

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

2009 MSPB 94

Docket No. AT-0831-08-0705-I-1

**Robbie C. Barker,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSF 3 123 004

June 5, 2009

Laura A. Keeton, Esquire, Huntingdon, Tennessee, for the appellant.

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

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the November 13, 2008 initial decision that affirmed the Office of Personnel Management's reconsideration decision denying her request to change her late husband's survivor annuity election. We DENY the appellant's petition for failure to meet the Board's criteria for review set forth at [5 C.F.R. § 1201.115](#)(d); however, for the reasons set forth below, we REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On or about October 28, 2005, the appellant's husband, Lyndle Barker, retired from his position with the Department of Agriculture under a Voluntary Separation Incentive Program. Initial Appeal File (IAF), Tab 5, Subtab 2B at 3, 5, Subtab 2D at 11, 14-15. Mr. Barker's Standard Form (SF) 2801, Application for Immediate Retirement under the Civil Service Retirement System, which he signed on October 6, 2005, indicated that the couple married on June 30, 1962, and were still married to each other at the time he retired. *Id.*, Subtab 2B at 5-6, Subtab 2D at 11-12. Section D, Box 1b of Mr. Barker's retirement application indicated an election to provide the appellant with a partial survivor annuity equal to 55% of \$12,000 a year. *Id.*, Subtab 2B at 5, Subtab 2D at 11. On October 25, 2005, the appellant signed a SF 2801-2, Spouse's Consent to Survivor Election, which also indicated that Mr. Barker had elected a survivor annuity in the amount of 55% of \$12,000.00 per year for her. *Id.*, Subtab 2B at 7, Subtab 2D at 13. Mr. Barker passed away on August 6, 2007. *Id.*, Subtab 2D at 7.

¶3 The appellant applied for survivor benefits and, on August 28, 2007, she wrote a letter to the Office of Personnel Management (OPM) asserting that an unintentional administrative error must have occurred because her husband had intended for her to receive 55% of his benefits after he passed away. *Id.* at 1-5, 10. W. Kent Jones, the Barkers' family attorney, also wrote to OPM claiming personal knowledge that the appellant's partial survivor annuity was contrary to Mr. Barker's expressed intent. *Id.* at 8-9. OPM issued a January 29, 2008 initial decision finding that Mr. Barker elected a partial survivor benefit for the appellant and that it must deny the appellant's request for a full survivor annuity. IAF, Tab 5, Subtab 2C at 1.

¶4 The appellant requested that OPM reconsider its initial decision and asserted that the amount of her first payment was considerably lower than the full survivor benefit she had discussed with her husband. *Id.*, Subtab 2B at 1. The appellant claimed that her husband had assured her that "all of the paperwork

would be taken care of to fulfill his request” that she receive “55% of his annuity, a full survivor benefit,” and further alleged that the amount of the survivor benefit election on Mr. Barker’s SF 2801 had been changed with correction tape. *Id.* at 1-2. The appellant asserted that a small trace of the original number remained and that “[i]t began with the number two (2) which reflects the correct amount that [Mr. Barker] had on his original retirement application.” *Id.* at 2. The appellant further asserted that she had been diagnosed with cancer and that “a less than full survivor annuity benefit would cause undue financial hardship.” *Id.* She submitted a letter from Ty Smith, Assistant Administrative Officer with Mr. Barker’s former employing agency, explaining her understanding that Mr. Barker had intended to provide a full survivor annuity for the appellant, but she claimed that her office had typed Mr. Barker’s retirement application for him and opined that “[d]ue to the high volume of retirement applications prepared during [that] time, an administrative error could have be[en] made and otherwise overlooked.” *Id.* at 3. OPM’s June 26, 2008 reconsideration decision affirmed its initial decision. IAF, Tab 5, Subtab 2A.

¶5 The appellant appealed OPM’s reconsideration decision, arguing that the correct survivor annuity amount on Mr. Barker’s original SF 2801 was altered and transferred to the SF 2801-2 that she signed. IAF, Tab 1, Appeal Form, Question 28. The appellant further asserted that Mr. Barker had not initialed the change to his SF 2801 and requested that OPM restore her survivor benefit to the original amount indicated on Mr. Barker’s SF 2801. *Id.*, Questions 28-29. OPM’s response explained that Mr. Barker had elected to provide a reduced survivor annuity for the appellant and that the appellant gave her irrevocable consent to that election, noting that no law, rule, or regulation afforded OPM the discretion to allow the appellant to change her husband’s election of a partial survivor annuity for the appellant. IAF, Tab 5 at 1-2. After holding a telephonic hearing, the administrative judge affirmed OPM’s reconsideration decision, finding that, if Mr. Barker had intended to provide the appellant a full survivor annuity, he

would have checked Box 1a of Section D of his SF 2801, and left Box 1b blank, but that even if “Box 1b could be used to provide a ‘full’ benefit, the amount entered on that line would have been \$40,000.00 and not approximately \$20,000.00 as attested to by Ms. Smith.” IAF, Tab 14, Initial Decision at 3. The administrative judge also noted that if Mr. Barker had intended to provide full survivor benefits to the appellant, “there would have been no need for the preparation or execution of an SF 2801-2” in order for the appellant to assent to Mr. Barker’s election of a reduced survivor annuity. *Id.*

¶6 The appellant's petition for review restates her argument that her husband intended to leave her a full survivor annuity and that the amount in Box 1b on his SF 2801 was changed to state the amount that the appellant was to receive rather than the figure to be divided in order to determine the appellant’s survivor annuity. Petition for Review File (PFRF), Tab 1 at 4-5. OPM responds that the appellant’s petition fails to meet the Board’s criteria for review. PFRF, Tab 4.

ANALYSIS

¶7 As noted above, the appellant’s petition for review merely restates her argument that Mr. Barker’s SF 2801 form was altered, claiming that the initial “decision is contrary to the testimony and evidence adduced at [the] hearing.” PFRF, Tab 1 at 4. However, the appellant fails to establish any error in the administrative judge’s factual analysis of the evidence in the appeal and we do not perceive one either. Further, the appellant proffers no new evidence and fails to establish that the administrative judge’s decision was based on an erroneous interpretation of statute or regulation. Accordingly, we deny the appellant’s petition for review because it fails to meet the Board’s criteria for review. *See* [5 C.F.R. § 1201.115\(d\)](#).

¶8 Nevertheless, we reopen the appeal on our own motion under [5 C.F.R. § 1201.118](#) and remand the appeal for further adjudication to address the following issues, which have not been considered to this point. OPM’s

reconsideration decision in this matter was both incomplete and potentially misleading because it only analyzed the appellant's claim under [5 C.F.R. § 831.622\(a\)](#), and incorrectly stated that Mr. Barker was required to file any change in his survivor annuity election no later than April 1, 2006, 30 days after the date of his first monthly annuity payment. IAF, Tab 5, Subtab 2A at 1-2. Contrary to OPM's assertion, because the Barkers were married at the time he retired and his retirement application indicated that he elected a partially reduced annuity in order to provide the appellant a current spouse annuity, Mr. Barker could have elected, no later than 18 months after the time he retired, to increase the reduction in his annuity in order to provide a larger survivor annuity to the appellant. See [5 U.S.C. § 8339\(o\)\(1\)\(B\)](#); [5 C.F.R. § 831.622\(b\)\(1\)](#). Further, the statute requires OPM to give annual notice to each eligible employee of their right to make such an election and of the applicable procedures and deadlines. See [5 U.S.C. § 8339\(o\)\(6\)](#); see also *Brush v. Office of Personnel Management*, [982 F.2d 1554](#), 1559 n.19 (Fed. Cir. 1992); *Nunes v. Office of Personnel Management*, [2009 MSPB 73](#), ¶¶ 10-11, 14-15. The parties did not address the applicability of these statutory and regulatory provisions below, and there is no evidence in the record regarding whether OPM provided Mr. Barker with the required annual notice. Thus, we remand the appeal to afford the parties the opportunity to submit evidence and argument on these issues. See generally *Nunes*, [111 M.S.P.R. 221](#), ¶¶ 19-20 (2009) (remanding for further adjudication where the parties and the administrative judge had consistently addressed the issue of annual notice of election rights under [5 U.S.C. § 8339\(k\)\(2\)](#), rather than the notice requirement of [5 U.S.C. § 8339\(o\)](#)).

ORDER

¶9 Accordingly, the initial decision is VACATED and this appeal is REMANDED for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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