UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2011 MSPB 40

Docket No. DA-0831-09-0704-I-1

Dianna S. Calkins,
Appellant,
v.
Office of Personnel Management,
Agency,
and
Diana M. Frantz
Intervenor.

March 21, 2011

Dianna S. Calkins, Des Arc, Arkansas, pro se.

Karla W. Yeakle, 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 agency has filed a petition for review of an initial decision that reversed the reconsideration decision and ordered it to grant a survivor annuity to the appellant. For the following reasons, we GRANT the agency's petition for review, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 The appellant, Dianna S. Calkins, appealed an Office of Personnel Management (OPM) reconsideration decision that denied her request for a survivor annuity based upon the federal service of her deceased husband, Ernest R. Calkins. Initial Appeal File (IAF), Tab 1. The record evidence indicates that Mr. Calkins retired in 1979 under the Civil Service Retirement System (CSRS). IAF, Tab 4, subtab 5 at 24. At the time of his retirement, Mr. Calkins designated his former wife, Diana Mary Calkins, now Diana Mary Frantz - the intervenor in this appeal, to receive lump sum death benefits. *Id.* at 25. That marriage ended in divorce, but Mr. Calkins never notified OPM of the divorce. The appellant subsequently married Mr. Calkins on May 1, 1984, and there is no evidence that Mr. Calkins ever submitted a written election to OPM to provide for a survivor benefit for the appellant.

¶3 Upon Mr. Calkins' death, the appellant filed a request to receive survivor annuity benefits. IAF, Tab 4, subtab 5 at 1-4. OPM denied the request, finding in its reconsideration decision that Mr. Calkins had elected an annuity reduced for survivor benefits for his first wife, Diana Mary, but that he did not elect a reduction in his annuity within one year following his marriage to provide survivor benefits for the appellant. *Id.*, subtab 2. Thus, OPM found that the appellant was not entitled to survivor benefits.

¶4 On appeal, the appellant asserted that she was married to Mr. Calkins for 24 years and that he told her that she would "draw his retirement." IAF, Tab 1. The appellant also argued that, although OPM claimed it sent Mr. Calkins the required election forms, he had not received them. IAF, Tab 5. She also asserted that she had read his mail to him because he retired from employment with a disease that caused him to lose his eyesight and to become legally blind. *Id.*

¶5 The administrative judge found that the evidence does not show that Mr. Calkins' condition was relevant during the time period of 1984-85, and that the appellant failed to show that his eyesight prevented him from receiving notices

from OPM and/or making a timely election. Initial Decision (ID) at 4. The administrative judge concluded that OPM established that it is more likely true than untrue that it provided Mr. Calkins with the notice cited in the reconsideration decision. ID at 6-7. However, the administrative judge further found that, under *Simpson v. Office of Personnel Management*, 347 F.3d 1361 (Fed. Cir. 2003), the 1986 affidavit from Nelson T. Henderson, Treasury Liaison Officer, Office of Financial Control and Management, Retirement and Insurance Group, which OPM submitted to show that it has fulfilled the mandatory notice obligation, was deficient because it failed to inform the annuitant that, even if he had previously elected a spousal annuity when he married, he must make a new election after his divorce. ID at 5-6. The administrative judge, therefore, determined that the notices sent were not sufficient to advise the decedent of his rights and obligations. ID at 7. The administrative judge additionally found that the appellant's unrebutted testimony was that Mr. Calkins always intended to provide a survivor annuity for her. *Id.* He also found that OPM did not claim and the record does not reflect that OPM terminated the reduction in Mr. Calkins' annuity after his divorce from Diana Mary Calkins. Thus, the administrative judge found that, under Board law, Mr. Calkins' continued receipt of a reduced annuity manifested his intent to provide an annuity for the appellant. ID at 7. Accordingly, the administrative judge determined that the appellant met her burden of establishing her entitlement to CSRS survivor annuity benefits, and he reversed OPM's reconsideration decision. ID at 7.

¶6 OPM has filed a petition for review, and neither the appellant nor the intervenor has filed a response. Petition for Review (PFR) File, Tab 1

ANALYSIS

¶7 On review, OPM has not challenged the administrative judge's determination that it failed to fulfill the mandatory notice obligation because its annual notices were insufficient to advise the decedent of his rights and

obligations. PFR File, Tab 1. Rather, OPM asserts that "errors were made in OPM's representations to the Merit Systems Protection Board (MSPB) in the initial proceedings that may have affected the analysis of the administrative judge, for this sole reason, OPM files this petition for review setting forth the correct facts in the case." *Id.* Specifically, OPM now argues the following:

> The decedent, Mr. Calkins, was married at the time of his retirement on October 17, 1979, to Diana M. Frantz. On his retirement application, he elected "50%" for the amount of the survivor annuity. OPM sent BRI 46-270, Choose the Type of Annuity, form to Mr. Calkins to provide him with the choice to either reaffirm his election or to change his mind. This form provided the amount of his annuity with and without the survivor reduction, the amount of the survivor annuity, and a statement that his annuity will not be finalized until he returns the form to OPM. Mr. Calkins returned the form to OPM electing NO survivor annuity. His annuity was correctly adjudicated with no survivor reduction. . . . OPM's reconsideration decision erroneously stated that he elected an annuity reduced for survivor benefits at the time of his retirement for his then spouse, Diana M. Frantz, the intervenor.
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> The record contains Mr. Calkin's retirement application, the original Master Record Print Out (MRPO) dated September 10, 1980, showing code 85 (no survivor annuity elected) as his survivor election, a MRPO from 2008 still showing code 85, and a copy of the relevant annual notices. The record also contains OPM's reconsideration decision which erroneously states Mr. Calkins received a reduced annuity during his lifetime. The record does not contain the BRI 46-270 (Choose the Type of Annuity form) showing Mr. Calkins' election of no survivor annuity. Mr. Calkins received a full life annuity (not reduced for a survivor annuity benefit) from the commencing date of his annuity until his death.

PFR File, Tab 1 at 1-2. Based on this new assertion that Mr. Calkins did not receive a reduced annuity during his lifetime, OPM contends for the first time on review that this case is distinguishable from *Allen v. Office of Personnel Management*, 99 M.S.P.R. 653, 658 (2005), where the Board found that an annuitant's intent to provide a survivor annuity for his new spouse is evidenced by his continuous receipt of a reduced annuity following his remarriage.

¶8 The Board generally will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271 (1980). In this case, OPM asserts that, even though its reconsideration decision and its response to the appellant's appeal both explicitly admitted that, at the time Mr. Calkins retired, he elected to provide a survivor annuity for Diana Mary Calkins, Mr. Calkins actually completed a form BRI 46-270 on which he elected no survivor annuity. PFR File, Tab 1. OPM has provided no explanation as to why it made such misrepresentations both to the appellant in its reconsideration decision and to the Board during the processing of the appeal below. Furthermore, OPM has failed to provide any evidence to support this argument.[1] In fact, the administrative judge even suspended the appeal for almost 5 months to allow the parties to discuss settlement, and yet OPM did not bring forth the BRI 46-270. IAF, Tab 17. Thus, OPM has failed to show that it has acted with due diligence in raising this new argument and it has failed to present any evidence to support this argument on review.[2]

¶9 Notwithstanding OPM's lack of diligence in its processing of the appellant's application for a survivor annuity, we are still compelled to grant its petition for review and remand this appeal for further adjudication because

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[1] As noted above, OPM's argument is based upon its interpretation of Mr. Calkins' master record print out (MRPO) that shows code "85" in the election. *See* IAF, Tab 4, subtab 5 at 22. However, OPM has provided no evidence to show that code "85" is the proper code for a full annuity. Furthermore, the statements of a party's representative in a pleading do not constitute evidence, *see Hendricks v. Department of the Navy*, 69 M.S.P.R. 163, 168 (1995).

[2] The Board is concerned about OPM's negligent actions responding to the appellant's request for a survivor annuity and during the proceedings below. OPM's apparent lack of diligence, resulting in material, erroneous representations of fact in its reconsideration decision and before the administrative judge, has caused a significant waste of time and resources for the Board and the parties.

payment of a retirement benefit may not be made in direct contravention of the CSRS statute. *See Office of Personnel Management v. Richmond*, 496 U.S. 414, 416-17, 434 (1990) (the doctrine of equitable estoppel cannot be used to pay a retirement benefit from the Federal Treasury that is contrary to a statutory appropriation because the payment would violate the Appropriations Clause of the Constitution). Because OPM has now raised the issue that the payment of a survivor annuity would be in contravention of the CSRS statute and constitute a violation of the Constitution, we must remand this appeal for further adjudication.

ORDER

¶10 Accordingly, we vacate the initial decision, and remand the appeal to the regional office to receive admissible evidence from the parties on whether Mr. Calkins elected and received a reduced annuity to provide survivor benefits for his first wife. If the administrative judge finds on remand that Mr. Calkins elected and received a reduced annuity, he may adopt, in a new initial decision, his prior findings and conclusions of law in this appeal.

FOR THE BOARD:

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