

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

**2013 MSPB 66**

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Docket No. SF-0843-13-0210-I-1

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**Robert C. Devlin,  
Appellant,  
v.  
Office of Personnel Management,  
Agency.  
August 20, 2013**

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Robert C. Devlin, Marina, California, pro se.

Cynthia Reinhold, 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 the Office of Personnel Management's (OPM) final decision denying his application for a Federal Employees' Retirement System (FERS) basic employee death benefit based on the federal service of his father and filed on behalf of his mother's estate. For the reasons set forth below, we DENY the petition for review and AFFIRM the initial decision.

## BACKGROUND

¶2 The administrative judge made the following findings of fact, which the parties do not dispute. The appellant's parents were married almost 42 years when his father, Daniel Devlin Sr., died on January 26, 2010. Initial Appeal File (IAF), Tab 11, Initial Decision (ID) at 2. At the time of his death, Mr. Devlin was a current FERS-covered employee of the Department of Defense with approximately 6 years of civilian service to his credit. *Id.* Following her husband's death, the appellant's mother, Darlene Devlin, started to prepare an Application for Death Benefits, Standard Form (SF) 3104, but she died on February 12, 2010, before she could sign or file it. *Id.*

¶3 On July 1, 2010, the appellant and his brother, co-administrators of their mother's estate, completed, signed, and filed the SF 3104, seeking the basic employee death benefit to which Mrs. Devlin would have been entitled under [5 U.S.C. § 8442](#)(b) as the current spouse and widow of a federal employee. ID at 2. OPM denied the application, but paid the estate with interest the FERS contributions that Mr. Devlin had made. *Id.* The appellant filed a Board appeal and the administrative judge affirmed OPM's decision on the basis that the estate was not legally entitled to apply for or receive the benefit. ID at 2-6. The appellant has filed a petition for review disputing the administrative judge's interpretation of the law. Petition for Review (PFR) File, Tabs 1, 5.

## ANALYSIS

¶4 The entitlement to a death benefit based on the service of an employee who dies while still in duty status is set forth in [5 U.S.C. § 8442](#)(b), and in OPM's implementing regulation, [5 C.F.R. § 843.309](#). If a federal employee under FERS dies after completing at least 18 months of civilian service, but before accruing 10 years of civilian service, the employee's qualifying current spouse is entitled

to receive the basic employee death benefit.<sup>1</sup> [5 U.S.C. § 8442\(b\)\(1\)\(A\)](#); *see Clark v. Office of Personnel Management*, [256 F.3d 1360](#), 1361-62 (Fed. Cir. 2001); *see also* [5 C.F.R. §§ 843.102](#), .309(a). The appellant bears the burden of proving entitlement to the death benefit. *Hall v. Office of Personnel Management*, [51 M.S.P.R. 560](#), 564 (1991), *aff'd*, 979 F.2d 216 (Fed. Cir. 1992) (Table); [5 C.F.R. § 1201.56](#).

¶5 This is a case of first impression before the Board, the issue being whether the estate of a current spouse may apply for and receive the section 8442(b)(1)(A) death benefit on the spouse's behalf. For the following reasons, we agree with the administrative judge that it cannot.

¶6 As for the application for benefits, [5 C.F.R. § 843.302](#) does not provide for application by an estate. It only permits the "current or former spouse" to apply, and a current or former spouse is by definition a "living person." [5 C.F.R. § 843.102](#). As for the receipt of benefits, [5 U.S.C. § 8442\(b\)](#) provides only that a "widow or widower" is entitled to payment of the death benefit.<sup>2</sup> It would therefore appear that the purpose of the FERS death benefit is to make provision for the employee's surviving spouse – not to augment her estate. This interpretation of the statute is consistent with decisions in similar cases standing for the proposition that the right to file for an annuity is personal to the annuitant.<sup>3</sup> *See, e.g., Davis v. Office of Personnel Management*, [938 F.2d 1283](#),

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<sup>1</sup> Based on Mr. Devlin's January 26, 2010 death, the amount of this benefit would have been 50 percent of Mr. Devlin's final annual rate of basic pay (or average pay if higher) plus \$29,722.95. *See* Office of Personnel Management Benefits Administration Letter, No. 10-103 (April 16, 2010).

<sup>2</sup> There is a statutory provision that allows fiduciaries to receive death benefit payment on behalf of individuals under legal disability. [5 U.S.C. § 8466\(c\)](#). This provision, however, does not provide for receipt of payment on behalf of a deceased individual.

<sup>3</sup> We acknowledge that the basic employee death benefit is distinct from the annuity. [5 U.S.C. § 8442\(b\)\(3\)](#). Nevertheless, both the death benefit and the annuity are "[r]ights of a widow or widower." [5 U.S.C. § 8442](#).

1285 (Fed. Cir. 1991) (an administrator cannot file a posthumous application for disability retirement benefits on behalf of a deceased spouse); *Oshiver ex. rel. Oshiver v. Office of Personnel Management*, [896 F.2d 540](#), 541-42 (Fed. Cir. 1990) (the spouse of a “missing” employee cannot file for a retirement annuity on behalf of the employee). It is also consistent with OPM’s regulations, which define the basic employee death benefit as “the payment to the current spouse of a deceased employee . . . .” [5 C.F.R. § 843.102](#) (emphasis added).

¶7 On review, the appellant argues that the term “current spouse” is used only to establish eligibility and entitlement to the basic employee death benefit, and not for payment of the benefit. PFR File, Tab 1 at 4. The regulations, however, allow for payment to a qualifying current spouse’s estate only if she was already receiving installment payments at the time of her death. See [5 C.F.R. § 843.309\(c\)\(2\)](#) (If a current spouse “who was receiving” the death benefit in installments dies, her estate will be paid the remaining portion in a lump sum).<sup>4</sup> It is undisputed that Mrs. Devlin was not receiving such installment payments. Moreover, regardless of whether OPM might be allowed to make payments to the estate, the appellant’s argument does not address the basic issue of whether the estate could establish its own entitlement to the death benefit. For the reasons explained above, we find that it cannot.

¶8 The appellant also argues that *Clark*, [256 F.3d 1360](#), which the administrative judge addressed in her initial decision, ID at 5, “suggests that there is an open question regarding appeals of this nature . . . and . . . the letter of the law is not clear enough on such cases,” PFR File, Tab 1 at 4. We disagree. *Clark*

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<sup>4</sup> We find no contradiction between this regulatory exception and the statutory language providing that the “widow or widower is entitled to” the death benefit. [5 U.S.C. § 8442\(b\)](#). Once the widow or widower applies for the benefit to which she is entitled, she has a property interest in it regardless of whether she has actually received it. See *Cushman v. Shinseki*, [576 F.3d 1290](#), 1297-98 (Fed. Cir. 2009). The death benefit may therefore pass to her estate as part of the property that she owned during her life.

was factually similar to the instant appeal to the extent that the employee's surviving current spouse died before applying for the benefit. There was, however, no need for the court in *Clark* to decide the issue now before the Board. In denying the estate's application for death benefit, OPM followed the principles of an Alabama law under which one who feloniously and intentionally takes the life of another person is deemed to have predeceased his victim, who was in that case the deceased employee. *Clark*, 256 F.3d at 1361. The appellant reads too much in the administrative judge's comment that *Clark* "leaves open the possibility that an estate may seek the [basic employee death benefit]." *See* ID at 5. The administrative judge only meant that *Clark* did not resolve the issue in the instant appeal. For the reasons explained above, we agree with the administrative judge that the estate of a current spouse may not apply for and receive the section 8442(b)(1)(A) death benefit on her behalf.

¶9 The equities of this case are compelling. Mr. and Mrs. Devlin were married for over 40 years and they passed away within 3 weeks of one another. It is undisputed that Mrs. Devlin met the basic death benefit eligibility criteria and that she would have been entitled to receive it while she was alive. ID at 4. Nor can Mrs. Devlin be faulted for not submitting the application in a timely manner. Even shortly after her husband's death, she acted diligently in preparing the application for death benefits and was prevented from completing it only by her own passing. Nevertheless, the equities of the situation do not empower OPM or the Board to award monetary benefits in the absence of statutory authorization. A claim for payment of money from the public treasury that is contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution, art. I, § 9, cl. 7, and the government cannot be estopped from denying benefits not otherwise permitted by law. *Office of Personnel Management v. Richmond*, [496 U.S. 414](#), 424, 434 (1990).

**ORDER**

¶10 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 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](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:

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