

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

2014 MSPB 35

Docket No. DC-0843-13-0329-I-1

**Nancy Holly,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

May 19, 2014

Nancy Holly, Leland, North Carolina, pro se.

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

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 the initial decision, which reversed its reconsideration decision denying the appellant's request for a waiver of her former spouse survivor annuity. For the reasons discussed below, we AFFIRM the initial decision's determination that the appellant may waive her entitlement to a former spouse survivor annuity, and thereby eliminate the current reduction in the annuity she receives, but we MODIFY the legal reasoning justifying that result.

BACKGROUND

¶2 Whether the appellant can waive her entitlement to a former spouse retirement annuity, and thereby eliminate the \$738 reduction in the amount of her current monthly annuity, appears to be a question of law, as the underlying facts do not appear to be in dispute. The appellant was formerly married to Charles Holly. Their marriage ended in a “Judgment for Absolute Divorce” issued by the Circuit Court for Howard County, Maryland, in October 1999. Initial Appeal File (IAF), Tab 6 at 72-74. This Judgment approved and incorporated the terms of a Voluntary Separation and Property Settlement (Property Settlement) executed by the Hollys on May 6, 1999. *Id.* Paragraph 13 of the Property Settlement provided that Mr. Holly, then a federal employee, irrevocably assigned to the appellant a pro rata share of his unreduced basic annuity upon his retirement. *Id.* at 53. Paragraph 13.3 of the Property Settlement provided as follows:

This paragraph 13 *shall not constitute a waiver by Wife of her rights to receive benefits as a widow or former spouse survivor . . .* under Husband’s retirement plan. The parties agree that pursuant to Section 8341(h) of title 5, United States Code, Wife shall be awarded the maximum possible Former Spouse Annuity under the CSRS.¹ Husband further agrees to take all necessary steps to elect Wife as the designated beneficiary for purposes of establishing and sustaining such surviving spouse coverage for Wife. Wife agrees *in the event she elects to have survivor rights or survivor annuity rights* as above described, that the cost of these shall be paid exclusively by the Wife from her share of the Husband: Retirement Benefits by way of a reduced benefit award to the Wife.

Id. at 54 (emphasis added).

¹ “CSRS” refers to the Civil Service Retirement System. We note that Mr. Holly appears to have been covered by that retirement system at the time of the divorce in 1999, but that he appears to have retired under the Federal Employees’ Retirement System (FERS). We need not determine which system is applicable to this appeal, as the circumstances in which entitlement to a retirement annuity may be waived are the same under both retirement systems. Compare [5 U.S.C. § 8465\(a\)](#) (FERS), with [5 U.S.C. § 8345\(d\)](#) (CSRS).

¶3 In 2001, the Howard County Circuit Court issued an “Order Acceptable for Processing under the Civil Service Retirement System” (2001 Court Order) to carry into effect the provisions of the Property Settlement relating to the appellant’s interest in Mr. Holly’s employee retirement benefits. *Id.* at 34-39. As set forth in the Property Settlement, the 2001 Court Order provided that the appellant was entitled to a portion of Mr. Holly’s federal retirement annuity, that she would be awarded the maximum possible former spouse survivor annuity, and that the costs associated with providing the former spouse survivor annuity would be borne solely by the appellant. *Id.* By letter dated July 3, 2001, OPM found that the 2001 Court Order met the legal requirements to entitle the appellant to a portion of Mr. Holly’s retirement annuity when he retired, and that it intended to honor the court’s award of a former spouse survivor annuity. *Id.* at 84.

¶4 Mr. Holly retired on May 30, 2010. IAF, Tab 9, Initial Decision (ID) at 2. Prior to this, the appellant stated that she attempted unsuccessfully over a period of months to get information from OPM regarding what she needed to do to start receiving her portion of Mr. Holly’s retirement annuity and to learn how much her portion would be reduced should she elect a former spouse survivor annuity. IAF, Tab 7 at 1; *see id.* at 36. She stated her understanding at the time of the 1999 Property Settlement—which she says she confirmed with an OPM official—that she would be advised at the time of Mr. Holly’s retirement what a former spouse survivor annuity would cost and that she would be able to accept or waive the annuity at that time. *Id.* at 1. On September 1, 2010, OPM sent the appellant a letter stating that the current survivor annuity payable to her was \$3,689 per month. *Id.* at 38. The letter did not inform her as to the cost of a survivor annuity, i.e., how much her portion of Mr. Holly’s retirement annuity would be reduced to pay for the survivor annuity benefit. The appellant stated that, upon receipt of the September 1 letter, she immediately started calling OPM, and was finally able to speak to someone on September 21, who told her the cost of the survivor annuity would be \$738 per month. *Id.* at 2. She stated that she told the

OPM official that she did not want the survivor annuity and was advised to write a letter asking to waive the survivor benefit. *Id.* The appellant submitted such a letter on September 27, 2010. *Id.* at 39. In the interim, OPM issued a letter on September 22 informing the appellant that she was approved to receive a portion of Mr. Holly's retirement annuity (the appellant's portion would be \$1,988 per month), but that OPM would be withholding \$738 per month from that portion to pay the cost of the survivor annuity. *Id.* at 40.

¶5 The appellant stated that, after many phone calls trying to follow up on her request to waive the survivor annuity benefit, she received a voice message from an OPM official on November 8, 2010, telling her she needed to submit an amended court order stating that she was waiving all rights to survivor benefits. *Id.* at 2.² The Howard County Circuit Court issued such an Order on February 3, 2011 (2011 Court Order). *Id.* at 45-47. OPM determined, however, that the 2011 Court Order could not be processed because it constituted a modification prohibited by [5 C.F.R. § 838.806](#), inasmuch as it was not the first order dividing the marital property. *Id.* at 48. After OPM issued an initial decision and the appellant sought reconsideration, OPM issued a reconsideration decision denying the appellant's request for a waiver of her entitlement to a former spouse survivor annuity because the 2011 Court Order was unacceptable for processing. IAF, Tab 6 at 19-21, 23-25, 27.

¶6 On appeal to the Board, the administrative judge issued an initial decision that reversed OPM's reconsideration decision and ordered it to grant the appellant's request for a waiver of the former spouse survivor annuity, and ordered OPM to stop withholding \$738 from her portion of Mr. Holly's monthly annuity. *ID* at 3-5. In so ruling, the judge relied on [5 U.S.C. § 8465](#)(a), which

² Although OPM has not conceded or stipulated to the appellant's statements of her communications and understandings as described in this and the preceding paragraph, her account is both consistent with the evidence of record and un rebutted.

provides that an individual who is entitled to an annuity “may decline to accept all or any part of the annuity by a waiver signed and filed with the Office [of Personnel Management],” and four Board decisions that held that such a waiver is valid as long as the waiver expressly states that it is irrevocable and is done before the individual files a claim for a survivor annuity. ID at 4; *see Davis v. Office of Personnel Management*, [109 M.S.P.R. 499](#), ¶ 6 (2008); *Mulroy v. Office of Personnel Management*, [92 M.S.P.R. 404](#), ¶ 16 (2002); *Shelly v. Office of Personnel Management*, [88 M.S.P.R. 224](#), ¶ 10 (2001); *Worley v. Office of Personnel Management*, [86 M.S.P.R. 237](#), ¶ 10 (2000).

¶7 In its petition for review, OPM argues that the four Board decisions relied on by the administrative judge are contrary to the statute, which expressly provides that waivers must be revocable, and urges the Board to overrule those decisions and affirm its reconsideration decision. Petition for Review (PFR) File, Tab 1. In response, the appellant reiterates her contention that the 1999 Property Settlement did not obligate her to receive a former spouse survivor annuity but rather gave her the option of electing such an annuity when Mr. Holly retired, and that she should be permitted to waive that benefit. PFR File, Tab 3.

ANALYSIS

¶8 Subsequent to the issuance of the initial decision and OPM’s filing of its petition for review in this case, the Board agreed with OPM’s contention that the four decisions on which the administrative judge relied were contrary to the statute and overruled them, holding that [5 U.S.C. § 8345](#)(d) does not permit an irrevocable waiver of the entitlement to an annuity. *Clark v. Office of Personnel Management*, [120 M.S.P.R. 440](#), ¶¶ 5-12 (2013). As discussed below, however, the *Clark* decision does not require that we affirm OPM’s denial of the appellant’s request for waiver.

¶9 Title 5, United States Code Section 8445(a) provides that a former spouse of a deceased employee or annuitant is “entitled to an annuity . . . if and to the

extent expressly provided for . . . in the terms of any decree of divorce . . . or any court order or court-approved property settlement agreement incident to such decree.” As the appellant contends, the “extent” to which the 1999 Property Settlement approved by the 2001 Court Order “expressly provided for” a former spouse survivor annuity was not unconditional or a certainty. The Property Settlement provided that the appellant “shall be awarded the maximum possible Former Spouse Annuity” pursuant to the former spouse survivor annuity statute, while simultaneously providing that the Property Settlement “shall not constitute a waiver . . . of her rights to receive benefits as a . . . former spouse survivor,” and that, “in the event she *elects* to have survivor rights or survivor annuity rights,” she would bear the cost of such a survivor annuity by way of a reduction in her portion of Mr. Holly’s retirement annuity. IAF, Tab 6 at 54 (emphasis supplied).

¶10 The appellant’s understanding of this language is reasonable, i.e., when her former husband retired and she learned how much the election of a survivor annuity would reduce her portion of Mr. Holly’s retirement annuity, she could make an informed decision whether to elect a survivor benefit and the accompanying reduction in her portion of Mr. Holly’s annuity, or she could waive a survivor benefit and receive the full, unreduced portion of Mr. Holly’s annuity. This understanding does not conflict with [5 U.S.C. § 8465](#)(a), which provides that an annuitant “may decline to accept all or any part of the amount of the annuity by a waiver signed and filed with” OPM, but that the “waiver may be revoked in writing at any time.” The waiver filed with OPM by the appellant on September 27, 2010, constituted such a waiver. *See* IAF, Tab 7 at 39. Although the appellant’s waiver cannot be an irrevocable one, it can be an indefinite one.³

³ If the appellant elected to revoke her waiver in the future and provide for a survivor annuity, she would presumably either have to make back payments or the survivor

Moreover, finding that the appellant's September 27 waiver was valid and effective does not require giving effect to the 2011 Court Order; the September 27 waiver was valid and effective on its own.⁴

¶11 The circumstances of the present case are distinguishable from those in *Clark*. That case involved an annuitant, a former federal employee, who made an irrevocable election pursuant to [5 U.S.C. § 8339\(k\)\(2\)\(A\)](#) for a reduction in his own current annuity in order to provide a survivor annuity for his wife, whom he married after retiring. [120 M.S.P.R. 440](#), ¶¶ 2, 5. Although the law did not permit Mr. Clark to rescind his election of a survivor annuity for his wife, the Board's case law at the time allowed the same result to be achieved indirectly by having his wife irrevocably waive her future entitlement to a survivor annuity. *Id.*, ¶ 5. The Board in *Clark* agreed with OPM that this line of precedent was inconsistent with the express language of [5 U.S.C. § 8345\(d\)](#), which provides that a "waiver may be revoked in writing at any time."⁵ *Id.*, ¶¶ 5-12. Accordingly, the Board held that the annuitant's wife could not irrevocably waive her entitlement to a survivor annuity so that her husband could receive an unreduced retirement annuity. *Id.*, ¶ 12.

¶12 In *Clark*, the Board explained that the origin of the waiver principle articulated in [5 U.S.C. §§ 8345\(d\)](#) and 8465(a) was a 1952 statute intended to address the situation in which a veteran's receipt of an annuity based on civilian federal service could decrease his total income because he could be denied his non-service-connected disability military pension as a result of exceeding a

annuity would be reduced to account for the period for which deductions were not made.

⁴ The only reason that the 2011 Court Order was sought and issued was that an OPM official advised the appellant that this was necessary for her to waive her entitlement to a survivor annuity.

⁵ As noted above, the relevant language of the FERS waiver provision, [5 U.S.C. § 8465\(a\)](#), is identical to the CSRS waiver provision in [5 U.S.C. § 8345\(d\)](#).

monetary cap. *Clark*, [120 M.S.P.R. 440](#), ¶ 10; 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 civil service annuity.⁶ *Clark*, [120 M.S.P.R. 440](#), ¶ 10. However, it was also important that any such waiver be revocable; otherwise there could be a second unintended and unwanted consequence should the reason for the waiver cease to exist. *Id.* 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 was entitled. *Id.*

¶13 In the present case, there was no election by Mr. Holly to reduce his own retirement annuity in order to provide a former spouse survivor annuity for the appellant. *Cf.* [5 U.S.C. § 8417](#)(b) (an employee may elect a survivor annuity for a former spouse). Instead, the court-approved Property Settlement provided that the appellant could elect to receive such a benefit, but only if she bore the entire cost via a reduction in her portion of Mr. Holly’s retirement annuity. Honoring the appellant’s request to waive her entitlement to a survivor annuity – and thus the obligation to fund that benefit through a reduction in her share of Mr. Holly’s annuity – is fully consistent with the purpose of the waiver provision discussed above, as it would allow her to prevent a reduction in her total income at the present time.

¶14 Furthermore, it is significant that in *Clark*, the annuitant’s wife only was entitled to a future survivor annuity upon the death of her husband, and therefore, at the time she attempted to waive her right to the survivor annuity, she did not meet the statutory requirement for the waiver of being “[a]n individual entitled to an annuity.” *Clark*, [120 M.S.P.R. 440](#), ¶ 7; *see* [5 U.S.C. § 8345](#)(d). The

⁶ Although the legislative history does not indicate that Congress contemplated waivers in the context of survivor annuities, the plain language of [5 U.S.C. § 8465](#) does not restrict waivers to the situation described in the legislative history.

appellant in this matter is currently entitled to an annuity as part of the Property Settlement. Thus, the appellant meets the statutory requirements for declining to accept all or any part of her annuity by signed waiver. [5 U.S.C. § 8465\(a\)](#). Accordingly, we find that under the particular circumstances presented in this case, the appellant may waive her entitlement to a survivor annuity.

ORDER

¶15 We ORDER the agency to grant the appellant's request for a waiver of the former spouse survivor annuity. The agency is further ORDERED to immediately cease its reductions of \$738 from the appellant's monthly annuity payments, and to reimburse the appellant for all prior reductions taken to date from her monthly apportioned annuity payments. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶16 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶17 No later than 30 days after the agency tells the appellant that 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 in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [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 RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (U.S.C.), sections 7701(g), 1221(g), 1214(g) or 3330c(b); or [38 U.S.C. § 4324\(c\)\(4\)](#). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1202.202, and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

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.