

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

**2010 MSPB 230**

---

Docket No. AT-0831-10-0001-I-1

---

**Joan M. Djeridi,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

November 24, 2010

---

Joan M. Djeridi, Lake Helen, Florida, pro se.

Karla W. Yeakle, 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 appellant has filed a petition for review of an initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) finding that she is not entitled to a survivor annuity benefit. We DENY the petition for review for failure to meet the review criteria under [5 C.F.R. § 1201.115](#). We REOPEN the appeal on our own motion under [5 C.F.R. § 1201.118](#), however, REVERSE the initial decision, and FIND that the appellant is entitled to a former spouse survivor annuity. We DO NOT SUSTAIN OPM's reconsideration decision.

## BACKGROUND

¶2 The appellant and Edmund Djeridi had been married for more than 39 years when Mr. Djeridi retired from federal service under the Civil Service Retirement System (CSRS) on January 3, 1996. Initial Appeal File (IAF), Tab 6, Subtab 2D at 1, Subtab 2E at 37, Tab 8. At the time of his retirement, he chose to receive a reduced annuity in order to provide a maximum survivor annuity for the appellant. IAF, Tab 6, Subtab 2D at 35. On July 19, 1999, Mr. Djeridi and the appellant divorced. *Id.*, Subtab 2E at 26, 28. The July 19, 1999 divorce decree divided marital property and provided that the appellant would receive 50% of Mr. Djeridi's retirement annuity, but did not mention a survivor annuity. *Id.* at 26-35. On August 21, 2000, OPM wrote letters to Mr. Djeridi and the appellant explaining that it would pay the appellant 50% of Mr. Djeridi's gross annuity benefit each month as directed in the divorce decree. *Id.* at 18, 20. OPM's letters further stated that the divorce decree did not award survivor benefits. *Id.* The letters did not explain that their divorce automatically nullified Mr. Djeridi's prior election to provide a survivor annuity for the appellant; however, OPM generally informed Mr. Djeridi that, although a subsequent court order that modified or replaced the first court order dividing marital property would not be acceptable for processing under its regulations, he "may" voluntarily elect survivor benefits for his former spouse within 2 years of the divorce. *Id.* at 18.

¶3 In a letter dated November 7, 2000, the appellant asked OPM to consider her entitlement to a survivor annuity based on a Qualified Court Order issued by a Florida state court on June 1, 2000, which purported to award the appellant the maximum former spouse survivor annuity. *Id.* at 17, 22-25. On April 7, 2001, OPM wrote letters to Mr. Djeridi and the appellant that were similar to the letters of August 21, 2000, except that OPM characterized the letters as an initial decision and stated how to request reconsideration with OPM. *Id.* at 11-13. The letters made no reference to the June 1, 2000 Qualified Court Order, but apparently relying on the divorce decree, stated that OPM would pay 50% of Mr.

Djeridi's gross annuity to the appellant each month, and further that "[w]e find no references to former spouse survivor benefits in your court order." *Id.* at 11-12. These letters did not explain that the appellant was no longer entitled to a survivor annuity based on Mr. Djeridi's pre-divorce election, or that Mr. Djeridi could or should submit a new voluntary election to provide such a benefit. *Id.*

¶4 Meanwhile, in the fall of 2000, Mr. Djeridi wrote OPM on at least two occasions to request information about the survivor annuity election referenced in OPM's August 21, 2000 letter. *Id.* at 16, 19. On or about December 22, 2000, OPM sent Mr. Djeridi a Former Spouse Survivor Annuity Election form (RI 20-64) (revised February 1999). *Id.* at 14-15. That form stated the time limit for electing to provide a survivor benefit for a former spouse, but again failed to explain that Mr. Djeridi was required to submit a new election form because his pre-divorce election was no longer valid. *Id.* The information provided by OPM indicated that there would be no adjustment to Mr. Djeridi's gross monthly annuity if he elected a maximum survivor benefit for his former spouse, and that the maximum survivor benefit would be \$1,056 per month plus future cost-of-living adjustments. *Id.* at 14. On or about February 24, 2001, Mr. Djeridi completed the portion of the election form requesting additional information from OPM on electing a smaller survivor benefit,<sup>1</sup> and he returned the form to OPM. *Id.* at 9-10. Specifically, Mr. Djeridi requested information about the impact on his gross annuity if he elected to provide a former spouse survivor annuity of only \$1,000 per month. *Id.* at 9. He did not complete the portions of the form that would have indicated that he either wished to elect, or had decided not to provide, a survivor benefit. *Id.* at 9, 14-15. Having not received a reply to his request, Mr. Djeridi wrote a June 13, 2001 letter to OPM seeking a response to

---

<sup>1</sup> Mr. Djeridi actually dated his form "02-24-02." IAF, Tab 6, Subtab 2E at 9. The administrative judge found based on the other record evidence that he actually signed this form on February 24, 2001, IAF, Tab 7 at 2, and neither party has contested that finding on review.

his inquiry as soon as possible because he understood his filing time limit would expire in July 2001. *Id.* at 10. A few days later, however, he wrote OPM again instructing OPM to “disregard” his June 13, 2001 letter because, “I’ve changed my mind. I don’t want the application.” *Id.* at 7. On June 21, 2001, OPM returned Mr. Djeridi’s election form to him, instructing him to complete the reverse of the form as soon as possible if he wished to make a survivor election. *Id.* at 8.

¶5 The record does not contain any indication that Mr. Djeridi contacted OPM again regarding a survivor annuity. However, the appellant wrote to OPM in 2005 “to confirm” that she would receive a survivor annuity upon her ex-husband’s death. IAF, Tab 6, Subtab 2B at 3. OPM sent her a written response stating that she would receive a survivor annuity at a rate of \$1,152 per month, plus any future cost-of-living adjustments. *Id.* at 2. It is undisputed that the reduction in Mr. Djeridi’s gross annuity to pay for the costs of a maximum survivor annuity continued until his death on February 21, 2009. IAF, Tab 6 at 2, Subtab 2D at 5, Tab 7 at 3; Petition for Review File (PFR File), Tab 4 at 5 n.1.

¶6 Following Mr. Djeridi’s death, the appellant applied for a former spouse survivor annuity from OPM. IAF, Tab 6, Subtab 2D at 1-4. OPM denied the appellant’s application, *id.*, Subtab 2C, the appellant requested reconsideration, *id.*, Subtab 2B, and OPM issued a reconsideration decision affirming its initial decision, *id.*, Subtab 2A.

¶7 The appellant filed an appeal and requested a hearing, but subsequently withdrew her request for a hearing. IAF, Tab 1 at 2, Tab 7 at 1. The administrative judge issued an initial decision based on the written record and affirmed OPM’s reconsideration decision. IAF, Tab 11, Initial Decision (ID) at 1. She found that the 1999 divorce decree did not award the appellant a survivor annuity benefit, but did divide marital property, and among other things, awarded the appellant half of Mr. Djeridi’s gross federal retirement annuity during his lifetime. ID at 2, 4-5. The administrative judge found that the 1999 divorce

decree was silent on the issue of whether the appellant would receive a survivor annuity, and that OPM properly determined that the June 1, 2000 Qualified Court Order was not a court order acceptable for processing under OPM's regulations on the question of survivor annuity benefits. ID at 4-5. She further found that there was insufficient evidence to conclude that the Qualified Court Order constituted a voluntary election by Mr. Djeridi to provide the appellant a former spouse survivor annuity, and that Mr. Djeridi had otherwise failed to make a valid election under OPM's regulations to provide a survivor benefit for the appellant within 2 years after their divorce. ID at 5.

¶8 The appellant has filed a petition for review of the initial decision. PFR File, Tab 1. OPM has responded in opposition to the petition for review. PFR File, Tab 4.

#### ANALYSIS

¶9 The appellant, as the applicant for benefits, bears the burden of proving entitlement to a former spouse survivor annuity by preponderant evidence. *McKenzie v. Office of Personnel Management*, [113 M.S.P.R. 240](#), ¶ 7 (2010). "Divorce terminates a prior election of spousal survivor benefits." *Hernandez v. Office of Personnel Management*, [450 F.3d 1332](#), 1334 (Fed. Cir. 2006); see [5 U.S.C. § 8339\(j\)\(5\)\(A\)](#). Thus, the appellant's entitlement to a survivor annuity, based on Mr. Djeridi's pre-divorce election to provide such benefits, terminated when Mr. Djeridi and the appellant divorced in 1999.

¶10 The former spouse of a retired federal employee is entitled to a survivor annuity if the employee expressly provided for one in an election under [5 U.S.C. § 8339\(j\)\(3\)](#), or in the terms of any divorce decree, or in any court order or court-approved property settlement agreement issued in connection with the divorce decree. [5 U.S.C. § 8341\(h\)\(1\)](#); *Bleidorn v. Office of Personnel Management*, [111 M.S.P.R. 456](#), ¶ 6 (2009). OPM's implementing regulations explain that, for the purpose of awarding a former spouse survivor annuity, or explaining,

interpreting, or clarifying a court order that awards a former spouse survivor annuity, a court order must be issued on a day prior to the date of retirement or date of death of the employee, or be the first order dividing the marital property of the retiree and the former spouse. [5 C.F.R. § 838.806](#)(a)-(b); *Bleidorn*, [111 M.S.P.R. 456](#), ¶ 6.

¶11 The administrative judge found, and we agree, that the appellant's July 1999 divorce decree divided marital property, including pension benefits, but did not expressly mention a survivor annuity. IAF, Tab 6, Subtab 2E at 26-34; ID at 4-5. We also agree with the administrative judge's implicit finding that the June 1, 2000 Qualified Court Order entered subsequent to Mr. Djeridi's retirement was a modification of the first order and thus, under [5 U.S.C. § 8341](#)(h)(4) and OPM's implementing regulations, was ineffective for the purpose of awarding a survivor annuity. IAF, Tab 6, Subtab 2E at 22-25; ID at 4; *see Short v. Office of Personnel Management*, [94 M.S.P.R. 363](#), ¶¶ 10-17 (2003) (applying *Vaccaro v. Office of Personnel Management*, [262 F.3d 1280](#) (Fed. Cir. 2001)). Further, the appellant has not presented any basis to disturb the administrative judge's explained finding that, under the circumstances of this case, there is insufficient evidence to conclude that the Qualified Court Order could be considered a timely election of former spousal annuity benefits for the appellant. ID at 5; *cf. Bleidorn*, [111 M.S.P.R. 456](#), ¶¶ 9-13.

¶12 On review, the appellant asserts that she does not understand why the judge who issued her divorce decree and the Qualified Court Order would sign an order "that is absolutely unacceptable because of the first order." PFR File, Tab 1. The appellant's petition for review fails to provide a basis for granting review. Although she disagrees with the administrative judge's decision, she has failed to present any new and material evidence that, despite her due diligence, was not available when the record closed or to show that the administrative judge erroneously interpreted any statute or regulation. *See* [5 C.F.R. § 1201.115](#)(d). We therefore DENY the appellant's petition for review.

¶13 We REOPEN this case on our own motion under [5 C.F.R. § 1201.118](#) to address OPM's apparent concession, made for the first time on review, that it sent Mr. Djeridi "a legally deficient notice" of his right to elect a former spouse survivor annuity for the appellant. PFR File, Tab 4 at 4-5 n.1.

¶14 OPM has a statutory obligation to notify each annuitant annually of his election rights under [5 U.S.C. § 8339\(j\)](#). [5 U.S.C. § 8339](#) note; *Hernandez*, 450 F.3d at 1334; *Brush v. Office of Personnel Management*, [982 F.2d 1554](#), 1559-60 (Fed. Cir. 1992). "A former spouse may receive survivor annuity benefits, even without an affirmative election by the annuitant, if (1) the annuitant did not receive the required notice, and (2) 'there [is] evidence sufficient to show that the retiree indeed intended to provide a survivor annuity for the former spouse.'" *Hernandez*, 450 F.3d at 1334-35 (quoting *Wood v. Office of Personnel Management*, [241 F.3d 1364](#), 1368 (Fed. Cir. 2001)).

¶15 On appeal, OPM had the burden of proving both that it sent the annual notice and that the notice was adequate to inform Mr. Djeridi of the specific election requirements under [5 U.S.C. § 8339\(j\)](#). See *Painter v. Office of Personnel Management*, [106 M.S.P.R. 385](#), ¶ 5 (2007). We find that OPM has not met its burden.

¶16 OPM's annual notices failed to inform Mr. Djeridi that his pre-divorce election of a maximum survivor annuity had been nullified by the intervening divorce, and that he was required to make a new election within 2 years of their divorce if he still intended that his former spouse receive an annuity. IAF, Tab 6, Subtab 2E at 1-6; see *Simpson v. Office of Personnel Management*, [347 F.3d 1361](#), 1364-65 (Fed. Cir. 2003) ("[A]nnual notice is deficient when it fails to inform an annuitant that, even if he had previously elected a spousal annuity when married, he must make a new election after his divorce."). Similarly, OPM's notices also failed to inform Mr. Djeridi that his continued receipt of a reduced annuity did not constitute an election to provide for a survivor annuity for his former spouse. IAF, Tab 6, Subtab 2E at 3-6; see *Simpson*, 347 F.3d at

1366; *Wood*, 241 F.3d at 1367 (holding that a letter OPM sent to the annuitant was inadequate notice because it failed to mention a requirement that he make an election after his divorce, and it failed to inform him that his “continued receipt of a reduced annuity would not suffice to constitute an election”). As the court explained in *Simpson*, we find that “OPM’s notices of record fail to comply with the statutory requirement of notice because an annuitant who elects an annuity for his (or her) spouse while married reasonably expects that he has complied with the statute sufficiently to cause the annuity to be paid on his death.” *See* 347 F.3d at 1364.

¶17 As set forth above, *supra* ¶¶ 2-4, beyond the annual notices, there was substantial communication between OPM and Mr. Djeridi prior to the expiration of the 2-year election period. We have reviewed these communications, but find no indication that OPM ever expressly informed Mr. Djeridi that a pre-divorce election automatically terminates upon divorce and that an annuitant must make a new election to provide a survivor annuity for a former spouse. Thus, none of this additional communication cured the fundamental defects in OPM’s annual notices. *See Simpson*, 347 F.3d at 1364-65; *Wood*, 241 F.3d at 1367.

¶18 We find that the appellant has shown by preponderant evidence that Mr. Djeridi intended that she receive a maximum survivor annuity, as he had elected prior to their divorce. It is undisputed that Mr. Djeridi continued to receive a reduced annuity as if his pre-divorce survivor benefit election remained effective throughout his lifetime. Continued acceptance of a reduced annuity can be a strong indication that the annuitant intended to provide a survivor annuity for the former spouse. *Wood*, 241 F.3d at 1368 (“In both *Brush* and *Vallee* [*v. Office of Personnel Management*, [58 F.3d 613](#) (Fed. Cir. 1995)], this court found that an employee’s continued acceptance of a reduced annuity following divorce, standing alone, adequately demonstrated that employee’s intent to provide a survivor annuity for the former spouse.”); *accord Simpson*, 347 F.3d at 1366-67. OPM argues that because “Mr. Djeridi wrote to OPM to state that he did not wish

to elect a former spouse survivor annuity for the appellant . . . his actions were fundamentally inconsistent with the intent to continue to provide survivor benefits, and the continuation of the survivor reduction do[es] not ‘stand alone’ to show intent.” PFR File, Tab 4 at 5 n.1. We find that the record does not support OPM’s contention. OPM is apparently referring to Mr. Djeridi’s letter to OPM in mid-June 2001, instructing OPM to “disregard” his June 13, 2001 letter because, “I’ve changed my mind. I don’t want the application.” IAF, Tab 6, Subtab 2E at 7. We find, however, that Mr. Djeridi’s prior communication with OPM indicates that Mr. Djeridi was considering the possibility of slightly reducing the amount of the appellant’s maximum survivor benefit, rather than eliminating it entirely.<sup>2</sup> *Id.* at 9-10. In that context, his mid-June 2001 letter indicating that he had “changed [his] mind,” referred to his prior inquiry for more information on that option. *Id.* at 7, 9-10. Thus, we find that this final correspondence from Mr. Djeridi to OPM supports a finding that Mr. Djeridi intended that OPM make no adjustment to the maximum survivor annuity election he had made at the time of his retirement. Mr. Djeridi never sought to cancel the reduction to his annuity, and he did not take affirmative steps to discontinue the survivor annuity benefits for the appellant after the divorce. *Cf. Hernandez*, 450 F.3d at 1334-35 (former spouse seeking a survivor annuity failed to demonstrate that her ex-husband intended that she receive such benefits based on his continued receipt of a reduced annuity, because her ex-husband had informed OPM during the election period that he wanted to terminate survivor benefits for the appellant). Under the circumstances, we find that Mr. Djeridi adequately manifested his intention that

---

<sup>2</sup> OPM acknowledged as much in its brief below when it explained that, in completing and returning the form RI 20-64, Mr. Djeridi “had only made an inquiry to use a survivor base of \$1000, . . . not an election.” IAF, Tab 6 at 2; *see also* PFR File, Tab 4 at 4 (“He completed the form in such a manner as to only request information about the cost of a partial former spouse survivor annuity benefit.”).

the appellant receive a maximum survivor annuity consistent with his pre-divorce election. *See Simpson*, 347 F.3d at 1366-67; *Wood*, 241 F.3d at 1368.

### ORDER

¶19 We ORDER the Office of Personnel Management (OPM) to award the appellant a former spouse survivor annuity as if Mr. Djeridi had made a timely re-election after their divorce to provide her with a maximum survivor annuity. OPM must complete this action no later than 20 days after the date of this decision.

¶20 We also ORDER OPM to inform 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 that 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\(b\)](#).

¶21 No later than 30 days after OPM tells the appellant that 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\(a\)](#).

¶22 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 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](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:

---

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