UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2013 MSPB 95

Docket No. AT-0831-12-0485-I-1

Harold Harvey Clark,
Appellant,
v.
Office of Personnel Management,
Agency,
and
Nancy I. Clark,
Intervenor.

OPM Claim No. CSA No. 3 602 222

December 6, 2013

Harold Harvey Clark, Hollywood, South Carolina, pro se.

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

Nancy I. Clark, Hollywood, South Carolina, intervenor.

BEFORE

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

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has petitioned for review of an initial decision that reversed its denial of the intervenor's request to waive her future entitlement to a survivor annuity. For the reasons discussed below, we

GRANT OPM's petition for review and REVERSE the initial decision, finding that the intervenor may not waive her entitlement to a survivor annuity so that the appellant can receive an unreduced retirement annuity.[1]

BACKGROUND

¶2 The pertinent facts are undisputed. The appellant was unmarried in 1995, when he retired from federal service and started receiving an annuity under the Civil Service Retirement System (CSRS). Initial Appeal File (IAF), Tab 12, Initial Decision (ID) at 2. When he married the intervenor in 2007, the appellant elected to receive a reduced annuity in order to provide the maximum survivor annuity benefit to his wife, and OPM approved this election. *Id*. In October 2010, the appellant requested that OPM terminate the survivor annuity election based on financial hardship. *Id*. OPM denied that request on the basis that the appellant's 2007 election was irrevocable under 5 U.S.C. § 8339(k)(2)(A). On appeal, the Board affirmed that determination, but informed the appellant that the intervenor could irrevocably request waiver of her entitlement to a survivor annuity, and thus restore the appellant's full annuity under the Board's interpretation of the controlling statute, 5 U.S.C. § 8345(d). *Clark v. Office of Personnel Management*, MSPB Docket No. AT-0831-11-0615-I-1, Final Order at 2 (Nov. 25, 2011) (0615 Final Order). The intervenor subsequently submitted a letter to OPM stating that she wished to irrevocably waive her entitlement to a survivor annuity. IAF, Tab 9 at 12. OPM issued a reconsideration decision denying the request. *Id*. at 5-11.

¶3 On appeal to the Board, the administrative judge issued an initial decision that reversed OPM's reconsideration decision and ordered it to grant the

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[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.

intervenor's requested irrevocable waiver of survivor annuity benefits and to retroactively restore the appellant's unreduced annuity. ID at 3-4. The basis for that decision was Board precedent cited by the administrative judge. ID at 3. The administrative judge acknowledged OPM's request that this precedent be overruled, but correctly noted that an administrative judge may not overrule the Board's precedential decisions. ID at 4 n.3.

¶4 In its petition for review, OPM urges the Board to overrule that precedent. Petition for Review (PFR) File, Tab 1. Because the arguments raised by OPM required further development, the Board issued a briefing order to provide the parties the opportunity to provide additional evidence and argument on the issues raised on review. *Id.*, Tab 3. OPM filed a response to the Briefing Order. *Id.*, Tab 4. The appellant and the intervenor have not filed a response to the petition for review or the briefing order.

ANALYSIS

¶5 An individual who marries after retiring with a CSRS annuity "may irrevocably elect" a reduction in his current annuity in order to provide a survivor annuity benefit to his spouse or former spouse. 5 U.S.C. § 8339(k)(2)(A). Because of the irrevocable nature of this election, the law does not permit an individual, such as the appellant, to rescind his election and return to an unreduced annuity, regardless of whether the election causes him financial hardship. *See id*. Under existing precedent, however, the same result can be achieved indirectly by having the person named as the beneficiary of the survivor annuity irrevocably waive her future entitlement to that benefit. *Mulroy v. Office of Personnel Management*, 92 M.S.P.R. 404, ¶¶ 15-17 (2002); *Shelley v. Office of Personnel Management*, 88 M.S.P.R. 224, ¶ 8 (2001); *see* 0615 Final Order.

¶6 The source of the principle enunciated in *Mulroy* and *Shelley* was a prior decision in *Worley v. Office of Personnel Management*, 86 M.S.P.R. 237 (2000), which adopted the reasoning in a non-precedential decision by the U.S. Court of

Appeals for the Federal Circuit in *Wallace-Ingram v. Office of Personnel Management*, 155 F.3d 566 (Fed. Cir. 1998) (Table).[2] Unlike the present case, which involves an attempt to waive a future survivor annuity in order to restore an annuitant's unreduced retirement annuity, *Worley* involved an attempt by the widow of a deceased annuitant to waive her entitlement to a survivor annuity so that she could receive an immediate lump-sum payment of her late husband's unpaid retirement contributions under 5 U.S.C. § 8342(d). *Id.*, ¶¶ 3 & 5. The Board ruled that she was entitled to make such a waiver under a statute that provides as follows:

> An individual entitled to annuity from the Fund may decline to accept all or any part of the annuity by a waiver signed and filed with the Office of Personnel Management. The waiver may be revoked in writing at any time. Payment of the annuity waived may not be made for the period during which the waiver was in effect.

5 U.S.C. § 8345(d). The Board held that an individual who files a waiver of her entitlement to a survivor annuity under CSRS after the death of the annuitant could terminate her entitlement to a survivor annuity as long as the waiver expressly states that it is irrevocable and is done before she files a claim for a survivor annuity. *Worley*, 86 M.S.P.R. 237, ¶¶ 11-12. The Board extended the *Worley* holding in *Mulroy* and *Shelley* to apply to cases such as the present one, in which the annuitant, whose annuity was reduced to provide a survivor benefit, is still alive and the purpose of the waiver of survivor annuity benefits by the beneficiary is to permit the restoration of an unreduced annuity payable to the annuitant.[3] *Mulroy*, 92 M.S.P.R. 404, ¶¶ 15-17; *Shelley*, 88 M.S.P.R. 224 ¶ 8.

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[2] We note that the court has cited in a precedential decision *Mulroy* and *Shelley* for the proposition that the beneficiary of the survivor annuity may irrevocably waive her future entitlement to that benefit. *See James v. Office of Personnel Management*, 372 F.3d 1365, 1368 (Fed. Cir. 2004). However, the court's discussion was in dictum and is not binding precedent for the Board.

[3] In *Davis v. Office of Personnel Management*, 109 M.S.P.R. 499, ¶ 6 (2008), the Board extended the holding in *Shelley* and *Mulroy* to cases governed by the Federal

¶7 OPM makes four basic arguments challenging this body of precedent. It first asserts that the Board's decisions violate or nullify other statutory restrictions of the CSRS and the Federal Employees' Retirement System (FERS) statutes, including the express language of 5 U.S.C. § 8345(d), which provides that such waivers "may be revoked at any time." PFR File, Tab 1 at 5-11. Second, OPM points out that the Board's precedent allows someone who has only a future, contingent entitlement to a survivor annuity to waive her entitlement and contends that the statute applies only to those who have a present entitlement. *Id.* at 11-13. Third, OPM argues that the Board's decisions permitting irrevocable waivers place the Civil Service Retirement and Disability Fund (CSRDF) in jeopardy of making payments in excess of what is permitted by law. *Id.* at 13-15. Finally, OPM asserts that any authorization of irrevocable waivers must come from legislation enacted by Congress. *Id.* at 15.

¶8 The question of whether *Mulroy*, *Shelley*, and *Worley* violate or nullify section 8345(d) and other sections of the CSRS and FERS statutes is a question of statutory interpretation. Therefore, we first must determine, by using "traditional tools of statutory construction," if "Congress had an intention on the precise question at issue, [and if so,] that intention is the law and must be given effect." *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see Delverde, SRL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000) (explaining that the "traditional tools of statutory construction" include an examination of the statute's text, structure, and legislative history, as well as an application of the relevant canons of interpretation). Further, it is a well-settled principle of statutory interpretation that a "statute is to be construed in a way which gives meaning and effect to all of its parts." *Saunders v. Secretary of Health & Human Services*, 25 F.3d 1031,

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Employees' Retirement System, which has a waiver provision, 5 U.S.C. § 8465(a), which is identical in all material respects to the CSRS provision, 5 U.S.C. § 8345(d).

1035 (Fed. Cir. 1994) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1982) (noting the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect")). Only if the statute is silent or ambiguous with respect to the specific issue will the inquiry proceed to the question of whether an agency's interpretation is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 842-43.

¶9 In the instant case, we agree with OPM that the Board erred in *Worley* in finding that section 8345(d) authorizes an individual to make an irrevocable waiver. The language of the section expressly states that the waiver "may be revoked at any time." Thus, waivers under this provision are plainly defined as revocable in the section. *Worley* found that the use of the word "may" in the section is permissive language, which gives the individual discretion to make a waiver irrevocable. 86 M.S.P.R. 237, ¶ 10. However, this analysis ignores that the provision also states that an individual's discretion to revoke a waiver may be exercised "at any time." By permitting an individual to make an irrevocable waiver, *Worley* does not give meaning and effect to the entire provision. Therefore, we conclude that the only reasonable interpretation of section 8345(d) is that Congress did not intend for it to authorize an irrevocable waiver.

¶10 Furthermore, even if one could find section 8345(d) to be ambiguous on this issue, which we do not find, it is apparent from the legislative history that Congress did not intend to authorize an irrevocable waiver in this provision. As explained in the legislative history of the 1952 act, the problem to be fixed by the legislation, which is the origin of the language found in 5 U.S.C. § 8345(d), was a situation in which receipt of an annuity decreased an existing annuitant's total income. H.R. Rep. No. 82-2407, *reprinted in* 1952 U.S.C.C.A.N. 2266, 2267 & 2269. This unintended and paradoxical result could be avoided if the law allowed the annuitant to waive all or part of his or her annuity. However, it was also important that any such waiver be revocable. If the waiver was not revocable, there could be a second unintended and unwanted consequence should the reason

for the waiver cease to exist. In that event, Congress intended that the annuitant must be allowed to revoke the waiver and resume receipt of the full annuity to which he or she was entitled.

¶11 In our briefing order, we requested OPM to identify any prior cases where it has challenged *Worley*'s interpretation of section 8345(d) and to present argument on whether Congress has endorsed or rejected the Board's longstanding interpretation of this provision. PFR File, Tab 3 at 4. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove School District v. T.A.*, 557 U.S. 230, 239-40 (2008) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). In response, OPM demonstrated that it has argued against the *Wallace-Ingram* and *Worley* interpretation of its statutes in several prior appeals.[4] PFR File, Tab 4 at 2-5. However, neither the court nor the Board issued a precedential decision responding to OPM's argument in any of these cases. Furthermore, we find that there is insufficient indication that Congress has considered the Board's interpretation of section 8345(d) in any legislation since *Worley*. The section itself was last amended by Congress in 1994 before *Wallace-Ingram* and *Worley*. In addition, there is no indication in any closely related provisions of the CSRS or FERS statutes that Congress has adopted the Board's interpretation of the statute. Therefore, we conclude that the Board's interpretation of section 8345(d) and its corresponding FERS provision has not been endorsed by OPM or Congress.

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[4] *See James*, 372 F.3d at 1368; *Davis v. Office of Personnel Management*, 109 M.S.P.R. 499 (2008); *Cardinal v. Office of Personnel Management*, 109 M.S.P.R. 296 (2008) (split-vote Final Order); *Cummins v. Office of Personnel Management*, 107 M.S.P.R. 39 (2007) (nonprecedential Final Order); *Deutsch v. Office of Personnel Management*, 107 M.S.P.R. 181 (2007) (Table); *McGuire v. Office of Personnel Management*, 107 M.S.P.R. 12 (2007) (nonprecedential Final Order); and *Kincaid v. Office of Personnel Management*, 104 M.S.P.R. 42 (2006).

¶12 Accordingly, we find that we must overrule our previous decisions in *Davis*, *Shelley*, *Mulroy*, and *Worley* because the interpretation of the CSRS and FERS statutes to permit an irrevocable waiver by an individual entitled to an annuity from the Fund is not consistent with the express language in 5 U.S.C. §§ 8345(d) and 8465(a).[5] We also REVERSE the initial decision and find that the intervenor may not waive her entitlement to a survivor annuity so that the appellant can receive an unreduced retirement annuity.

ORDER

¶13 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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).

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[5] Because we find that 5 U.S.C. § 8345(d) does not authorize an irrevocable waiver, it is unnecessary for the Board to consider OPM's other arguments on review.

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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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.