

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

SCARLET L. ROSS,
Appellant,

DOCKET NUMBER
DE-0831-12-0154-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: April 15, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Lewanna Bell-Lloyd, Esquire, Olathe, Kansas, for the appellant.

Christopher H. Ziebarth, 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, which affirmed the reconsideration decision of the Office of Personnel Management (OPM)

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions.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\(c\)](#).

denying her request for a former spouse survivor annuity. Generally, we grant petitions such as this one only when: the initial decision contains erroneous 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.² See Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). 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\(b\)](#).

The appellant and her then-husband, Gordon Ross, a federal employee, divorced in December 2002 after a 21-year marriage. Initial Appeal File (IAF), Tab 5, Subtab 5 at 30, 35-42. Under a Qualified Domestic Relations Order (QDRO), the appellant received a "one-half share of the pension benefits accrued during the marriage including survivor's benefits." *Id.* at 32-33. The appellant submitted the QDRO to OPM in 2004. *Id.* at 49. After Ross retired in January 2006, *id.* at 51, OPM approved her former spouse annuity. *Id.* at 47.

The appellant married Thomas Olson on August 4, 2006, at 48 years of age. *Id.* at 27. On October 17, 2006, Ross notified OPM that she had remarried.

² 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.

Id., Subtab 2 at 1. Ross died on July 21, 2008. *Id.*, Subtab 5 at 28. The appellant applied for death benefits on August 26, 2008. *Id.* at 23-26. OPM notified her thereafter that she was ineligible for a former spouse survivor annuity. *Id.* at 22A.

On September 2, 2010, the appellant submitted to OPM an August 20, 2010 decree annulling her marriage to Olson and stating that “the purported marriage” was “without legal effect retroactively from the marriage’s inception.” *Id.* at 9-14; *see id.* at 13. OPM found that the appellant was not entitled to a survivor annuity based on the annulment because she had remarried before attaining age fifty-five, *id.*, Subtab 4, and affirmed its decision on reconsideration, *id.*, Subtab 2. The administrative judge affirmed OPM’s decision. IAF, Tab 14, Initial Decision (ID) at 2, 4.

The Board may order OPM to make retirement payments only in accordance with the terms of the retirement statutes. *O’Connell v. Office of Personnel Management*, [103 M.S.P.R. 579](#), ¶ 3 (2006) (citing *Office of Personnel Management v. Richmond*, [496 U.S. 414](#), 424 (1990)). Absent specific statutory authority, the Board and OPM lack the authority to grant an annuity for equitable reasons. *See Richmond*, 496 U.S. at 416, 434. 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), *cert. denied*, 479 U.S. 1037 (1987).

Section 8341(h) of Title 5 of the U.S. Code addresses a former spouse’s entitlement to a survivor annuity. It states in relevant part:

[A] former spouse of a deceased employee . . . is entitled to a survivor annuity under this subdivision, if and to the extent expressly provided for . . . in terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such degree.

[5 U.S.C. § 8341](#)(h)(1); *see Snyder v. Office of Personnel Management*, [463 F.3d 1338](#), 1340 (Fed. Cir. 2006). A former spouse’s remarriage before age fifty-five,

however, will end her entitlement to a survivor annuity, unless the marriage to the individual upon whose service the annuity is based lasted 30 or more years. [5 U.S.C. § 8341](#)(h)(3)(B), (k); *see also* [5 C.F.R. § 831.644](#)(b); [5 C.F.R. § 838.732](#)(a). When the entitlement to a former spouse annuity terminates because of remarriage, it will be reinstated only under limited circumstances. When, as here, the remarriage has been annulled:

[T]he entitlement will not be reinstated . . . unless --

- (i) The decree of annulment states that the marriage is without legal affect retroactively from the marriage's inception; *and*
- (ii) The former spouse's entitlement is based on section 4(b)(1)(B) or section (4)(b)(4) of Pub. L. 98-615.

[5 C.F.R. § 831.644](#)(d)(2) (emphasis added).

The appellant maintains that subsection 831.644(d)(2) allows reinstatement because her decree of annulment was retroactive to the inception of her marriage to Olson. PFR File, Tab 1 at 5-7. Although her annulment decree meets the requirement of subsection 831.644(d)(2)(i), *see* IAF, Tab 5, Subtab 5 at 13, her circumstances do not satisfy the conditions in subsection 831.644(d)(2)(ii). These conditions are set forth in the Civil Service Retirement Spouse Equity Act of 1984, Pub. L. 98-615, § 4, 98 Stat. 3195, 3205 (1984), *amended by* Federal Employee Benefits Improvement Act, Pub. L. 99-251, § 201(a)-(c), 100 Stat. 14, 22 (1986), *located at* [5 U.S.C. § 8341](#) note. The conditions enumerated in the Spouse Equity Act include the following: The former spouse must have filed an application for a survivor annuity with OPM on or before May 7, 1989, have been at least 50 years of age on May 7, 1987, and have not remarried before age fifty-five after September 14, 1978. §§ 4(b)(1)(B), (4)(b)(4), 98 Stat. at 3205, *located at* [5 U.S.C. § 8341](#) note; *see* *Teigeler v. Office of Personnel Management*, [40 M.S.P.R. 325](#), 327 (1989) (plain language of this section “applies only to exclude those who were remarried after September 14, 1978”), *aff’d*, [898 F.2d 1574](#) (Fed. Cir. 1990), *abrogated on other grounds by* *Dilworth v. Office of Personnel Management*, [132 F.3d 712](#) (Fed. Cir. 1997). Here, the

appellant clearly does not meet the conditions. She remarried in 2006 at age forty-eight, IAF, Tab 5, Subtab 5 at 27, and she applied for a survivor annuity in 2004, *id.* at 49. To qualify for reinstatement under [5 C.F.R. § 831.644](#)(d)(2), a former spouse must meet the requirements in both subsection (i) and subsection (ii). The appellant meets only the requirement of subsection (i).

The appellant contends that the rationale for restricting post-annulment reinstatement of former spouse survivor annuities may be compared to the rationale state courts have offered for not reinstating alimony payments following the annulment of a remarriage: to allow the former spouse that paid alimony to determine with certainty whether he might face a future obligation to resume payments. PFR File, Tab 1 at 5; *see* 50 Fed. Reg. 20,064 (May 12, 1985). She argues that OPM has acknowledged that the analogy to alimony does not fit circumstances like hers, where the retiree has died and thus no longer receives an annuity that would be reduced. PFR File, Tab 1 at 5; *see* 60 Fed. Reg. 14,201 (Mar. 16, 1995) (located at IAF, Tab 13, Ex. A). Subsection 831.644(d)(2)(ii), however, still references the restrictions in Pub. L. 98-615. The Board has held that the plain language of the statute is controlling. *Teigeler*, 40 M.S.P.R. at 327. Contrary to the appellant's assertion, *see* PFR File, Tab 1 at 5-6, section 831.644(d)(2) requires a former spouse seeking reinstatement of a survivor annuity to meet *both* requirements enumerated there. Absent specific statutory authority, the Board may not grant an annuity for reasons of equity. *See Richmond*, 496 U.S. at 416, 434. Accordingly, the Board AFFIRMS the initial decision.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. 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).

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:

William D. Spencer
Clerk of the Board

Washington, D.C.