

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDNA L. HARRISON,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 2 487 054)

DOCKET NUMBERS
PH831M8610595
PH831M8610638

DATE: SEP 13 1988

Edna L. Harrison, Herndon, West Virginia, pro se.

Raymond J. Kirk, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on September 24, 1986, that affirmed the Office of Personnel Management's reconsideration decision denying her request for waiver of an annuity overpayment. For the reasons stated below, the Board GRANTS the appellant's petition, VACATES the initial decision, and REMANDS this case to the Philadelphia Regional Office to permit the appellant to supplement the record.

BACKGROUND

The appellant filed an appeal of the agency's reconsideration decision that had found that her annuity had been overpaid in the amount of \$2,268.00. The agency denied

the appellant's request for waiver of the overpayment because she had not established that financial hardship would result from repaying the amount in installments of \$42.00 per month.

The appellant filed a petition for appeal with the Board but did not request a hearing. The administrative judge decided this case on the basis of the parties' written submissions. She found that the preponderance of the evidence established that the appellant returned one annuity check in the amount of \$483.00 to the Office of Personnel Management. The administrative judge therefore reduced the amount of the total overpayment by \$483.00. She further found that the appellant's claims of financial hardship were not supported and consequently sustained OPM's denial of waiver.

As a petition for review, the appellant forwarded a copy of the second letter she had sent to the regional office. In that letter, the appellant claimed that: (1) The agency took an excessive amount of time to compute her correct annuity and to rule on her request for waiver (eighteen months and three years, respectively); (2) she had financial obligations, poor health, and [advanced] age; (3) she was not at fault in the overpayment; (4) recovery would be against equity and good conscience; (5) she had stopped assisting a close relative with education expenses but otherwise had the same expenses as when she had originally requested waiver; and (6) her health had deteriorated. As another part of her petition for review,

the appellant submitted an additional letter in which she stated that her husband died on September 9, 1986, and that his death affected her financial condition.

The agency did not petition for review of the administrative judge's decision reducing the amount of the overpayment and did not respond to the appellant's petition for review.

ANALYSIS

The appellant has presented new and material evidence

According to the information in the appellant's letter, her husband died after the record closed in this appeal but approximately two weeks before the initial decision was issued. We find that, under the circumstances of this case, the appellant's allegation that her husband has died constitutes new evidence that was previously unavailable despite due diligence. See 5 C.F.R. § 1201.115; cf. *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980) (the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence).

The appellant's allegation also constitutes material evidence. Cf. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980) (the Board will not grant a petition for review based on new evidence absent a showing that the new evidence is of sufficient weight to warrant an outcome different from that of the initial decision). The appellant stated that her husband's death "definitely will affect my

income." Petition for Review File, Tab 1 at 3. The appellant's changed income is relevant to the issue of financial hardship and could warrant a result different from that of the initial decision. See *Eaton v. Office of Personnel Management*, MSPB Docket No. DA831M8610424 (September 13, 1988).

The administrative judge must give the appellant the opportunity to supplement her evidence.


The appellant alleges that her income will be affected by her husband's death but has not provided sufficient information to establish that recovery of her overpayment should be waived. Therefore, the administrative judge must give her the opportunity to supplement her evidence to establish the impact of her husband's death on her financial status. See *Clinton v. Office of Personnel Management*, MSPB Docket No. DA831M8710035 (September 13, 1988).

ORDER

Accordingly, the Board REMANDS this case to the administrative judge for her to reopen the record to allow the appellant to submit evidence detailing how the death of

the appellant's husband affected the appellant's income. In addition, the administrative judge must afford the agency the opportunity to respond to the appellant's additional evidence, if any, and, after considering the new evidence submitted by the parties, issue a new initial decision in this appeal.

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.