UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 115

Docket No. DA-0831-09-0696-I-1

Betty Walker Walley,

Appellant,

v.

Office of Personnel Management,

Agency.

June 22, 2010

F. Sherman Boughton, Jr., Esquire, New Orleans, Louisiana, for the appellant.

Kristine Prentice, 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 a petition for review (PFR) of the initial decision affirming the Office of Personnel Management's (OPM's) reconsideration decision that found the appellant was not entitled to a former spouse survivor annuity based upon her former spouse's federal service. For the reasons that follow, we GRANT the PFR, REVERSE the initial decision, and find that OPM's reconsideration decision is NOT SUSTAINED.

BACKGROUND

¶2 The decedent in this case, Loren R. Walley, Sr. (Walley), was an employee of the U.S. Postal Service, and was covered under the Civil Service Retirement System (CSRS). Initial Appeal File (IAF), Tab 9, Subtab 6 at 9. Walley and the appellant obtained a judgment of divorce (divorce decree) from a Louisiana state court on January 6, 1993. IAF, Tab 9, Subtab 5, Attachment 2. This divorce decree contained two brief clauses; the first dissolved the marriage and the second declared that each party was the owner of an undivided one-half interest in all marital property. *Id*.

¶3 On February 1, 1998, Walley retired from the Postal Service and in his retirement application indicated he was unmarried and elected to receive a retirement annuity payable only during his lifetime, with no survivor benefit for his former spouse, the appellant in this case. IAF Tab 9, Subtab 6 at 1. On April 15, 1998, the appellant filed a Petition for Judicial Partition of Community Property (partition petition), which stated in relevant part:

> 3. Plaintiff and Defendant acquired property during their marriage which was subject to a community property regime and have not been able to agree to an amicable property partition and settlement of all claims between the parties arising from the matrimonial regime. The parties have partitioned all of the immovable property and some of the movable property by mutual agreement.
>
> 4. The Plaintiff seeks a Judicial Partition of the Community Property consisting of the Defendant's United States Postal Retirement Plan which has not been partitioned.

IAF, Tab 10, Exhibit A.

¶4 The state court ultimately issued an order titled "Court Order Acceptable For Processing" (partition order), dated February 22, 2008. IAF, Tab 9, Subtab 5, Attachment 1. The partition order provides that "the Former Spouse shall be awarded the maximum possible former spouse survivor annuity under the CSRS." *Id*. The state judge signed the order on February, 22, 2008, at 11:13 a.m.; Walley died that same evening. *Id*., Attachments 1, 3.

¶5 The appellant filed an application with OPM on April 14, 2008, seeking a survivor annuity as Walley's former spouse. IAF, Tab 9, Subtab 5. OPM denied the appellant's application for a former spouse survivor annuity based on its determination the divorce decree made no reference to any award of survivor annuity benefits for the appellant. IAF, Tab 9, Subtab 4. The appellant requested reconsideration. IAF, Tab 9, Subtab 3. On August 10, 2009, OPM issued its final, reconsideration decision, affirming its denial of a former spouse survivor annuity to the appellant. IAF, Tab 9, Subtab 2.

¶6 The appellant appealed to the Board's Dallas Regional Office. IAF, Tab 1. The administrative judge affirmed OPM's reconsideration decision, finding that the divorce decree did not award the appellant a former spouse survivor annuity and there was no indication that Walley intended to provide one to her. IAF, Tab 13 at 4-5. The administrative judge also concluded that the partition order was an invalid modification of the divorce decree because it was not the first court order distributing marital property, it was issued after Walley's retirement, and it was issued on the day of Walley's death. IAF, Tab 13 at 5-6.

¶7 The appellant has filed a PFR of the initial decision. Petition for Review File (PFR File), Tab 1. OPM has filed a response in opposition to the PFR. PFR File, Tab 4.

ANALYSIS

¶8 The appellant bears the burden of proving her entitlement to a survivor annuity under CSRS. *Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986). The divorced spouse of a retired federal employee is entitled to a survivor annuity if the employee has elected a survivor annuity under 5 U.S.C. § 8339(j)(3), or a survivor annuity has been provided for in a divorce decree or a court order or court-approved property settlement agreement issued in conjunction with the divorce decree under 5 U.S.C. § 8341(h)(1). *Warren v. Office of Personnel Management*, 407 F.3d 1309, 1313 (Fed. Cir.

2005). The statute further requires that the right to a survivor annuity be "expressly provided for" in the election, in the court order, or in the court approved settlement agreement. *Id*. The Board has no authority to rewrite or equitably reform state court divorce decrees that do not unambiguously provide for the annuity. *Hayward v. Office of Personnel Management*, 578 F.3d 1337, 1345 (Fed. Cir. 2009).

¶9 "Magic words" are not required to assign a survivor annuity in favor of a former spouse, but the statute provides that a modification of a divorce decree or court approved settlement agreement is not effective if it is made after the employee's retirement or death. 5 U.S.C. § 8341(h)(4); *Warren*, 407 F.3d at 1315; *McKenzie v. Office of Personnel Management*, 113 M.S.P.R. 240, ¶ 8 (2010). Under OPM's regulations, for purposes of awarding a former spouse survivor annuity, a court order must be issued on a day prior to the date of retirement or death of the employee or be the first court order dividing the marital property. 5 C.F.R. § 838.806 (b). A court order that fails to meet either of these requirements is not acceptable for processing by OPM. 5 C.F.R. § 838.806(a). The Federal Circuit and the Board have accepted OPM's interpretation of the statute and have held that a subsequent state court order purporting to modify the original division of marital property in a divorce will not qualify as an acceptable court order granting a survivor annuity. *See Warren*, 407 F.3d at 1316; *Bleidorn v. Office of Personnel Management*, 111 M.S.P.R. 456, ¶¶ 6-7 (2009).[1] However, in a bifurcated divorce proceeding — where the initial court order (divorce decree) merely terminates the marriage and matters relating to property division are reserved for a subsequent order — the subsequent order is the first order

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[1] The Board has refined this proposition somewhat further, finding that when a state court distributes some marital property, but expressly reserves the annuity issue for a second order, the second order is not a prohibited modification under section 8341 (h)(4). *See Griffin v. Office of Personnel Management*, 83 M.S.P.R. 67, 74-75 (1999).

dividing marital property and does not modify the original divorce decree and there is no conflict with 5 U.S.C. § 8341(h)(4). *See Vaccaro v. Office of Personnel Management*, 262 F.3d 1280, 1287 (Fed. Cir. 2001); *Newman v. Love*, 962 F.2d 1008, 1010 (Fed. Cir. 1992).

¶10 On review, the appellant argues that the administrative judge erred in concluding that the divorce decree constituted the first court order dividing marital property, thereby rendering the partition order a subsequent modification of the divorce decree that was unacceptable for processing under OPM's regulations. PFR File, Tab 1. The appellant further argues that Louisiana utilizes a bifurcated divorce process, and that the partition order was the first court order distributing marital property. *Id*.

¶11 The dispositive issue is whether the divorce decree partitioned or otherwise divided any of the marital property. If the answer is yes, the subsequent partition order would constitute an unacceptable modification of the divorce decree because it was issued after Walley retired and on the same day that he died. *See* 5 C.F.R. § 838.806(b)(1). If the answer is no, the partition order would be acceptable for processing as the first court order dividing the marital property. *See* 5 C.F.R. § 838.806(b)(2).

¶12 The relevant clause in the divorce decree provides:

> IT IS FINALLY ORDERED, ADJUDGED AND DECREED that Plaintiff and Defendant be and they are hereby recognized as owners of an undivided one-half (1/2) community interest each in and to all property, real, personal and mixed, which was acquired during the existence of the marriage.

IAF, Tab 9, Subtab 5. The administrative judge concluded that this language divided the marital property. IAF, Tab 13 at 4-5. The administrative judge reasoned that the partition petition acknowledged that some marital property had been previously divided, and the only conceivable source of authority to divide the marital property between the time of the divorce decree and the partition petition came from the divorce decree. *Id*.

¶13 The administrative judge's reasoning is not persuasive. At the outset, the language of the clause does not support the administrative judge's conclusion. To "partition' is typically defined as the "dividing of land held by joint tenants or tenants in common" or "any division of real or personal property between co-owners resulting in individual ownership." Black's Law Dictionary, 6th Edition (1990). Similarly, to "divide" is to "cut into parts, separate, or disunite." *Id*. Here, the divorce decree specifically acknowledged that the parties owned an "**undivided** one-half (1/2) community interest" in their marital property. IAF, Tab 9, Subtab 5 (emphasis added). This phrase simply cannot be read to divide or partition the marital property into the individual ownership of the parties.

¶14 The administrative judge also reasoned that the partition petition specifically stated that the parties had partitioned various marital property after the divorce and those partitions had to be pursuant to the divorce decree. IAF, Tab 13 at 4-5. The divorce decree, however, did not expressly divide any marital property, so any subsequent partition of marital property could not be pursuant to the terms of the divorce decree. Further, the administrative judge did not consider another potential method for dividing marital property -- by agreement. Indeed, the partition petition expressly states the other marital property had been partitioned by "mutual agreement," not court order. IAF, Tab 10, Exhibit A.

¶15 Because the parties' divorce decree simply terminated their marriage and did not distribute any of the marital property, this case is essentially one involving a bifurcated divorce proceeding. *See Vaccaro,* 262 F.3d at 1287; *Newman,* 962 F.2d at 1010. In such cases, because the subsequent order is the first court order dividing marital property, it is not a modification of the original divorce decree (which did not address the division of marital property) and

5 U.S.C. § 8341(h)(4) is not implicated. *Vaccaro*, 262 F.3d at 1287; *Newman*, 962 F.2d at 1011.[2]

¶16 Here, the partition order was the first court order addressing the division of marital property between the appellant and Walley, and as such the order satisfied the requirements for processing under 5 C.F.R. § 838.806(b)(2). Thus, the alternative requirements of 5 C.F.R. § 838.806(b)(1) – that the order be issued before the retirement or death of the spouse — are irrelevant to the resolution of this matter. *See generally Newman*, 962 F.2d at 1011-12 (second order was not a modification of divorce decree); *Davis v. Office of Personnel Management*, 112 M.S.P.R. 543, ¶ 6 (2009) (order subsequent to divorce decree must be first order dividing marital property or issued before spouse's retirement). Therefore, OPM erred in failing to accept it for processing under 5 C.F.R. § 838.806(b)(2).

ORDER

¶17 We ORDER the Office of Personnel Management (OPM) to award the appellant a former spouse survivor annuity in accordance with the terms of the Court Order Acceptable For Processing issued by the Sixth Judicial District Court, Parish of East Carroll, Louisiana on February 22, 2008. OPM must complete this action no later than 20 days after the date of this decision.

¶18 We also ORDER OPM to inform the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information that OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

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[2] OPM's previous regulations, which considered only the first order dissolving the marriage, had to be amended to comply with the underlying statute and give effect to bifurcated divorce proceedings. *See Hokanson v. Office of Personnel Management*, 122 F.3d 1043, 1047-48 (Fed. Cir. 1997).

¶19 No later than 30 days after OPM tells the appellant that it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

¶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 RIGHT TO REQUEST ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. §§ 1201.201, 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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:

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