UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

93 M.S.P.R. 628

HELEN M. AUDET,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency,

and

WILLIAM D. AUDET,
Intervenor.

DOCKET NUMBER
BN-0831-02-0122-I-1

DATE: August 12, 2003

(CSA 3 362 588)

Frederick D. Williams, Esquire, Windham, Maine, for the appellant.

Kenneth R. Brown, Washington, D.C., for the agency.

James C. Bowes, Esquire, Portland, Maine, for the intervenor.

BEFORE

Susanne T. Marshall, Chairman
Neil A. G. McPhie, Member

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has filed a petition for review (PFR) of the initial decision that reversed its reconsideration decision in this case. For the reasons discussed below, we GRANT the petition under 5 C.F.R. § 1201.115, REVERSE the initial decision, and AFFIRM OPM's reconsideration

decision not to reduce the intervenor's Civil Service Retirement System (CSRS) annuity to provide the appellant with a former spouse survivor annuity.

BACKGROUND

¶2 The intervenor retired under CSRS on August 1, 1991. Initial Appeal File (IAF), Tab 3, subtab 4. On February 26, 2001, the court rendered a Judgment of Divorce that divided marital property between him and the appellant. The Judgment of Divorce awarded the appellant a portion of "any retirement or pension benefit belonging to" the intervenor, stated that the parties would submit a Qualified Domestic Relations Order (QDRO) to the court for signature "to effectuate this provision," and retained jurisdiction to enter the QDRO. *Id.*, subtab 6. The April 24, 2001 QDRO awarded the appellant a former spouse survivor annuity. *Id.*, subtab 6.

¶3 On May 16, 2001, the appellant applied for benefits, including a former spouse survivor annuity, based on the intervenor's federal service. *Id.*, subtab 5 at 1. OPM found, however, that the QDRO awarding the former spouse survivor annuity was a prohibited modification of the Judgment of Divorce under 5 U.S.C. § 8341(h)(4) because it was issued after the intervenor's retirement and was not the first order dividing marital property. Thus, OPM would not honor the former spouse survivor annuity award. *Id.*, subtabs 2, 4.

¶4 Because of this, the appellant filed a motion with the court to correct the "clerical error" in the Judgment of Divorce. IAF, Tab 11, subtab 3. The court granted the motion on September 10, 2001, stating that it intended the appellant to have a survivor annuity and that language to that effect was "inadvertently omitted" from the Judgment of Divorce. It entered a second Judgment of Divorce "to replace, as an original Judgment of Divorce, the previous Judgment." It stated that the new order was "effective nunc pro tunc to February 26, 2001." *Id.*, subtab 4. The second Judgment of Divorce included the following paragraph that was not included in the first Judgment of Divorce: "Under Section 8341(h)(1),

Title 5 U.S. Code, [the appellant] is awarded a Former Spouse Survivor Annuity under the Civil Service Retirement System. The amount of the Former Spouse Survivor Annuity will be equal to thirty-two and one-half percent (32.5%) of [the intervenor's] Employee Annuity." *Id.*; IAF, Tab 3, subtabs 5, 6.

¶5 The appellant filed a petition for appeal of OPM's reconsideration decision, IAF, Tab 1, to which OPM responded, *id.*, Tab 3. The administrative judge (AJ) notified the intervenor of his right to participate in the proceedings and granted his request to intervene. *Id.*, Tabs 4, 6. The AJ decided the appeal on the written record because the appellant did not request a hearing. *Id.*, Tabs 1, 2; Initial Decision (I.D.) at 2.

¶6 Citing the Federal Rules of Civil Procedure, the AJ found that a court has the inherent authority to correct clerical mistakes in judgments. He found that the court's corrective action rendered the uncorrected Judgment of Divorce void ab initio, and, thus, that the Judgment of Divorce had not been amended, explained, clarified, interpreted, or otherwise modified. He therefore concluded that the "corrected" Judgment of Divorce, as the original written order that first ended the marriage while dividing marital property, was a court order acceptable for processing (COAP) and must be honored by OPM. I.D. at 7. The initial decision notified the parties that it would become final on October 24, 2002, unless a PFR were filed by that date. I.D. at 8.

¶7 The appellant has filed a timely response opposing OPM's PFR. PFR File, Tab 3.

ANALYSIS

OPM's PFR was timely filed.

¶8 The appellant asserts that OPM's PFR was not timely because it was not sent to her or her representative until November 1, 2002, and was not received by them until November 4, 2002. PFR File, Tab 3 at 1. She has submitted postmarked envelopes to support her assertion. *Id.*, Tab 3, Ex. 1. She contends

that OPM's delay denied her due process of law in that it denied her 12 days in which to review, research, and prepare a response. *Id.*, Tab 3 at 1.

¶9 The date of filing is determined by when the document is filed with the Board. 5 C.F.R. § 1201.4(*l*). OPM filed its PFR with the Board by facsimile dated October 23, 2002. PFR File, Tab 1. The date of filing by facsimile is the date of the facsimile. 5 C.F.R. § 1201.4(*l*). Thus, OPM filed its PFR on October 23, 2002, and its filing was timely. Furthermore, the appellant, in fact, filed a timely response to OPM's PFR. PFR File, Tab 3. She has failed to explain her bare contention that she was denied due process by OPM's alleged delay. She has also not explained why she did not file a motion for an extension of time with the Board if she believed that she needed additional time to prepare a response. *See* 5 C.F.R. § 1201.114(e). Therefore, her assertion does not provide a basis for rejecting OPM's PFR.

The second Judgment of Divorce is not a COAP.

¶10 OPM argues that the AJ erred in finding that the second Judgment of Divorce, entered on September 10, 2001, was a COAP. It asserts, inter alia, that the second Judgment of Divorce was a prohibited replacement of the first Judgment of Divorce that divided marital property. PFR File, Tab 1. We agree with OPM.

¶11 A former spouse's entitlement to a survivor annuity is set forth in 5 U.S.C. § 8341(h), which Congress enacted as part of the Spouse Equity Act of 1984. *See Newman v. Love*, 962 F.2d 1008, 1009 (Fed. Cir. 1992). That statute provides, in relevant part, as follows:

> (h)(1) Subject to paragraphs (2) through (5) of this subsection, a former spouse of a[n] … annuitant … is entitled to a survivor annuity under this subsection, if and to the extent expressly provided for … in the terms of any decree of divorce or annulment or any court order or court-approved property settlement agreement incident to such decree.
>
> ….

> (4) For purposes of this subchapter, a modification in a decree, order, agreement, or election referred to in paragraph (1) of this subsection shall not be effective -
>
> (A) if such modification is made after the retirement or death of the employee … concerned, and
>
> (B) to the extent that such modification involves an annuity under this subsection.

The requirement that such a benefit be "expressly provided" is substantive, and not a mere technicality. *Hokanson v. Office of Personnel Management*, 122 F.3d 1043, 1047 (Fed. Cir. 1997). The intent to provide the survivor annuity must be clear, definite, explicit, plain, direct, and unmistakable, not dubious or ambiguous. *E.g., Hahn v. Office of Personnel Management*, 71 M.S.P.R. 154, 156 (1996).

¶12 When enacting the Spouse Equity Act, Congress empowered OPM to prescribe regulations that are necessary and proper to carry out the Act. 5 U.S.C. § 8347(a); *Love*, 962 F.2d at 1013. OPM has interpreted 5 U.S.C. § 8341(h) in 5 C.F.R. § 838.806 governing amended court orders. Subsection (a) of the regulation specifically states that a court order awarding a former spouse survivor annuity is not a COAP "if it is issued after [the employee's] date of retirement or death" and "modifies or replaces the first order dividing the marital property of the employee and the former spouse." 5 C.F.R. § 838.806(a) (emphasis supplied). Here, the second Judgment of Divorce was undisputedly issued after the intervenor's retirement. Moreover, the court's own September 10, 2001 order, granting the appellant's "Emergency Motion to Correct Clerical Error," stated that the second Judgment of Divorce was "hereby entered to replace, as an original Judgment of Divorce, the previous Judgment." IAF, Tab 11, Ex. 4 (emphasis supplied). Accordingly, the second Judgment of Divorce is not a COAP under 5 C.F.R. § 838.806(a).

¶13 Furthermore, 5 C.F.R. § 838.806(c) states that a court order that awards a former spouse survivor annuity and that is "issued" after the first order dividing

the marital property of the retiree and the former spouse "has been vacated, set aside, or otherwise declared invalid, is not a" COAP if it is issued after the date of retirement, changes any provision concerning a former spouse survivor annuity in the previous court order, and is effective prior to the date when it is "issued." Subsection (e) defines "issued" as "actually filed with the clerk of the court, and does not mean the effective date of a retroactive court order that is effective prior to the date when actually filed with the clerk of the court (e.g., a court order issued nunc pro tunc)." (Emphasis supplied.) Here, the second Judgment of Divorce added a provision to the first Judgment of Divorce by adding the paragraph providing the appellant with a former spouse survivor annuity. Further, despite its February 26, 2001 date, it was not actually filed with the clerk of the court until September 10, 2001. Thus, it was effective prior to the date when it was "issued." Accordingly, it is not a COAP under 5 C.F.R. § 838.806(c).

¶14 The AJ cited the Federal Rules of Civil Procedure as the basis for the court's inherent authority to correct "clerical mistakes" in judgments. I.D. at 7. While the Board may look to those rules for guidance, it is not bound by them. *E.g., Crickard v. Department of Veterans Affairs*, 92 M.S.P.R. 625, ¶ 25 (2002). In any event, the appellant must meet the statutory requirements for the award of a former spouse survivor annuity. *See* 5 U.S.C. § 8341(h)(1); 5 C.F.R. § 838.806(a), (c). The Board may not order the payment of federal retirement benefits when the statutory conditions for such benefits have not been met. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990).

OPM correctly determined that the First Judgment of Divorce and the QDRO do not provide a basis for awarding the appellant a former spouse survivor annuity.

¶15 In the first Judgment of Divorce, the court found that the parties had marital personal property and divided it, in relevant part, as follows:

> [The appellant] is awarded one half of the marital portion of any retirement or pension benefit belonging to [the intervenor]. The

> marital portion of the retirement plan is to be determined by dividing the number of months of marriage while [the intervenor] was employed by the total number of months employed, that is 221/337 or 65%. The parties shall submit a Qualified Domestic Relations Order to this court for signature to effectuate this provision. [The appellant] shall be responsible for drafting the QDRO by March 15, 2001. The court shall retain jurisdiction to enter such Order. The remaining one half interest in the marital portion of the plan is awarded to the owner. The remainder is set aside to the owner as non-marital property.

IAF, Tab 3, subtab 6.

¶16 That provision did not satisfy the statutory standard because it does not "expressly provide[] for" a survivor annuity for the appellant. 5 U.S.C. § 8341(h)(1); *see also Hokanson*, 122 F.3d at 1047 (stating that an award of a former spouse survivor annuity must be express). Rather, it awards a portion of the "retirement or pension benefit" or "the retirement plan" belonging to the intervenor. In *Hokanson*, the court found that the regulations specifically distinguish between the payment of a share of a federal employee's retirement benefits to a former spouse during the lifetime of the retired federal employee, and the award of a survivor annuity to the former spouse payable after the death of the employee. *Id.* at 1045-46. It thus stated that an award directing the payment of a share of "a federal employee's retirement benefits is distinct from, and will not be interpreted as, an award of a survivor annuity." *Id.* at 1046; *see also Walker v. Office of Personnel Management*, 81 M.S.P.R. 377, ¶ 6 (1999) (finding that OPM's regulatory definition of "employee retirement benefits" does not include survivor annuities); *Holzman v. Office of Personnel Management*, 62 M.S.P.R. 254, 258-59 (1994) (finding that a divorce decree that provided for the receipt of a portion of the retirement benefits did not expressly provide for the receipt of a survivor annuity), *aff'd*, 48 F.3d 1237 (Fed. Cir. 1995) (Table). Accordingly, we will not interpret the first Judgment of Divorce's award of a portion of the "retirement or pension benefit" or "the retirement plan" in this case to include an award of a survivor annuity. *See Hokanson*, 122 F.3d at 1047;

Hahn, 71 M.S.P.R. at 156; *see also Pitsker v. Office of Personnel Management*, 89 M.S.P.R. 252, ¶ 4 (2001) (finding it well settled that decisions of the Federal Circuit constitute precedent that is binding on the Board).

¶17 To the extent that the first Judgment of Divorce can be read as deferring a decision on retirement benefits until the QDRO was entered, the orders are likewise ineffective to make such an award. In *Vaccaro v. Office of Personnel Management*, 262 F.3d 1280 (Fed. Cir. 2001), the court addressed the issue of whether a 1996 divorce decree that divided marital property, but deferred the "[d]ivision of community interest in the Federal Employee's Civil Service Pension" and did not award a former spouse survivor annuity, was modified by a subsequent 1997 order that did award such an annuity. *Id.* at 1284-85. The court held that the 1996 decree did not meet the requirements of 5 U.S.C. § 8341(h)(1) and OPM's regulations for the express provision of a survivor annuity. It further found that the 1997 order was ineffective as a matter of law under 5 U.S.C. § 8341(h)(4) because it modified the 1996 decree after Mr. Vaccaro's death by providing a survivor annuity when the 1996 decree made no mention of such an annuity. *Id.* at 1287.

¶18 Similarly, the QDRO in this case constituted a prohibited modification of the first Judgment of Divorce under 5 U.S.C. § 8341(h)(4) and 5 C.F.R. § 838.806(b). The first Judgment of Divorce divided marital property and made no mention of a former spouse survivor annuity; the QDRO was issued after the intervenor's retirement, and the QDRO involved a survivor annuity award. As the court stated in *Moran v. Office of Personnel Management*, 310 F.3d 1382 (Fed. Cir. 2002), 5 U.S.C. § 8341(h)(4) "is clear" in stating that a modification is ineffective if issued after the federal employee's retirement and "it contains no exceptions." *Id.* at 1383-85 (holding that OPM properly refused to accept a 1999 order nunc pro tunc that changed the basis for determining the former spouse's survivor annuity since it was a modification of a 1994 order and was issued after the employee had retired).

¶19 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). For the reasons discussed above, we conclude that the appellant has failed to meet that burden. Accordingly, we affirm OPM's reconsideration decision.

ORDER

¶20 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 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 web site, http://www.mspb.gov.

FOR THE BOARD:

_____
Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.