

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

2009 MSPB 111

Docket No. CH-0831-08-0780-I-1

**Patricia A. Bleidorn,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSA 3 355 541

June 15, 2009

Joseph W. Stadnicar, Esquire, Beavercreek, Ohio, for the appellant.

Cynthia Reinhold, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 The appellant petitions for review of the December 18, 2008 initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) denying her claim for former spouse survivor annuity benefits under the Civil Service Retirement System (CSRS). For the reasons set forth below, we GRANT the appellant's petition for review under [5 C.F.R. § 1201.115](#)(d), and REVERSE the initial decision. OPM's reconsideration decision is NOT SUSTAINED.

BACKGROUND

¶2 On or about June 3, 1992, Charles Bleidorn retired from his civilian position with the Department of the Air Force. Initial Appeal File (IAF), Tab 7, Subtab 5 at 16. At the time, Mr. Bleidorn and the appellant were married, and he elected maximum survivor benefits for her. *Id.* The couple divorced on March 31, 2005, and the divorce decree filed on April 1, 2005, divided marital property, awarding the appellant 36% of Mr. Bleidorn’s civil service retirement annuity, but the divorce decree did not award her a former spouse survivor annuity. *Id.* at 10-14. The divorce decree stated that the division of Mr. Bleidorn’s civil service retirement “shall be evidenced by a Qualified Domestic Relations Order (QDRO) or any other orders required by [OPM].” *Id.* at 2. On May 10, 2005, the court entered a QDRO that reiterated the division of Mr. Bleidorn’s retirement benefits set forth in the divorce decree and further provided that the appellant agreed that Mr. Bleidorn would not continue to elect a “Survivor Benefit Annuity” and “any costs associated with [a] Survivor Benefit Annuity that the [appellant] may elect” would be her sole responsibility. *Id.* at 4-9. On November 2, 2005, OPM wrote to inform the appellant that the May 10, 2005 QDRO did not comply with the provisions of 5 C.F.R. part 838, and, consequently, was not a court order acceptable for processing. IAF, Tab 6, Subtab 6 at 1. As a result, OPM terminated the court-ordered apportionment of Mr. Bleidorn’s retirement annuity and asserted that its November 1, 2005 annuity payment was an erroneous overpayment that the appellant must return. *Id.* OPM’s file indicates that the appellant reimbursed OPM for the overpayment. IAF, Tab 7, Subtab 5 at 25.

¶3 Mr. Bleidorn and the appellant returned to court and obtained an amended QDRO, dated December 2, 2005, which incorporated language from 5 C.F.R. part 838, reiterated her 36% share of Mr. Bleidorn’s retirement annuity, awarded her the maximum possible former spouse survivor annuity under [5 U.S.C. § 8341\(h\)\(1\)](#), and indicated that she would bear the cost of her former spouse survivor annuity through a reduction in the amount of her share of Mr. Bleidorn’s

retirement annuity. *Id.* at 1-3. On the authority of the amended QDRO, OPM initially indicated that it “intend[ed] to honor the court’s former spouse’s survivor annuity award,” and that, beginning April 1, 2006, it would pay the appellant a net monthly former spouse annuity of \$1,192.88, which represented 36% of Mr. Bleidorn’s \$4,658.00 gross monthly annuity, \$1,676.88, less \$484.00, the amount that OPM identified as its cost for providing the appellant’s monthly \$2,826.00 former spouse survivor benefit. *Id.*, Subtab 4. Mr. Bleidorn and the appellant jointly requested reconsideration of OPM’s apportionment of the retirement annuity, *id.*, Subtab 3, and OPM’s August 14, 2008 reconsideration decision affirmed its March 13, 2006 initial decision with regard to the appellant’s share of Mr. Bleidorn’s retirement annuity, *id.*, Subtab 2 at 1-2, 4. However, OPM determined that the appellant would not be entitled to a survivor annuity because the divorce decree was the first order dividing marital property issued after Mr. Bleidorn’s retirement, the divorce decree did not award the appellant a survivor annuity, and any subsequent order would not be acceptable for processing under OPM’s regulations because it would modify or replace the first order dividing the marital property. *Id.* at 3-4.

¶4 The appellant filed a Board appeal, asserting that she had never requested that OPM reconsider its decision regarding survivor benefits and further contending that, because “[t]he divorce decree clearly state[d] that a QDRO was to be issued to divide the retirement,” the QDRO was “necessary to fulfill the intent of the divorce decree.” IAF, Tab 6, Subtab 1 at 1, 4. The appellant also asserted that because her ex-husband’s retirement benefits are a comprehensive package, including, inter alia, the option to elect a former spouse survivor annuity, the amended QDRO “fulfills the language of the divorce decree” and provided for the award of a survivor annuity. *Id.* at 2, 4. OPM responded with its file on the matter. IAF, Tab 7. At a status conference, the appellant decided to forego her challenge to OPM’s apportionment of the retirement annuity, reserving the right to address it at a later time, if necessary, and requested that the

administrative judge adjudicate the appeal on the written record. IAF, Tab 10. The administrative judge affirmed OPM's reconsideration decision on her determination that the first order dividing the marital property (the March 31, 2005 divorce decree) did not expressly provide for a former spouse survivor annuity, and the subsequent May 10, 2005 QDRO was clearly a modification of the first order, and thus was "not acceptable for processing under [5 C.F.R. § 838.806](#)" and "cannot be recognized for the purpose of providing the appellant with [survivor] benefit[s]." IAF, Tab 11, Initial Decision (ID) at 4.

¶5 The appellant's petition for review restates her argument that the amended QDRO was not a "modified judgment," but was instead a court order, written with input from OPM, that fulfilled the exact wording of the divorce decree. Petition for Review File (PFRF), Tab 2 at 5. After submitting her petition for review, the appellant, who was pro se until this point in the proceedings, retained counsel and submitted a supplement to the petition for review. PFRF, Tab 1. The supplement argues that OPM failed to give Mr. Bleidorn the statutorily required notice of his right to elect survivor benefits for a former spouse after their divorce, and includes a signed statement from Mr. Bleidorn stating that he "did not receive any notice or information from [OPM] regarding [his] ability to or requirement to elect Survivor Annuity Benefits after [his] divorce from [the appellant]." *Id.* at 4. The appellant further argues that Mr. Bleidorn's submission of the amended QDRO to OPM was a timely election to provide the appellant with former spouse survivor benefits within 2 years of their divorce under [5 U.S.C. § 8339\(j\)\(3\)](#), and that Mr. Bleidorn's September 15, 2008 written statement, submitted by the appellant below, confirms his "choice and desire" that the appellant receive survivor benefits. *Id.* at 2-3. OPM designated a representative, but did not otherwise respond. PFRF, Tab 5.

ANALYSIS

¶6 The burden of proving entitlement to a survivor annuity, by a preponderance of the evidence, is on the applicant for benefits. *Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986); [5 C.F.R. § 1201.56\(a\)\(2\)](#). In pertinent part, the former spouse of a retired federal employee is entitled to a survivor annuity if the employee expressly provided for one in an election under [5 U.S.C. § 8339\(j\)\(3\)](#), or in the terms of any divorce decree, or in any court order or court-approved property settlement agreement issued in connection with the divorce decree. [5 U.S.C. § 8341\(h\)\(1\)](#); *Warren v. Office of Personnel Management*, [407 F.3d 1309](#), 1313 (Fed. Cir. 2005). The statute further dictates that a modification of such a divorce decree or court order is not effective if it is made after the retirement or death of the employee, to the extent that the modification involves a former spouse survivor annuity. [5 U.S.C. § 8341\(h\)\(4\)](#); *Warren*, 407 F.3d at 1313, 1315. OPM's implementing regulations explain that, for the purpose of awarding a former spouse survivor annuity, or explaining, interpreting, or clarifying a court order that awards a former spouse survivor annuity, a court order must be issued on a day prior to the date of retirement or date of death of the employee, or be the first order dividing the marital property of the retiree and the former spouse. [5 C.F.R. § 838.806\(a\)-\(b\)](#).

¶7 In this case, the first order dividing the marital property of the retiree and the former spouse is the March 31, 2005 divorce decree, which divided marital property, including Mr. Bleidorn's retirement annuity, but was silent on the question of a former spouse survivor annuity. IAF, Tab 7, Subtab 5 at 10-14; [5 C.F.R. § 838.806\(f\)\(1\)\(i\)](#). Because the March 31, 2005 divorce decree divided property, but was silent on the question of a survivor annuity, any subsequent court order would be a prohibited modification of that first order and ineffective under the statute and the regulations, to the extent it addressed a survivor annuity. *See Rafferty v. Office of Personnel Management*, [407 F.3d 1317](#), 1323-24 (Fed.

Cir. 2005) (citing *Vaccaro v. Office of Personnel Management*, 262 F.3d 1280, 1287 (Fed. Cir. 2001)).

¶8 The appellant's claim that the provision in the divorce decree calling for a QDRO to evidence "[t]he division of [Mr. Bleidorn's] Civil Service Retirement" either awarded her a former spouse survivor annuity or is sufficient to allow for a subsequently issued QDRO to award her a former spouse survivor annuity is without merit. PFRF, Tab 2 at 5. First, the language in the divorce decree awarding the appellant a portion of Mr. Bleidorn's "Civil Service Retirement," *see* IAF, Tab 7, Subtab 5 at 12, is insufficient, in and of itself, to award her a former spouse survivor annuity because, "an award directing the payment of a share of a federal employee's retirement benefits is distinct from, and will not be interpreted as, an award of a survivor annuity," *see Hokanson v. Office of Personnel Management*, [122 F.3d 1043](#), 1046 (Fed. Cir. 1997). This is because "an award of a former spouse survivor annuity must be express," and the language that the appellant cites does not expressly award her a survivor annuity. *See id.* at 1047. Given the lack of an express reference to survivor benefits, the language that the appellant cites is also insufficient to reserve the question of a former spouse survivor annuity for the purpose of addressing it in a subsequently issued court order. *See Rafferty*, 407 F.3d at 1323-24; *Vaccaro*, 262 F.3d at 1287. Thus, we find that the first order dividing the marital property failed to expressly provide for a former spouse survivor annuity, and the subsequent QDRO and amended QDRO were not court orders acceptable for processing with regard to a survivor annuity because they modified the first order. ID at 4.

¶9 However, as an alternative to using a court order issued in connection with the divorce, a retiree may directly elect to provide a former spouse survivor annuity within 2 years after the date of the divorce, pursuant to [5 U.S.C. § 8339\(j\)\(3\)](#). [5 U.S.C. § 8341\(h\)\(1\)](#); *Warren*, 407 F.3d at 1316. In the supplement to her petition for review, the appellant contends, for the first time, that the amended QDRO was a timely filed written election of a former spouse

survivor annuity under [5 U.S.C. § 8339\(j\)\(3\)](#). PFRF, Tab 1 at 2-3. We would normally decline to consider an argument raised for the first time on petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *See, e.g., Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980). However, neither OPM nor the administrative judge appear to have considered the matter in this regard or to have specifically notified the appellant regarding the potential applicability of [5 U.S.C. § 8339\(j\)\(3\)](#). Further, the appellant, who proceeded pro se until this point, raised the issue in her first submission after securing legal representation, PFRF, Tab 1, and the Board has placed a high priority on resolving retirement benefit cases on the merits, *see, e.g., Murphy v. Office of Personnel Management*, [103 M.S.P.R. 431](#), ¶ 19 (2006) (the paramount concern in a retirement appeal is whether the appellant is entitled to the benefit she seeks, not how well she argues her case) (citing *Karker v. Office of Personnel Management*, [80 M.S.P.R. 235](#), ¶ 9 (1998)). Thus, we have considered the appellant's argument that the amended QDRO was a timely filed election of a former spouse survivor annuity under 5 U.S.C. § 8339(j)(3), and we find it meritorious for the following reasons.

¶10 In support of her argument, the appellant cites our reviewing court's discussion in *Warren*, 407 F.3d at 1317, regarding the treatment of a QDRO, which OPM deemed not acceptable for processing as a court order awarding a former spouse survivor annuity, as an election to provide a former spouse survivor annuity under [5 U.S.C. § 8339\(j\)](#). In *Warren*, the court remanded the appeal to the Board because OPM failed to give the retiree the required notice of his right, following his divorce, to elect a survivor annuity for his former spouse, and the record was insufficient to determine the retiree's intent with respect to the survivor annuity issue. 407 F.3d at 1316-17. The court declined to address the question of whether the QDRO was a timely election of a former spouse survivor annuity under [5 U.S.C. § 8339\(j\)](#) because the appellant failed to raise the

argument in her brief, only raising it at oral argument, and, as mentioned above, the issue presented factual issues that could not be resolved on the existing record. *Id.* at 1317.

¶11 However, the instant record is sufficient to resolve the issue in this case. Unlike the retiree in *Warren*, Mr. Bleidorn endorsed the document asserted as a timely election of former spouse survivor annuity benefits, the amended QDRO, specifically indicating that it was “SEEN AND APPROVED” by him. IAF, Tab 7, Subtab 5 at 3. Additionally, there is nothing in the record to indicate that Mr. Bleidorn did not want his former spouse to receive survivor benefits or that he had remarried at the time he endorsed the amended QDRO on November 15, 2005, or since. Further, although Mr. Bleidorn is not an intervenor in this proceeding,^{*} his endorsement of both QDROs, IAF, Tab 7, Subtab 5 at 3, 9, and his other subsequent signed statements, IAF, Tab 6, Subtab 2, Tab 7, Subtab 3 at 1-2, establish that his intention and desire was for the appellant to receive a former spouse survivor annuity based on his federal service. The amended QDRO meets the regulatory requirements under [5 C.F.R. § 831.632\(a\)](#) that an election of a former spouse survivor annuity be made in writing and be filed with OPM within 2 years after the retiree’s marriage to the former spouse terminates. IAF, Tab 7, Subtab 5 at 1-3. Because we grant the appellant’s petition for review on this basis, we need not address the appellant’s remaining argument that OPM failed to provide the statutorily required notice of his right to elect a former spouse survivor annuity. PFRF, Tab 1 at 1-2.

* The record reflects that OPM served Mr. Bleidorn with a copy of its response to this appeal, IAF, Tab 7 at 5, Subtab 6, and that response included a statement that his rights and interests may be affected by a finding in or the outcome of this appeal and explicitly referenced the Board’s procedures for requesting intervention under [5 C.F.R. § 1201.34](#), IAF, Tab 7 at 4. Although the record contains a signed statement from Mr. Bleidorn supporting the appellant’s appeal, IAF, Tab 6, Subtab 2, he did not file a motion to intervene.

¶12 Accordingly, we grant the appellant's petition for review on our determination that the submission of the amended QDRO satisfies the requirements of [5 C.F.R. § 831.632\(a\)](#) to elect a former spouse survivor annuity for the appellant. Giving effect to this election will likely result in a reapportionment of Mr. Bleidorn's annuity. We find that the Board currently lacks jurisdiction over issues related to the apportionment of Mr. Bleidorn's annuity given his election of maximum survivor benefits for the appellant, because OPM has not issued a final or reconsideration decision on the matter. *See Garside v. Office of Personnel Management*, [109 M.S.P.R. 65](#), ¶ 3, n.* (2008) ("Generally, the Board has no jurisdiction over a retirement matter until after OPM has issued a final or reconsideration decision adjudicating that matter.").

ORDER

¶13 We ORDER the Office of Personnel Management (OPM) to issue a new decision regarding the apportionment of Mr. Bleidorn's annuity that treats the December 2, 2005 amended QDRO as Mr. Bleidorn's election, pursuant to [5 U.S.C. § 8339\(j\)\(3\)](#) and [5 C.F.R. § 831.632\(a\)](#), of maximum survivor benefits for the appellant under [5 U.S.C. § 8341\(h\)](#). OPM must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe 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\(b\)](#).

¶15 No later than 30 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).

¶16 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. § § 1201.201](#), 1201.202 and 1201.203. 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 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.