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

**2013 MSPB 63**

Docket No. DC-0831-11-0677-I-1

**Catherine Anne Hughes,**

**Appellant,**

**v.**

**Office of Personnel Management,**

**Agency.**

August 15, 2013

Neil A.G. McPhie, Esquire, Arlington, Virginia, 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 petitions for review of an initial decision that affirmed the reconsideration decision of the Office of Personnel Management (OPM) informing the appellant that her survivor annuity would be offset based on her entitlement to benefits under the Social Security Act. For the following reasons, we GRANT the petition for review, REVERSE the initial decision, and ORDER

OPM to recalculate the appellant's survivor annuity consistent with this decision to account for the fact that she is not entitled to social security survivor benefits.[*]

## BACKGROUND

¶2 After the death of her husband, Initial Appeal File (IAF), Tab 8, Subtab 6 at 13, the appellant filed an application for a Civil Service Retirement System (CSRS) survivor annuity based on her husband's federal service, *id*. at 9-12. OPM notified the appellant that her survivor annuity was subject to an offset if she was "eligible" for Social Security Administration (SSA) survivor benefits. *Id*. at 8. OPM later notified the appellant that SSA had verified her "eligibility" for social security benefits, and that the offset amount from her CSRS survivor annuity would be $721.24, which represented the portion of the monthly social security benefit that she was "eligible" to receive as a result of her husband's federal service performed after December 31, 1983, while covered under both the Federal Insurance Contributions Act and CSRS deductions. *Id*. at 7. After the appellant requested reconsideration, OPM affirmed its initial decision to offset the appellant's survivor annuity because she was "entitled, or on proper application would be entitled," to social security benefits. IAF, Tab 8, Subtab 2. OPM found that, although the appellant was working and could not collect the social security benefit, this did not negate her "eligibility" for the benefit. *Id*.

¶3 On appeal, the appellant asserted that, because her earned income exceeded the income limit for receiving a social security benefit, such benefits were not payable to her, *see* IAF, Tab 8, Subtab 5 at 1-6, and therefore her CSRS survivor annuity should not be reduced because she was not "entitled" to SSA benefits under the law, *e.g.*, IAF, Tab 11 at 4-7. The administrative judge, however, affirmed OPM's reconsideration decision. IAF, Tab 16, Initial Decision (ID) at 2,

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[*] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for

6. The administrative judge found that social security law provides that deductions in social security payments "to which an individual is entitled" shall be made on the basis of an individual's wages and income, and that the appellant's income, therefore, resulted in a deduction to the SSA benefits to which she was "entitled." ID at 5. The administrative judge held that, even though no SSA benefits were payable to the appellant due to her income, she was still "entitled" to those benefits. *Id*. Finally, the administrative judge noted that under 5 C.F.R. § 831.1006(f), if a social security benefit is reduced under any provision of the Social Security Act, even if reduced to zero, entitlement to that benefit is not considered to have terminated. *Id*.

¶4 The appellant asserts on review that common usage of the term "entitled," which she claims is not defined in the applicable statutes or OPM's regulations, requires proper grounds for seeking or claiming something, which includes the right to receive what is sought or claimed. Petition for Review (PFR) File, Tab 1 at 7. She also contends that the statutory language must be construed to give meaning to every word, that the language of the statute is clear, and that, even if congressional intent is not clear, OPM's interpretation of the statute is not reasonable and not entitled to deference. *Id*. at 7, 14-15. OPM has opposed the appellant's petition for review. Petition for Review File, Tab 4.

## ANALYSIS

¶5 The computation of a CSRS survivor annuity is governed, in relevant part, by 5 U.S.C. § 8349. For purposes of this appeal, § 8349(b)(1)(B) provides that a survivor annuity "to which a person is entitled under this subchapter" shall be "subject to reduction under this subsection if that . . . person is also entitled (or would on proper application also be entitled) to any similar benefits under Title II

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review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

of the Social Security Act based on the wages and self-employment income of such individual described in section 8402(b)(2)."

¶6 Under the relevant provisions of Title II of the Social Security Act, *see* 42 U.S.C. § 402(e), a widow of an individual who died a fully-insured individual, if such widow is not married, has attained age 60, has filed an application for widow's insurance benefits, and is not entitled to old-age insurance benefits, "shall be entitled to a widow's insurance benefit" beginning with the first month in which she becomes so entitled to such insurance benefits, and ending with the month preceding the first month in which any of the following occurs: she remarries, dies, or becomes entitled to an old-age insurance benefit equal to or exceeding the primary insurance amount of such deceased individual. Deductions shall be made from any payment or payments under Title 42 to which an individual is entitled, and from any payment or payments to which any other persons are entitled on the basis of such individual's wages and self-employment income, until the total of such deductions equals such individual's benefit or benefits under 42 U.S.C. § 402 for any month. 42 U.S.C. § 403(b)(1).

¶7 The starting point for any case involving statutory interpretation is the language of the statute itself, which must be examined to determine Congress' intent and purpose on the question at issue. *Adkins v. Office of Personnel Management*, 104 M.S.P.R. 233, ¶ 12 (2006), *aff'd sub nom. Springer v. Adkins*, 525 F.3d 1363 (Fed. Cir. 2008). In addition, it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *Department of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 342 (1994); *Fitzgerald v. Department of the Air Force*, 108 M.S.P.R. 620, ¶ 9 (2008); *Styslinger v. Department of the Army*, 105 M.S.P.R. 223, ¶ 30 (2007). This rule of statutory construction has even greater force when, as in this case, the identical words are in the same statutory section. *See CUNA Mutual Life Insurance Co. v. United States*, 169 F.3d 737, 741 (Fed. Cir. 1999).

¶8 The statutes in question do not define the term "entitled." Nevertheless, "entitled" is used three times in the same subsection of 5 U.S.C. § 8349(b)(1)(B). The first use of the term clearly contemplates a benefit that a person has a legal right to actually receive. Otherwise, such a survivor annuity could not be "subject to reduction." Applying the rule of statutory construction that identical words used in the same statutory section are intended to have the same meaning, we find that the two other references to "entitled" in § 8349(b)(1)(B) also refer to a benefit that a person has a legal right to receive without impediment. *See Johnson v. Department of Veterans Affairs*, 91 M.S.P.R. 405, ¶ 11 (2002) (when a word is used in the same section of a statute more than once, and the meaning is clear in one place, under the doctrine of noscitur a sociis, the word will be given the same meaning in any other place; the word "employer" in the definition section of the Uniformed Services Employment and Reemployment Rights Act of 1994 should be given the same meaning at each appearance).

¶9 This holding is consistent with the definition of "entitled" set forth in the applicable SSA regulations. Under 20 C.F.R. § 404.303, "entitled" means "that a person has applied and has proven his or her right to benefits for a period of time." In *Stephenson v. Office of Personnel Management*, 705 F.3d 1323, 1326-28 (Fed. Cir. 2013), the court used this regulatory definition to interpret 5 U.S.C. § 8452, which requires OPM to reduce a disability annuity under the Federal Employees' Retirement System (FERS) "for any month in which an annuitant is entitled both to an annuity under this subchapter . . . and to a disability insurance benefit under section 223 of the Social Security Act." Section 223 of the Social Security Act provided, in relevant part, that "[n]o payment under this paragraph may be made" to an individual who did not meet the definition of disability for any month in which he engaged in substantial gainful activity. *Id.* at 1327. The court held that, by its express terms, section 223 of the Social Security Act, which is codified at 42 U.S.C. § 423, prohibited SSA from paying Mr. Stephenson SSA disability benefits for any month during the period in which he performed

substantial gainful activity, even though he had previously applied for, and been granted, SSA disability benefits. *Id*. at 1328. The court noted that, if Mr. Stephenson had requested benefits for any month in which he performed substantial gainful activity, SSA would have been required to deny his request because he had no "right to benefits" during the period in question. *Id*. at 1328. Thus, the court held that under either SSA's definition of "entitled" or a dictionary definition cited by OPM, Mr. Stephenson was not "entitled" to SSA disability benefits for any month in which he performed substantial gainful activity, and OPM erred in denying his request to recalculate his FERS annuity to account for the cessation of his monthly SSA benefits. *Id*. at 1328, 1331.

¶10 We find that the definition of "entitled," as set forth at 20 C.F.R. § 404.303, applies here as it did in *Stephenson*. Thus, the appellant was not "entitled" to social security survivor benefits because she had no right to such benefits. Similar to section 223 of the Social Security Act, which was at issue in *Stephenson*, the SSA statute in this case, 42 U.S.C. § 403, essentially prohibits any payment at all in cases such as this one by providing that deductions shall be made from payments on the basis of an individual's wages and self-employment income, until the total of such deductions equals the such individual's SSA benefits. As in *Stephenson*, if the appellant in this case had requested survivor benefits from SSA, SSA would have been required to deny her request for payment because she had no "right to benefits" given her income. In fact, the record includes a letter to the appellant from SSA informing her that she was entitled to a payment of $255.00 because of the death of her spouse, SSA had checked to see if she could receive any other SSA benefit on her spouse's record, and "[w]e found that the benefit we are paying you now is the only one you can receive." IAF, Tab 11 at 12.

¶11 We acknowledge that under 5 U.S.C. § 8349(b)(2)(A), a reduction under § 8349(b)(1)(B) "shall be made in a manner consistent with the manner in which reductions under subsection (a) are computed and otherwise made," and that

under 5 U.S.C. § 8349(a)(3)(A), the amount of a benefit used in calculating a reduction "shall be determined without regard to subsections (b) through (l) of section 203 of the Social Security Act, and without regard to the requirement that an application for such benefit be filed." However, § 8349(b)(2)(A) addresses *how* a reduction is made if there is an entitlement to similar benefits under Title II of the SSA; it does not purport to define the term "entitled" in § 8349(b)(1)(B).

¶12 We also recognize that an actual payment of social security benefits is not required in order for the offset to be triggered. As pointed out by OPM on review, PFR File, Tab 4 at 5, the statute provides that a CSRS survivor annuity must be reduced if a person would, on proper application, be entitled to similar benefits under Title II of the SSA. However, there must at least be the prospect of payment if an application is filed. Here, even if the appellant had filed an application for social security survivor benefits, no payment would have been made because she had no legal right to actually receive such a payment.

¶13 Finally, we find that the Board's decisions in *Hicks v. Office of Personnel Management*, 44 M.S.P.R. 340 (1990), and *Johnson v. Office of Personnel Management*, 84 M.S.P.R. 533 (1999), *abrograted on other grounds by King v. Office of Personnel Management*, 97 M.S.P.R. 307, ¶ 15 (2004), are distinguishable from this appeal. In *Hicks*, 44 M.S.P.R. at 342-43, the Board affirmed OPM's determination to reduce a civil service annuity under 5 U.S.C. § 8332(j) because the appellant was entitled to social security benefits once he attained the age of 62, even though he was unable to collect such benefits because his income from his job was too high. The Board reasoned that there was no requirement that the appellant actually receive social security benefits before his annuity will be offset, and that 5 U.S.C. § 8332(j) provided an offset for both those entitled to social security benefits and those who would be entitled to such benefits upon proper application. *Id*. at 343. The Board also noted that 42 U.S.C. § 403(b) "presupposes entitlement; outside earnings become relevant only as a deduction, up to the amount of that entitlement." *Id*. Similarly, in *Johnson*,

84 M.S.P.R. 533, ¶¶ 3-4, 7, OPM relied on 5 U.S.C. § 8332(j) to recompute the appellant's annuity to eliminate the credit for post-1956 military service that had been included in his civil service annuity because he was entitled to SSA benefits after reaching the age of 62, even though he was not receiving such benefits due to his income from working. The Board held that the fact that the appellant would not have received a payment from SSA did not mean that he was not entitled to benefits, given that "entitlement to an old-age benefit is based solely on the individual's age, his status as a fully insured individual, and the filing of an application." *Id.*, ¶ 8.

¶14 Section 8332(j), however, provides that post-1956 military service shall be excluded in determining the aggregate period of service on which an annuity "payable under this subchapter . . . is based," if the individual "is entitled, or would on proper application be entitled," to monthly old-age or survivors benefits based on the individual's wages and self-employment income. Section 8332(j), therefore, includes the terms "payable" and "entitled," which could reasonably be interpreted as having different meanings. *See Brodsky v. Office of Personnel Management*, 108 M.S.P.R. 228, ¶ 20 (2008) (a definition's use of two different words – "employee" and "retiree" – to refer to two categories of former spouses indicated that the terms were intended to have different meanings). Here, by contrast, § 8349(b)(1)(B) only uses the term "entitled" to describe both the CSRS survivor annuity and the social security survivor benefit. Thus, *Hicks* and *Johnson* are distinguishable because the Board is interpreting a different statute in this case, and there is no indication that the Board in *Hicks* and *Johnson* relied upon, or was even aware of, SSA's regulatory definition of "entitled."

## ORDER

¶15 We ORDER OPM to issue a new reconsideration decision that recalculates the appellant's survivor annuity without the offset because she is not entitled to

SSA benefits. OPM must complete this action no later than 20 days after the date of this decision.

¶16 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).

¶17 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).

¶18 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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 the date of this order. *See* 5 U.S.C. § 7703(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, http://www.mspb.gov/appeals/uscode/htm. 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:

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