

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

66 M.S.P.R. 21

Docket Number SE-0831-94-0016-I-1

**MARILYN D. DOW**, , Appellant,

v.

**OFFICE OF PERSONNEL MANAGEMENT**, Agency.

**(CSF 2 052 958)**

Date: December 15, 1994

Craig M. Liebler, Esquire, Kennewick, Washington, for the appellant.

Connie E. Torrillo, Washington, D.C., for the agency.

**BEFORE**

Ben L. Erdreich, CHAIRMAN  
Jessica L. Parks, Vice Chairman  
Antonio C. Amador, Member

**OPINION AND ORDER**

The appellant has petitioned for review of the December 30, 1993 initial decision that dismissed her petition for appeal as untimely filed. For the reasons discussed below, we GRANT the petition for review, REVERSE the initial decision dismissing the appellant's appeal as untimely filed, and SUSTAIN the Office of Personnel Management's (OPM) reconsideration decision, denying the appellant's application for a survivor annuity under the Civil Service Retirement System (CSRS).

**BACKGROUND**

On September 17, 1993, OPM issued a reconsideration decision denying the appellant's request for a survivor annuity under the CSRS because she had been married to her late husband for less than nine months at the time of his death. See Initial Appeal File (IAF), Tabs 1, 8, Subtab 2. The reconsideration decision informed the appellant that the time limit for filing an appeal of the decision was 25 days from the issuance date of the reconsideration decision. *Id.* The appellant, however, filed her appeal on October 13, 1993, one day after the deadline for filing her appeal. See IAF, Tab 1. In response to the administrative judge's order that she submit evidence and argument showing that her appeal was timely filed, or that good cause existed for the delay, the appellant explained that her attorney's legal assistant had erroneously

calculated the deadline to be October 13, 1993, rather than October 12, 1993. See IAF, Tab 3. The appellant further stated that, although the appeal was ready to be filed on October 12, 1993, and would have been mailed on that date, it was not mailed "due to [the legal assistant's] child being ill." *Id.*

In his initial decision, the administrative judge found that miscalculation of the filing deadline does not establish good cause for a filing delay because it does not demonstrate the exercise of due diligence or ordinary prudence, and the fact that the miscalculation was made by the appellant's representative rather than by the appellant personally did not offer support for a finding of due diligence. See Initial Decision (ID) at 3. The administrative judge further found that the absence of an objection from OPM concerning waiver of the time limit for the appellant did not support a finding of due diligence by her because prejudice to the agency is not considered until the appellant has established good cause for the untimely filing. See ID at 4. Consequently, the administrative judge dismissed the appeal as untimely filed. *Id.*

### ANALYSIS

*The appellant has shown good cause for her untimeliness.*

In her petition for review,<sup>1</sup> the appellant contends that the administrative judge erred by not applying the correct legal standard. See Petition for Review (PFR) at 8-20. In this connection, she contends that, under the factors discussed by the Board in *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980), the administrative judge should have found good cause for waiver of the Board's time limit based on the illness of the legal assistant's child. *Id.* She further contends that the administrative judge's decision was not supported by substantial evidence, and that, because the administrative judge issued a pre-hearing conference order and conducted a pre-hearing conference regarding the merits of the appeal after the appellant had submitted her affidavit on timeliness, his actions constituted a waiver of the Board's time limit. See PFR at 20-32.

At the time that the appellant filed her appeal, an individual who was dissatisfied with OPM's reconsideration decision regarding retirement benefits needed to file an appeal with the Board within 25 days of the issuance of that decision.<sup>2</sup> See 5 C.F.R. § 1201.22(b). This time limit may be waived only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.22(c). To establish good cause for an untimely appeal, a party must show that she exercised diligence or ordinary prudence under the particular circumstances of the case. See *Alonzo*, 4 M.S.P.R. at 184.

In *Alonzo*, the Board identified the following factors that should be considered in determining whether a good cause waiver of the filing deadline should be granted: The

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<sup>1</sup> As an attachment to her petition, the appellant has submitted a number of documents, all of which were part of the record below. See PFR File Attachments (Binder).

<sup>2</sup> After the appellant filed her appeal, the Board extended the regulatory time limit for filing an appeal from an OPM reconsideration decision to 35 days. 59 Fed. Reg. 31,109 (June 17, 1994).

length of the delay; whether the appellant was notified of the deadline or was otherwise aware of it; the existence of circumstances beyond the control of the appellant which affected her ability to comply with the time limits; the degree to which negligence by the appellant has been shown to be present or absent; circumstances which show that any neglect involved is excusable neglect; a showing of unavoidable casualty or misfortune; and the extent and nature of the prejudice to the agency which would result from waiver of the time limit. *Id.*

In *Anderson v. Department of Justice*, 999 F.2d 532 (Fed. Cir. 1993), the United States Court of Appeals for the Federal Circuit concluded that "[r]elevant to th[e good cause] determination is ... the length of the delay." *Id.* at 534. Furthermore, the court held that, "[i]n view of the minimal [one-day] delay," among other considerations, a good cause waiver of the filing deadline was warranted. *Id.* at 535. Similarly, in this case, we find that the minimal nature of the appellant's filing delay is a consideration in her favor.

In this connection, we note that the appellant's attorney filed an affidavit below explaining that his legal assistant erroneously calculated the filing deadline to be October 13 instead of October 12; that the petition for appeal was actually completed on October 12, leaving what was thought to be a one-day cushion; that the legal assistant was to mail the petition for appeal when she left the office on October 12; but that she called the attorney the next morning and advised him that "due to her child being ill she hadn't mailed" the petition. The attorney stated that his office then faxed a copy of the petition to the regional office and mailed it as well. See IAF, Tab 3. (Affidavit of Craig M. Liebler). We therefore conclude that these circumstances establish a reasonable excuse for the one-day delay in filing especially since, as the appellant argued below, the appeal was actually received by the Board as quickly as would have been the case if it had been mailed before the deadline. See *Walls v. Merit Systems Protection Board*, No. 93-3243, slip op. at 11 (Fed. Cir. July 26, 1994). That the appellant in this case was represented, unlike the appellant in *Walls*, does not require a different result because the Board has previously excused the delay occasioned by a representative's mistaken filing. See *Sanford v. Department of Defense*, 61 M.S.P.R. 207, 210 (1994).

Upon the appellant's showing of good cause for the untimely filing of her appeal, waiver of the filing deadline is appropriate, "absent a showing of substantial prejudice to the agency caused by the delay in filing." 5 C.F.R. §§ 1210.12, 22(c); *Alonzo*, 4 M.S.P.R. at 184. Because the appellant has shown good cause for her untimely filing and because the agency did not respond to the timeliness issue and did not show substantial prejudice due to the one-day filing delay, we find that waiver of the filing deadline is appropriate. See *Walls*, slip op. at 11.

*OPM correctly denied the appellant's request for a survivor annuity under the CSRS.*

The record indicates that the parties agreed that the only issue to be resolved in this appeal concerns the legal question of the statutory standard for eligibility for survivor annuity benefits. See IAF, Tab 9. The appellant conceded that she had not been married to her husband for at least nine months before his death. *Id.* Nonetheless, she argued below that, although 5 U.S.C. § 8341(a)(1)(A) requires that the surviving wife of a deceased annuitant must have been married to the annuitant for at least nine

months immediately before his death to be eligible for survivor annuity benefits, the statute's requirement is not absolute. See IAF, Tab 10. In this regard, she states that the statute's "duration requirement" should apply only to "death-bed marriages." See IAF, Tab 10 at 16.

We find, however, that the appellant is not entitled to survivor annuity benefits because she was not married to her husband for at least nine months prior to his death. See 5 U.S.C. § 8341(a)(1)(A); 5 C.F.R. § 831.642(a)(1). The two exceptions to this statutory requirement are (1) if the death of the deceased annuitant was accidental, or (2) if the surviving spouse of such individual had been previously married to the individual and subsequently divorced. See 5 U.S.C. § 8341(i)(1), (2). Since the record does not indicate, nor has the appellant alleged, that either of these two exceptions apply to her, we find that OPM correctly denied her request for a survivor annuity. See *Pabst v. Office of Personnel Management*, 51 M.S.P.R. 598, 600 (1991).

Moreover, the appellant's argument regarding "death-bed marriages" is immaterial because the statute does not speak of death-bed marriages, and states only that a surviving spouse of a deceased annuitant must have been married to the annuitant for at least nine months prior to the annuitant's death. See 5 U.S.C. § 8341(a)(1)(A). To the extent that the appellant suggests that OPM should be estopped on equitable grounds from denying her request, we note that the United States Supreme Court has held that the government cannot be equitably estopped from enforcing a statutory provision governing a claimant's eligibility for public funds. See *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990). Thus, estoppel cannot be applied in this appeal as a matter of law.

### **ORDER**

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

### **NOTICE TO APPELLANT**

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place,  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board  
Robert E. Taylor, Clerk  
Washington, D.C.