UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 145

Docket No. AT-0831-10-0059-I-1

Arlene Smith In Re: Paul D. Marshall,*

Appellant,

v.

Office of Personnel Management,

Agency.

July 16, 2010

Arlene Smith, Bluffton, South Carolina, pro se.

Roxann Johnson, 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 petitioned for review of an initial decision dismissing as untimely filed her appeal of the Office of Personnel Management's (OPM's) final decision finding she was not entitled to survivor annuity benefits under the Civil Service Retirement System (CSRS). For the reasons set forth below, we DENY the petition, REOPEN the appeal on the Board's own motion under 5 C.F.R.

* The appellant's former spouse's name appears to have been spelled incorrectly as "Paul D. Marshal" in the initial decision and other materials. *See* Initial Appeal File, Tab 1.

§ 1201.118, REVERSE the initial decision, and REMAND the appeal for further proceedings consistent with this Opinion and Order.

BACKGROUND

¶2 OPM issued a final decision on June 15, 2006, finding the appellant was not entitled to survivor annuity benefits as the former spouse of Paul D. Marshall. Initial Appeal File (IAF), Tab 5 at 5. The appellant did not appeal OPM's June 15, 2006 final decision. On August 2, 2009, the appellant wrote a letter to OPM requesting reconsideration of her entitlement to a survivor annuity. Petition for Review (PFR) File, Tab 6 at 5. She cited as reasons for her request her divorce decree and correspondence from OPM that she asserted showed she was entitled to a survivor annuity benefit. *Id.* On September 15, 2009, OPM issued another final decision finding that the appellant was not entitled to CSRS survivor annuity benefits. IAF, Tab 5 at 3. The decision included a notice of appeal rights to the Board. *Id.* at 4.

¶3 On October 14, 2009, the appellant filed an appeal of OPM's September 15, 2009 final decision with the Board's Atlanta Regional Office. IAF, Tab 1. OPM moved for dismissal of the appeal on the grounds that its final decision was issued in June 2006 and that the appellant's October 14, 2009 appeal therefore was untimely filed. *Id.*, Tab 5 at 1. The administrative judge issued an Order on Timeliness, stating that it appeared the appellant's appeal was more than 2 years late and directing her to submit evidence and argument showing the appeal was timely filed or there was good cause for the filing delay. *Id.*, Tab 6. The appellant did not respond. The administrative judge issued an initial decision stating that the appellant had sought to appeal from OPM's June 15, 2006 final decision. She dismissed the appeal as untimely filed without a showing of good cause for the filing delay. *Id.*, Tab 7 at 1, 3. The administrative judge also stated that OPM's September 15, 2009 decision was not an appealable final decision but merely a letter informing the appellant of its previous decision. *Id.* at 3. In

support of her conclusion, the administrative judge cited *Muyco v. Office of Personnel Management*, 104 M.S.P.R. 557, ¶ 12 (2007). *Id.*

¶4 The appellant has filed a petition for review in which she argues that her divorce decree and numerous pieces of correspondence from OPM awarded her survivor annuity benefits. PFR File, Tab 1. She states that if she did not respond to OPM's June 15, 2006 decision, it was because she believed a decision had been made earlier awarding her survivor annuity benefits. *Id.* OPM has responded in opposition to the petition for review. PFR File, Tab 4.

ANALYSIS

¶5 The Board may grant a petition for review when an appellant shows that an administrative judge has made an adjudicatory error affecting the outcome or when there is new and material evidence not previously available. 5 C.F.R. § 1201.115(d). The appellant's petition for review fails to meet this standard and we therefore deny it. We reopen the appeal on our own motion, however, under 5 C.F.R. § 1201.118, to address the propriety of the administrative judge's decision dismissing the appeal as untimely filed.

¶6 A Board appeal must be filed no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of receipt of the agency's decision, whichever is later. 5 C.F.R. § 1201.22(b)(1). The Board will dismiss an appeal that is untimely filed unless a good reason for the delay is shown. 5 C.F.R. § 1201.22(c). The appellant bears the burden of proving the timeliness of her appeal or good cause for a delay in filing by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(ii).

¶7 Here, the appellant filed an appeal on October 14, 2009, from OPM's September 15, 2009 final decision. IAF, Tab 1. Thus, her appeal was filed 29 days after the date of the final decision and within the 30-day deadline set forth in the Board's regulations. We find, therefore, that the administrative judge erred in treating OPM's June 15, 2006 final decision as the decision from which

the appellant had appealed. The appeal form submitted by the appellant clearly states that she is appealing from OPM's September 15, 2009 final decision. *Id.*, Appeal Form, Boxes 15, 27. Because the appellant filed her appeal within the 30-day deadline, we find that the appeal was timely filed.

¶8 The administrative judge also found that OPM's September 15, 2009 final decision was not an OPM final decision and that the appellant was not entitled to appeal it to the Board. IAF, Tab 7 at 4. OPM's decision dated September 15, 2009, however, specifically stated that it was affirming an initial decision that the appellant was not entitled to CSRS benefits. *Id.*, Tab 5 at 3. The decision refers to OPM's June 15, 2006 decision as both the initial decision and the final decision. IAF, Tab 5 at 3. Further, concerning the September 15, 2009 decision, OPM stated "[t]his constitutes the final decision of OPM" and provided the appellant notice of her Board appeal rights. *Id.* at 4. The Board has jurisdiction over OPM determinations affecting an appellant's rights or interests under CSRS after OPM has issued a final or reconsideration decision. 5 U.S.C. § 8347(d); *Baniaga v. Office of Personnel Management*, 86 M.S.P.R. 207, ¶ 5 (2000); 5 C.F.R. § 831.110. In this case, OPM's September 15, 2009 decision is a final decision affecting the appellant's rights or interests under CSRS and, thus, is appealable to the Board.

¶9 The administrative judge's reliance on *Muyco* to find that OPM's September 15, 2009 decision was not an appealable final decision is misplaced. In *Muyco*, the appellant requested reconsideration of an OPM initial decision, OPM found his request untimely, and the Board affirmed OPM's decision. *Muyco*, 104 M.S.P.R. 557, ¶ 2. The appellant later sent correspondence to OPM concerning the matter, and OPM responded in a letter stating that it had already issued a final decision on his application for CSRS benefits and that the Board had affirmed its determination. *Id.*, ¶ 3. The Board held in *Muyco* that OPM's letter in response to Muyco's correspondence did not constitute a new final decision on the merits of his CSRS claim and that OPM did not err or abuse its

discretion in refusing to issue a new decision. *Id.*, ¶¶ 11-12. Here, by contrast, OPM did not simply issue a letter reminding the appellant that a final decision had been issued. OPM issued a new final decision with a notice of appeal rights to the Board. IAF, Tab 5 at 3-4. Therefore, *Muyco* is not controlling precedent in this case. OPM's September 15, 2009 final decision is a decision over which the Board has appellate jurisdiction. 5 U.S.C. § 8347(d); *Baniaga*, 86 M.S.P.R. 207, ¶ 5; 5 C.F.R. § 831.110.

ORDER

¶10 Accordingly, the initial decision dismissing the appeal as untimely filed without a showing of good cause for the delay is REVERSED, and the appeal is REMANDED to the Atlanta Regional Office for adjudication of the appellant's appeal of OPM's September 15, 2009 final decision.

FOR THE BOARD:

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