

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

**2009 MSPB 212**

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Docket No. PH-0831-09-0377-I-1

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**Patricia A. Rollins,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSF 3 179 664

October 27, 2009

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Anthony J. Rollins, Esquire, Atlanta, Georgia, for the appellant.

Kristine Prentice, 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 (ID) that reversed its reconsideration decision denying the appellant's request to change her late husband's survivor annuity election. We GRANT the petition for review (PFR), AFFIRM that part of the ID finding that OPM failed to provide the required annual notice of election rights to the appellant's late husband, VACATE that part of the ID finding that the appellant is entitled to a waiver of the deadline for changing the election, and REMAND the

appeal to the regional office for further adjudication consistent with this Opinion and Order.

### BACKGROUND

¶2 On May 25, 2003, the appellant's husband (the annuitant) submitted his Application for Immediate Retirement, Standard Form (SF) 2801, in which he initialed and completed box 1b in Section D, Annuity Election, as follows:

**I CHOOSE A REDUCED ANNUITY WITH A PARTIAL SURVIVOR ANNUITY FOR MY SPOUSE EQUAL TO 55% OF \$ 2069 A YEAR.\*** If you choose this option, you must attach SF 2801-2 showing your spouse's consent.

\*The amount you select must be less than your yearly annuity.

Initial Appeal File (IAF), Tab 4, Subtab 6 at 14-15. The annuitant included with his application a notarized consent form signed by the appellant. *Id.* at 16.

¶3 Following the annuitant's death on June 10, 2008, the appellant filed an application for survivor annuity benefits and began receiving a monthly benefit of \$105. IAF, Tab 4, Subtab 2 at 1; *id.*, Subtab 5. On September 2, 2008, after receiving a congressional inquiry regarding the amount of the appellant's benefit, OPM issued an initial decision, informing the appellant that her annuity was computed in accordance with the election the annuitant made at the time of retirement, that OPM had no record that he subsequently attempted to change the election, and that the election must therefore remain in effect even if the annuitant mistakenly elected an annuity of 55% of \$2069 per year rather than per month. *Id.*, Subtab 4. OPM affirmed the initial decision in a March 10, 2009 reconsideration decision. *Id.*, Subtab 2. The appellant filed a timely appeal with the Board. IAF, Tab 1.

¶4 After holding a telephonic hearing, the administrative judge (AJ) reversed OPM's reconsideration decision. IAF, Tab 13, ID at 1, 5; *see* IAF, Tab 11 at 2. He found that the annuitant "made an unfortunate mistake" in electing a survivor annuity of 55% of \$2069 a year, and that the annuitant and the appellant did not

pay “sufficient attention to information provided . . . both before and after he retired showing a projected survivor annuity of \$94 per month based on such an election.” *Id.* at 4. He further found that if the appellant and the annuitant had paid sufficient attention they could have utilized the eighteen-month period following the date of retirement “to change his election to provide the maximum monthly survivor annuity for the appellant, which he no doubt had originally intended to do.” *Id.* He also found, however, that OPM failed to establish that it sent the required annual notice of election rights to the annuitant in 2003 or 2004, that the appellant credibly testified that she did not remember receiving the notices as the person responsible for the household mail, and that the appellant was therefore entitled to a waiver of the eighteen-month deadline for changing an election. *Id.* He thus ordered OPM to permit the appellant to make a new survivor annuity election. *Id.* at 5.

¶5 The agency has filed a timely petition for review, Petition for Review File (PFRF), Tab 1, and the appellant has filed a response in opposition, *id.*, Tab 4.

#### ANALYSIS

¶6 An individual seeking retirement benefits bears the burden of proving entitlement to those benefits by preponderant evidence. *Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986); [5 C.F.R. § 1201.56\(a\)](#). An annuitant must comply with [5 U.S.C. § 8339\(o\)\(1\)](#) to elect or increase a reduction in his monthly annuity payment in order to provide for or increase the amount of a survivor annuity. Section 8339(o)(1) provides for an eighteen-month window after an annuitant’s retirement in which he can make such an election or increase. Specifically, subsection 8339(o)(1)(B) states:

(B) An employee or Member –

(i) who, at the time of retirement, is married, and

(ii) who at such time designates . . . that a limited portion of the annuity of such employee or Member is to be used as the base for a survivor annuity under section 8341 (b) of this title,

may, during the 18-month period beginning on the date of the retirement of such employee or Member, elect to have a greater portion of the annuity of such employee or Member so used.

¶7 Further, subsection 8339(o)(6) states:

[OPM] shall, on an annual basis, inform each employee or Member who is eligible to make an election under this subsection of the right to make such election and the procedures and deadlines applicable to such election.

In addition, OPM promulgated a regulation, [5 C.F.R. § 831.622\(b\)\(1\)](#), to carry out [5 U.S.C. § 8339\(o\)\(1\)](#).\*

¶8 In summary, under [5 U.S.C. § 8339\(o\)](#), an annuitant, like the appellant's late husband, who was married at the time of retirement has an eighteen-month window after his retirement during which to make an election to increase his monthly annuity reduction to provide a greater survivor annuity for his spouse. Further, the statute requires OPM to give annual notice to each eligible employee of his right to make such an election and of the applicable procedures and deadlines. See [5 U.S.C. § 8339\(o\)\(6\)](#); see also *Brush v. Office of Personnel Management*, [982 F.2d 1554](#), 1559 n.19 (Fed. Cir. 1992); *Nunes v. Office of Personnel Management*, [111 M.S.P.R. 221](#), ¶¶ 10-11, 14-15 (2009). The Board has long held that OPM's failure to provide a notice of election rights and a filing deadline as required by statute or regulation may warrant a waiver of the filing deadline. E.g. *Nunes*, [111 M.S.P.R. 221](#), ¶ 16; *Speker v. Office of Personnel Management*, [45 M.S.P.R. 380](#), 385 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir.) (Table), and *modified on other grounds*, *Fox v. Office of Personnel Management*, [50 M.S.P.R. 602](#) (1991).

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\* The regulation, [5 C.F.R. § 831.622\(b\)\(1\)](#), states:

Except as provided in § 831.613 and paragraphs (b)(2) and (b)(3) of this section, a retiree who was married at the time of retirement and has elected . . . a partially reduced annuity to provide a current spouse annuity . . . may elect, no later than 18 months after the time of retirement, . . . an increased annuity reduction to provide a current spouse annuity.

¶9 On review, OPM concedes that it failed to establish that it provided adequate notice to the annuitant of his election rights under [5 U.S.C. § 8339\(o\)\(1\)](#), but asserts that the AJ erroneously determined that the remedy was to allow the appellant to change the survivor election on behalf of the annuitant. PFRF, Tab 1 at 5. It asserts that, when OPM fails to send the statutorily required notice and the annuitant is deceased, the next step is to ascertain whether there is evidence that the annuitant intended to change his election while he was still alive. *Id.* at 6-7. It claims that the annuitant's wishes here are unclear and that the only evidence of intent suggests his intent to continue the amount of survivor annuity that he originally elected. *Id.* at 8. OPM thus requests that the appeal be remanded so the AJ can address the issue of whether the annuitant intended to change his election. *Id.*

¶10 Comparable cases involving an appellant's entitlement to a survivor annuity following the death of the annuitant indicate that OPM's assertions on review have merit. When OPM fails to provide mandatory annual notice to an annuitant of his right to make an election and of the applicable procedures and deadlines, the Federal Circuit and the Board have looked to whether the annuitant intended to make the election in deciding whether the appellant is entitled to a survivor annuity that was not properly elected by the annuitant. *See Simpson v. Office of Personnel Management*, [347 F.3d 1361](#), 1366-67 (Fed. Cir. 2003) (instructing the Board to order OPM to grant the appellant a former spouse survivor annuity as if the annuitant, who was deceased, had made a timely election based on his continued receipt of a reduced annuity following their divorce); *Wood v. Office of Personnel Management*, [241 F.3d 1364](#), 1367-68 (Fed. Cir. 2001) (same); *Allen v. Office of Personnel Management*, [99 M.S.P.R. 653](#), ¶ 11 (2005) (finding the appellant was entitled to a survivor annuity even though her deceased husband failed to make a new election within two years after the death of his former spouse because his continued receipt of a reduced annuity demonstrated that he continuously intended to provide a survivor annuity).

¶11 The AJ here found that the annuitant “originally intended” to provide the maximum monthly survivor annuity for the appellant and that the annuitant “made an unfortunate mistake” in electing, and the appellant in consenting to, a survivor annuity of 55% of \$2069 a year. ID at 4. He also found that OPM did not establish that the required annual notices were sent to the annuitant, and thus the appellant was entitled to a waiver of the eighteen-month deadline for changing the election. *Id.* However, before finding that the appellant was entitled to such a waiver, the AJ should have considered evidence of whether the annuitant intended to change his election during the eighteen-month period following his retirement under [5 U.S.C. § 8339\(o\)\(1\)\(B\)](#), i.e., whether the annuitant, if he had the benefit of the annual notices that OPM failed to provide, intended to change his election from 55% of \$2069 per *year* to 55% of \$2069 per *month*. The AJ thus erred in failing to require the appellant to establish such intent before finding that she was entitled to a waiver of the deadline for changing the election.

¶12 The only evidence of the annuitant’s intent in the record is the testimony of the appellant, who testified that she did not remember receiving any information from OPM indicating a \$94 monthly survivor annuity benefit and that she was assured by her husband on his deathbed that she would be taken care of following his death. *See* Hearing Compact Disc. She also testified that when her husband filled out his retirement paperwork, his retirement counselors spoke only of monthly benefits and thus he was focused on his monthly benefit when he provided for a survivor annuity of 55% of \$2069 per year. *Id.* Therefore, evidence in the record regarding the annuitant’s intent is limited to his intent at the time of his original election and does not indicate whether he intended to change his election to provide for a greater survivor annuity if he had received the appropriate annual notices from OPM. Thus, we must remand the appeal to afford the parties the opportunity to present evidence and argument on this issue. *See Jordan v. Office of Personnel Management*, [100 M.S.P.R. 623](#), ¶ 13 (2005)

(remanding appeal to allow the parties to present additional evidence and argument as to whether the annuitant, who was deceased, continued to receive a reduced annuity until his death, and to determine, after consideration of that evidence, if the annuitant intended to provide a survivor annuity for his new spouse following the death of his first spouse).

ORDER

¶13 Accordingly, we AFFIRM the ID's finding that OPM failed to fulfill its annual notice obligations, VACATE the ID's finding that the appellant is entitled to a waiver of the statutory deadline for changing the election, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

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