

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

2008 MSPB 176

Docket No. SF-0843-07-0835-I-1

**Travis Davis,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSF 7 080 775

August 1, 2008

Travis Davis, North Fork, California, pro se.

Jessica Johnson, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) petitions for review of the initial decision that reversed its decision denying the appellant's application for a lump-sum death benefit under the Federal Employees' Retirement System (FERS) based upon the federal service of his deceased mother, Laurel A. Press. For the reasons set forth below, we GRANT OPM's petition, REVERSE the initial decision, and AFFIRM, as MODIFIED by this Opinion and Order, OPM's reconsideration decision denying the appellant's application.

BACKGROUND

¶2 At the time of her death, Laurel Press was an employee with the U.S. Postal Service with over 13 years of federal service subject to FERS. IAF, Tab 4, Subtab 6 at 2-3. The appellant, the eldest son of Laurel Press, filed an application with OPM for death benefits under FERS following his mother's death. *Id.*, Subtab 5. OPM denied the appellant's application based upon its determination that Laurel Press' estranged husband, David Press, was her widower and so entitled to a survivor annuity in precedence to any lump-sum payment to the decedent's surviving children. *Id.*, Subtab 2.

¶3 The appellant appealed OPM's reconsideration decision to the Board, providing evidence that Laurel and David Press were legally separated in July 2004, in the Superior Court of California, County of Madera. IAF, Tab 10. He also provided a copy of the Marital Settlement Agreement executed by Laurel and David Press in August 2002, pursuant to which Mr. Press waived all of his rights to all survivor benefits he may become entitled to under Laurel Press' pension plan with her employer, the U.S. Postal Service. IAF, Tab 7 at 6, 10. Based upon the written record, because the appellant did not request a hearing, the administrative judge (AJ) found that Mr. David Press had waived his entitlement to any survivor benefits and so reversed OPM's decision and ordered OPM to award the lump-sum death benefits to Laurel Press' surviving children in accordance with the statutory order of precedence. Initial Decision at 4-5.

¶4 OPM petitions for review, arguing that the AJ erred as a matter of law by applying the incorrect statutory provisions and by finding that Mr. Press' waiver of his survivor benefits was effective. Petition for Review File (RF), Tab 1. The appellant has not responded to OPM's petition.

ANALYSIS

¶5 Under FERS, lump-sum benefits will be paid if an employee dies "(1) without a survivor, or (2) with a survivor or survivors and the right of all

survivors under subchapter IV terminates before a claim for survivor annuity under such subchapter is filed.” 5 U.S.C. § 8424(e). Laurel and David Press were married on September 18, 1976. IAF, Tab 4, Subtab 6 at 1. They were legally separated in California Superior Court, Madera County on July 26, 2004; however, the marriage was neither dissolved nor annulled. IAF, Tab 10. As a separated but not divorced spouse, Mr. Press falls within the definition of a current spouse under FERS. 5 C.F.R. § 843.102. As Laurel Press’ husband for more than 9 months at the time of her death and as the father of children by that marriage, Mr. Press is considered her widower and survivor under Subchapter IV of FERS. 5 U.S.C. § 8441(2). As her widower, Mr. Press is entitled to a one-time payment and a survivor annuity based upon Laurel Press’ federal service. 5 U.S.C. § 8442(b)(1). Therefore, unless Mr. Press’ right as a survivor has terminated, no lump-sum credit can be paid to the appellant under 5 U.S.C. § 8424.

¶6 The FERS statute states that the survivor annuity of a widower terminates when he dies or when he remarries before becoming 55 years of age. 5 U.S.C. § 8442(d)(1). The appellant has provided no evidence that Mr. Press either remarried prior to age 55 or has died. However, the Board has previously held with regard to an identical provision in title 5 concerning the Civil Service Retirement System (CSRS) (5 U.S.C. § 8341(d)) that death and remarriage are not the only possible terminating events. *Worley v. Office of Personnel Management*, 86 M.S.P.R. 237, ¶ 9 (2000). The Board in *Worley* held that, because an individual entitled to an annuity may decline to accept all or part of an annuity, pursuant to 5 U.S.C. § 8345(d), an irrevocable waiver could terminate a survivor’s right to an annuity. *Id.*, ¶ 10. The FERS statute contains a provision which is identical to 5 U.S.C. § 8345(d) and states that an individual entitled to an annuity “may decline to accept all or any part of the amount of the annuity by a waiver signed and filed with [OPM]. The waiver may be revoked in writing at any time.” 5 U.S.C. § 8465(a). For the appellant to receive the lump-sum death

benefits he seeks, he must demonstrate that Mr. Press' right as a survivor under FERS has been terminated by an irrevocable waiver. To be effective, such a waiver must be signed and filed with OPM and must expressly state that it is irrevocable. See *Mulroy v. Office of Personnel Management*, 92 M.S.P.R. 404, ¶ 17 (2002); *Shelley v. Office of Personnel Management*, 88 M.S.P.R. 224, ¶ 10 (2001); *Worley*, 86 M.S.P.R. 237, ¶ 12.

¶7 Effective August 16, 2002, Laurel and David Press entered into a Marital Settlement Agreement, which divided their property. IAF, Tab 7. As part of that agreement, both parties agreed to “waive all of their rights to all such survivor benefits under such parties’ separate property pension plan.” *Id.* at 6. That agreement also transferred to Laurel Press’ sole possession “[f]ull interest in the Pension Plan held by the United States Postal Service.” *Id.* at 10. The appellant asserts that this is a sufficient and effective waiver of Mr. Press’ survivor annuity. However, this waiver does not expressly state that it is irrevocable and, although OPM is now aware of it due to this litigation, there is no evidence that it was ever filed with OPM. Therefore, the Marital Settlement Agreement is insufficient to terminate Mr. Press’ right to a survivor annuity pursuant to 5 U.S.C. § 8465(a). See *Mulroy v. Office of Personnel Management*, 92 M.S.P.R. 404, ¶ 17 (2002); *Shelley v. Office of Personnel Management*, 88 M.S.P.R. 224, ¶ 10 (2001); *Worley*, 86 M.S.P.R. 237, ¶ 12.* Mr. Press remains entitled to a

* We note that in *Worley*, *Mulroy*, and *Shelley*, the Board invited the spouses, who were either the appellant or an intervenor in those appeals, to file such an irrevocable waiver with OPM. *Mulroy*, 92 M.S.P.R. 404, ¶ 18; *Shelley*, 88 M.S.P.R. 224, ¶ 12; *Worley*, 86 M.S.P.R. 237, ¶ 16. If Mr. Press were an intervenor in this appeal, he could similarly be invited to file an irrevocable waiver; however, he has not intervened and we note that the appellant has expressly requested that he not be invited to do so. IAF, Tab 1. It is unclear from the record whether the AJ attempted to provide Mr. Press with an opportunity to intervene. If the AJ failed to do so, it was error because Mr. Press’ annuity rights were directly affected by the AJ’s decision. See *Fletcher v. Office of Personnel Management*, 41 M.S.P.R. 445, 448-49 (1989). However, it is unnecessary to invite him to intervene at this stage because his rights are not adversely affected by the outcome of this appeal.

survivor annuity as Laurel Press' widower and so lump-sum death benefits cannot be paid under 5 U.S.C. § 8424(e).

¶8 Moreover, even if the appellant were able to show that Mr. Press had irrevocably waived his right to a survivor annuity, the appellant still has not shown that, as one of the adult children of Laurel Press, he is entitled to the lump-sum benefit he seeks. Under FERS, if an employee dies without a survivor, a lump-sum benefit will be paid in accordance with the statutory order of precedence at 5 U.S.C. § 8424(d). The first beneficiary is one designated by the employee in a signed and witnessed writing prior to her death; the second in line, if there is no designated beneficiary, is the widow or widower of the employee; the third in line, if none of the above, is the child or children of the employee. 5 U.S.C. § 8434(d). There is no evidence in the record that Laurel Press designated a beneficiary to receive her FERS credit and so, under the statutory order of precedence, Mr. Press, as widower, would receive the lump-sum credit in precedence to her children. 5 U.S.C. § 8424(d). The appellant necessarily argues that Mr. Press' waiver of "all of [his] rights to all such survivor benefits," in the Marital Settlement Agreement should act as a waiver of both his annuity rights and his right to the lump-sum credit. However, the waiver provision of FERS, upon which the appellant's argument relies, speaks only of "an individual entitled to an *annuity*," who may decline "all or any part of the amount of the *annuity*." 5 U.S.C. § 8465(a) (emphasis added). There is no statutory or regulatory provision for the waiver of entitlement to a lump-sum credit. Even if Mr. Press, as widower, had signed and filed with OPM an irrevocable waiver of his right to a survivor annuity, which he has not, he cannot waive his right to lump-sum benefits and his place in the order of precedence under 5 U.S.C. § 8424(d).

¶9 Therefore, the appellant has not carried his burden of demonstrating that he is entitled to the benefits he seeks under FERS and so the initial decision is REVERSED and OPM's denial of his application is AFFIRMED as MODIFIED by this Opinion and Order.

ORDER

¶10 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 website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.