

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

2008 MSPB 109

Docket No. PH-0831-07-0512-I-1

**Linda L. Hayward,
Appellant,**

v.

**Office of Personnel Management,
Agency,**

and

**Jack N. Hayward,
Intervenor.**

OPM Claim No. CSA 3 698 162

May 28, 2008

Barbara J. Shah, Esquire, Bethel Park, Pennsylvania, for the appellant.

Arthur H. Baker, III, Esquire, Pittsburgh, Pennsylvania, for the intervenor.

Patrick Jennings, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) and the intervenor have petitioned for review of an initial decision that reversed OPM's reconsideration decision and awarded the appellant a former spouse survivor annuity. For the reasons set forth below, we GRANT both the intervenor's petition for review and

OPM's petition for review under 5 C.F.R. § 1201.115(d), and REVERSE the initial decision, SUSTAINING OPM's reconsideration decision.

BACKGROUND

¶2 The appellant and the intervenor were divorced in 1986 after a lengthy marriage. Initial Appeal File (IAF), Tab 9, Exhibit C. The intervenor is a former Federal employee covered under the Civil Service Retirement System (CSRS), and he is also entitled to military retired pay based on his military service. IAF, Tab 4, Subtab 6.

¶3 On March 26, 1990, the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division (state court), entered an order dividing the parties' marital property. IAF, Tab 9, Exhibit F. As relevant here, the state court noted that the intervenor is "a participant in the Civilian [sic] Service Retirement System ('the Plan')." *Id.* at 59, ¶ 2. The court awarded the appellant a portion of the intervenor's annuity under the "Plan" pursuant to "Title 10, Section 1408." *Id.* at 60, ¶ 7. In addition, the state court's order provided:

In the event that the [intervenor] is eligible for the Survivor Benefit Plan provided pursuant to Title 10 USC Section 1447, and 1448 et seq., the [intervenor] shall select the survivor benefit form which pays the largest monthly benefit to the [appellant].

Id. at 61, ¶ 7c. The state court explicitly stated that it was dividing property under state statute and under 10 U.S.C. § 1408, "which authorizes military retired or retainer pay to be distributed to former spouses." *Id.* at 63, ¶ 11. In addition, the order stated:

The Plan to which this Order applies is the Civil Service Retirement System Pension Plan in which [the intervenor] is a Participant, or any successor or transferee plan.

Id. at 65, ¶ 18. Further, the state court stated:

IT IS INTENDED that this Order shall qualify as a Qualified Domestic Relations Order under the Retirement Equity Act of 1984 and Title 10 USC Section 1408. The Court retains jurisdiction to amend this Order as might be necessary to establish or maintain its

status as a Qualified Domestic Relations Order under the Retirement Equity Act of 1984 and Title 10 USC Section 1408.

Id. at 67. The state court subsequently issued an order on May 31, 1995, that dealt exclusively with the intervenor's military retired pay under Title 10 of the United States Code. IAF, Tab 14 at 5-8.

¶4 In 1996, the intervenor retired from Federal service. IAF, Tab 4, Subtab 6. In 2001, the appellant contacted OPM in an attempt to obtain her portion of the intervenor's retirement annuity under the 1990 state court order. *Id.*, Subtab 5. At that time, and in a subsequent 2003 letter, OPM informed the appellant that the 1990 state court order was not acceptable for processing because it did not conform with the requirements of 5 C.F.R. part 838. *Id.* at 13-15.

¶5 In 2005, the appellant returned to the state court and obtained an order dated October 26, 2005, that modified the original 1990 state court order. IAF, Tab 4, Subtab 6 at 50-53. The 2005 order explicitly awarded the appellant a portion of the intervenor's CSRS annuity. *Id.* at 51, ¶ 1. The 2005 order further awarded the appellant a former spouse survivor annuity under 5 U.S.C. § 8341(h)(1). *Id.* at 51-52, ¶ 5. The appellant then submitted a new claim to OPM for a portion of the intervenor's retirement annuity and for a former spouse survivor annuity. IAF, Tab 4, Subtab 6 at 48.

¶6 Thereafter, OPM issued an initial decision in which it awarded the appellant a share of the intervenor's retirement annuity, but found that she is not entitled to a former spouse survivor annuity because the 1990 state court order did not award the appellant such benefits and because the 2005 order was not acceptable for processing for purposes of a former spouse survivor annuity because it was issued after the intervenor's retirement and was not the first court order dividing marital property. IAF, Tab 4, Subtab 4. The appellant sought reconsideration, *id.*, Subtab 3, and OPM affirmed its initial decision in a reconsideration decision issued on June 15, 2007, *id.*, Subtab 2.

¶7 The appellant filed an appeal in which she contended that she is entitled to a former spouse survivor annuity under the 1990 state court order and requested a hearing. IAF, Tab 1. She further argued that the 2005 order did not constitute a prohibited modification of the 1990 state court order but instead merely corrected the state court's mistaken citation to title 10 rather than title 5 without modifying the underlying award of a former spouse survivor annuity. IAF, Tab 16. The administrative judge afforded the intervenor notice of his right to participate in the appeal, which he exercised. IAF, Tabs 7, 11, 17.

¶8 After affording the appellant her requested hearing, the administrative judge reversed OPM's reconsideration decision. Initial Decision (I.D.) at 2, 4. The administrative judge found that the 2005 order was not acceptable for processing because it was entered after the intervenor's retirement and was not the first court order dividing marital property. *Id.* at 3. She further found that the 1990 state court order, because it referred to the "Civilian [sic] Service Retirement System," awarded the appellant a former spouse survivor annuity despite its erroneous citations to statutes applying only to military retired pay benefits. *Id.* at 3-4.

¶9 OPM and the intervenor have timely petitioned for review of the initial decision. Petition for Review (PFR) File, Tabs 1, 2. The appellant has responded in opposition to the petitions for review. *Id.*, Tab 7.

ANALYSIS

¶10 A survivor annuity shall be paid to the former spouse of a Federal retiree, "if and to the extent expressly provided for . . . in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree." 5 U.S.C. § 8341(h)(1); *Fiacco v. Office of Personnel Management*, 105 M.S.P.R. 193, ¶ 11 (2007); *Griffin v. Office of Personnel Management*, 83 M.S.P.R. 67, 72 (1999). The burden of proving entitlement to a survivor annuity is on the applicant for benefits. *Cheeseman v.*

Office of Personnel Management, 791 F.2d 138, 140-41 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *Ingle v. Office of Personnel Management*, 102 M.S.P.R. 202, ¶ 4 (2006). OPM’s regulations at 5 C.F.R. part 838, subparts A-I, apply to court orders affecting retirement benefits received by OPM on or after January 1, 1993. *Fiacco*, 105 M.S.P.R.193, ¶ 11; 5 C.F.R. § 838.101(c)(1). The administrative judge found that the appellant submitted the 1990 state court order to OPM in July 2001, I.D. at 3, and the appellant has not challenged this finding by filing a petition for review. Therefore, OPM’s regulations a 5 C.F.R. part 838, subparts A-I apply in this appeal.

¶11 By statute, OPM may not honor a modification to a court order providing a former spouse survivor annuity if the modification is made after the retirement or death of the Federal employee. 5 U.S.C. § 8341(h)(4); *Fiacco*, 105 M.S.P.R. 193, ¶ 13; *Griffin*, 83 M.S.P.R. at 72-73; 5 C.F.R. § 838.806(a). As the administrative judge correctly found, and which finding none of the parties disputes, the 2005 order in this case modified the earlier 1990 state court order and was issued after the intervenor’s retirement. I.D. at 3. Therefore, OPM may not honor the 2005 order. *See Vaccaro v. Office of Personnel Management*, 262 F.3d 1280, 1287 (Fed. Cir. 2001); *Lim v. Office of Personnel Management*, 98 M.S.P.R. 173, ¶ 8 (2005) (where the original order did not expressly provide for, or reserve disposition of, a survivor annuity, the appellant may not procure a survivor annuity through a subsequent court order without violating the restrictions of 5 U.S.C. § 8341(h)(4)).

¶12 Thus, the issue in this appeal is whether the 1990 state court order expressly provided for the payment of a former spouse survivor annuity to the appellant. The requirement that a survivor annuity be “expressly provided” is substantive, and not a mere technicality. *Hokanson v. Office of Personnel Management*, 122 F.3d 1043, 1047 (Fed. Cir. 1997); *Ingle*, 102 M.S.P.R. 202, ¶ 4. However, the “expressly provided for” provision does not require “magic words,” but only that the intent to provide the survivor annuity be clear, definite, explicit,

plain, direct, and unmistakable, not dubious or ambiguous. *Ingle*, 102 M.S.P.R. 202, ¶ 4; *Walker v. Office of Personnel Management*, 81 M.S.P.R. 377, ¶ 4 (1999). The Board and OPM are precluded from undertaking their own determinations of spousal entitlement or making an award of survivor benefits based on uncertain or ambiguous state court orders. *Thomas v. Office of Personnel Management*, 46 M.S.P.R. 651, 654 (1991). For OPM or the Board to construe unclear and ambiguous state court orders as they relate to former spouse survivor annuities would improperly make them, and not the state courts, the arbiters of spousal entitlements. *Id.* at 654 n.3.

¶13 The intervenor is entitled to retirement benefits based on his military service as well as under CSRS based on his Federal civilian service. The 1990 state court order at issue in this appeal is subject to multiple meanings because it purports to award the appellant a former spouse survivor annuity under the “Civilian [sic] Service Retirement System” while citing solely to statutes that do not apply to CSRS retirement benefits. In particular, the order cites 10 U.S.C. §§ 1408, 1447, 1448 et seq., IAF, Tab 9, Exhibit F at 60-61, 63, which are statutes relating exclusively to military retired pay benefits. In fact, the order specifically refers to 10 U.S.C. § 1408 as “authoriz[ing] military retired or retainer pay to be distributed to former spouses and set[ting] forth the conditions governing such a distribution.” *Id.* at 63. Indeed, the only reference in the order to a former spouse survivor annuity is to the “Survivor Benefit Plan provided pursuant to [10 U.S.C. §] 1447, and 1448 et seq.,” *id.* at 61, which, of course, relates exclusively to survivor benefits proceeding from military retired pay benefits.

¶14 In light of this language, the state court may have intended to award the appellant a former spouse survivor annuity under CSRS while citing to the incorrect statutes and mistakenly failing to refer to 5 C.F.R. part 838, as discussed below. On the other hand, the state court may have intended to award the appellant survivor benefits under the intervenor’s military retired pay while

mistakenly referring to CSRS. Thus, the 1990 state court order is ambiguous and we cannot find that it “expressly provide[s] for” a former spouse survivor annuity for the appellant. *See Kincaid v. Office of Personnel Management*, 104 M.S.P.R. 42, ¶ 11 (2006) (where a divorce decree was ambiguous, it did not “expressly provide for” an award of a survivor annuity, and the intervenor was not entitled to such an award).

¶15 As noted above, the administrative judge found that the 1990 state court order’s reference to the “Civilian [sic] Service Retirement System” was sufficient to evidence the court’s intent to award the appellant a former spouse survivor under the CSRS notwithstanding the court’s failure to reference the applicable statute and regulations. I.D. at 3-4. This finding was mistaken.

¶16 In *West v. Office of Personnel Management*, 105 M.S.P.R. 559, *review dismissed*, 230 F. App’x 998 (Fed. Cir. 2007), the Board discussed how OPM’s regulations at 5 C.F.R. part 838 are designed to allow OPM to give effect to state court orders that otherwise would lack sufficient clarity to be carried out:*

OPM has noted, however, that the same terms addressed in part 838 could be interpreted differently in the context of other retirement systems, such as the Employee Retirement Income Security Act (ERISA), and it has promulgated regulations designed to ensure that its interpretations will be applied only where the parties understood and intended that they would apply. Under those regulations, “[a]ny court order labeled as a ‘qualified domestic relations order’ or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing unless the court order expressly states that the provisions of the court order concerning CSRS . . . benefits are governed by the part.” OPM’s regulations provide

* *West* involved the division of a CSRS retirement annuity payable during the retiree’s lifetime between the retiree and his former spouse; it did not involve a former spouse survivor annuity as does the instant appeal. *West*, 105 M.S.P.R. 559, ¶¶ 2, 6. As such, *West* discussed the requirements of 5 C.F.R. § 838.302(a), which are not applicable in this appeal. *See id.*, ¶¶ 9-10. However, 5 C.F.R. § 838.302(a) is substantively identical to 5 C.F.R. § 838.803(a), which *is* applicable in this appeal. Furthermore, the Board in *West* relied on prior cases that involved former spouse survivor annuities and the application of 5 C.F.R. § 838.803(a). *West*, 105 M.S.P.R. 559, ¶¶ 11-12.

further that such an order must expressly refer to 5 C.F.R. part 838, and that it must “[s]tate that the provisions of the court order concerning CSRS . . . benefits are drafted in accordance with the terminology used in [that] part.”

West, 105 M.S.P.R. 559, ¶ 9 (citations omitted); *see* 5 C.F.R. § 838.803(a)(1)-(2).

¶17 The 1990 state court order at issue in this appeal is labeled a “Qualified Domestic Relations Order.” IAF, Tab 9, Exhibit F at 59. Thus, by regulation, the order is not acceptable for processing unless it “expressly states” that the provisions of the order concerning CSRS benefits are governed by 5 C.F.R. part 838. 5 C.F.R. § 838.803(a)(1). Moreover, the order is also required to “[e]xpressly refer to part 838” and “[e]xpressly state” that the order was drafted in accordance with the terminology used in part 838. 5 C.F.R. § 838.803(a)(2). The order does neither. Instead, the order uses terms of art associated with ERISA such as “[a]lternate [p]layee,” IAF, Tab 9, Exhibit F at 60-65; *see Kimble v. Office of Personnel Management*, 103 M.S.P.R. 175, ¶ 16 (2006), and it repeatedly provides that it is a “Qualified Domestic Relations Order,” IAF, Tab 9, Exhibit F at 59, 62-63, 67. Instead of containing appropriate and necessary references to part 838, the order cites ERISA, *id.* at 64, the Internal Revenue Code, *id.* at 63, and statutes governing military retired pay benefits, *id.* at 60-61, 63. Because the order makes no references to part 838, it does not meet the requirements of 5 C.F.R. § 838.803(a), and the administrative judge should not have found that the order was acceptable for processing. *See West*, 105 M.S.P.R. 559, ¶ 10.

¶18 In sum, because the 1990 state court order is ambiguous, it does not “expressly provide for” a former spouse survivor annuity. *See Kincaid*, 104 M.S.P.R. 42, ¶ 11; *Arnold v. Office of Personnel Management*, 94 M.S.P.R. 86, ¶¶ 17-18 (2003). Additionally, because the order fails to state that it is governed by 5 C.F.R. part 838, it does not meet the requirements of 5 C.F.R. § 838.803(a) and is not a court order acceptable for processing. *See West*, 105 M.S.P.R. 559, ¶ 10.

¶19 Finally, the appellant argued below, “The equities in this situation are clearly with Appellant.” IAF, Tab 16 at 7. While we are not unsympathetic to the appellant’s position, equitable considerations do not provide a basis for awarding benefits not otherwise authorized by law. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990); *Hunt v. Office of Personnel Management*, 89 M.S.P.R. 449, ¶ 9 (2001).

ORDER

¶20 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 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, www.cafc.uscourts.gov. 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:

William D. Spencer
Clerk of the Board
Washington, D.C.