

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

2010 MSPB 77

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

**Patricia A. Rollins,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

April 27, 2010

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

Kristine Prentice, 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) has filed a petition for review (PFR) of the remand initial decision (RID) that reversed its reconsideration decision and ordered it to permit the appellant to make a new survivor annuity election. For the reasons set forth below, we GRANT OPM's PFR, AFFIRM the RID as MODIFIED, and order OPM to process, effective December 5, 2003, the annuitant's election to provide the maximum survivor annuity.

BACKGROUND

¶2 On May 25, 2003, the appellant's husband (the annuitant) submitted his Application for Immediate Retirement, Standard Form 2801, in which he indicated that he chose a reduced annuity with a partial survivor annuity for his spouse equal to 55% of \$2,069 a year. Initial Appeal File (IAF), Tab 4, Subtab 6 at 14-15. With his application, he included a notarized consent form signed by the appellant. *Id.* at 16. When the annuitant died, the appellant filed an application for survivor annuity benefits and began receiving a monthly payment of \$105. *Id.*, Subtab 2 at 1; *id.*, Subtab 5. After receiving a congressional inquiry regarding the amount of the appellant's benefit, OPM issued an initial decision informing the appellant that it had computed her annuity in accordance with the annuitant's election, made at the time of his retirement, that there was no evidence that the annuitant had attempted to change his election, and that it must remain in effect, even if he mistakenly elected an annuity of 55% of \$2,069 per year, rather than 55% of \$2,069 per month. *Id.*, Subtab 4. OPM affirmed its decision on reconsideration. *Id.*, Subtab 2.

¶3 On appeal, the administrative judge reversed OPM's decision. IAF, Tab 13, Initial Decision (ID) at 1, 5. He found that the annuitant had mistakenly elected the lower survivor benefit, but that, if he and the appellant had paid attention to the information OPM provided them showing a projected survivor annuity monthly benefit of \$94, they could have changed the election to provide the maximum monthly survivor annuity for the appellant, as he had intended, within the 18-month period provided for by [5 U.S.C. § 8339\(o\)\(1\)\(B\)](#). *Id.* at 4. He also found that OPM failed to establish that it sent the required annual notice of election rights to the annuitant in 2003 or 2004, after he retired; he found that the appellant testified credibly that she was the person responsible for the household mail and did not remember receiving the notices; and he concluded, therefore, that she was entitled to a waiver of the 18-month deadline for changing an election. *Id.* He ordered OPM to permit the appellant to make a new survivor

annuity election. *Id.* at 5. OPM filed a PFR, challenging the administrative judge's order. PFR File, Tab 1. The Board granted OPM's PFR, affirmed that part of the ID finding that OPM failed to provide the required annual notice of election rights to the annuitant, but vacated the administrative judge's remedy. *Rollins v. Office of Personnel Management*, [112 M.S.P.R. 557](#), ¶¶ 1, 12-13 (2009). The Board found that, before finding that the appellant was entitled to a waiver, the administrative judge should have considered whether the annuitant intended to change his election during the 18-month period following his retirement, that is, whether, if he had the benefit of the annual notices that OPM failed to provide him, he intended to change his election to provide a greater survivor benefit for the appellant. *Id.*, ¶ 11. The Board remanded the appeal to afford the parties the opportunity to present evidence and argument on this issue. *Id.*, ¶ 12.

¶4 On remand, following a hearing, the administrative judge again reversed OPM's reconsideration decision. Remand Appeal File, Tab 6, RID at 1, 7. After considering testimony by the appellant, her son, and the annuitant's daughter, *id.* at 3-5, the administrative judge found that the annuitant intended to provide the appellant the maximum monthly survivor annuity benefit, equal to 55% of \$2,069 per month, that he thought he had done so, but made a clerical error in filling out the application, and that his intent remained the same during the 18-month period following his retirement, *id.* at 6-7. The administrative judge again ordered OPM to permit the appellant to make a new survivor annuity election. *Id.* at 8.

¶5 In its PFR of the RID, OPM concedes that the annuitant intended to provide a maximum survivor annuity for the appellant and would have increased her annuity had he received notice of the opportunity to do so within 18 months of his retirement. PFR File (B-1), Tab 1 at 4. OPM argues, however, that the administrative judge exceeded his authority in again ordering it to allow the appellant to make a new survivor annuity election. *Id.* Rather, OPM contends, the proper remedy is to pinpoint when, during the 18-month period provided, the

annuitant would have increased the appellant's survivor annuity, and to compute her survivor benefit accordingly. *Id.* at 1-2.

¶6 The appellant has responded in opposition to OPM's PFR. *Id.*, Tab 3.

ANALYSIS

¶7 Where, as here, 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 issue to be resolved in determining whether the appellant is entitled to a survivor annuity that was not properly elected by the annuitant is whether the annuitant intended to make the election. *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 based on evidence that the annuitant, who was deceased, intended to provide the appellant a reduced annuity following their divorce); *Allen v. Office of Personnel Management*, [99 M.S.P.R. 653](#), ¶ 11 (2005) (finding that the appellant was entitled to a survivor annuity, even though her deceased husband failed to make a new election within 2 years after their marriage, because his continued receipt of a reduced annuity following the death of his former spouse demonstrated that he continuously intended to provide a survivor annuity for the appellant).

¶8 In the absence of any substantive challenge by either party to the administrative judge's findings that the annuitant intended to provide the appellant a maximum survivor annuity and that, had he been given the opportunity to do so, he would have increased her annuity within the 18-month period provided, we affirm those findings.

¶9 In addressing the administrative judge's remedy, we note that the election at issue in this case belonged to the annuitant. Section 8339(o)(1)(B) of title 5, U.S. Code, provides that "[a]n employee or Member" may, within 18 months of his retirement, elect to have a greater portion of his annuity used as the base for a survivor annuity. The appellant cannot make this election for the annuitant. We

agree with OPM, therefore, that the administrative judge erred in ordering OPM to permit the appellant to make a new survivor annuity election.

¶10 In her response to OPM's PFR, the appellant seems to argue that there is no need to determine the effective date of the annuitant's deemed election. *See* PFR File (B-1), Tab 3 at 4-7. We disagree. As OPM has noted, that date affects the manner in which OPM must compute the reduction in the retirement annuity that must accompany an increase in survivor benefits, and it affects the amount of the deposit that must be made when an annuitant elects to increase those benefits. *See* [5 C.F.R. §§ 831.622\(b\)\(3\)](#), 831.661, 831.662, *cited in* PFR File (B-1), Tab 1 at 5.*

¶11 We see no need, however, to remand this appeal for a determination of the appropriate effective date of the annuitant's deemed election. OPM has indicated its willingness to stipulate that, if it had properly notified the annuitant of his rights, it would have received his request to increase his survivor annuity election to the maximum amount on December 5, 2003, during the month in which OPM issued its first annual notice to annuitants following the retirement of the annuitant in this case. PFR File, Tab 1 at 5; *see* IAF, Tab 4 at 1. Although the appellant has not expressly accepted OPM's proposed stipulation, she has not challenged the appropriateness of the proposed effective date, and she has not indicated that another date would be more appropriate. Moreover, the date OPM has proposed is consistent with the finding that the annuitant would have modified his original election on his receipt of the information OPM provided in its first annual notice following his retirement. We therefore find that the annuitant's election to increase the survivor annuity for the appellant should be deemed to be effective on December 5, 2003.

* Any overpayment the annuitant may have received during his lifetime as a result of the election he is deemed to have made is beyond the scope of this appeal and need not be addressed here.

ORDER

¶12 We ORDER OPM to process, effective December 5, 2003, the annuitant's election to provide the maximum survivor annuity for the appellant. OPM must complete this action no later than 20 days after the date of this decision.

¶13 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\(b\)](#).

¶14 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\(a\)](#).

¶15 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 OPM 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.