

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

2012 MSPB 114

Docket No. SF-0831-11-0707-I-1

**Dean D. Lee,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

September 28, 2012

Megan C. Johnson, Clackamas, Oregon, for the appellant.

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

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision affirming a reconsideration decision by the Office of Personnel Management (OPM) that denied his election of a survivor annuity as untimely filed. For the following reasons, we AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

BACKGROUND

¶2 The appellant retired under the Civil Service Retirement System (CSRS) on July 3, 2003. Initial Appeal File (IAF), Tab 5, Subtab 5 at 4. At that time, he

was not married, and he elected an unreduced annuity payable only during his lifetime. *Id.* On May 8, 2006, the appellant married Megan C. Johnson. *Id.* at 3. On October 1, 2009, the appellant filed a request to elect a survivor annuity for his spouse.¹ *Id.* at 1. OPM issued an initial decision denying the appellant's request as untimely filed under [5 U.S.C. § 8339\(k\)\(2\)\(A\)](#), and it subsequently affirmed the denial in a reconsideration decision. *Id.*, Subtabs 2, 4.

¶3 The appellant filed an appeal of OPM's reconsideration decision, wherein he acknowledged that he failed to file his election of a survivor annuity within the 2-year timeframe permitted under the CSRS but contended that his mental condition (Frontotemporal Dementia) provided a basis for waiving the time limit. IAF, Tab 1. Since the appellant did not request a hearing, the administrative judge issued an initial decision affirming OPM's reconsideration decision based solely on the written record. IAF, Tab 9, Initial Decision (ID). On petition for review, the appellant now reiterates that he was entitled to a waiver of the 2-year time limit for filing a survivor annuity election because he was unable to make the election during the relevant time period because of mental incompetence. Petition for Review (PFR) File, Tab 1 at 4.

ANALYSIS

¶4 An individual seeking retirement benefits bears the burden of proving entitlement to those benefits by preponderant evidence. *Cheeseman v. Office of Personnel Management*, [791 F.2d 138](#), 140-41 (Fed. Cir. 1986); [5 C.F.R.](#)

¹ On review, the appellant also contends that his October 1, 2009 request was his second request to provide a survivor annuity for his spouse and that he filed an earlier request 2 months after the filing deadline. Petition for Review File, Tab 1 at 4. We are unable to find any evidence in the record to support this assertion; however, even if the appellant is correct, he has still acknowledged that he failed to file the request within the 2-year filing deadline set by the statute. Therefore, it would not change the outcome in this appeal. *See Panter v. Department of the Air Force*, [22 M.S.P.R. 281, 282](#) (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

[§ 1201.56](#)(a). To meet this burden in this case, the appellant must show that he elected to provide a survivor annuity for his spouse “in a signed writing received” by OPM within 2 years after his marriage. See [5 U.S.C. § 8339](#)(k)(2)(A); *Vincent v. Office of Personnel Management*, [78 M.S.P.R. 307](#), 310 (1998). In addition, the Board has recognized three possible bases for waiving a filing deadline prescribed by statute or regulation: (1) the statute or regulation may provide for a waiver under specified circumstances; (2) an agency’s affirmative misconduct may preclude enforcement of the deadline under the doctrine of equitable estoppel; and (3) an agency’s failure to provide a notice of rights and the applicable filing deadline, where such notice is required by statute or regulation, may warrant a waiver of the deadline. See *Perez Peraza v. Office of Personnel Management*, [114 M.S.P.R. 457](#), ¶ 7 (2010).

¶5 In this appeal, the appellant has not alleged that an agency’s affirmative misconduct precluded him from filing a timely request for a survivor annuity, nor has he asserted that OPM failed to provide the required notice of rights and the applicable filing deadline. The dispositive issue, therefore, is whether a statute or regulation provides a basis for waiving the filing deadline. As noted above, the appellant has primarily argued throughout this appeal that he is entitled to a waiver of the 2-year filing deadline on the basis of mental incompetence.

¶6 However, our reviewing court has unequivocally held that [5 U.S.C. § 8339](#)(k)(2)(A)² does not permit waiver of the filing deadline based on mental incapacity. See *Schoemakers v. Office of Personnel Management*, [180 F.3d 1377](#), 1381-82 (Fed. Cir. 1999); see also *Dorsey v. Office of Personnel Management*, [587 F.3d 1111](#), 1115 (Fed. Cir. 2009). It has found that statutory language unambiguous in its requirement that, to obtain a survivor’s annuity upon

² We also have reviewed OPM’s regulation and have found no provision implementing [5 U.S.C. § 8339](#) that provides for waiver of the 2-year filing deadline based upon mental incompetence.

post-retirement marriage, an annuitant must file a signed writing within 2 years after the marriage and that nothing in the language or the legislative history suggests that Congress intended to permit a waiver of this deadline because of an annuitant's mental condition or incapacity. *Schoemakers*, 180 F.3d at 1382. As it noted in *Schoemakers*, “[w]here Congress intended to permit the waiver of filing deadlines for government annuitants because of their mental problems, it explicitly so provided.” *Id.* Observing that another CSRS provision, [5 U.S.C. § 8337\(b\)](#), specifically provides for such a waiver of the filing deadline for disability retirement applications, the court stated that the unequivocal requirement of filing within 2 years of marriage in section 8339(k)(2)(A) “strongly indicates that Congress did not intend to permit waiver of that requirement because of the annuitant’s mental condition.” *Schoemakers*, 180 F.3d at 1382. Based upon this precedent, we must conclude that the appellant has failed to show that he is entitled to waiver of the deadline under statute or regulation.

¶7 In the initial decision, the administrative judge examined the appeal under Board precedent holding that annuity elections are valid only if made by mentally competent individuals. *Id.* at 2-3, 6; *see Dombek v. Office of Personnel Management*, [43 M.S.P.R. 43](#) (1989) (affirming OPM’s decision because the appellant failed to prove that his wife was mentally incompetent at the time she elected an unreduced annuity payable only during her lifetime with no survivor benefits payable to the appellant); *Pooler v. Office of Personnel Management*, [23 M.S.P.R. 51](#), 53 (1984) (Board invalidated a retiree’s election of a life annuity with no survivor benefit under [5 U.S.C. § 8339\(j\)](#) when there was preponderant evidence that he was incompetent when he made the election). She declined to apply that precedent here on the grounds that those cases involved affirmative elections that could be voided, whereas this case involves a failure to elect, and, thus, there is no action for the Board to invalidate. *Id.* at 7. We make no finding as to whether the Board could void a decision not to elect a survivor annuity on

the basis of mental incompetence under *Pooler*, finding it sufficient to base our holding on the grounds that [5 U.S.C. § 8339](#) does not permit a waiver of the election deadline for mental incompetence. *See Schoemakers*, 180 F.3d at 1381-82.

¶8 Accordingly, we sustain OPM's reconsideration decision denying the appellant's election of a survivor annuity for his spouse as untimely filed.

ORDER

¶9 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 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.