

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

86 M.S.P.R. 237

GLADYS R. WORLEY,
Appellant,

DOCKET NUMBER
DC-0831-99-0630-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: July 3, 2000

CSF-2-511-498

Pamela T. Hawley, Goldsboro, North Carolina, for the appellant.

Christopher H. Ziebarth, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has petitioned the Board to review the initial decision that sustained the Office of Personnel Management's (OPM's) denial of her request to waive her survivor annuity in order for a lump-sum benefit to be paid. For the reasons stated below, the Board GRANTS the petition, REVERSES the initial decision, and DOES NOT SUSTAIN OPM's reconsideration decision.

BACKGROUND

¶2 When he applied for an immediate annuity under the Civil Service Retirement System (CSRS) on August 7, 1998, the appellant's husband, John M. Worley,

elected a reduced annuity with a partial survivor benefit for the appellant, rather than a reduced annuity with the maximum survivor benefit. Initial Appeal File (IAF), Tab 4, Subtab 6. The appellant signed a consent form agreeing to a partial survivor annuity. *Id.* In an undated award letter to Mr. Worley, OPM informed him that the monthly rate of the reduced survivor annuity was \$165.00, and that his retirement contributions totaled \$40,663.00. *Id.* On March 4, 1999, Mr. Worley died. *Id.*

¶3 In letters to OPM dated March 15 and 30, 1999, the appellant said that she did not want to receive a monthly survivor benefit in the then-current amount of \$166.00 per month, but instead wanted OPM to issue a lump-sum payment of her late husband's unpaid retirement contributions. *Id.*, Tab 4, Subtabs 5 and 6. In a May 3, 1999 initial decision, OPM denied her request, stating that there was "no provision of the Civil Service Retirement law that would allow [it] to pay the lump-sum instead of the survivor annuity." *Id.* OPM's reconsideration decision was to the same effect. *Id.*, Tab 4, Subtabs 2 and 3.

¶4 On appeal to the Board, the appellant argued, as she did before OPM, that if she received the reduced survivor benefit at the rate of \$166.00 per month, it would take approximately 16 1/2 years of annuity payments to equal the amount of Mr. Worley's unpaid retirement contributions. *Id.*, Tab 1. She contended that Mr. Worley "would not have wanted her to suffer financially after his death," and that if she should die before the total annuity paid equals those contributions, her children would receive the lump-sum payment. She asked why her children should receive a lump-sum benefit that she herself could not receive even if she wanted to terminate her annuity, and she opined that such a result is "not fair," particularly since she needs the money now. *Id.* The administrative judge found that "so long as the appellant's annuity right has not been terminated, the lump-sum benefit may not be paid by OPM," and he sustained OPM's reconsideration decision. Initial Decision (ID) at 2.

¶5 In her petition for review, the appellant repeats her argument that she should be allowed to waive her survivor benefit so that a lump-sum payment can be made. Petition for Review File, Tab 1. With her petition, she has submitted a medical report, which she says she obtained after reading the administrative judge's decision. The appellant has submitted this report for the first time on petition for review without an allegation or showing that, despite her due diligence, she could not have obtained it before the record below closed. Thus, the Board will not consider it. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980). Moreover, she has not shown how the report is material to the question of law presented in this case.

ANALYSIS

¶6 Under 5 U.S.C. § 8342(d), a lump-sum benefit is to be paid, based on the service of a deceased employee, if that service does not entitle anyone to a survivor annuity at the time of the decedent's death, or if, before a claim for a survivor annuity is filed, the survivor's right to the annuity has terminated. A lump-sum benefit, consisting of the amount of retirement contributions still held by OPM, is also payable when, as here, an annuitant dies. *See Wooten v. Office of Personnel Management*, MSPB Docket No. SF-0831-99-0340-I-1, slip op. ¶¶ 2 and 9 (June 1, 2000) (the Board remanded the appeal for findings on the correct disposition of the lump-sum payment due at the death of the annuitant).

¶7 Section 8342(d) of Title 5 provides that a lump-sum credit shall be paid if the "right of all survivors terminates before a claim for survivor annuity is filed." [Emphasis added]. Thus, if the appellant's right to a survivor annuity terminated before she filed a claim for the annuity, a lump-sum payment can be made since there is no claim or evidence that anyone else is entitled to a monthly survivor annuity based on Mr. Worley's service. OPM, however, determined that a lump-sum benefit is not payable because the appellant is entitled to a monthly survivor annuity, and eligibility for a monthly annuity takes precedence over

payment of a lump-sum. IAF, Tab 4, Subtab 2. Although OPM has not expressly so argued, implicit in its decision to deny the appellant's request for a lump-sum payment is the assumption that she may not terminate her right to a survivor annuity.

¶8 In *Wallace-Ingram v. Office of Personnel Management*, 76 M.S.P.R. 633, 637-38 (1997), the Board held that a person entitled to a monthly survivor annuity may not terminate that right in order to cause a lump-sum payment to be made, but that decision was reversed by the U.S. Court of Appeals for the Federal Circuit in *Wallace-Ingram v. Office of Personnel Management*, No. 98-3053 (Fed. Cir. May 12, 1998) (Table). The court's decision was unpublished and is therefore not citable as precedent under the court's rules. However, we find the court's reasoning persuasive, and we adopt it, as follows and with additional analysis.

¶9 There is nothing in the retirement statute, and OPM has cited no statutory provision, that limits terminating events in the case of a survivor benefit to either the remarriage or death of the person entitled to the survivor annuity. The court, in its unpublished decision in *Wallace-Ingram*, noted that, on the contrary, there was much in the CSRS statute to suggest that termination of a survivor benefit can occur under circumstances other than remarriage or death. For example, the provision at 5 U.S.C. § 8342(g) regarding annuity accrued and unpaid at the "termination" of a survivor benefit does not limit the term "termination."

¶10 Moreover, the appellant has the right, under 5 U.S.C. § 8345(d), to decline to accept all or any part of the annuity by a waiver signed and filed with OPM. Although section 8345(d) states that a waiver "may be revoked at any time" (our emphasis), it does not preclude an irrevocable waiver that would terminate rights to a survivor annuity before a claim for such annuity is made. *Accord Andersen Consulting v. United States*, 959 F.2d 929, 932 (Fed. Cir. 1992) (use of the permissive "may" in a statute authorizes discretion). Indeed, the statute contains no provision suggesting that the waiver specifically provided for in section

8345(d) is not effective, if so intended, to irrevocably terminate the right to a survivor annuity.

¶11 From the beginning of her dealings with OPM after the death of her husband, the appellant has expressed her desire to irrevocably waive her entitlement to a survivor benefit, rather than file a claim for a survivor annuity. As discussed above, within days of her husband's death, the appellant sent letters to OPM expressing her wish not to receive a monthly survivor benefit in the then-current amount of \$166.00 per month, and asking OPM to issue a lump-sum payment of her late husband's unpaid retirement contributions. IAF, Tab 4, Subtabs 5 and 6. The provisions of section 8342(d) therefore were met and the lump-sum should have been paid, but for OPM's refusal to allow the appellant to terminate her right to a survivor annuity before she filed a claim for such benefit.

¶12 Under these circumstances, we find that if the appellant files a waiver with OPM expressly stating that it is irrevocable and that it is retroactive to the date of Mr. Worley's death, then she would have terminated her rights to a survivor benefit under 5 U.S.C. § 8342(d) so as to allow a lump-sum benefit to be payable under 5 U.S.C. § 8342(c). Neither OPM nor the administrative judge cited any statutory provision or case law that prevents the appellant from irrevocably waiving her right to a survivor annuity before she files a claim for a survivor annuity.

¶13 In its reconsideration decision, OPM relied solely on 5 U.S.C. § 8342(a). IAF, Tab 4, Subtab 2. That provision states that an employee who is separated from federal service is entitled to be paid the lump-sum credit of his retirement contributions, and that, if he is paid the credit, he will void any right to a retirement annuity which he might otherwise have, unless he becomes reemployed in a position covered by the CSRS and redeposits the amount of the lump-sum payment plus interest. *See Broad v. Office of Personnel Management*, 53 M.S.P.R. 575, 576 (1992). This statutory provision is clearly inapplicable to the instant case.

¶14 The administrative judge cited *Canelo v. Office of Personnel Management*, 56 M.S.P.R. 217 (1993), as the only support for his finding that the appellant could not irrevocably waive her right to a survivor benefit. ID at 2. Waiver of a survivor annuity was not an issue in that case. Indeed, the Board found in *Canelo* that no one was entitled to a survivor annuity. *Id.* at 223. That case therefore does not support a finding contrary to the one reached here. Rather, the Board's decision in *Evans v. Office of Personnel Management*, 59 M.S.P.R. 94 (1993), is in accord with our holding in this case.

¶15 In *Evans*, the Board discussed the legislative history and purpose of section 8345(d), and found that it should be construed to permit waivers of annuities for limited, and presumably, legitimate reasons. *Id.* at 101 and 104. For example, the Board stated that a civil service annuity may be waived to permit continued receipt of another retirement benefit, that is, where the annuitant would be financially better off because of the waiver. *Id.* at 101. The Board allowed that waivers may also be effected for "certain other similar purposes." *Id.* We find that the appellant has shown a purpose for her waiver request that falls within the provisions of section 8345(d).

ORDER

¶16 Accordingly, the appellant shall be permitted to file a properly executed waiver with OPM terminating her survivor annuity. For a lump-sum benefit to be payable, the waiver must be irrevocable and made retroactive to the date of Mr. Worley's death. If the appropriate waiver is received, we order OPM to accept it and to award a lump-sum benefit as provided by statute, less the amount already paid to the appellant in survivor benefits.* OPM must complete this

* Section 8342(e) of Title 5 states that "[i]f all annuity rights ... based on the service of a deceased employee or Member terminate before the total annuity paid equals the lump-sum credit, the difference shall be paid [in a lump-sum]." The appellant sought to waive her survivor annuity before she filed a claim for it. Moreover, OPM averred below, the administrative judge found, and it is uncontested on petition for review that

action no later than 20 calendar days after receipt of any valid waiver filed by the appellant.

¶17 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).

¶18 No later than 30 calendar 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).

¶19 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 appellant would receive the lump-sum benefit under the statutory order of preference. ID at 2; 5 U.S.C. § 8342(c).

In view of the appellant's waiver request and this Order and upon reconsideration of the Board's decision in *Wallace-Ingram*, all of the annuity payments made thus far to the appellant constitute an overpayment. Rather than have OPM request the return of those payments before issuing a lump-sum benefit, it would seem practical and efficient for OPM to merely deduct the annuity payments from any lump-sum benefit due to the appellant and send her the difference.

the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. 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 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:

Robert E. Taylor
Clerk of the Board

Washington, D.C.