant's failure to timely make an election under section 8339(j) if the annuitant adequately manifested the intent to provide the survivor annuity in question. *See id.* at 1366-67; *Hairston*, 318 F.3d at 1130; *see also Vallee v. Office of Personnel Management*, 58 F.3d 613, 615-16 (Fed. Cir. 1995)

(OPM's failure to provide the statutorily mandated notice under 5 U.S.C. § 8339 note "excused the retiree's noncompliance with the election requirement").

¶8 In *Simpson*, the court found that, while OPM's general annual notices provided to all annuitants for the years 1989 through 1996 were adequate to inform annuitants of their rights to make an *original* election of a survivor annuity after retirement, the notices failed to properly inform annuitants who had already made an original election of a survivor annuity of the requirement to make a new election following their divorce. *Simpson*, 347 F.3d at 1364-65. The court found that "an annual notice is deficient when it fails to inform an annuitant that, even if he had previously elected a spousal annuity when married, he must make a new election after his divorce." *Id.* at 1365. The court further found that there was no evidence "in the record that a notice was sent to Mr. Simpson that he needed to make a reelection." *Id.*

¶9 In determining whether the content of OPM's annual notices to an annuitant adequately informed him of his election rights, we look to the notice sent immediately after the event that would result in his election or reelection decision.² See *id.*; *Hairston*, 318 F.3d at 1130-31. Mr. Allen married the appellant in this case on September 8, 1990. IAF, Tab 3, subtab 2B. The record contains an affidavit from an OPM records administrator attesting to OPM's mailing of its general annual notices to all annuitants for the years 1989 through 2003. *Id.*, subtab 2D. The record also contains what appears to be OPM's general annual notice sent out in September 1990. *Id.* As in *Simpson*, this notice fails to inform an annuitant that his original election at the time of retirement to

² We need not address whether OPM could cure its inadequate notice after the 2-year election period had expired because there is no evidence that OPM subsequently provided adequate notice in this case. However, we reserve for our future consideration whether OPM could subsequently provide adequate notice of the election requirement and thereby trigger a new 2-year election period, if its notice also informs the annuitant that the 2-year election period commences with its adequate notice.

provide a survivor annuity for his spouse terminates upon the death or divorce of his spouse and of the requirement to *reelect* a survivor annuity following the death or divorce of his spouse if he wishes to continue the survivor annuity for his divorced spouse or a spouse he subsequently marries (or remarries). *Id.*; see *Simpson*, 347 F.3d at 1364-66.

¶10 As in *Simpson*, OPM's September 1990 annual notice in this case contains a section with the heading "Events Which *May* Increase Your Annuity." *Simpson*, 347 F.3d at 1366; IAF, Tab 3, subtab 2D (emphasis added). The court found that the language used in the title and text of that section of the annual notice "would reasonably lead an annuitant to conclude that his earlier election of a survivor annuity would remain in effect as long as he continued to accept a reduced annuity, but that he could optionally increase his annuity if his marriage ended." *Simpson*, 347 F.3d at 1366. Additionally, we note that neither the retirement annuity application form signed by Mr. Allen nor OPM's annual notices regarding an annuitant's survivor annuity election rights state that a survivor annuity election made at the time of retirement will terminate upon the death or divorce of the annuitant's spouse, and that the election of a survivor annuity made at the time of retirement is ineffective with respect to a spouse the annuitant marries after retirement. IAF, Tab 3, subtab 2D. Thus, as the court found in *Simpson*, we find under the facts of this case as well that Mr. Allen could have reasonably assumed that his original election to provide for a survivor annuity would continue as long as he continued to receive a reduced annuity during his lifetime. See *Simpson*, 347 F.3d at 1366.

¶11 Consistent with *Simpson*, we find that the content of OPM's relevant notice in this case was inadequate to inform Mr. Allen of the requirement to make a new election following the death of his former spouse in order to provide a survivor annuity for the appellant. See *id.* at 1364-66. Thus, we find that OPM may not deny the appellant's application for a survivor annuity on the ground that Mr. Allen failed to elect a survivor annuity for the appellant within 2 years of his

remarriage. *See id.* at 1364-67. It is undisputed that Mr. Allen continuously received a reduced retirement annuity from the time of his retirement until his death so as to provide for a survivor annuity. IAF, Tab 2D. Consistent with *Simpson*, we find that this evidence, standing alone, adequately demonstrates that Mr. Allen continuously intended to provide a survivor annuity for his spouse upon his death. *See Simpson*, 347 F.3d at 1366-67. Thus, we find that OPM must grant the appellant's application for a survivor annuity. *See id.* at 1367.

ORDER

¶12 Accordingly, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision and ORDER OPM to grant the appellant's application for a CSRS survivor annuity.³ This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your

³ The appellant asserts on review that she has not cashed the October 14, 2004, \$49,327.74 check OPM tendered to her as a lump-sum payment of Mr. Allen's annuity contributions. PFRF, Tabs 1, 4. As a result of our order directing OPM to grant the appellant a survivor annuity, the appellant is no longer entitled to the lump-sum benefits and she should hold such payment to return it to OPM.

representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.