

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

2010 MSPB 246

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

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

December 21, 2010

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

Elaine Kaplan, Esquire, R. Alan Miller, Esquire, Earl A. Sanders, Esquire,
and 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 Pursuant to [5 U.S.C. § 7703](#)(d), the Director of the Office of Personnel Management (OPM) requests that the Board reconsider its final decision in this case, *McKenzie v. Office of Personnel Management*, [113 M.S.P.R. 240](#) (2010). For the reasons set forth below, we DENY the Director's petition for

reconsideration and AFFIRM the final decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 Mr. McKenzie retired from the federal service on December 31, 1998, under the Civil Service Retirement System (CSRS). At that time, he elected a survivor annuity for his wife, Ms. McKenzie. *McKenzie*, [113 M.S.P.R. 240](#), ¶ 2. Mr. and Ms. McKenzie divorced on March 16, 2006. *Id.* The Stipulated Judgment and Marital Settlement Agreement issued on that date did not mention the survivor annuity and therefore did not expressly award such benefits to Ms. McKenzie. *McKenzie*, [113 M.S.P.R. 240](#), ¶ 2.

¶3 The parties discovered this inadvertent omission¹ and attempted to rectify it. *Id.*, ¶ 11. Mr. McKenzie’s attorney, Susan Albertoni, drafted an order, entitled “Retirement Benefits Order: Re Division of Federal Employees’ Retirement System Benefits,” that explicitly awarded a former spouse survivor annuity to Ms. McKenzie. *Id.* The order states that Mr. McKenzie agreed “to take all necessary steps to elect a survivor annuity” for Ms. McKenzie. *Id.* On March 30, 2006, Ms. Albertoni sent the draft retirement benefits order to OPM to review to “determine if it meets with your criteria for approval before we process it with the Court.” Initial Appeal File (IAF), Tab 1, Attach. A. When OPM did not respond, she re-sent it a month later. *Id.*, Tab 1, Attach. B. She noted that “[t]o this date we have not received a response to our March 30, 2006 letter.” *Id.* In addition, Ms. Albertoni repeatedly attempted to speak to OPM officials by telephone and left several voicemail messages. *McKenzie*, [113 M.S.P.R. 240](#),

¹ The oversight was apparently due to the fact that Mr. McKenzie had already elected a survivor annuity for Ms. McKenzie at the time of his retirement, and he was unaware that he needed to make a reelection to preserve her survivor benefits post-divorce. *See* Initial Appeal File, Tab 1, Attach. F (Declaration in Support of Notice of Motion).

¶ 11. OPM never responded to Ms. Albertoni's requests for information and assistance. *Id.*

¶ 4 On July 6, 2006, the state court issued the retirement benefits order drafted by Mr. McKenzie's attorney. *Id.*, ¶ 2. Ms. Albertoni forwarded OPM the divorce judgment, marital settlement agreement, and retirement benefits order on July 17, 2006, along with a cover letter requesting that OPM "administer the court's orders as indicated." *Id.*, ¶¶ 3 & 12.

¶ 5 Another four months passed before OPM responded. *Id.*, ¶¶ 3 & 13. In letters to the parties dated November 9, 2006, OPM granted Ms. McKenzie her 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 because such an award should have been made in the first order dividing property, i.e., the Marital Settlement Agreement.² *Id.* OPM did not notify the parties that Mr. McKenzie still had the option, within two years from the date of divorce, to reelect a survivor annuity for Ms. McKenzie or instruct him on how to do so. *Id.*, ¶ 13.

¶ 6 Mr. McKenzie avers that he received a Notice of Annuity Adjustment dated February 1, 2007, that recalculated his annuity without deducting for a survivor annuity. *Id.* He states that this notice included a statement that he could reelect survivor benefits for his former spouse if he made the request within two years of the divorce. *Id.* Thereafter, Mr. McKenzie's attorney again attempted to get in contact with OPM. In a letter to Ms. McKenzie's attorney, Ms. Albertoni wrote:

As to the issues surrounding the survivor benefits inadvertently omitted from the original Judgment, no less than five messages have been left with Ms. Jackie Ragin, Claims I Group, Court Ordered Benefits Branch, telephone (202) 606-0222. Numerous messages have been left requesting information as to the proper pleading

² The applicable retirement statute provides that subsequent modifications to a divorce decree or court-approved settlement agreement are not effective if made after the employee's retirement. [5 U.S.C. § 8341](#)(h)(4).

necessary to insure that Ms. McKenzie receives an award of survivor annuity. To date, there has been no return call. Frequently, Ms. Ragin's voice mail is full and we are unable to request a return call. Formal correspondence has now been forwarded to Ms. Ragin requesting a response to our inquiry.

IAF, Tab 1, Attach. E.

¶7 The parties eventually returned to state court and, on October 25, 2007, obtained an additional order amending the Stipulated Judgment to include the award of a former spouse survivor annuity. *McKenzie*, [113 M.S.P.R. 240](#), ¶¶ 3 & 14. Ms. McKenzie submitted the amended order to OPM on several occasions in support of her application for a former spouse survivor annuity. *Id.* On November 6, 2008, OPM denied Ms. McKenzie's application for survivor benefits on the basis that the October 25, 2007 order was not acceptable for processing. *Id.*, ¶¶ 3, 15.

¶8 Ms. McKenzie requested that OPM reconsider, and in a February 10, 2009 decision, OPM affirmed its initial decision. *Id.* The reconsideration decision found that the Stipulation Judgment and Marital Settlement Agreement did not award a former spouse survivor benefit, and that the July 6, 2006 order was not acceptable for processing. *Id.* OPM also addressed the option of election:

You and Mr. McKenzie were both sent separate letters dated November 9, 2006, which stated that the court order did not provide a former spouse survivor benefit. Therefore he could have elected one for you within 2 years of [the] date of your divorce. Our records do not indicate that Mr. McKenzie made a voluntary election of former spouse survivor benefits for you.

IAF, Tab 6, Subtab 2. However, by the time OPM had issued its reconsideration decision, the two-year window had passed.

¶9 Ms. McKenzie then filed the instant Board appeal, which was signed by Mr. McKenzie. She asserted that Ms. Albertoni inadvertently omitted the award of survivor benefits when she drafted the Marital Settlement Agreement, that both parties had made exhaustive attempts to cure the omission, and that OPM failed to provide timely guidance. *McKenzie*, [113 M.S.P.R. 240](#), ¶ 4. The appeal

requested “the opportunity to reinstate the survivor benefit.... We have done all in our power to resolve this in a timely manner.” IAF, Tab 1 (appeal form, block 29).

¶10 The administrative judge determined that Ms. McKenzie was entitled to receive a former spouse survivor annuity because OPM should have considered the October 25, 2007 court order to be a valid election of a former spouse survivor annuity by Mr. McKenzie. *McKenzie*, [113 M.S.P.R. 240](#), ¶ 5. OPM and Mr. McKenzie, as intervenor, filed petitions for review of the administrative judge’s decision. *Id.*, ¶ 6. The Board affirmed and modified the initial decision, holding that Mr. McKenzie, through his attorney, communicated to OPM a voluntary election, in writing, to provide a former spouse survivor annuity to Ms. McKenzie. *Id.*, ¶ 18. OPM seeks reconsideration of that decision.³ Reconsideration File (RF), Tab 1.

ANALYSIS

¶11 The law provides that a former spouse of a federal employee is entitled to a survivor annuity if and to the extent a divorce decree or court order expressly provides for one, [5 U.S.C. § 8341\(h\)\(1\)](#), or if the annuitant makes a new election to grant a survivor annuity within two years after the date on which the marriage dissolves, *id.* at 8339(j)(3). *Downing v. Office of Personnel Management*, [619 F.3d 1374](#), 1376-77 (Fed. Cir. 2010). In its request for reconsideration, OPM contends that the Board’s decision is in conflict with § 8341(h)(4), which prohibits modifications of court orders for the purpose of effectuating former

³ The Director of OPM may file a petition for reconsideration of a final decision of the Board if the Director determines: 1) that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management; and 2) that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. See [5 U.S.C. § 7703\(d\)](#); [5 C.F.R. § 1201.119\(a\)](#). The Board will consider *de novo* the arguments raised by OPM on petition for reconsideration. *Griffin v. Office of Personnel Management*, [83 M.S.P.R. 67](#), 72 (1999).

spouse survivor annuity awards. RF, Tab 3 at 32-34. However, the issue before us is not whether the retirement benefits order constitutes a prohibited modification of a court order; rather, it is whether the retirement benefits order was an election under OPM's governing regulations. Because the statutory and regulatory framework permit an election of a survivor annuity within two years of the issuance of the termination of marriage, it does not constitute a prohibited modification of the initial court order. The provisions of § 8341(h)(4) are not nullified by giving force and effect to an election under the circumstances presented here. The July 6, 2006 order, which was transmitted to OPM within two years after the divorce, although defective under § 8341(h)(1), nevertheless constituted an election by Mr. McKenzie.

¶12 Both the U.S. Court of Appeals for the Federal Circuit and the Board have recognized that a court order that is defective under § 8341(h)(1) may nevertheless qualify as an election under § 8339(j)(3). *See Warren v. Office of Personnel Management*, [407 F.3d 1309](#), 1317 (Fed. Cir. 2005); *Bleidorn v. Office of Personnel Management*, [111 M.S.P.R. 456](#), ¶¶ 7, 9-11 (2009). Here, the July 6, 2006 retirement benefits order explicitly awards a former spouse survivor annuity to Ms. McKenzie, stating, inter alia, that Mr. McKenzie “agrees to take all necessary steps to elect” a former spouse survivor benefit for Ms. McKenzie. *McKenzie*, [113 M.S.P.R. 240](#) ¶ 11. The Board held that the order, buttressed by other correspondence sent to OPM by Mr. McKenzie's attorney, as well as the October 25, 2007 amended judgment, “all indicate Mr. McKenzie's clear intent to elect a former spouse survivor annuity.” *Id.*, ¶ 18.

¶13 OPM's reconsideration request does not challenge the Board's finding that the July 6, 2006 retirement benefits order “plainly awards a former spouse annuity” for Ms. McKenzie, *see id.*, but instead asserts that the order does not qualify as an election because (1) it was not signed by Mr. McKenzie and (2) there was “no specific designation of Ms. Albertoni as his agent to make an election.” RF, Tab 3 at 32. These requirements do not appear in the applicable

statute, [5 U.S.C. § 8339\(j\)\(3\)](#), or in the relevant OPM regulation, [5 C.F.R. § 831.632\(a\)\(1\)](#), but OPM bases its position on certain legislative history and case law stating that only the retiree can make an election. RF, Tab 3 at 30-31. However, nothing in the legislative history or cases cited by OPM states that an election is invalid if it is communicated to OPM by the retiree's attorney rather than by the retiree himself. *Id.* at 31.

¶14 OPM further contends that these requirements were approved by the Federal Circuit in *Warren*. OPM asserts that in *Warren* “clearly, the Federal Circuit did not view an order agreed to by counsel in the divorce proceedings to constitute an election by the retiree to provide a former spouse survivor annuity.” RF, Tab 3 at 32. However, in *Warren* the Federal Circuit declined to address whether the order at issue qualified as an election. 407 F.3d at 1317. Rather, the court stated that the election argument, raised at oral argument, presented “factual issues that we are not in a position to resolve.” *Id.* To be sure, the court noted that the retiree had not signed the state court order and stated that “it is therefore not entirely clear that [the retiree] authorized the entry of that order.” *Id.* However, if, as OPM asserts, the court “clearly” found that such an order could not qualify as an election, the court would have so held rather than remanding so that the Board could address the issue “based on the necessary factual background.”⁴ *Id.*

¶15 OPM further argues that Ms. Albertoni could not make an election for her client, Mr. McKenzie, because the divorce proceeding was a separate matter and therefore Ms. Albertoni could not act “as his agent to make a voluntary election of a former spouse survivor annuity for his former spouse.” RF, Tab 3 at 26. However, we do not view OPM's performance of its ministerial role as a separate

⁴ After the Federal Circuit issued its decision, OPM rescinded its reconsideration decision, depriving the Board of jurisdiction over the matter. *Warren v. Office of Personnel Management*, MSPB Docket No. SE-0831-03-0055-M-1 (Initial Decision, Feb. 17, 2006) (dismissing for lack of jurisdiction).

proceeding that is beyond the scope of the divorce litigation. The distribution of marital property, of which Mr. McKenzie's CSRS benefits were a significant share, was an essential part of the divorce proceedings.

¶16 OPM has not identified any authority that requires a retiree to sign his written election or any authority that prescribes a designation or appearance to be filed with OPM by the retiree's attorney. Nor is there any evidence that OPM ever notified the parties of such requirements despite the parties' diligence in calling and writing to OPM "requesting information as to the proper pleading necessary to insure that Ms. McKenzie receives an award of survivor annuity." IAF, Tab 1, Attach. E. In sum, the problem with OPM's position is that its own procedures do not require that an election be signed by the retiree or a "designation" stating that an attorney has been authorized to make an election on behalf of her client. Rather, the pertinent OPM regulation provides:

(a)(1) Except as provided in paragraphs (b) and (c) of this section, when the marriage of a retiree who retired on or after May 7, 1985, terminates after retirement, he or she may elect in writing a fully reduced annuity or a partially reduced annuity to provide a former spouse annuity. Such an election must be filed with OPM within 2 years after the retiree's marriage to the former spouse terminates.

[5 C.F.R. § 831.632\(a\)\(1\)](#).

¶17 Based on OPM's regulation, we hold that an applicant for former spouse survivor benefits makes a prima facie case of entitlement to a survivor annuity when the retiree's intent to provide a former spouse annuity has been conveyed to OPM (1) in writing, and (2) within two years after the retiree's marriage to the former spouse has terminated. Such a prima facie case will be sufficient for the applicant to meet her burden of proving entitlement to a former spouse survivor annuity unless overcome by evidence that the retiree held a contrary intent at the time the purported election was made.

¶18 Ms. McKenzie has met those requirements under the circumstances of this case. Mr. McKenzie's attorney drafted a written document stating that Mr.

McKenzie “agrees to take all necessary steps to elect” a former spouse survivor benefit for Ms. McKenzie, and this written document was mailed, on several occasions, to OPM within two years from the date that the marriage was terminated. *McKenzie*, [113 M.S.P.R. 240](#), ¶ 11. It is well-established that an individual is bound by the acts and omissions of his attorney. *Link v. Wabash R.R. Co.*, [370 U.S. 626](#), 633-34 (1962); *Rowe v. Merit Systems Protection Board*, [802 F.2d 434](#), 437 (Fed. Cir. 1986). There is no evidence that Mr. McKenzie held a contrary intent at the time the election was made on July 17, 2006, when the finalized order was transmitted to OPM. While Mr. McKenzie states that by October 25, 2007, he had changed his mind, and that he does not currently “desire” a survivor annuity for his former wife, *see McKenzie*, [113 M.S.P.R. 240](#), ¶ 18, an election of survivor benefits for a former spouse, once made, is irrevocable. [5 U.S.C. § 8339\(j\)\(3\)](#) (“The reduction... shall be permanent and unaffected by any future termination of the entitlement of the former spouse.”).

¶19 Lastly, we note that the parties repeatedly attempted to contact OPM for guidance on how to provide survivor benefits for Ms. McKenzie. “It seems safe to assume that an agency that administers a government program, particularly those as complex as the programs administered by OPM, brings to it a level of expertise not necessarily shared by the general public.” *Byrum v. Office of Personnel Management*, [618 F.3d 1323](#), 1329 (Fed. Cir. 2010). Clearly, the parties would have benefited from OPM’s expertise, but OPM repeatedly and routinely ignored their inquiries. *See, e.g.*, IAF, Tab 1, Attach. E. This is unfortunate, because had OPM assisted the parties, this prolonged litigation may not have been necessary.

ORDER

¶20 Accordingly, and upon reconsideration, we AFFIRM our final decision in this case, *McKenzie v. Office of Personnel Management*, [113 M.S.P.R. 240](#) (2010), AS MODIFIED by this Opinion and Order. The Director may seek

judicial review in the United States Court of Appeals for the Federal Circuit.
[5 U.S.C. § 7703\(d\)](#).

¶21 We ORDER OPM to issue a new decision that treats the July 6, 2006 retirement benefits order, transmitted to OPM on July 17, 2006, and effective on that date, as Mr. McKenzie's election pursuant to [5 U.S.C. § 8339\(j\)](#) and [5 C.F.R. § 831.632\(a\)](#) of survivor benefits for Ms. McKenzie under [5 U.S.C. § 8341\(h\)](#). OPM must complete this action no later than 20 days after the date of this decision.

¶22 We also ORDER OPM to tell the appellant and intervenor 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 and intervenor 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\(b\)](#).

¶23 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\(a\)](#).

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 Clerk of the Board.

NOTICE TO THE APPELLANT AND THE INTERVENOR 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.