CASE REPORT DATE: July 20, 2007

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BOARD DECISIONS

***Robinson v. Office of Personnel Management*, 2007 MSPB 172**
PH-0831-06-0659-I-1
July 13, 2007

Retirement
- Survivor Annuity

When the appellant retired under CSRS in 1995, he was not married and did not elect a survivor annuity benefit. He married on May 26, 2001, and sometime later that year, telephoned OPM to ask for information about leaving his retirement pension to his wife. He was advised that he had two years from the date of his marriage to elect a survivor annuity benefit for his spouse. In April 2003, the appellant again telephoned OPM and requested the proper forms for making such an election. OPM sent the appellant an SF-2808 Designation of Beneficiary form, which the appellant completed and signed on May 2, 2003, which was received by OPM on May 13, 2003. After telephoning OPM several times during the next 15 months to ascertain the status of his May 2003 submission, an OPM employee informed the appellant in September 2004 that he had filed the wrong form for electing a survivor annuity benefit. The appellant wrote letters to OPM in September and October 2004 seeking to correct the situation. OPM considered the October letter as a request to provide survivor annuity benefits for the appellant's spouse, but denied the request because it was not submitted within two years of the date of his marriage, as required by 5 U.S.C. § 8339(k)(2)(A).

On appeal to the Board, the administrative judge (AJ) found that the appellant failed to make a timely election of a survivor annuity because: (1) To make a timely election of a survivor annuity under § 8339(k)(2)(A), an annuitant must submit a "signed writing" that "manifest[s] an unmistakable intent" to make

such an election; (2) an SF-2808 does not suffice to manifest such an unmistakable intent.

Holding: The AJ correctly found that the submission of an SF-2808 Designation of Beneficiary form does not manifest an unmistakable intent to elect a survivor annuity benefit. Nevertheless, OPM has an obligation not only to provide accurate information in annual notices to annuitants concerning their right to elect survivor annuity benefits, but all communications to annuitants must provide accurate information "so that the statutorily required notice is not diluted or contradicted." If OPM provides inaccurate information, and this causes an annuitant to fail to elect a survivor annuity, the election should be considered to have been made. In this case, OPM misinformed the appellant that the SF-2808 was the correct form for electing a survivor annuity, causing him not to complete the correct form within the two-year period. The Board ordered OPM to grant the appellant's election of a reduced annuity with survivor benefits for his spouse.

***Brown v. Office of Personnel Management*, 2007 MSPB 173**
PH-844E-06-0577-I-1
July 13, 2007

Retirement
- Disability Retirement
Board Procedures/Authorities
- Pro Se Appellants
- Reopening and Reconsideration

The appellant, a Laborer Custodian with the U.S. Postal Service, applied for disability retirement under FERS, identifying post-traumatic stress disorder as his disabling condition. OPM denied the application, and on appeal to the Board's regional office, the AJ affirmed OPM's final decision.

Holding: Although the Board denied the appellant's petition for review, it reopened the appeal on its own motion and remanded the case to consider the medical evidence on which the Social Security Administration and the Department of Veterans Affairs relied in determining that the appellant is entitled to disability benefits. Citing *Lynum v. Office of Personnel Management*, 103 M.S.P.R. 426 (2006), the Board noted that the appellant was never specifically informed that he should submit the medical evidence on which those agencies relied. Chairman McPhie dissented, stating that reopening should be reserved for unusual circumstances, not present here, where the Board is firmly convinced that determining the appellant's entitlements on the record developed before the AJ would lead to the

wrong result and there is reason to believe the appellant should not be held responsible for the deficiencies in that record.

***Blaha v. Office of Personnel Management*, 2007 MSPB 174**
DA-0831-07-0068-I-1
July 16, 2007

Retirement
- Survivor Annuity

The initial decision affirmed a final OPM decision denying as untimely filed a request to elect a reduced annuity with a survivor annuity for a person with an insurable interest in the appellant. The parties stipulated that, at the time of her retirement, the appellant asked an employee in her agency's retirement section if she could get a survivor annuity for her domestic partner of 15 years, and was told that no such benefit was available. The AJ observed that section 8339(k)(1) does not provide for an election beyond the time of retiring and found that, even though the retirement counselor may have misinformed the appellant regarding whether she could elect an insurable interest survivor annuity for her domestic partner, and even if this misinformation caused the appellant to miss the deadline for electing an insurable interest survivor annuity, the deadline cannot be excused under *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), which held that the government cannot be estopped from denying benefits not otherwise permitted by law even if the claimant was denied monetary benefits because of his reliance on the mistaken advice of a government official.

Holding: The Board vacated the initial decision and remanded the appeal for further adjudication. The principle set forth in *Richmond* does not apply when a claim of equitable estoppel is raised and there is no claim for payment of money from the U.S. Treasury. There are 3 separate bases for waiving a filing deadline prescribed by statute or regulation: (1) where the statute or regulation provides for a waiver under specified circumstances; (2) where an agency's affirmative misconduct may preclude enforcement of the deadline under the doctrine of equitable estoppel; and (3) where an agency fails to give a notice of rights and the applicable deadline when such notice is required by law or regulation. The second basis is implicated in the present case, and because it was not considered below, further adjudication is necessary.

***Arenal v. Office of Personnel Management*, 2007 MSPB 175**
SF-0831-07-0016-I-1
July 17, 2007

Retirement
- Disability Retirement
Board Procedures/Authorities
- Reopening and Reconsideration
Defenses and Miscellaneous Claims
- Collateral Estoppel/Res Judicata/Law of the Case

In an earlier appeal adjudicated at the Board and before the Federal Circuit in 1989-1991, it was determined that the appellant was not entitled to CSRS retirement benefits because he lacked 5 years of creditable service. Thereafter, the appellant asserted to OPM that his first term of service ran for a longer period than was recognized in the first appeal, and that he otherwise met the requirements for a retirement annuity. In an April 19, 2001 letter, OPM informed the appellant that it had previously issued a reconsideration decision that addressed the appellant's request for benefits, and that could "no longer respond or reply to your correspondence." When OPM did not respond to the appellant's additional letters, the appellant filed the present appeal. The AJ issued an initial decision dismissing the appeal on the basis of res judicata (claim preclusion), because the issue of the appellant's entitlement to CSRS benefits had already been litigated by both the Board and the Federal Circuit, and the appellant's newly asserted basis for entitlement was or should have been raised in the first appeal.

Holding: The Board denied the appellant's PFR, declining to disturb the AJ's conclusion that the appellant's appeal was barred by the doctrine of res judicata. To the extent that the appellant's petition may be deemed as a request to reopen his previous appeal, the Board denied the request, noting the limited circumstances in which such a request will be granted.

COURT DECISIONS

The U.S. Court of Appeals for the Federal Circuit has not issued any precedential decisions involving MSPB decisions since the last Case Report. The court has, however, issued more than 20 nonprecedential decisions involving MSPB decisions, which can be accessed at the court's website: http://www.fedcir.gov/dailylog.html