

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

**2010 MSPB 27**

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Docket No. SF-0831-09-0421-I-1

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**Linda I. McKenzie,  
Appellant,  
v.  
Office of Personnel Management,  
Agency,  
and  
Leonard W. McKenzie  
Intervenor.**

OPM Claim No. CSA 3 854 039

February 4, 2010

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Linda I. McKenzie, Mariposa, California, pro se.

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

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 The Office of Personnel Management (OPM) and Leonard W. McKenzie, the intervenor, have filed petitions for review of the initial decision that reversed OPM's reconsideration decision and determined that the appellant, Linda I. McKenzie, was eligible for a former spouse survivor annuity. For the following

reasons, we DENY the petitions for review, REOPEN this appeal on the Board's own motion under [5 C.F.R. § 1201.118](#), and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

### BACKGROUND

¶2 Leonard W. McKenzie and Linda I. McKenzie were married on June 26, 1965. Initial Appeal File (IAF), Tab 1, Attachment J. On December 31, 1998, Mr. McKenzie retired from Federal service under the Civil Service Retirement System (CSRS). At that time, Mr. McKenzie elected the maximum survivor benefit for Ms. McKenzie, to whom he was then married. Subsequently, on March 16, 2006, Mr. and Ms. McKenzie were divorced. In a Stipulation Judgment, the Superior Court of California, County of Mariposa, terminated their marital relationship. Attached to the Stipulated Judgment was a Marital Settlement Agreement, which divided the marital property without awarding Ms. McKenzie a former spouse survivor annuity under CSRS. *Id.*, Tab 6, Subtab 6 at 8-8k. The court subsequently issued on July 6, 2006, an order captioned, “Retirement Benefits Order: Re Division of Federal Employees’ Retirement System Benefits,” which awarded Ms. McKenzie a survivor annuity. *Id.*, Subtab 6 at 7-7e.

¶3 Mr. McKenzie, through his divorce attorney, Susan L. Albertoni, forwarded the Stipulated Judgment, the Marital Settlement Agreement, and the Retirement Benefits Order to OPM for processing consistent with the state court’s orders on July 17, 2006. Initial Appeal File (IAF), Tab 1, Attachment C. In response, OPM granted Ms. McKenzie a share of Mr. McKenzie’s CSRS retirement annuity under the terms of the Marital Settlement Agreement, but it denied Mr. McKenzie’s request to award Ms. McKenzie a former spouse survivor annuity. *Id.*, Tab 6, Subtab 6 at 5-6a. OPM determined that the court’s July 16, 2006 Retirement Benefits Order was unacceptable for processing because it was not the first order issued by the court in the divorce. *Id.* Thereafter, Ms. McKenzie

submitted an application for a former spouse survivor annuity with OPM and filed with the application an additional order from the court, dated October 25, 2007, amending the Stipulated Judgment to include the award of a former spouse survivor annuity. *Id.*, Subtab 5. OPM ultimately issued a reconsideration decision, which affirmed its denial of her application for a former spouse survivor annuity. *Id.*, Subtab 2.

¶4 Ms. McKenzie filed a petition for appeal in which she asserted that Ms. Albertoni inadvertently omitted the award of survivor benefits when she drafted the Marital Settlement Agreement, and that, despite exhaustive efforts by both parties, OPM failed to provide timely guidance, within 2 years of the divorce, that Mr. McKenzie could have rectified Ms. Albertoni's error by simply filing a voluntary election of a former spouse survivor annuity. IAF, Tab 1, ¶ 28. Ms. McKenzie did not request a hearing in the appeal. *Id.* Mr. McKenzie signed the appeal form, and he initially declined an opportunity to intervene, then changed his mind and requested an opportunity to submit information. *Id.*, Tabs 1, 9, 10. However, after being granted an opportunity to intervene, Mr. McKenzie withdrew his request to intervene. *Id.*, Tab 11.

¶5 Although Mr. McKenzie declined to intervene, the AJ issued an order reopening the record and directing all of the parties to provide additional information to address the issues raised in Ms. McKenzie's petition for appeal. IAF, Tab 12. Mr. and Ms. McKenzie each responded to the order. *Id.*, Tabs 13, 14. OPM failed to respond to the order. After considering the written record, the AJ determined that Ms. McKenzie was entitled to receive a former spouse survivor annuity because OPM should have considered the court's October 25, 2007 order to be a valid election of a former spouse survivor annuity by Mr. McKenzie. IAF, Tab 15 (Initial Decision at 7-8).

¶6 Mr. McKenzie and OPM have petitioned for review of the initial decision. Petition for Review File (PFRF), Tabs 1, 3, 5. Ms. McKenzie has responded in opposition to the petitions. PFRF, Tab 8.

## ANALYSIS

¶7 Ms. McKenzie, as the applicant for benefits, bears the burden of proving entitlement to a former spouse survivor annuity by preponderant evidence. *Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *Ingle v. Office of Personnel Management*, [102 M.S.P.R. 202](#), ¶ 4 (2006). The divorced spouse of a retired federal employee is entitled to a survivor annuity if the employee has elected a survivor annuity under [5 U.S.C. § 8339\(j\)\(3\)](#), or a survivor annuity has been provided for in a divorce decree or a court order or court-approved property settlement agreement issued in conjunction with the divorce decree under [5 U.S.C. § 8341\(h\)\(1\)](#). *Warren v. Office of Personnel Management*, [407 F.3d 1309](#), 1313 (Fed. Cir. 2005). The statute further requires that the right to a survivor annuity be “expressly provided for” in the election, in the court order, or in the court approved settlement agreement. *Id.*; *Vaccaro v. Office of Personnel Management*, 262 F.3d 1280, 1284-5 (Fed. Cir. 2001).

¶8 The U.S. Court of Appeals for the Federal Circuit has stated that “magic words” are not required to assign a survivor annuity in favor of a former spouse. *Fox v. Office of Personnel Management*, [100 F.3d 141](#), 145-46 (Fed. Cir. 1996). But, the statute provides that a modification in a divorce decree or court approved settlement agreement is not effective if it is made after the employee’s retirement or death. [5 U.S.C. § 8341\(h\)\(4\)](#); *Warren*, 407 F.3d at 1315. OPM’s regulation adopts this statutory language and explicitly states that only the first court order from a court dividing marital property will be acceptable for processing. [5 C.F.R. § 838.806](#). The court has endorsed this interpretation of the statute, and found that subsequent state court orders modifying the division of marital property in a divorce will not qualify as a court order granting a survivor annuity. *Warren*, 407 F.3d at 1316. *But see*, *Griffin v. Office of Personnel Management*, [83 M.S.P.R. 67](#), ¶ 73 (1999)(the Board has found that when a state court distributes

some marital property, but reserves the annuity issue for a second order, the second order is not a prohibited modification under section 8341 (h)(4).)

¶9 However, as the court noted in *Warren*, an employee has two methods of providing a survivor annuity for a former spouse. As an alternative to using a court order issued in connection with the divorce to reinstate a survivor annuity, an employee or retiree has the option of making an election at the time of retirement or, if later, within 2 years after the date on which the marriage of the former spouse to the employee or retiree is dissolved. *Warren*, 407 F.3d at 1316. The court observed that a subsequent court order may qualify as a valid election of a former spouse survivor annuity, but found that the record was insufficient in *Warren* to determine that the retired employee had authorized the subsequent court order and to determine if he had remarried at the time of the court order, and, thus, needed the approval of his current spouse to make the election. *Id.* at 1317. In remanding the appeal, the court stated that the Board could address these factual issues to find an election of a former spouse survivor annuity, if the retired employee did not render the appeal moot by making a new election. *Id.*

¶10 The Board subsequently found in another appeal that, even where a first order dividing marital property fails to award a former spouse survivor annuity, a subsequent court order constituted a valid election of a former spouse survivor annuity under [5 U.S.C. § 8339\(j\)\(3\)](#), where the record shows that the retired employee endorsed the order and his other subsequent signed statements establish that his intention and desire was for the appellant to receive a former spouse survivor annuity. *See Bleidorn v. Office of Personnel Management*, [111 M.S.P.R. 456](#), ¶¶ 7, 9-11 (2009) (citing to *Warren*, 407 F.3d at 1317).

¶11 Following the precedent set in *Bleidorn*, the AJ found that Mr. McKenzie elected to provide a survivor annuity to Ms. McKenzie within 2 years after the divorce. Initial Decision at 7-8. The undisputed record shows that the state court issued the Stipulated Judgment on March 16, 2006, with an attached settlement agreement, which was prepared by Ms. Albertoni. IAF, Tab 6, Subtab 6 at 8-8l.

Shortly thereafter, Ms. Albertoni realized, and has acknowledged, that she inadvertently omitted from the agreement that Ms. McKenzie would receive an entitlement to survivor annuity benefits, and she prepared the Retirement Benefits Order to correct this oversight. *Id.*, Tab 1, Attachment E. The Retirement Benefits Order plainly awards a former spouse survivor annuity to Ms. McKenzie, and it states that Mr. McKenzie agreed “to take all necessary steps to elect a survivor annuity” for Ms. McKenzie. *Id.*, Tab 6 at 7c-7d. On March 30 and April 26, 2006, Ms. Albertoni, acting on behalf of Mr. McKenzie, submitted a draft of this order to OPM requesting it to review and pre-approve the order as acceptable for processing. *Id.*, Tab 1, Attachments A, B. Ms. Albertoni has also indicated that she repeatedly attempted to speak to OPM by telephone and left several voicemail messages in order to obtain information from OPM on how to rectify her error. Unfortunately, OPM never responded to Ms. Albertoni’s requests for information and assistance. *Id.*, Attachment E.

¶12 Ms. Albertoni submitted the draft order to the court for approval on July 6, 2006. The order, which is printed on Ms. Albertoni’s letterhead, was signed by Ms. McKenzie’s attorney, Marvin Brown and by the court, but it was not signed by Ms. Albertoni, Mr. McKenzie, or Ms. McKenzie. *Id.*, Tab 6, Subtab 6 at 7, 7e. On July 17, 2006, Ms. Albertoni, acting on behalf of Mr. McKenzie, submitted the Stipulated Judgment, the Marital Settlement Agreement, and the Retirement Benefits Order together as a single package to OPM with a cover letter requesting OPM to “administer the court’s orders as indicated.” *Id.*, Tab 1, Attachment C. This letter indicates that Mr. McKenzie was provided with a copy of the letter. *Id.*

¶13 On November 9, 2006, OPM notified the parties that it had processed the court’s award of a portion of Mr. McKenzie’s CSRS retirement benefits to Ms. McKenzie, but it informed the parties that it could not honor the court’s former spouse survivor annuity award because this benefit was not contained in the court’s first order dividing property. IAF, Tab 1, Attachment D. In denying Ms.

Albertoni's request, OPM did not notify the parties that Mr. McKenzie still had the option, within 2 years from the date of divorce, to submit a voluntary election of a former spouse survivor annuity in its correspondence to the parties. *Id.*, Tab 6, Subtab 6 at 5-6a. However, Mr. McKenzie avers that he received a notice of annuity adjustment from OPM on February 1, 2007, which recalculated his CSRS annuity without the reduction for a survivor annuity and which informed him in a note on the bottom that he could provide a survivor annuity for his former spouse by making an election within 2 years of the divorce. *Id.*, Tab 13. Mr. McKenzie, however, has not described in detail the specific information provided by OPM on making an election or stated that he conveyed this information to his attorney, Ms. Albertoni.<sup>1</sup>

¶14 On August 14, 2007, Mr. Brown filed a motion with the court to amend its March 16, 2006 Stipulated Judgment to include a former spouse survivor annuity for Ms. McKenzie. *Id.*, Attachment F. The draft order attached to the motion was signed as "approved as to form" by Ms. Albertoni, but was not signed by Mr. McKenzie or Ms. McKenzie. *Id.* The court granted the motion on October 25, 2007. *Id.*, Tab 6, Subtab 5. Mr. Brown and Ms. McKenzie then submitted the amended order to OPM on several occasions in support of her application for a former spouse survivor annuity. *Id.*

¶15 In an initial decision, issued on November 6, 2008, OPM denied Ms. McKenzie's application for survivor annuity benefits on the basis that the court's October 25, 2007 order was not acceptable for processing. IAF, Tab 6, Subtab 4. Ms. McKenzie requested reconsideration, and OPM denied

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<sup>1</sup> Given the extensive efforts made by the parties to obtain information from OPM on how to provide a former spouse survivor annuity to Ms. McKenzie and the failure of OPM to respond to these efforts, an issue still remains as to whether OPM has fulfilled its statutory duty to provide accurate and non-contradictory notice to retirees regarding their election options. *See Nixon v. Office of Personnel Management*, [452 F.3d 1361](#), 1367 (Fed. Cir. 2006); *Robinson v. Office of Personnel Management*, [106 M.S.P.R. 255](#), ¶ 14 (2007). However, we need not address this issue to resolve this appeal.

Ms. McKenzie's request, finding that the court's July 6, 2006 order was not acceptable for processing. *Id.*, Subtabs 2, 3. In the reconsideration decision, which is dated February 10, 2009, OPM found that Mr. McKenzie did not make a voluntary election of former spouse survivor benefits within 2 years after the date of the divorce. *Id.*, Subtab 2.

¶16 The AJ determined that, under all of the circumstances in the case, the state court's October 25, 2007 order should have been deemed a voluntary election of survivor benefits by Mr. McKenzie within the 2-year window for making such elections. IAF, Tab 15 at 7-8. On review, Mr. McKenzie questions this finding, and argues that early in this protracted process he was receptive to Ms. McKenzie receiving a survivor annuity, but by the time the court issued the October 25, 2007 amended judgment he "was no longer interested in that election." PFRF, Tab 3, ¶ 8. Mr. McKenzie asserts that he was aware of the 2-year period for electing a former spouse survivor annuity, and that he would have filed such an election if that had been his wish. *Id.* Mr. McKenzie also contends that Ms. Albertoni's approval of the October 25, 2007 order did not express his intention to make an election, and although he knew that he was bound by the court's orders awarding a survivor benefit to Ms. McKenzie, his acknowledgment of this obligation in pleadings below did not mean that it was his choice to elect a survivor annuity benefit for her. *Id.*

¶17 OPM argues on review that the AJ erred in relying upon *Bleidorn* because the amended order in that case was endorsed by the retired employee, and nothing in the record in that case indicated that the retiree did not want his former spouse to receive survivor benefits.<sup>2</sup> PFRF, Tab 5 at 7. In contrast, in this case, OPM

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<sup>2</sup> Normally, the Board will not consider arguments, such as OPM's arguments here, which are raised for the first time in a petition for review absent a showing that they were based on new and material evidence not previously available despite the party's due diligence. See *Fiacco v. Office of Personnel Management*, [105 M.S.P.R. 193](#), ¶ 18 (2007)(citing *Banks v. Department of the Air Force*, 4 MSPB 342, [4 M.S.P.R. 268](#), 271 (1980)). However, under the unique circumstances of this case, given the novelty of

asserts that the October 25, 2007, order does not reflect Mr. McKenzie's unmistakable intent to elect a survivor annuity, and the order does not qualify as a valid election filed by an annuitant because it was not signed by Mr. McKenzie. *Id.* OPM further argues that Ms. Albertoni had no authority to make a binding election on Mr. McKenzie's behalf because the right to make an election is personal to the employee or retiree alone. *Id.* at 10.

¶18 After considering all of the arguments and evidence, we reopen this appeal on our own motion, and affirm the AJ's finding in the initial decision as modified by this opinion and order. In particular, we find that Mr. McKenzie, through Ms. Albertoni's actions, communicated to OPM a voluntary election, in writing, to provide a former spouse survivor annuity to Ms. McKenzie. In particular, Ms. Albertoni's correspondence with OPM in March, April and July 2006, her preparation of the court's July 6, 2006 Retirement Benefits Order, and her signature approving the court's October 25, 2007 amended judgment all indicate Mr. McKenzie's clear intent to elect a former spouse survivor annuity. Indeed, Mr. McKenzie has acknowledged on review that he agreed with providing Ms. McKenzie a survivor annuity at the time of their divorce and that Ms. Albertoni's actions were taken with his knowledge and authorization. PFRF, Tab 3. Furthermore, although Mr. McKenzie contends that he changed his mind by October 2007 and the provision of a survivor annuity was no longer his choice at that time, there is no indication that he ever communicated this change of mind to anyone prior to the filing of this appeal. Thus, the undisputed record shows that Ms. Albertoni represented Mr. McKenzie in the state court proceedings below, and she consistently represented to the court and to OPM that it was his intention to provide Ms. McKenzie with a survivor annuity. IAF, Tab 1, Attachments A, B, C, E. It is well established that a person is bound by the consequences of his

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OPM's arguments and in the interest in reaching the correct result in this case, we will consider the arguments on review.

representative's conduct. See *Rowe v. Merit Systems Protection Board*, [802 F.2d 434](#), 437 (Fed. Cir. 1986) (citing *Link v. Wabash Railroad Co.*, [370 U.S. 626](#), 633-34, 82 S.Ct. 1386, 1390-91, 8 L.Ed.2d 734 (1962)). Thus, the record as a whole shows that Mr. McKenzie made a voluntary election for Ms. McKenzie to receive a former spouse survivor annuity within 2 years of the divorce.

¶19 Furthermore, contrary to OPM's arguments on review, we find no basis for finding that a retired employee must personally sign an election of a former spouse survivor annuity or that he cannot delegate an authorized representative to make an election for him. The provision of the statute at issue, [5 U.S.C. § 8339\(j\)\(3\)](#), provides that an employee who has a former spouse may elect at the time of retirement or within 2 years after the dissolution of the marriage to elect a survivor annuity for the former spouse. The statute, however, does not set forth any specific form which the election must take, and, unlike other similar provisions in the statute, it does not state that the election must be signed by the employee.<sup>3</sup> OPM's implementing regulation states that a retiree "may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity. Such an election must be received within 2 years after the retiree's marriage to the former spouse terminates." [5 C.F.R. § 831.632](#). Therefore, under the applicable statute and regulations, an annuitant may make an

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<sup>3</sup> In its PFR, OPM argues that an election must be signed by Mr. McKenzie based upon the Board's decision in *Vincent v. Office of Personnel Management*, [78 M.S.P.R. 307](#), 310-11 (1998). In *Vincent*, the Board found that a retired employee, who marries after retirement, may make an election for his current spouse under [5 U.S.C. § 8339\(k\)\(2\)\(A\)](#) within 2 years of a post-retirement marriage by submitting a signed election in writing to OPM, but that the statute does not require that the signed election be a holographic signature. *Id.* Accordingly, the Board found that absent a specific statutory or regulatory requirement, the retired employee was not required to personally sign the election of survivor benefits for it to be valid, but that his spouse, acting at his direction and request, and in his presence, could sign the election on his behalf. *Id.* at 311. We find that *Vincent* is inapposite to this appeal because section 8339(j)(3) and its implementing regulation, unlike section 8339(k)(2)(A), does not specifically require that the election of a former spouse survivor annuity be signed.

election of survivor benefits for his former spouse through any other writing provided that such writing manifests the intent to elect such benefits. More specifically, there is nothing in the language of section 8339(j)(3) and the relevant OPM regulations which may be read as requiring that an election must contain a signature by the retiree. Therefore, we affirm the AJ's initial decision awarding Ms. McKenzie a former spouse survivor annuity.

#### ORDER

¶20 We ORDER OPM to take such action as is necessary to grant Mr. McKenzie's election of former spouse survivor annuity benefits for Ms. McKenzie under [5 U.S.C. § 8339\(j\)\(3\)](#). OPM must complete this action no later than 20 days after the date of this decision.

¶21 We also ORDER OPM to tell Ms. McKenzie 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 Mr. McKenzie and Ms. McKenzie to provide all necessary information that OPM requests to help it carry out the Board's Order. Ms. McKenzie, if not notified, should ask OPM about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶22 No later than 30 days after OPM tells Ms. McKenzie that it has fully carried out the Board's Order, she may file a petition for enforcement with the office that issued the initial decision in this appeal if she believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why Ms. McKenzie 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\(a\)](#).

¶23 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 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 Clerk of the Board.

**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.