

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

2011 MSPB 46

Docket No. AT-0831-10-0065-I-1

**Thomas M. Deese,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

March 25, 2011

Patrick J. Deese, Esquire, Melbourne, Florida, for the appellant.

Camela Green-Brown, 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 petitioned for review of the initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) which denied the appellant's application for a survivor annuity under the Civil Service Retirement System (CSRS). For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND this matter to OPM for further development of the record and the issuance of a new reconsideration decision.

BACKGROUND

¶2 The appellant applied for a survivor annuity under [5 U.S.C. § 8341](#) as an unmarried dependent child over the age of 18 who is incapable of self-support because of a mental disability incurred before age 18. Initial Appeal File (IAF), Tab 11, Subtab 2D at 1-2. The application indicates that the appellant was born in 1955 and that his father was a former federal employee covered by the CSRS. *Id.* at 1; *id.*, Subtab 2E at 54. The appellant’s father died in 2001. IAF, Tab 11, Subtab 2D at 6.

¶3 The appellant stated in his application that he suffers from schizophrenia, but indicated that he was 20 years of age at the onset of the disability. IAF, Tab 11, Subtab 2D at 2. OPM ultimately denied the application on the ground that “there are no medical records to show that [the appellant] was treated for his condition prior to age 18 and no information to support that he was incapable of self support because of a condition incurred before 18.” IAF, Tab 11, Subtab 2A at 1.

¶4 The appellant appealed OPM’s final determination letter. IAF, Tab 1. Following a hearing, the administrative judge affirmed OPM’s determination, finding that the appellant had failed to establish by preponderant evidence that he was incapable of self-support at the time that his father died. IAF, Tab 35, Initial Decision (ID) at 1, 4. Specifically, the administrative judge found that, although the appellant had been diagnosed with schizophrenia and paranoid psychotic illness and that he had exhibited symptoms of such mental illness throughout his adult life, the record also indicated that he was a licensed certified public accountant and that his social security statement indicated that he had taxable social security earnings in calendar year 2001, the year of his father’s death, totaling \$11,799.00, or approximately \$981.00 per month. ID at 3; *see* IAF, Tab 4 at 14. Because the administrative judge found that the appellant’s income at the time of his father’s death exceeded the Social Security Administration’s applicable monthly “substantial gainful activity” standard for 2001, and that it

also exceeded the 2001 “poverty levels” established by the U.S. Census Bureau and the Department of Health & Human Services, he concluded that the appellant failed to establish that he qualified as an “unmarried dependent child regardless of age who is incapable of self-support” . . . on the date on which a disabled child’s survivor annuity would have commenced.” ID at 4-5 (quoting [5 U.S.C. § 8341\(a\)\(4\)\(B\)](#)). In light of his conclusion, the administrative judge found it unnecessary to determine whether the appellant incurred his disability before the age of 18. ID at 5 n.4.

¶5 The appellant contends in his petition for review that: 1) he was denied due process because the grounds stated in the initial decision for denying his request for a survivor annuity are allegedly different from those set forth in OPM’s determination letter; 2) the administrative judge should have granted the appellant’s motion for partial summary judgment based on requests for admissions that he served on OPM, which he asserts should have been deemed admitted; and 3) the initial decision employed the incorrect legal standard for determining “incapability of self support for a mental patient seeking a child survivor annuity on the date after his father’s death.” Petition for Review (PFR) File, Tab 1 at 3-4. OPM has not filed a response to the appellant’s petition for review.

ANALYSIS

¶6 The burden of proving entitlement to a survivor annuity is on the applicant for benefits. *Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986). As the administrative judge recognized, the appellant was over 22 years of age at the time of his father’s death. ID at 2; *see* IAF, Tab 11, Subtab 2D at 1, 6. Section 8341(a)(4)(B) of title 5 of the United States Code therefore governs the appellant's entitlement to survivor annuity benefits. It provides that the “unmarried dependent child” of a deceased federal employee is

entitled to a survivor annuity, regardless of age, if he “is incapable of self-support because of mental or physical disability incurred before age 18.” *Id.*

¶7 In the initial decision, the administrative judge stated that, “because the child annuity commences on the day after the employee dies, and the statute makes no provision to allow such an annuity to commence at a later date, the appellant was required to prove that he met the statutory definition of ‘child’ on the day following his father’s death.” ID at 2. He thus concluded that the appellant bore the burden of proving, inter alia, that at the time of his father’s death in 2001, he “*was* incapable of self support.” ID at 2-3 (emphasis added).

¶8 This was error. The plain language of section 8341(a)(4)(B) requires that an applicant for a child survivor annuity demonstrate that he currently “is incapable of self-support.” Thus, the Board has previously rejected as “unreasonable and incorrect” the suggestion that, in addition to the requirement that the appellant establish that he suffered from a mental or physical disability incurred before age 18, he “also had to show that he was incapable of self-support before age eighteen because of his . . . condition” *Staples v. Office of Personnel Management*, [68 M.S.P.R. 570](#), 576 (1995), *overruled in part on other grounds*, *Rajbhandary v. Office of Personnel Management*, [91 M.S.P.R. 192](#) (2002); *see Ingram v. Office of Personnel Management*, [38 M.S.P.R. 556](#), 558 n.* (1988). We also reject as inconsistent with the governing statutory language a requirement that an applicant demonstrate that he “was” incapable of self-support at the time of the employee’s or parent’s death. Because the administrative judge’s conclusion that the appellant failed to establish his entitlement to a child survivor annuity is based solely on his finding that the appellant failed to establish that he was incapable of self-support at the time of his father’s death, it cannot be sustained. We therefore VACATE the initial decision.¹

¹ Although the administrative judge correctly recognized that the statute provides that “[t]he annuity of a child . . . commences on the day after the employee or Member dies,” [5 U.S.C. § 8341](#)(e)(3); *see* ID at 2, this does not compel the conclusion that the

¶9 Furthermore, because OPM’s reconsideration decision also denied the appellant’s application for a survivor annuity based on a lack of medical records showing that the appellant “was” incapable of self-support because of a mental or physical disability incurred before age 18, *see* IAF, Tab 11, Subtab 2A at 1, it also employed an incorrect legal standard in denying the appellant’s application for a survivor annuity. Because OPM’s reconsideration letter contains no determination whether the appellant currently “is incapable of self-support,” within the meaning of section 8341(a)(4)(B), we do not have jurisdiction over that issue here. *See Salarzon v. Office of Personnel Management*, [44 M.S.P.R. 588](#), 593 (1990), *aff’d*, 925 F.2d 1479 (Fed. Cir. 1991) (Table); [5 C.F.R. § 831.110](#). We therefore REMAND this matter to OPM for a determination whether the appellant “is incapable of self-support,” and if so, whether the appellant’s condition is “because of a mental or physical disability incurred before age 18.” OPM should make new determinations on these issues in the first instance, taking into consideration the records produced by the appellant below.

¶10 Finally, we note that under section 8341(a)(4)(B), an applicant must also have been an “unmarried dependent.” The statute defines the term “dependent” to mean “in the case of any child, . . . that the employee or Member involved was, *at the time of the employee or Member’s death*, either living with or contributing to the support of such child, as determined in accordance with such regulations as [OPM] shall prescribe.” [5 U.S.C. § 8341\(a\)\(3\)](#) (emphasis added). Again, because OPM has not made a determination whether the appellant was unmarried or a dependent, we lack jurisdiction to make determinations on those issues in the

applicant must establish that he was incapable of self-support on the date of the employee or Member’s death. Indeed, the statute contemplates entitlement to a child survivor annuity under other circumstances in which an applicant becomes incapable of self-support after the day the employee or Member dies. For example, section 8341(e)(3)(D) provides that the “annuity and the right thereto terminate on the last day of the month before the child - (D) ceases to be . . . a student after becoming 18 years of age *unless* he is *then* incapable of self-support.” (Emphasis added).

first instance on review. Accordingly, on remand, OPM should also make determinations on these matters.²

ORDER

¶11 Accordingly, we REMAND this matter to OPM for additional record development consistent with this Opinion and Order and the issuance of a new reconsideration decision. We ORDER OPM to issue its new decision within 120 days of the date of this Opinion and Order, subject to the appellant's further right to appeal to the Board if he disagrees with OPM's new reconsideration decision. *See Rajbhandary*, 91 M.S.P.R. at 198.

FOR THE BOARD:

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

² In light of our disposition, it is unnecessary to address the appellant's remaining contentions on review.