UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 128

Docket No. DA-0831-11-0274-I-2

Christina D. Hathaway,

Appellant,

v.

Office of Personnel Management,

Agency.

November 21, 2012

Andrew Cavana and Dawn Hathaway, Brooklyn, New York, for the appellant.

Karla W. Yeakle, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review[1] of the initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) which denied the appellant's claim for a survivor annuity under the Civil

[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

Service Retirement System (CSRS). For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision.

BACKGROUND

¶2 In a reconsideration decision, OPM denied the appellant's claim for a survivor annuity under CSRS based on the service of her late husband, Eugene Hathaway. MSPB Docket No. DA-0831-11-0274-I-1, Initial Appeal File (IAF), Tab 4, Subtab 4. OPM found that Mr. Hathaway elected not to provide a survivor annuity for the appellant, that the appellant freely consented to the election, and that Mr. Hathaway did not change his election during the 18-month period immediately following his retirement. *Id*.

¶3 The appellant appealed the reconsideration decision. IAF, Tab 1. In her appeal, the appellant requested a hearing; however, she later withdrew that request. MSPB Docket No. DA-0831-11-0274-I-2, Initial Appeal File 2 (IAF2), Tab 11. Based on the written record, the administrative judge affirmed the reconsideration decision. IAF2, Tab 17. She found that Mr. Hathaway elected not to provide the appellant with a survivor annuity with her consent and that the appellant failed to show that Mr. Hathaway had not received notices from OPM informing him that he could change his election within 18 months of his retirement. *Id*. at 6-14.

¶4 The appellant petitions for review. Petition for Review (PFR) File, Tab 1. The agency has responded in opposition to the petition. PFR File, Tab 5. On review, the Board issued an Order in which it noted that that evidence of the appellant's consent in this case was filed on an OPM Form 1431 rather than an SF 2801-2. PFR File, Tab 8; *see* IAF, Tab 5, Subtab 6 at 13. The Board directed the parties to file briefs as to whether evidence of spousal consent filed on an OPM Form 1431, rather than an SF 2801-2, can constitute "[e]vidence of spousal consent . . . filed on a form prescribed by OPM." *Id.* at 2; *see* 5 C.F.R. § 831.614(b); *see also Luten v. Office of Personnel Management*, 110 M.S.P.R.

667, ¶¶ 11-13 (2009). Both parties have filed responsive briefs. PFR File, Tabs 9-10.

ANALYSIS

¶5 The appellant asserts on review that the administrative judge erred in reopening the record on November 7, 2011, after she had announced that the close of the record would be October 20, 2011, to allow OPM to resubmit evidence. On June 2, 2011, OPM submitted argument opposing the administrative judge's statement during a prehearing conference that, under *McDonald v. Office of Personnel Management*, 115 M.S.P.R. 236 (2010), an OPM official's affidavit attesting that OPM had sent annual notices to Mr. Hathaway during the 18 months after his retirement informing him that he could change his survivor annuity election was insufficient evidence to show that it was more probable than not that OPM had sent the notice. IAF, Tab 11. The administrative judge rejected the submission. IAF, Tab 12. Subsequently, as the appellant asserts, she reopened the record to allow OPM to resubmit the argument and allowed the appellant to respond.

¶6 Administrative judges have broad authority in adjudicating their cases, and this broad authority includes the authority to sua sponte extend the record closing date to ensure that the record is fully developed and that the case is fairly and justly adjudicated. *See Palmer v. U.S. Postal Service*, 50 M.S.P.R. 552, 555 (1991); *Walton v. Tennessee Valley Authority*, 48 M.S.P.R. 462, 468 (1991). The administrative judge did not abuse her discretion in reopening the record under the circumstances of this case.

¶7 Under the CSRS, the surviving spouse of a retired federal employee is entitled to an annuity equal to 55 percent of the retiree's annuity unless the survivor consented in writing to receive no such survivor annuity or a reduced annuity at the time of the employee's retirement. 5 U.S.C. §§ 8339(j)(1), 8341(b)(1); *Luten*, 110 M.S.P.R. 667, ¶ 10; 5 C.F.R. § 831.614. A retiree may,

within 18 months after retirement, choose to elect a survivor annuity for the spouse to whom he was married at retirement if he did not previously do so or to increase the size of such an annuity. 5 U.S.C. § 8339(o)(1); *Nunes v. Office of Personnel Management*, 111 M.S.P.R. 221, ¶¶ 10–11 (2009); 5 C.F.R. § 831.622(b)(1).

¶8 OPM has a statutory obligation to notify annuitants annually that they have 18 months after retirement to provide or increase a spouse's survivor annuity. 5 U.S.C. § 8339(o)(6). When OPM fails to show that it complied with the statutory notice requirements and "the annuitant's conduct is consistent with his having made the election at issue," survivor benefits have been ordered as if the deceased had made a timely election. *See Simpson v. Office of Personnel Management*, 347 F.3d 1361, 1364 (Fed. Cir. 2003); *Hairston v. Office of Personnel Management*, 318 F.3d 1127, 1130 (Fed. Cir. 2003); *Wood v. Office of Personnel Management*, 241 F.3d 1364, 1366 (Fed. Cir. 2001).

¶9 OPM bears the burden of proving that it sent the notice. *Nunes*, 111 M.S.P.R. 221, ¶ 20. OPM may establish by preponderant evidence that it sent the notice by submitting the affidavit of the OPM official responsible for printing and distributing retirement forms and notices. If OPM can establish through credible evidence that it is more probable than not that it sent the notice, the burden of going forward falls upon the appellant, who must put forth credible testimony or other evidence tending to support her contention that the annuitant did not receive the notice. *Id*. The administrative judge must then decide whether to credit the appellant's evidence of non-receipt and whether such evidence overcomes the presumption that the annuitant received the notice. *See Reynolds v. Department of Justice*, 63 M.S.P.R. 189, 193, *dismissed*, 36 F.3d 1112 (Fed. Cir. 1994) (Table); *Stracquatanio v. Walkama*, 54 M.S.P.R. 529, 532 (1992) (a letter properly addressed, stamped, and mailed is presumed to have been duly delivered to the addressee).

¶10 As the administrative judge noted, the record below includes the affidavit of Mary Beth Smith-Toomey, the OPM official responsible for printing and distributing retirement forms and notices. IAF, Tab 5. Toomey stated that all annuitants were sent general notices regarding survivor elections in September 1989, September 1990, December 1991, December 1992, December 1993, December 1994, January 1996, and December 1996. *Id*. In addition to submitting Toomey's affidavit, OPM provided copies of the notices that it sent to all annuitants within the 18 months following Mr. Hathaway's retirement. *Id*. Also, OPM provided the Employee Annuitant Master Record Printout indicating Mr. Hathaway's correspondence address at the time of his retirement and during the relevant period. *Id*. Thus, OPM established with such evidence that it is more probable than not that the annual notice was sent to Mr. Hathaway.

¶11 As the administrative judge found, record evidence diminishes the credibility of the appellant's assertion that Mr. Hathaway did not receive the annual notice because OPM lists his address as New York, New York, and his correct address was Brooklyn, New York. The record shows that Mr. Hathaway received and responded to other letters that OPM sent to him at the New York, New York address -- a notice of annuity overpayment and an election letter concerning his life insurance option. IAF2, Tab 15. The record shows that the zip code for the New York, New York address used by OPM and the zip code for the Brooklyn, New York address specified by the appellant is the same. IAF, Tab 5 at 7, 9.

¶12 In her petition, the appellant also contends that the administrative judge did not give sufficient weight to the affidavits of her and her children averring that Mr. Hathaway had expressed his intention to provide for the appellant. As stated above, however, survivor benefits have been ordered as if the deceased had made a timely election when OPM fails to show that it complied with the statutory notice requirements and the annuitant's conduct is consistent with his having

made the election at issue. *See Simpson*, 347 F.3d at 1364. We are not presented with such circumstances here because OPM has established by preponderant evidence that it notified Mr. Hathaway that he could, within 18 months of his retirement, change his election from no survivor annuity for the appellant.

¶13 The appellant also contends, as she did below, that on the March 1995 application for retirement signed by Mr. Hathaway, the initials in the box choosing "an annuity payable only during my lifetime" are not Mr. Hathaway's. The appellant asserts that Mr. Hathaway always initialed "EH" in block form and the initials on the application are not in block form. In support of her assertion, she submitted a 2006 document involving real estate that Mr. Hathaway initialed with block letters "EH." The appellant's assertion is not persuasive. As the administrative judge noted, the document showing Mr. Hathaway's initials in block form was executed in 2006, a time well beyond the 1995-96 time period relevant to this appeal. IAF2, Tab 17 at n.3. Further, as the administrative judge also noted, Mr. Hathaway signed the application, certifying that he had read and understood it. The appellant makes no contention that the signature is not Mr. Hathaway's and did not show that Mr. Hathaway was incompetent at the time that he signed it. *Id*. at 6-9.

¶14 The appellant also asserts that her case is similar to *McDonald v. Office of Personnel Management*, 115 M.S.P.R. 236 (2010), because a federal employee told her that she had to sign the waiver for Mr. Hathaway to receive his retirement. In *McDonald*, the Board found that if McDonald could show that a federal employee engaged in affirmative misconduct by telling her that she had to sign the waiver for her husband to receive his annuity, under equitable estoppel, this misconduct would preclude enforcement of the requirement that McDonald's husband formally change his election pursuant to the notices sent by OPM within 18 months of his retirement and McDonald would be entitled to a survivor annuity. The appellant, however, was aware of the *McDonald* decision during the course of proceedings and neither below nor on petition for review has she

alleged that the employee who told her that she had to sign the waiver for Mr. Hathaway to receive his annuity engaged in affirmative misconduct. Thus, the appellant's assertions regarding *McDonald* are unsupported by the record.

¶15 Finally, as noted in the Board's Order, OPM's implementing regulations state,

> (a) A married employee may not elect a self-only annuity . . . without the consent of the current spouse . . . .
>
> (b) Evidence of spousal consent . . . must be filed on a form prescribed by OPM.
>
> (c) The form will require that a notary public or other official authorized to administer oaths certify that the current spouse presented identification, gave consent, signed or marked the form, and acknowledged that the consent was given freely in the notary's or official's presence.
>
> (d) The form described in paragraph (c) of this section may be executed before a notary public . . . .

5 C.F.R. § 831.614. As stated above, the "evidence of [the appellant's] consent" in this case was filed on an OPM Form 1431 rather than an SF 2801-2. IAF, Tab 5, Subtab 6 at 13. OPM's *CSRS and FERS Handbook*, however, provides that "[s]pousal consent must be given on [an] SF 2801-2." Furthermore, the instructions on the SF 2801 instruct applicants electing a self-only annuity to attach an SF 2801-2; and the current version of the SF 2801-2 states that "[p]revious editions are not usable."

¶16 In her response to the Board's Order, the appellant argues that the OPM Form 1431 cannot constitute "[e]vidence of spousal consent . . . filed on a form prescribed by OPM" because there is a marked difference between the OPM Form 1431 and the SF2801-2. PFR File, Tab 9 at 5. Specifically, the appellant notes that, unlike the OPM Form 1431, the SF 2801-2 contains a notice directed to the spouse that:

> I understand that if my spouse elected no regular or insurable interest survivor annuity in Part 1 above, after my spouse dies, I will not receive a survivor annuity, my health coverage will terminate when my spouse dies, and I will not be eligible to enroll in the Federal Long Term Care Insurance Program (FLTCIP) if I am not already enrolled before my spouse's death. I also understand that my consent is final (not revocable).

Id.

¶17 In its response, OPM states that when evidence of spousal consent filed on an OPM Form 1431 supplements an incomplete SF 2801-2, the information on the OPM Form 1431 constitutes evidence of spousal consent filed on a form prescribed by OPM. PFR File, Tab 10 at 4. In Mr. Hathaway's case, OPM states that the SF 2801-2 was submitted with his retirement application package, but it was incomplete because the notary did not complete Part 3 of the form. At the time of Mr. Hathaway's retirement, OPM's practice in such cases was to send the annuitant an OPM Form 1431, in lieu of providing the entire SF 2801 retirement application package inclusive of the SF 2801-2, in order to obtain spousal consent. Thus, on September 28, 1995, OPM sent Mr. Hathaway a cover letter detailing the deficiency with the form along with an OPM Form 1431.

We agree with OPM that where, as here, evidence of spousal consent filed on an OPM Form 1431 supplements an incomplete SF 2801-2, the information on the OPM Form 1431 constitutes evidence of spousal consent filed on a form prescribed by OPM. As OPM correctly notes, neither statute nor regulation requires that a waiver can only be made in a signed SF 2801-2. Moreover, on its face, the OPM Form 1431 meets the requirements specified at 5 C.F.R. § 831.614(c). Further, although section 52A2.1-2 of OPM's CSRS and FERS Handbook states, in part, that "Spousal consent must be given on SF 2801-2," we note that section 41A4.1-1 of the Handbook provides that the "employee must

complete [the] Standard Form 2801 . . . and . . . OPM Form 1431 . . . if applicable."[2]

ORDER

¶18 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 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

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[2] In holding that that evidence of spousal consent filed on an OPM Form 1431 to supplement an incomplete SF 2801-2 constitutes evidence of spousal consent filed on a form prescribed by OPM, we express no opinion on the question whether, in the absence of an incomplete SF 2801-2, an OPM Form 1431 standing alone can constitute such evidence of spousal consent. *See Luten*, 110 M.S.P.R. 667, ¶¶ 11-13.

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.