

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

LINDA L. BORSON,  
Appellant,

DOCKET NUMBER  
AT-0831-12-0088-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: November 26, 2012

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Richard L. Downey, Esquire, Fairfax, Virginia, for the appellant.

Cynthia Reinhold, Washington, D.C., for the agency.

**BEFORE**

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

**FINAL ORDER**

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. Generally, we grant petitions such as this one only when: the initial decision contains erroneous

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)).<sup>2</sup> After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

On review, the appellant generally reasserts her argument that, pursuant to the February 2, 1998 divorce decree that ended her marriage to Timothy Borson, she is entitled to the lump-sum benefit payable under the Civil Service Retirement System (CSRS) following Mr. Borson's death. Petition for Review (PFR) File, Tab 1. As the administrative judge explained, however, [5 U.S.C. § 8342\(c\)](#) sets forth the order of precedence in which the payment of lump-sum benefits is to be made. Initial Appeal File (IAF), Tab 31, Initial Decision (ID) at 2. First, payment is made to the "beneficiary or beneficiaries designated by the employee or Member in a signed and witnessed writing received in the Office [of Personnel Management] before his death. For this purpose, a designation, change, or cancellation of beneficiary in a will or other document not so executed

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<sup>2</sup> 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.

and filed has no force or effect.” *Id.* On November 5, 1996, Mr. Borson completed a designation of beneficiary form naming his parents as the beneficiaries of any lump-sum benefit payable under the CSRS after his death, and it is undisputed that the February 2, 1998 divorce decree did not change that designation and was not signed by Mr. Borson or witnessed. *See* IAF, Tab 12, Subtab 2C at 3, 24-32. Given these circumstances, the administrative judge correctly found that the appellant is not entitled to receive the lump-sum death benefit. ID at 4; *see Alexander v. Office of Personnel Management*, [58 M.S.P.R. 358](#), 362 (1993) (“Thus, because a valid [Designation of Beneficiary form] that designated Mrs. Martin as the decedent’s beneficiary existed, OPM was required under the law to award the lump-sum benefits to her and not to the appellant.”).

For the first time on review, the appellant makes several arguments regarding the constitutionality of the distribution of the lump-sum death benefit to Mr. Borson’s mother, including the allegation that the order of precedence set forth in [5 U.S.C. § 8342\(c\)](#) deprives the appellant of her court-ordered property rights without due process of law in violation of the 14<sup>th</sup> Amendment to the U.S. Constitution. PFR File, Tab 1 at 2. The Board 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. *See Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). The appellant has made no such showing.

**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](http://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.