

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

94 M.S.P.R. 81

LEONORA CEREZO,
Appellant,

DOCKET NUMBER
SE-0831-02-0147-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 3, 2003

(CSF 2 611 773)

Rufus F. Nobles, I, Zambales, Philippines, for the appellant.

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

BEFORE

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

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has timely filed a petition for review of the May 23, 2002 initial decision that reversed OPM's reconsideration decision, which had dismissed as untimely filed the appellant's request for reconsideration of OPM's disallowance of her application for survivor annuity benefits. For the reasons set forth below, we GRANT OPM's petition under 5 C.F.R. § 1201.115, REVERSE the initial decision, and AFFIRM OPM's reconsideration decision.

BACKGROUND

¶2 On May 1, 2000, the appellant submitted an application for death benefits based on the service of her late husband. Initial Appeal File (IAF), Tab 3, Subtab 5.* On July 17, 2000, OPM issued an initial decision that found the appellant was not entitled to survivor or death benefits. IAF, Tab 3, Subtab 4. On the reverse side of this decision, under “Instructions on How to Request Reconsideration of This Initial Decision,” the appellant was instructed in pertinent part that:

You must file your written request for reconsideration with OPM within 30 days from the date of this notice (block 1). OPM can extend the time limit if you request an extension and your request shows that you were not notified of the time limit or were prevented from responding by a cause beyond your control. Your request for reconsideration should include all evidence and any arguments you want us to consider.

Id.

¶3 On October 1, 2001, the appellant requested reconsideration of OPM’s July 17, 2000, initial decision. IAF, Tab 3, Subtab 3. This reconsideration request included the first page of an April 6, 2001, reconsideration-decision letter to Jose Carreon, another Filipino applicant for retirement benefits. *Id.*, att. The first paragraph of the decision letter to Mr. Carreon stated as follows:

This is in reply to your October 2, 2000, request for reconsideration of the March 30, 1988, initial decision of the Office of Personnel Management (OPM) that you are not entitled to an annuity under the Civil Service Retirement (CSR) System. **We will respond to your untimely request, although you have presented no evidence showing that there were circumstances that prevented you from filing a timely reconsideration request.** For the reason(s) explained below, we affirm initial decision [sic].

* The appellant initially submitted an application for death benefits on November 2, 1986. IAF, Tab 3, Subtab 6 at 32-33. On July 13, 1989, OPM advised the appellant that she was not eligible for benefits and that, if she wanted a formal decision regarding her eligibility, she should submit an Application for Death Benefits, which OPM enclosed, and any additional documentation. *Id.* at 31.

Id. (emphasis added). In the appellant's letter requesting reconsideration, she stated that OPM should grant her the same consideration as Mr. Carreon "so there will be no bias." IAF, Tab 3, Subtab 3, request for reconsideration at 6. In a reconsideration decision issued January 7, 2002, OPM dismissed as untimely the appellant's request for reconsideration. IAF, Tab 1, att.

¶4 In her timely appeal to the Board, the appellant again submitted the same first page of OPM's reconsideration-decision letter to Mr. Carreon and again requested the "same treatment" so there would be "no bias." IAF, Tab 1. The AJ issued a notice, explaining the law applicable to the appellant's situation, instructing her to show circumstances beyond her control if any existed, and instructing OPM to explain why the appellant should not be given the same treatment as Mr. Carreon. IAF, Tab 4. Neither party responded.

¶5 Based on the parties' previous submissions, the administrative judge issued an initial decision, finding that OPM was unreasonable and abused its discretion in denying appellant's request for reconsideration due to untimeliness. Initial Decision at 5-6. The administrative judge therefore reversed OPM's reconsideration decision and remanded the case to OPM for issuance of a new reconsideration decision on the merits of the appellant's application for benefits. *Id.* at 6-7.

¶6 OPM has timely filed a petition for review, Petition for Review File, Tab 1, in which it claims that the AJ misinterpreted 5 C.F.R. § 831.109(e)(2), which sets out the criteria for OPM's discretionary extension of the time for filing a reconsideration decision. The appellant has not responded to the petition for review.

ANALYSIS

¶7 A request for reconsideration of an initial decision by OPM on retirement matters must be received by OPM within 30 days of the date of the initial decision. 5 C.F.R. § 831.109(e)(1) (2001). OPM has discretion to extend the

time limit for filing a request for reconsideration, but only “when the individual shows that [she] was not notified of the time limit and was not otherwise aware of it, or that [she] was prevented by circumstances beyond [her] control from making the request within the time limit.” 5 C.F.R. § 831.109(e)(2).

¶8 There is no dispute that the request for reconsideration was filed approximately 13 months late. The appellant has not alleged that she was unaware of the time limit for filing the request for reconsideration. In addition, the appellant has not alleged nor shown that she was prevented by circumstances beyond her control from requesting reconsideration within the time limit. Rather, the appellant bases her request for waiver of the time limit on OPM’s alleged unreasonableness and abuse of discretion. She alleges, in essence, that it was unreasonable and an abuse of discretion for OPM to refuse to waive her untimeliness when it had previously waived Mr. Carreon’s untimeliness.

¶9 The appellant misinterprets 5 C.F.R. § 831.109(e)(2). That section provides only two bases for waiving the time limit: (1) Where the appellant was not notified of the time limit and was not otherwise aware of it; and (2) where the appellant was prevented by circumstances beyond her control from making the request within the time limit. 5 C.F.R. § 831.109(e)(2). The Board will reverse an OPM final decision denying reconsideration under this section only if it finds that OPM’s denial was unreasonable or an abuse of discretion. *Meister v. Office of Personnel Management*, 52 M.S.P.R. 508, 513 (1992). If the appellant fails to show that she was not notified of the time limit and was not otherwise aware of it, or that she was prevented by circumstances beyond her control from making the request within the time limit, the issue of whether OPM was unreasonable or abused its discretion in denying her untimely request for reconsideration is not reached. *Azarkhish v. Office of Personnel Management*, 915 F.2d 675, 677-78 (Fed. Cir. 1990) (the court did not reach the issue of whether OPM abused its discretion where the appellant did not show that she was prevented from timely filing her request for reconsideration and it was undisputed that she was aware of

the time limit because 5 C.F.R. § 831.109(e)(2) provides OPM discretion in extending the time limit for requesting reconsideration only upon a showing of either lack of knowledge of the time limit or prevention).

¶10 Thus, here, since the appellant did not allege that she was unaware of the time limit or that she was prevented by circumstances beyond her control from making the request within the time limit, the issue of whether OPM was unreasonable or abused its discretion in dismissing her untimely request for reconsideration is not reached. *See id.* Therefore, the AJ erred in finding that OPM was unreasonable and that it abused its discretion, and in reversing OPM's final decision on that basis. *See id.* Accordingly, we reverse the initial decision and affirm OPM's reconsideration decision.

ORDER

¶11 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.