

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

92 M.S.P.R. 404

DANIEL E. MULROY,
Appellant,

DOCKET NUMBER
PH-0831-00-0358-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency,

DATE: September 18, 2002

And

MARIANNE MULROY,
Intervenor.

(CSA 3 854 205)

Edward W. Kopko, Esquire, Ithaca, New York, for the appellant.

Patrick Jennings, Washington, D.C., for the agency.

Michelle A. Jones, Esquire, Krasno, Krasno & Quinn Law Offices,
Pottsville, Pennsylvania, for the intervenor.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that affirmed a reconsideration decision by the Office of Personnel Management (OPM) that reduced his Civil Service Retirement System (CSRS) annuity to provide for the

intervenor's survivor annuity. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, REVERSE the initial decision, and ORDER OPM not to reduce the appellant's CSRS annuity for the purpose of providing the intervenor either an apportionment or a survivor annuity.

BACKGROUND

¶2 When the appellant and the intervenor divorced on July 5, 1989, their divorce decree provided for the subsequent entry of a Qualifying Domestic Relations Order (QDRO). Initial Appeal File (IAF), Tab 5, Subtab 6 at 29. The QDRO, which the court issued on June 19, 1991, provided that the intervenor be afforded an apportionment of the appellant's CSRS annuity as well as survivor benefits. *Id.* at 29-31. When the appellant later retired effective January 2, 1999, *id.* at 20, however, he elected an unreduced retirement annuity without survivor benefits, *id.*, Subtab 5 at 1.

¶3 Based on the QDRO, OPM issued an initial decision finding that: (1) a portion of the appellant's retirement annuity must be awarded to the intervenor (her "apportionment" was computed as \$8,676.86); and (2) notwithstanding the appellant's election of an unreduced retirement annuity without survivor benefits, his retirement annuity must be reduced to provide for the intervenor's survivor annuity. IAF, Tab 5, Subtab 4. The appellant requested reconsideration, *id.*, Subtab 3, and submitted a February 10, 2000 court order that vacated the QDRO pursuant to a joint motion by him and the intervenor, *id.*, Subtab 6 at 3-4. In a letter dated May 12, 2000,¹ OPM informed the appellant as follows:

¹ This letter was not included in OPM's response file, IAF, Tab 5, and was later submitted by the appellant, IAF, Tab 10, Exhibit 8. OPM has not challenged the authenticity of the letter.

We are forwarding a payment to your account in the amount of \$8676.86, which covers the portion of your annuity that we withheld due to the court order dated July 5, 1989.^[2] We processed the court order dated February 10, 2000, which terminates your former spouse's interest in your retirement. We will be forwarding you a decision regarding your former spouse's entitlement to a court ordered survivor annuity under separate cover.

IAF, Tab 10, Exhibit 8. OPM then issued its July 11, 2000 reconsideration decision, finding that the February 2000 court order was ineffective to extinguish the intervenor's right to a survivor annuity provided by the QDRO; this OPM decision did not address the apportionment issue. IAF, Tab 5, Subtab 2.

¶4 The appellant filed this appeal, challenging "OPM[']s decision providing [a] survivor annuity" to the intervenor. IAF, Tab 1, Appeal Form at 2. The intervenor moved to intervene, in support of the appellant's appeal, asserting that she and the appellant had agreed to vacate the QDRO and that OPM should have honored the February 2000 court order vacating the QDRO. IAF, Tabs 7, 9. The administrative judge (AJ) granted the motion to intervene. IAF, Tab 8. Because the appellant waived his right to a hearing, IAF, Tab 11, the AJ issued her initial decision based on documentary submissions, Initial Decision (ID). The AJ found that, even if OPM's May 2000 letter misled the appellant regarding the effect of the February 2000 court order, the applicable statute and regulations precluded effectuating the court order because it modified or replaced the QDRO, so that the appellant's retirement annuity must be reduced to provide for both an apportionment and a survivor annuity. ID at 4-5, 8.

¶5 The appellant has timely filed a petition for review, arguing generally that the AJ made legal errors. Petition for Review File (PRF), Tab 1. OPM has

² OPM is apparently referring to the QDRO. As noted in the text above, the divorce decree was dated July 5, 1989, but the QDRO was dated June 19, 1991. IAF, Tab 5, Subtab 6 at 29.

timely responded in opposition to his petition. PRF, Tab 3. The intervenor has not filed a response.

ANALYSIS

The Board has jurisdiction over the apportionment issue.

¶6 Although the parties have not raised below or on review the issue of Board jurisdiction, the Board may raise the matter of its own jurisdiction sua sponte at any time. *Waldrop v. U.S. Postal Service*, 72 M.S.P.R. 12, 15 (1996). For the reasons discussed below, we find that the AJ correctly assumed jurisdiction over the apportionment issue, although the issue was not addressed in OPM's reconsideration decision.

¶7 As described above, OPM's initial decision explicitly adjudicated both the apportionment issue and the survivor annuity issue. IAF, Tab 5, Subtab 4. OPM then issued its May 2000 letter, which resolved the apportionment issue in favor of the appellant (and the intervenor) and stated that a decision would be issued on the survivor-annuity issue "under separate cover." IAF, Tab 10, Exhibit 8. Consistent with this letter, OPM subsequently issued its reconsideration decision addressing only the survivor-annuity issue and not the apportionment issue. IAF, Tab 5, Subtab 2.

¶8 The Board has jurisdiction to adjudicate an individual's rights and interests under the CSRS only after OPM has rendered a reconsideration or final decision on the issue in question. 5 C.F.R. §§ 831.109, .110; *Litzenberger v. Office of Personnel Management*, 88 M.S.P.R. 419, ¶ 9 (2001); *Cooper v. Office of Personnel Management*, 43 M.S.P.R. 458, 461 (1990). Thus, where OPM has not issued a reconsideration decision on a retirement issue, the Board ordinarily does not have jurisdiction over it. *Scallion v. Office of Personnel Management*, 72 M.S.P.R. 457, 461 (1996). That is, "the scope of an appeal involving federal retirement benefits is limited to those matters addressed in OPM's reconsideration decision." *Dragonette v. Office of Personnel Management*, 71

M.S.P.R. 384, 386 (1996); *see Autrey v. Office of Personnel Management*, 27 M.S.P.R. 130, 131-32 (1985) (where OPM's reconsideration decision related only to retirement credit for military service, the Board lacks jurisdiction to consider retirement credit for civilian service).

¶9 The Board has recognized a limited exception to this general rule, however, where OPM has, in effect, refused to issue a reconsideration decision, thereby making its initial decision on the retirement matter its final decision for purposes of a Board appeal. *McNeese v. Office of Personnel Management*, 61 M.S.P.R. 70, 74, *aff'd*, 40 F.3d 1250 (Fed. Cir. 1994) (Table). Thus, the Board will accept jurisdiction over a retirement matter, notwithstanding OPM's failure to issue a reconsideration decision on the matter, where OPM improperly failed to respond to the appellant's repeated requests for a reconsideration decision or where OPM failed to advise the appellant of his right to request a reconsideration decision and did not intend to issue any further decision on the appellant's application. *See id.*

¶10 Here, OPM clearly addressed the apportionment issue in its initial decision. And while OPM's reconsideration decision did not address the apportionment issue, OPM acknowledged the modification of its position on this issue, by redepositing funds it had withheld from the appellant's account pursuant to its initial decision. IAF, Tab 10, Exhibit 8. Moreover, in its May 2000 letter, OPM did not indicate that it intended to further consider its decision to honor the amended court order to the extent it extinguished the intervenor's right to an apportionment of the appellant's retirement benefits. IAF, Tab 10, Exhibit 8. In addition, the AJ addressed the apportionment issue in her initial decision. ID at 4-5, 8. Under these circumstances, we find that OPM's May 2000 letter constitutes its final decision on the apportionment issue and that the Board therefore has jurisdiction over the issue. *See McNeese*, 61 M.S.P.R. at 73-74 (although the Board ordinarily lacks jurisdiction to review a retirement matter until after OPM issues a reconsideration decision, it will assume jurisdiction

where OPM has in effect declined to issue a reconsideration decision and it appears that OPM does not intend to issue any further decision).

OPM correctly concluded that the intervenor is not entitled to an apportionment of the appellant's retirement annuity.

¶11 Regarding the intervenor's entitlement to an apportionment of the appellant's retirement annuity, the appellant contends on review generally that the AJ made legal errors. PRF, Tab 1; IAF, Tab 10. We therefore find that the appellant's petition does not meet the criteria for review because he does not explain how or why the AJ erred. *See Alexander v. Department of Commerce*, 30 M.S.P.R. 243, 248-49 (1986) (the appellant's petition for review did not meet the criteria for review because it did not set forth specific objections to the initial decision); *Special Counsel v. Hoban*, 24 M.S.P.R. 154, 158 (1984) (exceptions without specific record citations and persuasive argument of error are insufficient to alter the AJ's reasoned findings and will not be considered). We nevertheless reopen this appeal on our own motion because it is clear from the record that the AJ erred by, in effect, reversing OPM's final decision (OPM's May 2000 letter) to effectuate the February 2000 court order as to the apportionment issue.

¶12 The AJ treated the apportionment issue and the survivor-annuity issue in the same manner, in concluding that the February 2000 court order was ineffective to extinguish the intervenor's rights to an apportionment and a potential survivor annuity, afforded by the QDRO. ID at 5-10. As discussed below, however, the applicable statutory and regulatory provisions treat the two matters differently.

¶13 The statutory provision applicable to court orders affecting survivor annuities (5 U.S.C. § 8341(h)) prohibits modification of the court order after the employee's retirement or death. On the other hand, the statutory provision applicable to court orders affecting apportionment of retirement annuities (5 U.S.C. § 8345(j)) does not prohibit modification of the court order after the employee's retirement or death. *See also* 5 C.F.R. § 838.1004(e)(1) (this

provision, set forth in subpart J applicable to court orders received by OPM before January 1, 1993, *see* 5 C.F.R. § 838.102(a)(6), prohibits modification of a court order regarding a former spouse survivor annuity after the employee's retirement or death; however, there is no provision in subpart J that prohibits modification of a court order regarding other types of retirement benefits, including apportionment); *compare* 5 C.F.R. § 838.225 (permitting "amended court order pertaining to payment of a portion of the employee annuity" to former spouse) *with* 5 C.F.R. § 838.806 (prohibiting post-retirement/death modification of court order regarding former spouse survivor annuity). *Compare also* CSRS and FERS Handbook for Personnel and Payroll Offices (Handbook), ch. 5 ("Court Orders"), part 5A4 ("Apportionment Orders") (containing no prohibition against modification of court order after employee's retirement or death), *with id.*, ch. 5, part 5A5 ("Survivor Benefit Orders"), section E (after employee's retirement or death, precluding modification of court order regarding survivor annuity).

¶14 Because there is no statutory or regulatory prohibition against modification of a court order regarding apportionment of a retirement annuity to benefit a former spouse, we find that OPM correctly gave effect to the February 2000 court order that vacated the QDRO providing for apportionment, and correctly concluded that the court order extinguished the intervenor's right to an apportionment of the appellant's retirement annuity. Therefore, the AJ's contrary finding must be reversed.

OPM must permit the intervenor to irrevocably waive her right to a survivor annuity.

¶15 Regarding the intervenor's entitlement to a survivor annuity, the appellant contends generally that the AJ made legal errors. He does not raise specific arguments of error, and merely "incorporates all arguments" set forth in his brief submitted below. PRF, Tab 1; IAF, Tab 10. The AJ addressed in her initial decision the arguments raised in the appellant's brief, ID at 3-5, 7-10, and we

find that the appellant's petition does not meet the criteria for review because he does not explain how or why the AJ erred. *See Alexander*, 30 M.S.P.R. at 248-49 (where the appellant's petition for review merely repeated the explanation he gave to the agency's deciding official, the petition did not meet the criteria for review because it did not set forth specific objections to the initial decision); *Hoban*, 24 M.S.P.R. at 158 (exceptions without specific record citations and persuasive argument of error are insufficient to alter the AJ's reasoned findings and will not be considered); *Cole v. Department of Transportation*, 18 M.S.P.R. 102, 104 n.3 (1983) (an attempt to incorporate by reference briefs that were filed below into a petition for review fails to meet the criteria for review).

¶16 We nevertheless reopen this appeal on our own motion because the initial decision is inconsistent with a recent Board decision. The circumstances in *Shelley v. Office of Personnel Management*, 88 M.S.P.R. 224 (2001), were materially similar to those here. There, the appellant initially filed with OPM a court order acceptable for processing (COAP) which provided for a survivor annuity to benefit his former spouse. *Id.*, ¶ 2. After retiring, the appellant filed with OPM a court order approving his agreement with his former spouse to cancel the former spouse's right to a survivor annuity. *Id.*, ¶ 3. The former spouse separately wrote to OPM, requesting that OPM cancel her right to a survivor annuity. *Id.*, ¶ 3. The Board agreed with the AJ that 5 U.S.C. § 8341(h)(4) precludes OPM from effectuating the subsequent court order because it constitutes a post-retirement modification of the COAP. *Id.*, ¶ 7. The Board found, however, that OPM must permit the former spouse to waive her right to a survivor annuity under 5 U.S.C. § 8345(d), which provides that an individual may decline to accept all or any part of an annuity by waiver signed and filed with OPM. *Id.*, ¶¶ 7-8. The Board recognized that a waiver granted under 5 U.S.C. § 8345(d) is revocable but that a revocable waiver right might lead to problems for OPM in accurately calculating the amount of the appellant's retirement annuity since his former spouse could at any time revoke her waiver. *Id.*, ¶ 8.

The Board therefore held that the former spouse may waive her right to a survivor annuity, under 5 U.S.C. § 8345(d), but that such a waiver must be irrevocable. *Id.*

¶17 Here, as in *Shelley*, the intervenor repeatedly expressed her wish to waive her right to a survivor annuity. IAF, Tab 5, Subtab 6 at 3-4, Tabs 7, 9. We therefore find that, if the intervenor files a waiver with OPM expressly stating that it is irrevocable, she will have permanently waived her right to a survivor annuity under 5 U.S.C. § 8345(d), and the appellant will then be entitled to his full retirement annuity without any reduction for a survivor annuity. *Shelley*, 88 M.S.P.R. 224, ¶ 10.

ORDER

¶18 Accordingly, the intervenor shall be permitted to file a properly executed irrevocable waiver with OPM terminating her right to a survivor annuity. If the appropriate waiver is received, we order OPM to accept it and to award the appellant the full amount of retirement benefits to which he is entitled. OPM must complete this action no later than 20 calendar days after receipt of any valid waiver filed by the intervenor.

¶19 We also ORDER OPM to tell the appellant and the intervenor 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 and the intervenor, if not notified, should ask OPM about its progress. *See* 5 C.F.R. § 1201.181(b).

¶20 No later than 30 days after OPM tells the appellant and the intervenor that it has fully carried out the Board's Order, the appellant and/or the intervenor may file a petition for enforcement with the office that issued the initial decision on this appeal if they believe that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why they believe that OPM has not

fully carried out the Board's Order, and should include the dates and results of any communications with OPM. 5 C.F.R. § 1201.182(a).

¶21 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 AND THE INTERVENOR 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 criteria set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g) or 1221(g), or 1214(g). The regulations may be found at 5 C.F.R. § 1201.202. If you believe you meet these criteria, 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 AND THE INTERVENOR 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:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.