

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

2010 MSPB 228

Docket No. DC-0831-10-0297-I-1

**Susan E. McDonald,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

November 18, 2010

Susan E. McDonald, Charlotte, North Carolina, 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 This case is before the Board on the appellant's petition for review of the initial decision that affirmed the Office of Personnel Management's (OPM's) reconsideration decision denying her request for a survivor annuity. For the reasons set forth below, we GRANT the petition under [5 C.F.R. § 1201.115\(d\)](#), VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant married the annuitant, Michael McDonald, in 1978. The annuitant applied for retirement benefits under the Civil Service Retirement System (CSRS), and, on October 17, 1996, the appellant signed Standard Form 2801-2, “Spouse’s Consent to Survivor Election,” irrevocably waiving a survivor annuity. Initial Appeal File (IAF), Tab 5, Subtab 2e at 23-25. The annuitant retired on disability from the U.S. Postal Service effective January 21, 1997, electing a life-only annuity. *Id.* at 23, 31. The appellant testified that the Postal Service induced her to consent to the waiver by telling her that her husband would be unable to receive a disability retirement annuity unless she signed the waiver. Hearing CD. She also testified that she and her husband realized that she had mistakenly waived her right to a survivor annuity a week after signing the waiver, but that a Postal Service employee told her husband that there was no recourse. *Id.* In May 2008, the appellant sought to become eligible for a survivor annuity. IAF, Tab 5, Subtab 2b. In a reconsideration decision, OPM denied her request. IAF, Tab 5, Subtab 2a. The appellant appealed the reconsideration decision to the Board’s regional office, IAF, Tab 1, and shortly thereafter, on February 15, 2010, her husband died. IAF, Tab 7 at 2.

¶3 Based on the record developed by the parties, including the testimony at the hearing held on March 30, 2010, the administrative judge affirmed the reconsideration decision. IAF, Tab 11 (Initial Decision (ID)). She found that the appellant did not dispute that she signed the waiver of annuity consent form. ID at 3. Further, she found that, although the annuitant received notice from OPM that he could change his election of a life-only annuity to provide a survivor annuity for the appellant within 18 months of the effective date of his retirement, the annuitant did not change his election. ID at 4. Specifically, she determined that OPM’s evidence that it sent such notices created a presumption that it had done so in this case, and the appellant’s testimony that she had not seen the notices was insufficient to rebut the presumption. *Id.* The administrative judge

noted the appellant's assertion that she and the annuitant received mistaken advice from a Postal Service employee at the time of the annuitant's retirement, but she found that the government was entitled to rely on a form voluntarily signed absent a showing of fraud, duress, or mental incompetence. ID at 3-5. The administrative judge found that the appellant must be held to her election since she did not allege or show the existence of fraud, duress, or mental incompetence. ID at 5.

¶4 The appellant has filed a petition for review. Petition for Review (PFR) File, Tabs 1, 2. OPM has filed a response in opposition to the petition. PFR File, Tab 5.

ANALYSIS

¶5 Under the CSRS, the surviving spouse of a retired federal employee is entitled to an annuity equal to 55 percent of the retiree's annuity unless the survivor consented in writing to receive no such survivor annuity or a reduced annuity at the time of the employee's retirement. [5 U.S.C. §§ 8339\(j\)\(1\), 8341\(b\)\(1\)](#); *Luten v. Office of Personnel Management*, [110 M.S.P.R. 667](#), ¶ 10 (2009); [5 C.F.R. § 831.614](#). OPM has promulgated implementing regulations that provide a 30-day window, after the retiree's receipt of the first regular monthly annuity payment, during which the retiree “may name a new survivor or change his election of type of annuity” by filing a new written election, with spousal consent, if applicable. *Blaha v. Office of Personnel Management*, [106 M.S.P.R. 265](#), ¶ 7 (2007); [5 C.F.R. § 831.621](#). The relevant statute and regulations also provide that a retiree may, within 18 months after retirement, choose to elect a survivor annuity for the spouse to whom he was married at retirement if he did not previously do so or to increase the size of such an annuity. [5 U.S.C. § 8339\(o\)\(1\)](#); *Nunes v. Office of Personnel Management*, [111 M.S.P.R. 221](#), ¶¶ 10-11 (2009); [5 C.F.R. § 831.622\(b\)\(1\)](#).

¶6 OPM has a statutory obligation to notify annuitants annually that they have 18 months after retirement to provide or increase a spouse's survivor annuity. [5 U.S.C. § 8339\(o\)\(6\)](#). When OPM fails to show that it complied with the statutory notice requirements and “the annuitant’s conduct is consistent with his having made the election at issue,” survivor benefits have been ordered as if the deceased had made a timely election. See *Simpson v. Office of Personnel Management*, [347 F.3d 1361](#), 1364 (Fed. Cir. 2003); *Hairston v. Office of Personnel Management*, [318 F.3d 1127](#), 1130 (Fed. Cir. 2003); *Wood v. Office of Personnel Management*, 241 F.3d 1364, 1366 (Fed. Cir. 2001).

¶7 OPM bears the burden of proving that it sent the notice. *Nunes*, [111 M.S.P.R. 221](#), ¶ 20. When an appellant makes a nonfrivolous allegation that OPM has failed to send the required statutory notice, the burden of production falls to OPM. *Id.* OPM bears the ultimate burden of persuasion on the issue of whether it sent the notice. *Id.* OPM is required to show beyond making a bare allegation that it actually sent the notice, and it must offer proof of the contents of the notice. *Id.* If OPM can establish through credible evidence that it is more probable than not that it sent the notice, the burden of going forward falls upon the appellant, who must put forth credible testimony or other evidence tending to support her contention that the annuitant did not receive the notice. *Id.* The administrative judge must then decide whether to credit the appellant's testimony and whether such testimony overcomes the presumption that the annuitant received the notice. *Id.*

¶8 The record below includes the affidavit of Cyrus S. Benson, the OPM official responsible for printing and distributing retirement forms and notices. IAF, Tab 5, Subtab 2e at 11-12. Benson stated that all annuitants were sent general notices regarding survivor elections in December 1996, December 1997, as well as every December between 1991 and 2008. *Id.* OPM, however, did not submit a copy of the mailing list used on any of the dates of mailing after the annuitant retired. Thus, it is unknown whether the annuitant was on the mailing

list. *Cf. Nunes*, [111 M.S.P.R. 221](#), ¶ 21. Although OPM may have established with such evidence that it is more probable than not that the annual notice was sent to the annuitant, *see id.*, the administrative judge never informed the parties of their respective burdens. On remand, the appellant shall be allowed to present evidence and argument supporting her contention that the annuitant may not have received the annual notices required by [5 U.S.C. § 8339\(o\)\(6\)](#) during the 18-month period following his retirement, OPM shall be permitted to present evidence and argument supporting its contention that the annual notices were properly sent to the annuitant, and the administrative judge shall make explained credibility findings accordingly. *See Nunes*, [111 M.S.P.R. 221](#), ¶ 21.

¶9 If the administrative judge determines on remand that OPM failed to provide the required notice, she should then determine whether there is sufficient evidence that the appellant's husband intended to provide her with a survivor annuity. We note that the appellant need not show that OPM's error was harmful, i.e., that OPM's failure to provide the required notice caused her husband to not change his election in order to provide a survivor annuity for her. *See Nixon v. Office of Personnel Management*, [452 F.3d 1361](#), 1368 (Fed. Cir. 2006) (where OPM has failed to provide a required notice of election rights, and there is some indication that the employee wished to elect a spousal annuity, the appellant is generally not required to make a separate showing that OPM's error was harmful).

¶10 As stated above, the appellant testified that an unnamed employee of the U.S. Postal Service misled her and the annuitant into believing that he could not elect a survivor annuity for the appellant and receive a disability retirement annuity. If the unnamed employee committed affirmative misconduct that caused the appellant's husband to not elect a survivor annuity for her, the appellant might be entitled to waiver of the election requirement under the doctrine of equitable estoppel. *See Office of Personnel Management v. Richmond*, [496 U.S. 414](#), 41-23 (1990) (leaving open the possibility that equitable estoppel may be

applied against the federal government in cases involving affirmative misconduct).

¶11 We find, as an initial matter, that application of equitable estoppel would not result in the expenditure of appropriated funds in contravention of statute. *See Richmond*, 496 U.S. at 416, 434 (the government cannot be estopped from denying benefits not otherwise permitted by law even if the claimant was denied monetary benefits because of his reliance on the mistaken advice of a government official). The appellant did not seek to draw additional funds from the U.S. Treasury; she requested that her husband's annuity be reduced to provide her with a survivor annuity. Equitable estoppel is therefore available as a possible basis for waiver of the election requirement. *Nunes*, [111 M.S.P.R. 221](#), ¶ 18; *see Perez Peraza v. Office of Personnel Management*, [114 M.S.P.R. 457](#), ¶ 7 n.1 (2010).

¶12 Whether the annuitant simply misunderstood the Postal Service employee's advice, the employee inadvertently misinformed him, or the employee committed affirmative misconduct, is unclear from the current record. If the appellant and the annuitant misunderstood the advice, the mistake is unilateral and the election cannot be changed. *Nunes*, [111 M.S.P.R. 221](#), ¶ 19. If the Postal Service employee unintentionally gave bad advice, the Board has held that the negligent provision of misinformation does not constitute affirmative misconduct. *Id.* However, the parties here were never informed regarding the correct standard for establishing equitable estoppel. *See IAF*, Tabs 2, 8; *Peraza*, [114 M.S.P.R. 457](#), ¶ 11. Thus, we must remand this appeal for further adjudication. On remand, the parties shall be afforded the opportunity to address whether the Postal Service employee who advised the annuitant committed affirmative misconduct that would preclude enforcement of the requirement that the appellant's husband formally change his election to provide the appellant a survivor annuity under the doctrine of equitable estoppel, or whether the alleged erroneous information merely resulted from the Postal Service employee's negligence. We further note that the appellant must show on remand that she and the annuitant acted

reasonably in relying on the information allegedly provided by the Postal Service employee. *Nunes*, [111 M.S.P.R. 221](#), ¶ 19.

ORDER

¶13 Accordingly, we remand the appeal for further adjudication consistent with this Opinion and Order. The administrative judge shall afford the appellant a hearing on remand, if she requests one, limited to the issues identified herein.

FOR THE BOARD:

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