

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

**2009 MSPB 217**

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Docket No. DA-0831-09-0253-I-1

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**Rodney G. Davis,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 4 418 866

October 29, 2009

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James R. Filyaw, Esquire, Fort Smith, Arkansas, for the appellant.

Karla W. Yeakle, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 The appellant has filed a petition for review of the initial decision affirming the Office of Personnel Management's (OPM) final decision, which found that the appellant's former spouse is entitled to the maximum survivor annuity benefit because the divorce decree awarding the appellant's former spouse a survivor annuity did not specify the amount of the annuity. For the reasons set forth below, we GRANT the petition for review and REVERSE the initial decision. OPM's final decision is NOT SUSTAINED.

## BACKGROUND

¶2 The appellant retired under the Civil Service Retirement System (CSRS), effective January 3, 2008, and elected a maximum survivor annuity for his current spouse. Initial Appeal File (IAF), Tab 6, Subtab 2d at 14. OPM subsequently issued the appellant a letter, informing him that it intended to award his *former* spouse a maximum survivor annuity, as directed by a 2005 divorce decree. *Id.* at 10, 24-25. The appellant was the defendant in the divorce proceedings, and the divorce decree awarded his former spouse in relevant part

thirty-five percent of the defendant's Civil Service Retirement System Benefits which were accumulated during the parties marriage (from April 12, 1985 to the date of the entry of this Decree) by the defendant in connection with his employment; thirty-five percent of the defendant's Thrift Savings Plan connected with the aforesaid Civil Service Retirement; survivor annuity payment upon the death of defendant, said benefits shall be divided by a QDRO or subsequent Order if such is needed. The plaintiff's benefits shall be equal to thirty-five percent (35%) of the accumulation in said funds and plans during the parties' marriage (i.e., April 12, 1985 to date of the entry of this Decree) . . . .

*Id.* at 24-25 (punctuation as in the original). The appellant requested reconsideration, arguing that the divorce decree entitled his former spouse to only 35% of the maximum survivor annuity, and that the balance of the annuity should be paid to his current spouse. IAF, Tab 6, Subtab 2b. OPM issued a final decision affirming its initial decision. *Id.*, Subtab 2a at 2-3. OPM's decision was based on a finding that the divorce decree did not specifically address the amount of the survivor benefits to which the appellant's former spouse was entitled. *Id.*, Subtab 2a at 3, Subtab 2d at 24-25.

¶3 The appellant filed a Board appeal, reiterating his argument that the divorce decree entitled his former spouse to a survivor annuity equal "to only 35% of applicable benefits." IAF, Tab 1 at 4. The appellant submitted a new court order, dated March 18, 2009, which purported to clarify the divorce decree in favor of the appellant's interpretation. The order provided that the former

spouse's survivor annuity would be 35% of the maximum survivor annuity, prorated for the duration of the marriage during the appellant's federal employment. IAF, Tab 8 at 5-6.<sup>1</sup>

¶4 The administrative judge issued an initial decision affirming OPM's final decision. IAF, Tab 10 (ID) at 1, 6. She found that the divorce decree did not limit the former spouse's share of the survivor annuity, and that the former spouse was therefore entitled to the maximum survivor annuity by default. ID at 6. In reaching her decision, the administrative judge declined to consider the March 18, 2009 court order because she found that it did not meet OPM's regulatory criteria for consideration. ID at 5.

¶5 The appellant filed a petition for review, arguing that the administrative judge erred in declining to consider the March 18, 2009 court order purporting to clarify the divorce decree. Petition for Review File (PFRF), Tab 1 at 6, 10. He also argues that the original divorce decree clearly apportioned the survivor annuity in accordance with his interpretation, and that he and his former spouse agree on the apportionment. *Id.* at 7, 10. OPM has filed a response, arguing that the petition for review should be denied for failure to meet the Board's review criteria. PFRF, Tab 4 at 4.

### ANALYSIS

¶6 The administrative judge correctly declined to consider the March 18, 2009 court order. ID at 5; IAF, Tab 8 at 5-6. That order purports to clarify the original divorce decree, and it was issued after the appellant's retirement and was not the first order dividing marital property. The order, therefore, fails to meet the criteria of [5 C.F.R. § 838.806\(b\)](#),<sup>2</sup> and is not a court order acceptable for

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<sup>1</sup> The administrative judge afforded the appellant's former spouse the opportunity to intervene, but the former spouse did not do so. IAF, Tab 7, Tab 9 at 1 n.\*.

<sup>2</sup> The administrative judge erroneously cited to [5 C.F.R. § 838.1004\(e\)\(1\)](#) as the regulatory basis for not considering the order. ID at 5. That regulation applies only to

processing by OPM. *See Warren v. Office of Personnel Management*, [407 F.3d 1309](#), 1315 (Fed. Cir. 2005); *Lim v. Office of Personnel Management*, [98 M.S.P.R. 173](#), ¶ 6 (2005).

¶7 However, the administrative judge erred in finding that the original divorce decree did not contain a provision stating that the appellant's former spouse would be awarded less than the maximum former spouse survivor annuity. ID at 6. In reading the divorce decree, both OPM and the administrative judge appear to have overlooked the clause stating that the former spouse's "benefits shall be equal to thirty-five percent (35%) of the accumulation in said funds and plans during the parties' marriage (i.e., April 12, 1985 to date of the entry of this Decree)." *Compare* IAF, Tab 6, Subtab 2d at 25 *with* ID at 2; IAF, Tab 6, Subtab 2a at 2.

¶8 Based on this clause, we find that the divorce decree explicitly provides the appellant's former spouse with less than the maximum former spouse survivor annuity, and the language in the decree is not ambiguous because it is not susceptible to any other reasonable interpretation. *Cf. Dodd v. Office of Personnel Management*, [108 M.S.P.R. 96](#), ¶ 14 (2008) (a court order is ambiguous to the extent that its terms are susceptible to more than one reasonable interpretation). The apportionment clause is not contained in the sentence that generally awards the former spouse a share of the appellant's CSRS retirement benefits; it is contained in the following sentence and precedes a clause discussing the former spouse's retirement benefits received through her own employment. IAF, Tab 6, Subtab 2d at 24-25. However, the apportionment clause cannot be reasonably interpreted as applying to the former spouse's retirement benefits because it refers to the "said funds and plans," indicating that

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court orders received by OPM before January 1, 1993. [5 C.F.R. § 838.101\(c\)\(2\)](#). However, the error was not material because the properly applicable regulation, 5 C.F.R. § 838.806(b), sets forth the same criteria verbatim.

it applies to “funds and plans” already discussed, i.e., the appellant’s CSRS retirement benefits. *Id.* Moreover, the divorce decree explicitly provides a separate apportionment formula for the former spouse’s retirement benefits based on her own employment. *Id.* at 25. Thus, we find that the provision in the divorce decree that the former spouse’s “benefits shall be equal to thirty-five percent (35%) of the accumulation in said funds and plans during the parties’ marriage (i.e., April 12, 1985 to date of the entry of this Decree),” *id.*, applies to the appellant’s CSRS benefits named in the preceding sentence, which includes the award of a survivor annuity for the former spouse, *id.* at 24.

¶9 We find that the divorce decree satisfied the requirements of [5 C.F.R. § 838.805](#) and awarded the appellant’s former spouse a partial survivor annuity consistent with the appellant’s contentions in this appeal. The maximum possible survivor annuity is 55% of the gross annuity. *See Dodd*, [108 M.S.P.R. 96](#), ¶ 13. The apportionment clause provides that the appellant’s former spouse will be awarded 35% the maximum possible survivor annuity, prorated for her period of marriage to the appellant during the appellant’s federal service. IAF, Tab 6, Subtab 4d at 24-25; *see* 5 C.F.R. § 838.922(a).

#### ORDER

¶10 We ORDER OPM to correct its records to reflect, consistent with this Opinion and Order, that the appellant’s former spouse is entitled to 35% of a prorata share of the maximum survivor annuity. OPM must complete this action no later than 20 days after the date of this decision.

¶11 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\(b\)](#).

¶12 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\(a\)](#).

¶13 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](http://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:

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