

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

2010 MSPB 112

Docket No. DE-831M-09-0077-I-1

**Kathryn King,
Appellant,**

v.

**Office of Personnel Management,
Agency,**

and

**Diana M. King
Intervenor.**

June 18, 2010

P. Mars Scott, Esquire, Missoula, Montana, for the appellant.

Ronald A. Thuesen, Esquire, Missoula, Montana, for the appellant.

Richard Valentich, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed an untimely petition for review of an initial decision affirming the Office of Personnel Management's (OPM's) reconsideration decision, which found that she was ineligible for survivor annuity benefits under the Civil Service Retirement System (CSRS); she had been

overpaid in the amount of \$41,939.13; and collection of the debt would not cause her financial hardship. For the reasons set forth below, we DISMISS the petition for review as untimely filed, but we REOPEN the appeal on the Board's own motion pursuant to [5 C.F.R. § 1201.118](#), VACATE the initial decision, and REMAND the appeal to the Denver Field Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 After her putative husband, Donald King, a federal annuitant, died on May 26, 2004, OPM paid the appellant, Kathryn King, a monthly CSRS survivor annuity effective May 27, 2004. Initial Appeal File (IAF), Tab 5, Subtab 2 at 1. On June 7, 2007, however, OPM suspended the appellant's survivor annuity benefits effective March 7, 2007. *Id.*; IAF, Tab 17, Att. A. The intervenor in this appeal, Diana King, had filed a competing claim for survivor annuity benefits, and OPM was unable to determine who had been Mr. King's legal spouse when he died. IAF, Tab 17, Att. A; *see* IAF, Tab 10.

¶3 On February 7, 2008, the Montana Twenty-First Judicial District Court, Ravalli County, issued its Judgment of Validity of Common Law Marriage, finding that the intervenor was the lawful common law wife of Mr. King from 1984 until his death, and the appellant's marriage to Mr. King was void as a matter of law. IAF, Tab 17, Att. B. Based on this ruling, OPM found in an April 1, 2008 decision that the intervenor was entitled to the survivor annuity benefits arising from Mr. King's federal service. IAF, Tab 5, Subtab 4. OPM found that the appellant had erroneously been paid survivor annuity benefits in the gross amount of \$48,303.27, from May 27, 2004, through February 28, 2007. *Id.* OPM reduced the amount of the overpayment by \$6,364.14, to account for health benefits premiums that it can recover separately. *Id.* As a result, OPM found that the appellant was overpaid by \$41,939.13 in annuity benefits. *Id.*

¶4 The appellant requested reconsideration, but she did not specifically request waiver, compromise, or deferral of the overpayment. IAF, Tab 5, Subtab 3; IAF, Tab 17, Att. D. Rather, she asserted that the intervenor already received the annuity payments through the district court case, and she directed OPM to the intervenor to recover those funds. IAF, Tab 5, Subtab 3; IAF, Tab 17, Att. D. OPM issued its October 28, 2008 reconsideration decision, finding that she was not eligible for survivor annuity benefits and had received an overpayment of \$41,939.13. IAF, Tab 5, Subtab 2 at 1-2. OPM also found that the appellant had not shown that collection of the overpayment would cause her financial hardship, and set a repayment schedule of thirty-six monthly installments at \$1,164.97 and a final installment of \$ 0.21. *Id.* at 2-3.

¶5 The appellant filed this appeal, apparently seeking waiver of recovery of the overpayment, and did not request a hearing. IAF, Tab 1 at 3; IAF, Tab 15 at 3-4. The administrative judge issued an order setting forth the appellant's burden of proof and the type of evidence required to show that she is entitled to a waiver of repayment or adjustment of the repayment schedule based on financial hardship, detrimental reliance, or unconscionability. IAF, Tab 2 at 9-11. The appellant argued that she was without fault in causing the overpayment and that repayment would be unconscionable. IAF, Tab 17 at 7-9. Specifically, the appellant alleged that she is entitled to waiver of recovery of the overpayment because the intervenor was paid for the same coverage period by both OPM and the appellant in conjunction with the Montana court proceedings in which it was determined that the intervenor was Mr. King's spouse. IAF, Tab 1 at 9-10; IAF, Tab 5, Subtab 5 at 1-3; IAF, Tab 17 at 4, 7-8. The appellant asserted that, during the litigation before the Montana court, she deposited the annuity payments she received from OPM with her attorney or the court and that the money was paid to the intervenor. IAF, Tab 5, Subtab 5 at 1; IAF, Tab 17 at 7, Att. D at 1, Att. F at 1-2.

¶6 The administrative judge affirmed OPM’s reconsideration decision on the record, and found that the appellant failed to prove by preponderant evidence that she is entitled to a survivor annuity, and that OPM proved by preponderant evidence the existence and amount of the overpayment of \$41,939.13, which she received between May 27, 2004, and February 28, 2007. Initial Decision (ID) at 3-5. The administrative judge further found that she had not shown by substantial evidence that she is entitled to waiver of recovery of the overpayment because, although she was without fault in causing the overpayment, she did not show that recovery would be against equity and good conscience. ID at 5-9. In the initial decision dated March 24, 2009, the administrative judge also informed the appellant that any petition for review must be filed by April 28, 2009, unless she could prove that she received the initial decision “more than 5 days after the date of issuance,” in which case she could “file a petition for review within 30 days after the date [that she] actually receive[d] the initial decision.” ID at 10.

¶7 The appellant filed a pro se petition for review on September 9, 2009, over 4 months after the presumptive filing deadline. Petition for Review File (PFR File), Tab 1. The Clerk of the Board notified the appellant that the petition was filed beyond the presumptive deadline of April 28, 2009, and enclosed a “Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit” form. PFR File, Tab 2. The appellant subsequently filed such a completed motion. PFR File, Tab 4 at 1-2. The intervenor has responded in opposition to the petition for review. PFR File, Tab 3. OPM has not responded to the petition for review.

ANALYSIS

The petition for review was untimely filed without good cause for the delay.

¶8 “Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the

date the petitioner received the initial decision.” [5 C.F.R. § 1201.114\(d\)](#). The Board will waive this time limit only upon a showing of good cause for the delay in filing. [5 C.F.R. §§ 1201.12](#), 1201.114(f). To establish good cause for an untimely filing, a party must show that she exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, [4 M.S.P.R. 180](#), 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of her excuse and her showing of due diligence, whether she is proceeding pro se, and whether she has presented evidence of the existence of circumstances beyond her control that affected her ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to her inability to timely file her petition. *Moorman v. Department of the Army*, [68 M.S.P.R. 60](#), 62-63 (1995), *aff’d*, 79 F.3d 1167 (Fed. Cir. 1996) (Table). The Board may grant or deny the waiver of a filing time limit in the interest of justice, after considering all the facts and circumstances of a particular case. *Shiflett v. U.S. Postal Service*, [839 F.2d 669](#), 670-74 (Fed. Cir. 1988).

¶9 In her Motion to Accept Filing as Timely and/or to Ask the Board to Waive or Set Aside the Time Limit, the appellant does not allege that she failed to receive the initial decision or that she received the initial decision more than 5 days after the date of issuance. PFR File, Tab 4 at 1-6. Instead, she seems to be asserting that her petition for review was untimely because she was waiting to receive additional information regarding the monies she allegedly paid to the intervenor in the Montana court proceeding. The appellant asserts under penalty of perjury that she is requesting waiver of the filing deadline because she has been in the midst of

further investigation of the monies from OPM. I am not at fault in causing or contributing to the overpayment of the annuity. Recovery from me would be against equality [sic] and good conscience [sic]. I will continue to encourage you in the collection of the government monies paid to Diana King twice. Once by the District Court . . . as

issued and given to Diana by me from the annuities. The second was issued to Diana by OPM, thus she was paid twice.

Id. at 3. The appellant's motion includes a letter from her attorney below dated March 31, 2009. PFR File, Tab 4, Att. The letter states that because the administrative judge found that she had no authority to correct any duplicate payments that may have been made to the intervenor, the attorney would be "pursuing [her] claim with the Twenty-First Judicial District Court" in Montana "to attempt to correct the duplicate payments that [she] made to Diana." *Id.*

¶10 In timeliness cases, however, the Board has rejected analogous arguments about pursuing a remedy in another forum and found that such arguments do not support a showing of good cause for a filing delay. *See, e.g., Harris v. Department of Defense*, [101 M.S.P.R. 123](#), ¶¶ 8-9 (2006) (finding that the appellant failed to show good cause for delay based on her assertions that she was not able to file her appeal timely because she was engaged in equal employment opportunity counseling); *Little v. Government Printing Office*, [99 M.S.P.R. 292](#), ¶ 9 (2005) (finding that pursuing a remedy in another forum does not constitute good cause for an untimely appeal); *Barker v. Department of the Air Force*, [98 M.S.P.R. 10](#), ¶ 9 (2004) (finding that the appellant's allegation of involvement in proceedings before a hearing examiner of the Michigan Air National Guard pertaining to his removal did not explain how he was prevented from timely filing his petition for review), *review dismissed*, 122 F. App'x 499 (Fed. Cir. 2005).

¶11 The length of the delay is also problematic, despite the appellant's pro se status.¹ We have consistently denied a waiver of our filing deadline, even for pro se appellants, when the delay is not minimal. *E.g., Stoute v. Department of the Navy*, [102 M.S.P.R. 311](#), ¶¶ 6-8 (2006). Here, the petition for review was filed

¹ The appellant was represented by counsel below. *E.g.*, IAF, Tabs 12-13, 17. Both the petition for review and the Motion to Accept Filing as Timely and/or to Waive or Set Aside the Time Limit, however, were signed and submitted by the appellant rather than the counsel who represented her below. PFR File, Tabs 1, 4.

more than 4 months after the filing deadline. This is considerably more than a minimal delay. *See, e.g., Lima v. Department of the Air Force*, [101 M.S.P.R. 64](#), ¶ 8 (2006) (a delay of 9 days was not minimal); *Allen v. Office of Personnel Management*, [97 M.S.P.R. 665](#), ¶ 8 (2004) (the appellant's 14-day delay was not minimal). Further, the March 31, 2009 letter from the appellant's attorney at the time, which is referenced above, states that it is enclosing a copy of the initial decision, and instructs the appellant to review the initial decision and to call the attorney so that they could "discuss it in more detail." PFR File, Tab 4, Att. We may infer from this correspondence that the appellant received the initial decision relatively soon after it was issued and that she had the benefit of counsel at the time she received it. For all of these reasons, we DISMISS the petition for review because it was untimely and the appellant failed to show good cause for the delay.

The Board reopens this appeal on its own motion.

¶12 "The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time" [5 C.F.R. § 1201.118](#). As we explain below, we find it appropriate to reopen this appeal under the particular circumstances of the case. Although the administrative judge reached the correct decision based on the record as it stood while the appeal was before her, the appellant has augmented the record on review in an effort to show that she set aside money in trust during 2006 and 2007, which seems to exceed the funds held in trust that would have been paid pursuant to an October 7, 2005 state court order. PFR File, Tab 1, Atts. 2-4, 6, 7; *see* IAF, Tab 8 at 7. The issue of unjust enrichment based on duplicate payments is now the subject of a state court proceeding. PFR File, Tab 1, Att. 6. In addition to the appellant's proffer of evidence to show that she paid into a trust account funds representing the annuity payments she received, she also has alleged that OPM paid the intervenor a sum representing the annuity paid to the appellant for the time period at issue. *See* IAF, Tab 17 at 7. The evidence currently in the record, however, is insufficient to determine how much

money the appellant paid into the trust, how much money was paid to the intervenor from that trust, and how much money, if any, OPM has paid to the intervenor. Therefore, we believe that it is appropriate for the Board to conduct a full accounting of the funds collected from the appellant and paid to the intervenor from the trust fund, as well as any funds paid to the intervenor by OPM.

The appellant is not entitled to an annuity and received an overpayment.

¶13 As stated previously, a Montana court found that the appellant's marriage to Mr. King was void as a matter of law and that the intervenor was Mr. King's common law wife from 1984 until his death. IAF, Tab 17, Att. B. The administrative judge correctly found that, with exceptions not applicable here, a widow of a retired federal employee is entitled to a survivor annuity, and that "widow" is defined in relevant part for this matter as "the surviving wife of an employee . . . who was married to him at least 9 months immediately before his death." ID at 3-4 (citing [5 U.S.C. § 8341\(a\)\(1\)\(A\), \(b\)\(1\)](#)) The administrative judge accurately determined that, in light of the Montana court's decision, the appellant did not meet the definition of "widow," and thus was not entitled to a survivor annuity. ID at 4. The appellant has not challenged these findings on review.

¶14 There is also no real dispute that an overpayment exists. Based on OPM's computerized records showing pay-outs to the appellant, the administrative judge properly found that OPM showed by preponderant evidence that an annuity overpayment existed and established the amount of the overpayment. ID at 5. The appellant has not challenged either point on petition for review.

The record below supported a finding that repayment was not against equity and good conscience.

¶15 A waiver of recovery of an overpayment may be granted when the annuitant is without fault and recovery would be against equity and good conscience. *Spinella v. Office of Personnel Management*, [109 M.S.P.R. 185](#), ¶ 6

(2008) (citing [5 U.S.C. § 8470\(b\)](#) and [5 C.F.R. § 845.301](#)). In this case, the administrative judge found that the appellant was without fault in causing the overpayment. ID at 6. Generally, recovery is against equity and good conscience when it would cause financial hardship, the annuitant can show that because of the overpayment she relinquished a valuable right or changed positions for the worse, or recovery could be unconscionable under the circumstances. *Spinella*, [109 M.S.P.R. 185](#), ¶ 6 (citing [5 C.F.R. § 845.303](#)). The appellant bears the burden of establishing her eligibility to a waiver by substantial evidence. *Spinella*, [109 M.S.P.R. 185](#), ¶ 6 (citing [5 C.F.R. § 845.307\(b\)](#)). The administrative judge found here that the appellant did not meet that burden. ID at 5-9.

¶16 The appellant contended and still contends that she should not have to repay OPM because the annuity benefits paid to her were placed in trust with either her attorney or the court, and they have already been remitted to the intervenor pursuant to the Montana court’s finding that the intervenor was Mr. King’s lawful spouse. PFR File, Tab 4 at 3-4; IAF, Tab 1 at 9-10; IAF, Tab 5, Subtab 3; IAF, Tab 17 at 6-9. The appellant requested that OPM “contact Ms. Diana King” concerning the refund of those monies. IAF, Tab 1 at 9-10; IAF, Tab 5, Subtab 3. The appellant argued that if she were required to repay OPM for the entire amount of her annuity overpayment, the intervenor would be unjustly enriched to the appellant’s detriment, because after the Montana court issued its declaratory judgment, OPM paid the intervenor the same benefits that it had paid to the appellant. IAF, Tab 17 at 7-9. OPM, on the other hand, stated that it was “not a party to the Opinion & Order that would require [OPM] to contact Diana King for reimbursement of survivor annuity benefits that were erroneously issued” IAF, Tab 5, Subtab 2 at 2.

¶17 On appeal to the Board, the appellant submitted a copy of an Opinion & Order by the Montana Twenty-First Judicial District Court, Ravalli County, dated October 7, 2005, wherein the court granted the intervenor’s motion for release of

funds held by the court and/or in a trust account. IAF, Tab 8 at 7. In this order, the court also required counsel for the appellant “to file a verified accounting of all proceeds received within 10 days.” *Id.*

¶18 The intervenor argued that the appellant had known and acknowledged in a settlement agreement associated with the February 7, 2008 Montana declaratory judgment action that the appellant had not been Mr. King’s spouse and that she had no claim to benefits based upon his federal service. IAF, Tab 10 at 1. She further argued that the appellant, in a “second settlement” agreement, “agreed to pay her own debts contingent on [the intervenor’s] waiving everything [the appellant] owes [the intervenor].” *Id.* The appellant, who was represented by counsel in the proceeding before the administrative judge, did not submit into the record below any accounting of any funds that had been held by the court or her attorney, or paid to the intervenor, and neither the appellant nor the intervenor submitted copies of the purported settlement agreements.

¶19 In light of this, the administrative judge reasoned that recovery was not against equity and good conscience because the appellant had not provided any evidence of detrimental reliance, i.e., that she had changed her position for the worse or relinquished a valuable right based on either the incorrect payment or OPM’s notice that payments would be made. ID at 7; *see Spinella*, [109 M.S.P.R. 185](#), ¶ 6; [5 C.F.R. § 831.1403\(a\)\(2\)](#). The administrative judge further reasoned that the appellant failed to show that recovery would be unconscionable. ID at 7-9.

¶20 The Board will waive recovery of an annuity overpayment based on unconscionability under only exceptional circumstances. *Spinella*, [109 M.S.P.R. 185](#), ¶ 7. In doing so, the Board will consider all relevant factors under a “totality-of-the-circumstances” approach to determine whether recovery is unconscionable. *Id.* Those circumstances may include, but are not limited to, cases in which: (1) there has been an exceptionally lengthy delay by OPM in adjusting an annuity; (2) OPM failed to respond within a reasonable length of

time to an annuitant's inquiries regarding an overpayment; (3) OPM failed to act expeditiously to adjust an annuity in the face of specific notice; or (4) OPM was otherwise grossly negligent in handling the case. *Simpson v. Office of Personnel Management*, [96 M.S.P.R. 52](#), ¶ 20 (2004). The Board also considers other circumstances such as the annuitant's personal limitations, including lack of education, physical or mental disability, or other factors that would make recovery of the payment manifestly unfair. *Bacani v. Office of Personnel Management*, [64 M.S.P.R. 588](#), 596 (1994), *appeal dismissed*, 56 F.3d 79 (Fed. Cir. 1995) (Table).

¶21 The administrative judge found that OPM did not delay in terminating the appellant's survivor annuity benefits, nor did it fail to respond to inquiries in a timely manner, nor was it otherwise negligent in handling the case. ID at 8. Rather, the administrative judge found, OPM timely suspended the appellant's payments after the intervenor made her competing claim and waited until the Montana court ruled on the issue of who was legally married to Mr. King at the time of his death. *Id.*

¶22 The administrative judge also found that the appellant provided no proof that the funds allegedly given to the intervenor pursuant to the Montana court's 2005 order granting the Motion and Brief for Release of Funds Held by District Court and/or in Trust Account that the intervenor filed with the court and that the appellant submitted below were the same funds that represent the overpayment at issue here. *Id.*; *see* IAF, Tab 8 at 3-7. The administrative judge further found that there was no proof that she in fact paid the intervenor the amount of the overpayment. ID at 8-9. The administrative judge pointed out that while the annuity overpayment here covered the time period from May 27, 2004, through February 28, 2007, the Montana court granted the motion to release the funds on

October 7, 2005.² ID at 8. This would mean that the bulk of the annuity overpayment to the appellant occurred after the funds were released. *See* IAF, Tab 5, Subtab 4; IAF, Tab 8 at 7. The administrative judge further noted that the appellant did not show that she objected to paying the intervenor the funds held by the Montana court, nor did she show that she informed the Montana court that the intervenor would receive a double payment if the funds were paid. ID at 9. The administrative judge concluded that the Board may not estop OPM from denying benefits not otherwise authorized, even if equitable considerations favor the applicant. *Id.* (citing *McLaughlin v. Office of Personnel Management*, [62 M.S.P.R. 536](#), 559 (1994), *aff'd*, 47 F.3d 1181 (Fed. Cir. 1995) (Table)).

The Board remands this appeal to allow the administrative judge to determine whether the intervenor was unjustly enriched.

¶23

The administrative judge made the correct decision based on the evidence before her at the time. Though the appellant presented a copy of the Montana court order requiring payment to the intervenor of the funds that were held in trust as of October 7, 2005, and a November 2008 letter from her tax advisor, Mary Lemons, EA, which states that the Internal Revenue Service (IRS) has been informed regarding the intervenor's tax liability for the sum that was transferred to her, neither the court order nor the letter state the amount of money that was transferred to the intervenor. *See* IAF, Tab 8 at 3-7; IAF, Tab 17, Att. F. Further, as the administrative judge pointed out, payment of the funds held in trust was apparently made in October 2005, whereas the appellant's obligation to repay OPM extends for annuity benefits paid to her through February 2007. ID at 8. In her response to the appeal, the intervenor suggested that a settlement agreement was in place to cover the matter of the appellant's payments, but no further information is provided in the record below. *See* IAF, Tab 10 at 1.

² The initial decision states that the motion was granted on October 12, 2005; however, the Montana court's order was signed on October 7, 2005. ID at 8; IAF, Tab 8 at 7.

¶24 Nevertheless, the appellant filed with her petition for review records of various and mostly unspecified deposits made with the intervenor's attorney during 2006 and 2007. PFR File, Tab 1, Att. 3. She has also included her federal income tax returns for 2005 through 2007, which show that she disputed the income received from OPM. *Id.*, Att. 2 at 2, 4-5, 7-9, 11-12. A November 26, 2007 letter from the IRS also included with the petition for review shows that the dispute was resolved. *Id.*, Att. 4. The appellant additionally provided a letter from the intervenor's attorney dated April 3, 2007, which states that the appellant transferred to the intervenor \$32,367.65 representing the survivor annuity, and that another \$15,935.62 was owed to the intervenor. PFR File, Tab 1, Att. 7 at 2.

¶25 Although these records pre-date the close of the record below and cannot be considered as new evidence, *see Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980), they lend credibility to the appellant's claims and raise the possibility that the intervenor may have been unjustly enriched at the appellant's expense for at least part of the period during which the appellant received the annuity overpayment. It also appears that in January 2009 the appellant took legal action in the Montana court seeking a correction of the apparent double payment. PFR File, Tab 1, Att. 6. If the intervenor has, in fact, received double payments and the Montana court cannot, or will not, disgorge those funds and return them to the appellant so that she may repay OPM, OPM's recovery of the appellant's overpayment would be manifestly unfair. *See Bacani*, 64 M.S.P.R. at 596.

¶26 "The Board has stated that, in annuity cases such as this one, the paramount concern is whether the appellant is entitled to the benefit she seeks, not how well she argues her case. . . . The Board has stated further that, especially in such an annuity appeal, any doubt as to whether the Board should reopen an appeal for an adjudication of its merits should be resolved in favor of the appellant." *Moore-Meares v. Office of Personnel Management*, [105 M.S.P.R. 613](#), ¶ 8 (2007). For this reason, we believe that further processing is appropriate in order to determine

whether this appeal presents exceptional circumstances that would allow the Board to waive repayment based on unconscionability, at least to the extent that the intervenor received payments representing specific periods of time from both OPM and the appellant.

¶27 On remand, the administrative judge must obtain a full accounting from the appellant and the intervenor and determine the complete amount of annuity money that was collected from the appellant and paid to the intervenor by the appellant directly, by an attorney- or court-managed trust fund. In addition, the administrative judge needs to determine what funds OPM has paid the intervenor. The administrative judge must also consider the impact of any Montana state court decision handed down during the pendency of this petition for review. To the extent that the appellant or the trust fund has transferred annuity money to the intervenor which has also been paid to the intervenor by OPM, and any double payments have not been recovered by the court and returned to the appellant, repayment may be unconscionable.

ORDER

¶28 Accordingly, we VACATE the initial decision and REMAND the appeal to the Denver Field Office to allow the parties to present any additional evidence and argument, which would allow the Board to resolve the foregoing issues.

FOR THE BOARD:

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