

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

88 M.S.P.R. 224

HOWARD D. SHELLEY,  
Appellant,

DOCKET NUMBER  
SF-0831-00-0388-I-1

v.

OFFICE OF PERSONNEL  
MANAGEMENT,  
Agency.

DATE: April 6, 2001

(CSA 3 874 460)

Howard D. Shelley, Madera, California, pro se.

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

**BEFORE**

Beth S. Slavet, Chairman  
Barbara J. Sapin, Vice 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 his request to cancel the survivor annuity for his former spouse. For the reasons stated below, we DENY the petition, REOPEN the appeal on our own motion pursuant to 5 C.F.R. § 1201.118, REVERSE the initial decision, and find that OPM's reconsideration decision is NOT SUSTAINED.

## BACKGROUND

¶2 The appellant and his former spouse, Dorothy Shelley, were divorced on December 29, 1994. Initial Appeal File (IAF), Tab 6, Subtab 6, attachment 3. In the marital settlement agreement, Ms. Shelley's interest in the appellant's retirement benefits was reserved to be addressed in a subsequent court order acceptable for processing. *Id.* at 3e. This court order was filed on January 31, 1996. IAF, Tab 6, Subtab 6, attachment 2. The appellant retired from federal service on March 31, 1999. IAF, Tab 6, Subtab 6, attachment 9.

¶3 On June 1, 1999, the appellant wrote to OPM, stating that his former spouse was willing to "relinquish" her annuity and asking what steps must be taken to effect the removal of the survivor annuity deduction from his retirement benefits. IAF, Tab 6, Subtab 5. The appellant stated that he was having financial difficulties, but that his former spouse was still working full-time and making more money than he was. *Id.* On July 12, 1999, the appellant and his former spouse filed a "Stipulation to amend divorce settlement agreement" in which they agreed to cancel Ms. Shelley's right to receive any apportionment of the appellant's monthly retirement benefits or to receive any future award of survivor annuity. IAF, Tab 6, Subtab 6, attachment 1. By letter dated August 31, 1999, OPM found that the July 12, 1999 court order was sufficient to cancel the monthly apportionment to Ms. Shelley, but that under OPM's regulations, the order could not cancel Ms. Shelley's survivor annuity. IAF, Tab 6, Subtab 4. On September 6, 1999, Ms. Shelley wrote to OPM to state that she had no interest in the appellant's retirement benefits and would like OPM to cancel her survivor annuity. IAF, Tab 6, Subtab 5. Ms. Shelley stated that the appellant had agreed to buy a better life insurance policy than the survivor annuity. *Id.* The appellant requested that OPM reconsider its decision to not cancel his former spouse's survivor annuity. IAF, Tab 6, Subtab 3. By letter dated March 24, 2000, OPM denied the appellant's request for reconsideration, finding that because the July

12, 1999 court order was issued after the appellant had retired, its regulations prevented it from accepting the July 12, 1999 court order. IAF, Tab 6, Subtab 2.

¶4 The appellant appealed OPM's reconsideration decision to the Board. IAF, Tab 1. Because the appellant did not request a hearing, the administrative judge decided the appeal on the written record. IAF, Tab 12. In his initial decision, the administrative judge affirmed OPM's reconsideration decision, finding that 5 U.S.C. § 8341(h)(4) states that a second court order is an invalid modification of the first court order if it is issued after the retirement or death of the employee and if the modification involves an annuity. IAF, Tab 12.

¶5 The appellant timely petitioned for review of the initial decision. Petition for Review File (PFRF), Tab 1. OPM's response to the petition appeared to be untimely, PFRF, Tab 4; therefore, OPM was told that it needed to file a motion to accept its filing as timely or to waive the time limit, PFRF, Tab 5. OPM timely filed such a motion. PFRF, Tab 6. Because OPM submitted sufficient evidence to show that it had timely filed its response, we GRANT its motion, and we have considered OPM's response in making our determination.

### ANALYSIS

¶6 Although OPM never again raised the issue, in one of its first letters to the appellant, OPM stated that a court ordered survivor benefit is irrevocable under 5 C.F.R. § 838.932. IAF, Tab 6, Subtab 4. This statement is inaccurate. Section 838.932 states as follows:

(a) Except as provided in paragraph (b) of this section, a court order that gives the former spouse the right to elect a former spouse survivor annuity satisfies the requirements of § 838.804(b)(2) and provides a former spouse survivor annuity in the amount otherwise provided by the court order.

(b) A former spouse who has been awarded a former spouse survivor annuity by a court order that gives the former spouse the right to elect a former spouse survivor annuity may irrevocably elect not to be eligible for a former spouse survivor annuity based on the court order.

(c) The former spouse may make the election under paragraph (b) of this section at any time after the issuance of the court order. An election under paragraph (b) of this section –

- (1) Must be in writing and in the form prescribed by OPM;
- (2) Is effective on the first day of the month following the month in which OPM received the election; and
- (3) Is irrevocable once it has become effective.

It is clear that this section of OPM's regulations concerns former spouses who are given the right to elect a survivor annuity in a court order. In the present appeal, the appellant's former spouse was not given an election right; thus, 5 C.F.R. § 838.932 does not apply to the present situation. However, nothing in the regulation prohibits a former spouse who is awarded a survivor annuity by court order without election from waiving the survivor annuity. Any reading of the regulation otherwise by OPM is contrary to the clear language of the regulation and erroneous.

¶7 While we agree with the administrative judge that 5 U.S.C. § 8341(h)(4) does not allow OPM to give effect to the July 12, 1999 court order because it is a modification of an annuity made after the date of the appellant's retirement, we believe that OPM must give effect to the appellant's former spouse's waiver of the survivor annuity under 5 U.S.C. § 8345(d).\*

¶8 The appellant's former spouse 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. *See also Worley v. Office of Personnel Management*, 86 M.S.P.R. 237 (2000) (finding that a widow was entitled to waive her right to a survivor annuity under 5 U.S.C. § 8345(d)); *Vesser v. Office of Personnel Management*, 29 F.3d 600 (Fed. Cir. 1994) (finding that an annuitant was entitled to waive his right to an annuity under 5 U.S.C. § 8345(d)). We recognize that the waiver right granted

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\* Because the appellant failed to raise this argument in his petition for review, we are reopening on our own motion.

in 5 U.S.C. § 8345(d) is revocable, and that such a revocable right may lead to problems for OPM in accurately calculating the amount of the appellant's annuity since the appellant's former spouse could at any time revoke her waiver. Thus, in order for the appellant to be entitled to the full amount of his annuity, his former spouse must irrevocably waive her right to a survivor annuity. Although 5 U.S.C. § 8345(d) states that a waiver "may be revoked at any time" (emphasis added), it does not preclude an irrevocable waiver. *Worley*, 86 M.S.P.R. 237, ¶ 10. Moreover, an irrevocable waiver would be consistent with OPM's regulation at 5 C.F.R. § 838.932 which only allows for irrevocable waivers for former spouses who are given an election regarding a survivor annuity.

¶9 The appellant's former spouse has several times expressed her wish to waive her right to a survivor annuity. As mentioned above, Ms. Shelley wrote to OPM on September 6, 1999, and asked that OPM cancel her right to a survivor annuity. IAF, Tab 6, Subtab 5. The July 12, 1999 court order was also submitted to OPM and put it on notice that Ms. Shelley wanted to waive her right to a survivor annuity. IAF, Tab 6, Subtab 6. Moreover, the appellant wrote to OPM on June 1, 1999, stating that his former spouse was willing to "relinquish" her annuity and asking what steps must be taken to effect this waiver. IAF, Tab 6, Subtab 5. The record does not show that OPM ever informed the appellant or Ms. Shelley about Ms. Shelley's right to waive the survivor annuity under 5 U.S.C. § 8345(d); however, Ms. Shelley met the statutory requirements for waiving her right to a survivor annuity by signing her September 6, 1999 letter asking to cancel her right and filing it with OPM.

¶10 Given the facts of this appeal, we find that, if Ms. Shelley files a waiver with OPM expressly stating that it is irrevocable, then 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 benefits without any reduction for a survivor annuity. This result is in accord with the Board's decision in *Evans v. Office of Personnel Management*, 59 M.S.P.R. 94 (1993).

¶11 In *Evans*, the Board discussed the legislative history and purpose of 5 U.S.C. § 8345(d) and found that it should be construed to permit waivers of annuities for limited and legitimate reasons. *Evans*, 59 M.S.P.R. at 101, 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 and his former spouse have shown a purpose for Ms. Shelley’s waiver request that falls within the provisions of 5 U.S.C. § 8345(d).

### **ORDER**

¶12 Accordingly, the appellant’s former spouse 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 appellant’s former spouse.

¶13 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).

¶14 No later than 30 days after OPM 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 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 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).

¶15 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 (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:

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Robert E. Taylor  
Clerk of the Board

Washington, D.C.