

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

2010 MSPB 149

Docket No. DC-0831-10-0145-I-1

**John D. Hamilton,
Appellant,**

v.

**Office of Personnel Management,
Agency,**

and

**Jean Hamilton,
Intervenor.**

July 21, 2010

John D. Hamilton, Hillsborough, North Carolina, pro se.

Roxann Johnson, Washington, D.C., for the agency.

Jean Hamilton, Trevett, Maine, intervenor, pro se.

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 the initial decision that affirmed in part and reversed in part the October 15, 2009 reconsideration decision by the Office of Personnel Management (OPM). For the reasons set forth below, we DENY the appellant's petition, REOPEN the appeal on the Board's own motion

under [5 C.F.R. § 1201.118](#), and AFFIRM the initial decision as MODIFIED by this Opinion and Order. We AFFIRM OPM's decision with respect to its finding that the appellant's former spouse is entitled to a pro rata share of his lifetime annuity and maximum former spouse survivor annuity benefits. We REVERSE OPM's decision with respect to its calculation of the pro rata share and its finding that the appellant is to bear the costs of providing for the former spouse survivor annuity.

BACKGROUND

¶2 The appellant and his former spouse, Jean M. Hamilton, the intervenor in this case, were married on July 1, 1961, and separated on September 10, 1992. Initial Appeal File (IAF), Tab 6 at F1. On December 22, 1995, they executed a Separation and Property Settlement Agreement, which was subsequently incorporated into the March 12, 1996 divorce decree. *Id.* On July 25, 1997, the Durham County (North Carolina) District Court issued a Civil Service Retirement Systems Domestic Relations Order (Order). *Id.* at F1-F5. Under the heading "Findings of Fact," at paragraph 7, the Order stated:

Pursuant to the Separation and Property Settlement Agreement, the parties agreed that [Jean Hamilton] would receive a share of [the appellant's] retirement benefits as of September 10, 1992, the parties' date of separation. [The appellant] will be eligible for retirement benefits under the Civil Service Retirement System based on employment with the United States Government. [Jean Hamilton] is entitled to fifty-five percent (55%) of [the appellant's] gross monthly annuity, with reduction for Former Spouse Survivor's Annuity, under the Civil Service Retirement System. Under Section 8341(h)(1) of Title 5, United States Code, [Jean Hamilton] is awarded the maximum possible Former Spouse Survivor Annuity under the Civil Service Retirement System.

Id. at F1-F2. The decree portion of the Order provided, at paragraph 1:

[Jean Hamilton] is entitled to and is hereby awarded fifty-five percent (55%) of [the appellant's] gross monthly annuity, with reduction for Former Spouse Survivor's Annuity, under the Civil Service Retirement System.

Id. at F3. By letter dated November 4, 1997, OPM notified the appellant that, pursuant to the Order, it would pay his former spouse 55 percent of his gross retirement annuity benefit beginning with his retirement. *Id.* at G1.

¶3 The appellant retired on March 1, 2006, with his annuity commencing the following day, and his current spouse, Carol Dukes Hamilton, consented not to receive a survivor annuity. *See id.* at G49. By letter dated August 24, 2006, OPM informed the appellant that, pursuant to the July 25, 1997 Order, it would provide his former spouse 55 percent of the appellant's gross annuity benefit of \$7,181, or \$3,949.55 per month, beginning with his first annuity payment on March 2, 2006. *Id.* at G6. OPM further stated that it intended to honor the court's former spouse survivor annuity award, and that Jean Hamilton's monthly payments would be reduced by \$773 to pay for the cost of providing the survivor benefit. *Id.*

¶4 On September 13, 2006, the appellant's attorney asked OPM to revisit its calculation, noting that OPM was awarding Jean Hamilton 55 percent of the appellant's current gross annuity benefit, whereas the Order provided that she would receive 55 percent of his gross annuity benefit as of September 10, 1992. *Id.* at G8-G9. In an "amended" letter dated December 4, 2006, OPM responded that it would pay her \$1,349.15 per month, i.e., 55 percent of \$2,453, his gross annuity benefit as of September 10, 1992. *Id.* at G10. Again, OPM indicated that her monthly payment would be reduced by \$773 to pay for her survivor benefit. OPM further informed the appellant that, because it had withheld \$22,127.74 from his benefit from March 2, 2006, to September 30, 2006, and by its new calculations his former spouse was due only \$4,013.80 for that period, it would pay him the difference of \$18,113.94. *Id.*

¶5 On May 17, 2007, the appellant and his former spouse consented to an amendment to the Order, which deleted paragraph 1 of the decree portion of the original Order and replaced it with the following:

[Jean Hamilton] is entitled to and is hereby awarded 55% of [the appellant's] gross monthly annuity, based on the percentage described in Paragraph 7 in the Findings of Fact hereinabove, which is incorporated herein as if fully set forth; and, without any deduction for the Former Spouse Survivor Annuity.

Id. at F6-F7. It appears the sole intent of the amendment was to eliminate the former spouse survivor benefit so that the appellant's former spouse would receive an unreduced monthly payment. *See id.* at G12, G16.

¶6 However, after receiving the amended Order, OPM did not eliminate the deduction for former spouse survivor benefits, but instead recalculated Jean Hamilton's share of the appellant's lifetime annuity, returning to a formula based on the appellant's current retirement benefit. By letter dated July 16, 2007, OPM informed the appellant that, pursuant to the amended Order, it would pay Jean Hamilton 55 percent of his gross annuity benefit of \$7,360, or \$4,048 per month, and also provide her a retroactive payment of \$38,108.10, to be deducted from the appellant's monthly payments. *Id.* at G14.

¶7 The appellant attempted to resolve the matter with the help of his congressman, but without success. *Id.* at G17-21, G26-27. On June 16, 2008, OPM issued a new letter, again informing the appellant that his former spouse was to receive 55 percent of his current gross annuity. *Id.* at G31. OPM further determined that she remained entitled to a survivor annuity benefit, and that the reductions to pay for the benefit would now be taken from the appellant's monthly payments. *Id.* By letter dated July 22, 2008, the appellant's attorney once more registered his objections to OPM's calculation. *Id.* at G34. He contended that, pursuant to the amended Order, the correct allocation to Jean Hamilton was 55 percent of the appellant's retirement annuity as of the date of their separation, with no reduction for survivor benefits. *Id.* In its response, dated August 14, 2008, OPM informed the appellant's attorney that the amendment to the Order was unacceptable for processing with respect to survivor

benefits, because it was not the first court order dividing marital property and was issued after the appellant's retirement. *Id.* at G36; *see* [5 C.F.R. § 838.806](#).

¶8 On January 12, 2009, the appellant and his former spouse consented to a second amendment to the Order, which again deleted paragraph 1 of the decree portion and replaced it with the following:

[Jean Hamilton] is entitled to and is hereby awarded 55% of [the appellant's] gross monthly annuity benefits as of September 10, 1992 based on the percentage described [at] Paragraph 7 in the Findings of Fact in the original Civil Service Retirement Systems Domestic Relations Order, which is incorporated herein as if fully set forth.

IAF, Tab 6 at F9-F11. The second amendment further stated:

This is not a change from the original Order nor the Amended Order but it appears that the OPM is interpreting the amended Order as deleting the reference to September 10, 1992; this was not the intent of the parties. The intent is and always has been to award [Jean Hamilton] 55% of [the appellant's] gross monthly annuity benefits **as of September 10, 1992**.

Id. at F10 (emphasis in original). The appellant and his former spouse further agreed that, "if allowed under the law, the [Order] shall be amended by deleting any references to [Jean Hamilton's] election of the Former Spouse Survivor Annuity so that [her] share is not reduced by the cost of a Former Spouse Survivor Annuity." *Id.*

¶9 On July 21, 2009, OPM informed the appellant that, pursuant to the newly amended Order, his former spouse would be awarded 55 percent of his 279 months of Federal service during the marriage divided by the 456 months of his total Federal service, or 33.65 percent of his gross annuity. *Id.* at G43. Based on the appellant's gross annuity of \$7,965, OPM calculated her share under the pro rata formula as \$2,680.22 per month. OPM did not explain why it was interpreting the amended Order in this manner. *Id.*

¶10 On August 12, 2009, the appellant timely requested reconsideration of OPM's July 21, 2009 decision. *Id.* at G46-48. With regard to the allocation of

lifetime benefits, he argued that the pro rata formula was inconsistent with both the original and amended Orders, which provided that Jean Hamilton's share was to be calculated as a percentage of his retirement benefit as of the date of their separation on September 10, 1992. *Id.* at G47. With regard to former spouse survivor annuity benefits, the appellant conceded that the original Order could not be modified, but contended that, under the terms of the original Order, the costs were to fall on his former spouse, not himself. *Id.*

¶11 On October 15, 2009, OPM issued a reconsideration decision affirming its initial decision of July 21, 2009. *Id.* at G49-G53. With regard to lifetime benefits, OPM found that the language in the amended Order awarding Jean Hamilton 55 percent of the appellant's gross monthly annuity benefits as of September 10, 1992, would be deemed to award her a pro rata share of the appellant's current gross annuity. Again, OPM did not explain this seemingly incongruous result, although it did list the relevant regulation, [5 C.F.R. § 838.621\(c\)](#), elsewhere in the decision. With regard to survivor benefits, OPM again found that the award of former spouse survivor annuity benefits could not be modified, and that the costs were to fall on the appellant. *Id.* at G53.

¶12 The appellant filed a timely Board appeal. IAF, Tab 1. Following a hearing, the administrative judge affirmed the reconsideration decision insofar as it awarded the appellant's former spouse a pro rata share of his current gross annuity. IAF, Tab 11 (Initial Decision, Feb. 2, 2010). However, the administrative judge also reversed the reconsideration decision in part, finding that, under the terms of the original Order, the appellant's former spouse was to bear the costs of the former spouse survivor annuity benefit. *Id.*

¶13 On petition for review, the appellant reiterates that both he and his former spouse intended that she would receive 55 percent of his annuity benefit as of the date of their separation on September 10, 1992. PFR File, Tab 1. He argues that OPM had all the information it needed to calculate the distribution on that basis, as evidenced by its letter of December 4, 2006. The appellant also objects that,

prior to the hearing, OPM never explained its legal justification for calculating the award on a pro rata basis. *Id.* OPM has filed a response, stating in general terms that the appellant's petition does not meet the criteria for review. PFR File, Tab 3.

ANALYSIS

¶14 The appellant has the burden of proving, by a preponderance of the evidence, that his former spouse is not entitled to the portion of his annuity benefits awarded by OPM. *See Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. [5 C.F.R. § 1201.56\(c\)\(2\)](#). In this case, the appellant must establish that OPM incorrectly interpreted the Order and the amendments thereto in calculating his former spouse's share of his retirement benefits.

¶15 Title 5 C.F.R. part 838 sets out the protocols OPM must follow in analyzing court orders affecting retirement benefits under the Civil Service Retirement System. With respect to the apportionment of a lifetime annuity, a court order must meet the minimum requirements of subpart C to be a court order acceptable for processing.¹ [5 C.F.R. § 838.103](#). We find, and the parties do not dispute, that the Order and the amendments thereto meet those requirements and are court orders acceptable for processing with respect to the appellant's lifetime retirement benefits. When two or more court orders relate to the same former spouse, the one issued last will be honored. 5 C.F.R. § 838.134(a)(2).

¹ The administrative judge erroneously cited regulations under subpart J, which apply only to court orders received by OPM prior to January 1, 1993. Initial Decision at 6; *see* [5 C.F.R. §§ 838.101\(c\)\(2\), 838.102\(a\)\(6\)](#).

¶16 In interpreting the terms of a court order which awards a former spouse a portion of an employee annuity, OPM applies the regulations under subpart F. See [5 C.F.R. §§ 838.102](#)(4), 838.601(a). Among those regulations is 5 C.F.R. § 838.621(c), which provides as follows:

A court order that awards a portion of an employee annuity as of a specified date before the employee's retirement awards the former spouse a prorata share as defined in paragraph (a) of this section.

Because the Order, as amended on January 12, 2009, awards Jean Hamilton a portion (55 percent) of the appellant's gross annuity as of September 10, 1992, OPM correctly deemed the amended Order to award Jean Hamilton a pro rata share of the appellant's gross monthly annuity. Furthermore, because the original Order and May 17, 2007 amendment likewise awarded her a 55 percent share of the appellant's gross annuity, OPM should have interpreted those orders in the same manner. While not excusing OPM's inordinate delay in applying its own regulations, we nonetheless note that those regulations were published and available to the appellant, his former spouse, and their respective attorneys when they obtained the Order and the amendments thereto.² See [5 C.F.R. § 838.601](#)(b)(2).

¶17 We find, however, that OPM miscalculated the amount of the pro rata share. Title [5 C.F.R. § 838.621](#)(a) defines the term pro rata share as follows:

Prorata share means one-half of the fraction whose numerator is the number of months of Federal civilian and military service that the employee performed during the marriage and whose denominator is the total number of months of Federal civilian and military service performed by the employee.

It is undisputed that the appellant performed 456 months of total Federal service, of which he performed 279 months while married to Jean Hamilton. Based on

² If the appellant and his former spouse did not intend for her to receive a pro rata share, they could have stated the exact dollar amount of the desired award or specifically instructed OPM not to apply salary adjustments after September 10, 1992, in computing her share of the appellant's annuity. See [5 C.F.R. § 838.622](#)(c)(1)(ii).

that figure, OPM calculated her share as 55 percent of 279 divided by 456, or 33.65 percent. In doing so, OPM relied on the language in the amended Order which purported to award her a 55 percent share of the appellant's gross annuity as of September 10, 1992. However, § 838.621(c) provides that whenever a court order awards "a portion" of an employee's retirement benefit as of a specified date prior to the employee's retirement, OPM must award a pro rata share as defined by § 838.621(a), and the size of the portion does not enter into that regulatory definition. Thus, under OPM's regulations, the original Order and both amendments thereto must be deemed to award Jean Hamilton a share of the appellant's gross annuity equal to half of 279 divided by 456, or 30.59 percent. That percentage has remained constant since the appellant retired, regardless of which order was in effect at a given time.

¶18 Accordingly, we find that Jean Hamilton is entitled to 30.59 percent of the appellant's gross annuity, beginning March 1, 2006, the date of his retirement. Pursuant to the original Order, and notwithstanding the subsequent amendments thereto, she remains entitled to the maximum former spouse survivor annuity benefit, the costs of which are to be deducted from her share of the appellant's lifetime annuity. *See* [5 C.F.R. § 838.806](#).

ORDER

¶19 We ORDER the Office of Personnel Management (OPM) to award Jean Hamilton a 30.59 percent share of the appellant's gross annuity, beginning March 1, 2006, with her payment to be reduced by the cost of her former spouse survivor annuity benefit. OPM must complete this action no later than 20 days after the date of this decision.

¶20 We also ORDER OPM to tell 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 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\(b\)](#).

¶21 No later than 30 days after OPM tells the appellant 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\(a\)](#).

¶22 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 criteria, 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:

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