UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

89 M.S.P.R. 449

SHERRY L. HUNT,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.

DOCKET NUMBER
BN-0831-00-0042-I-1

DATE: September 12, 2001

Sherry L. Hunt, Topsham, Maine, pro se.

John Panagakos, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review from the March 27, 2000 initial decision issued by the administrative judge, affirming the reconsideration decision of the Office of Personnel Management (OPM) determining that she was not entitled to a survivor annuity under the Civil Service Retirement System (CSRS) as the former spouse of a deceased Federal employee. The Merit Systems Protection Board (the Board) has jurisdiction. *See* 5 U.S.C. § 8347(d); 5 C.F.R. § 831.110. For the reasons below, the initial decision is AFFIRMED in part, VACATED in part, and the agency's reconsideration decision is REVERSED.

BACKGROUND

¶2 The appellant married Postal Service employee Jon Hunt in 1982, and they divorced on November 23, 1992. *See* Appeal File (AF), Tab 4, Subtab 6. Pursuant to the divorce proceedings, a "Qualified Domestic Relations Order" (QDRO) (so styled on the face of the order) was entered on December 9, 1992 in Circuit Court for the County of Ionia, Michigan. The QDRO assigned portions of Mr. Hunt's retirement benefits under CSRS to the appellant. *Id.* On September 18, 1997, Mr. Hunt retired from the Postal Service. In the retirement application signed by Mr. Hunt on September 11, 1997, he chose an annuity payable only in his lifetime, i.e., he elected not to provide for a survivor annuity. Mr. Hunt died on November 30, 1997. *Id.* The appellant applied to OPM for a survivor annuity as a former spouse in an application signed on January 6, 1998. *See* AF, Tab 4, Subtab 5. As part of her application for a survivor annuity, the appellant enclosed a copy of her QDRO as well as a copy of her judgment of divorce. *See id.*

¶3 The QDRO provided in pertinent part:

> 1. The retirement benefit plan subject to this order is the Civil Service Retirement System. …
>
> 5.f. The participant shall elect a benefit form that provides a survivor benefit (surviving spouse option). The survivor benefit shall be at leat 30 percent of the benefit as of October 30, 1992, provided to the participant during the participant's life. …

AF, Tab 4, QDRO at 1, 4.

¶4 By letters dated March 6 and June 29, 1998, OPM informed the appellant that under Part 838, Title 5, Code of Federal Regulations, "Court Orders Affecting Retirement Benefits," it could not honor the QDRO. OPM stated that the court order was labeled as a "qualified domestic relations order," but did not contain a reference to Part 838, Title 5, Code of Federal Regulations as required for such orders under 5 C.F.R. § 838.302(a)(2). *See* AF, Tab 4, Subtab 4. The appellant sought a reconsideration decision, and in a December 9, 1999 final

decision, OPM stated that because the QDRO did not contain the required language of 5 C.F.R. § 838.302, it could not be considered a court order acceptable for processing. Accordingly, OPM denied the appellant's request for a survivor annuity as a former spouse. *See* AF, Tab 4, Subtab 2.

¶5 The appellant timely petitioned for appeal, and did not request a hearing, Based upon the written record, the administrative judge issued an initial decision on March 27, 2000. The administrative judge found that the appellant was properly denied a survivor annuity under the QDRO because it did not meet the requirements as a court order acceptable for processing under 5 C.F.R. §§ 838.302(a)(1) and (2); that her former husband failed to select a survivor annuity prior to his death; and that the Spouse Equity Act did not apply to award her a survivor annuity because she failed to meet its specific requirements. Therefore, the administrative judge affirmed OPM's reconsideration decision denying the survivor annuity. Initial Decision (ID), AF, Tab 13 at 3-4.

ANALYSIS

¶6 We have examined the record and applicable law, and we find no reason to disturb the administrative judge's conclusions with regard to the applicability of portions of the Spouse Equity Act[1] or the appellant's ineligibility for a survivor annuity by reason of her former spouse's failure to elect a survivor annuity option prior to his death. We therefore affirm those portions of the initial decision.

¶7 The remaining issue before us is whether the regulations relied upon by OPM, 5 C.F.R. §§ 838.302(a)(1) and (2), bar the award of a survivor annuity based upon the alleged failure of the QDRO to conform to the regulations. We find that they do not.

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[1] The Spouse Equity Act provides for an automatic entitlement to a survivor annuity upon application by a former spouse only where the annuitant retired "before May, 7, 1985 or "died after becoming eligible to retire and before such date [May 7, 1985]." *See* 5 U.S.C. § 8341 note at 4(b)(1), and 5 C.F.R. § 831.683; *Hamilton v. Office of Personnel Management,* 69 M.S.P.R. 690, 693 (1996).

¶8 Congress provided in 5 U.S.C. § 8341(h) that "a former spouse of a deceased employee…is entitled to survivor annuity…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." Before Congress enacted this provision as part of the Spouse Equity Act of 1984, a court could not award a survivor benefit to the former spouse of a federal employee or retiree. One significant purpose of the Act was to require OPM to recognize court orders awarding survivor annuities to such former spouses. *See Newman v. Love*, 962 F.2d 1008, 1009 (Fed. Cir. 1992).

¶9 Thus, we must determine whether the QRDO "expressly provided" for a survivor annuity and whether the denial of the annuity is in accord with the statute and OPM's implementing regulations. In making that determination, we are mindful that OPM's role is ministerial in nature, and that it may not look behind the court decree or property settlement order to ascertain the intent of the parties, "even when it knows that [such action] contravenes the intent of the state court" because of an inadvertent error. *Rosato v. Office of Personnel Management*, 165 F.3d 1377, 1378, 1381 (Fed. Cir. 1999). Equitable considerations do not provide a basis for awarding benefits not otherwise authorized by law. *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990). State court attempts to provide a former spouse survivor annuity must be clear, specific, and unambiguous, and disagreements about the validity of a provision must be resolved by the state court. *Snyder v. Office of Personnel Management*, 136 F.3d 1474, 1477 (Fed. Cir. 1998). Therefore, 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).

¶10 In the Spouse Equity Act, Congress empowered OPM to prescribe regulations as are necessary and proper to carry out the intent of the Act.

5 U.S.C. § 8347(a)(1988); *Love*, 962 F.2d at 1013. Pursuant to that authority, OPM promulgated the regulations in issue here at 5 C.F.R. § 838.302:

> (a) Qualifying Domestic Relations Orders.
>
> (1) Any court order labeled as a "qualified domestic relations order" or issued on a form for ERISA qualified domestic relations orders is not a court order acceptable for processing unless the court order expressly states that the provisions of the court order concerning CSRS or FERS benefits are governed by this part.
>
> (2) When a court order is required by paragraph (a)(1) of this section to state that the provisions of a court order concerning CSRS or FERS benefits are governed by this part the court order must expressly--
>
> (i) Refer to part 838 of title 5, Code of Federal Regulations, and
>
> (ii) State that the provisions of the court order concerning CSRS or FERS benefits are drafted in accordance with the terminology used in this part.

¶11 These regulations were intended to apply where a court order purporting to award a survivor annuity to a former spouse bore a label identifying the order as a "qualified domestic relations order," as is the case here. OPM's purpose was to avoid the need to interpret such court orders, assuring uniformity of technical terms, avoiding confusion in light of the many jurisdictions issuing them, and to clearly distinguish federal retirement benefits plans from other plans covered under ERISA. OPM intended generally to quickly and easily end disputes over interpretations of state court orders. *See* 57 Fed. Reg. 33570 (1992). To assure that it conformed to the Congressionally mandated ministerial role, OPM sought to detail the requirements for a "court order acceptable for processing." The label "Qualifying Domestic Relations Order" is a term used in orders affecting retirement benefits plans under ERISA, which created the term to denote property divisions under plans governed by ERISA. Some, but not all benefits, are similar under both ERISA plans and CSRS and FERS, and OPM determined to change the terminology to clarify the meaning of "expressly provided" in situations

where divisions of CSRS/FERS interests were erroneously based upon assumptions that ERISA plans and CSRS/FERS were the same. However, where an order labeled a "Qualifying Domestic Relations Order" is encountered, OPM applies the regulations quoted above to avoid a trap for the unwary and to assure that the court understood that OPM, not ERISA, terminology applied to the terms of the order. *Id.* 33570-72.

¶12 We find that under the circumstances presented here an inflexible application of the regulations would frustrate the language and intent of 5 U.S.C. § 8341(h). As stated by OPM and recounted above, the purpose of the regulations is to require that a court order for the assignment of federal retirement benefits clearly indicate the retirement plan affected, to assure that OPM need not interpret the court order to ascertain the intent of the parties or the court, and to avoid confusion concerning the benefits available under federal plans as opposed to those available under plans covered by ERISA. We find that under the QDRO, the plain language of the order expressly identifies the Civil Service Retirement System as the plan affected by the order, and that the appellant's former spouse was required by that court order to elect a survivor annuity. Although much of the language in the remainder of the QDRO refers to various terms and provisions of the Internal Revenue Code, and could be applicable to various kinds of plans, (including an ERISA plan), only the CSRS is mentioned or affected by the terms of the QDRO. Thus, it is clear that no other plan besides the CSRS was intended to be subject to the terms of the order. Where there is no question on the face of the order (or contrary evidence elsewhere in the record) that *only* CSRS benefits were intended to be affected, the regulations' avowed purpose of avoiding confusion as to the identity of the plan or the applicability of OPM regulations disappears. Put another way, there is no rational reason to apply the regulation to deny the survivor annuity where the "expressly provided" requirement of the statute is met, and the CSRS plan is the only plan that could have been intended by the court's order.

¶13 We note that no "magic words" are required to gain the benefit of the statute. *See Fox v. Office of Personnel Management*, 100 F.3d 141, 143 (Fed. Cir. 1996), *citing Nicolson v. Office of Personnel Management*, 64 M.S.P.R. 340, 343 (1994); *Thomas v. Office of Personnel Management*, 46 M.S.P.R. 651, 654 (1994). In *Fox*, the court recognized that some ambiguities can be fatal to an attempt to provide survivor benefits. The court found that the property settlement at issue successfully provided the survivor annuity based upon the wording of the agreement, the surrounding circumstances at the time the parties drafted and signed the agreement, and the minor difference between the terms used in the agreement ("Survivors Benefit Plan") and the precise name for the civil service benefit ("survivor annuity"). *Fox*, 100 F.3d at 143-44. As noted above, however, in this appeal there is no ambiguity at all concerning the statute's requirement to provide that the federal retirement plan and the intended benefit be expressly identified.

¶14 In reaching our conclusion, we are also guided by the opinion in *Davenport v. Office of Personnel Management*, 62 F.3d 1384, 1387 (Fed. Cir. 1995). Where a court decree gave rise to some uncertainty as to the percentage of a survivor benefit to be awarded a former spouse, the court held that the statutory purpose of the "expressly provided" requirement would be frustrated if OPM could not "consult" the order to determine the precise meaning of a QDRO that "*does* expressly" provide for a survivor benefit. *Id.* at 1387. (Emphasis in original.) Because the QDRO here is clear in intent that its provisions for a survivor annuity apply to the CSRS, and the CSRS only, and no other plan under ERISA or otherwise is evident to cloud that intent, we find that to apply the regulation as OPM urges would create an absurd result. Therefore, we find that the failure to follow precisely the requirements of the regulations does not bar the award of the survivor annuity as ordered in the QDRO.

ORDER

¶15 We ORDER the Office of Personnel Management (OPM) to award the appellant a survivor annuity. OPM must complete this action no later than 20 days after the date of this decision.

¶16 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

¶17 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. *See* 5 C.F.R. § 1201.182(a).

¶18 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 other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

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Robert E. Taylor
Clerk of the Board

Washington, D.C.