

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

2007 MSPB 189

Docket No. DA-0831-06-0440-I-1

**Patsy R. Painter,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

OPM Claim No. CSF 2 998 965

August 16, 2007

Frank T. Ivy, Esquire, Austin, Texas, for the appellant.

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

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, 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) that found her ineligible for a former spouse survivor benefit. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the case for further adjudication.

BACKGROUND

¶2 Norba V. Painter and the appellant were married on September 3, 1954, Initial Appeal File (IAF), Tab 17, Ex. A, and subsequently divorced in 1979, *id.*, Tab 6, Attach. 4. Mr. Painter retired from federal service under the Civil Service Retirement System (CSRS) on September 20, 1986. IAF, Tab 5, Subtab 2a at 1, Tab 21 at 2. The appellant and Mr. Painter remarried in April 1996, and Mr. Painter requested that OPM reduce his annuity to provide a maximum survivor annuity for the appellant. Effective February 1, 1997, his annuity was reduced to provide a survivor annuity. IAF, Tab 5, Subtab 2a at 1, Tab 6, Attach. 4. On December 11, 1998, Mr. Painter and the appellant were divorced. The court order dissolving the marriage did not award the appellant a former spouse survivor annuity. IAF, Tab 13, Ex. A, Tab 17 at 1. Mr. Painter died on November 4, 2005. IAF, Tab 5, Subtab 2a at 1, Tab 21 at 1. The appellant applied for a former spouse survivor annuity and for death benefits, IAF, Tab 5, Subtab 2a at 1, which OPM denied, *id.*, Subtab 2c. The appellant requested reconsideration, *id.*, Subtab 2b, and OPM affirmed its initial decision on reconsideration, *id.*, Subtab 2a.

¶3 The appellant filed a petition for appeal. IAF, Tab 1. She requested a hearing, but subsequently withdrew her request. *Id.*, Tabs 3, 15, 18, 19. The administrative judge issued an initial decision based on the written record, affirming OPM's final decision. IAF, Tab 22, Initial Decision (ID). He found that: The 1998 divorce decree did not expressly award a former spouse survivor annuity to the appellant, ID at 5-6; a subsequent September 14, 2006 court order dividing the parties' property and awarding the appellant a former spouse annuity was ineffective as it was issued after Mr. Painter's death, ID at 6; and the appellant failed to prove that Mr. Painter intended to provide a former spouse survivor annuity for her, ID at 6-7.

¶4 The appellant has filed a petition for review, alleging that OPM has offered no evidence to prove that: Mr. Painter received the statutory annual notice of his

right to elect a former spouse survivor annuity after his December 11, 1998 divorce; Mr. Painter contacted OPM in 1999 and cancelled his election for a survivor annuity; and Mr. Painter's annuity was reissued at the unreduced rate after his December 11, 1998 divorce. Petition for Review File (PFRF), Tab 1 at 2-3. The appellant also alleges that the administrative judge erred in relying on a Designation of Beneficiary form executed by Mr. Painter in determining whether Mr. Painter intended to provide a survivor annuity for the appellant. *Id.* OPM has responded in opposition to the petition for review. PFRF, Tab 3.

ANALYSIS

¶5 Divorce terminates a prior election of spousal survivor benefits. 5 U.S.C. § 8339(j)(5)(A); *Hernandez v. Office of Personnel Management*, 450 F.3d 1332, 1334 (Fed. Cir. 2006). Thus, when Mr. Painter divorced the appellant on December 11, 1998, his election of a survivor annuity was terminated. A former spouse may receive survivor benefits if the CSRS annuitant makes an affirmative election to grant such benefits, however. 5 U.S.C. § 8339(j)(3); *Hernandez*, 450 F.3d at 1334. 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). On appeal, OPM has the burden of proving both that it sent the annual notice and that the notice was adequate to inform the annuitant of the specific election requirements under 5 U.S.C. § 8339(j). *Hernandez*, 450 F.3d at 1335; *Brush*, 982 F.2d at 1561. A notice regarding election of former spouse survivor benefits is insufficient if it does not “stat[e] 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.” *Hernandez*, 450 F.3d at 1335 (quoting *Simpson v. Office of Personnel Management*, 347 F.3d 1361, 1365 (Fed. Cir. 2003)).

¶6 In this case, however, OPM has provided no evidence that it sent the statutorily mandated annual notice to Mr. Painter and that Mr. Painter was sufficiently put on notice that he had to make a new election to provide a survivor annuity for the appellant. *See Brush*, 982 F.2d at 1561 (OPM must attempt to prove that the notice was actually sent; such evidence must be more than a bare allegation that a notice was sent; and OPM must offer proof as to the contents of the annual notice). We therefore find that a remand is necessary to determine whether OPM did send the statutorily mandated annual notice and whether the notice was adequate to inform Mr. Painter of the election requirements of 5 U.S.C. § 8339(j).

¶7 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)). Thus, if OPM failed to notify Mr. Painter of his right to elect a survivor annuity for the appellant after their December 11, 1998 divorce, and the evidence shows that he intended to provide a survivor annuity for the appellant, the appellant is entitled to former spouse survivor annuity. *See id.*

¶8 OPM alleged that: On January 4, 1999, Mr. Painter requested cancellation of the survivor annuity that he had elected for the appellant; the reduction in Mr. Painter’s retirement annuity therefore was eliminated; and effective January 1, 1999, Mr. Painter’s annuity was reissued at the unreduced rate. IAF, Tab 5, Subtab 2a, Tab 20 at 3. OPM has not provided a copy of Mr. Painter’s January 4, 1999 request that the pre-divorce survivor annuity be cancelled and has not provided documentation to support its allegations that the survivor annuity was eliminated from Mr. Painter’s retirement annuity and that his retirement annuity was restored to an unreduced annuity. *See Frye v. U.S. Postal*

Service, 102 M.S.P.R. 695, ¶ 11 (2006) (statements of a party's representative in a pleading do not constitute evidence). Because these alleged actions by Mr. Painter relate to whether or not he intended for the appellant to receive a former spouse survivor annuity, we find that a remand is necessary also to determine whether Mr. Painter intended to provide the appellant a survivor annuity. See *Hernandez*, 450 F.3d at 1335 (inadequate notice only entitles a former spouse to benefits if there is sufficient evidence that the annuitant intended for the former spouse to receive benefits).

¶9 We note that Mr. Painter signed an SF-2808 Designation of Beneficiary on January 26, 1999, naming his three children as beneficiaries to receive any lump-sum benefit payable after his death and cancelling his previous designation, executed on October 1, 1996, naming the appellant as the beneficiary. IAF, Tab 5, Subtab 2d at 6, 7; ID at 6. The SF-2808 clearly states, however, that “this designation of beneficiary will not affect the rights of any survivors who may qualify for annuity benefits after [the annuitant’s] death.” IAF, Tab 5, Subtab 2d at 6. The administrative judge therefore erred in relying on this form in finding that such an action is inconsistent with Mr. Painter’s intent to provide a survivor annuity for the appellant. ID at 6; see *Kirk v. Office of Personnel Management*, 93 M.S.P.R. 547, ¶ 10 (2003) (the SF-2808 does not manifest the appellant’s unmistakable intent to elect a survivor annuity benefit).

¶10 Finally, we find that, because the interests of Mr. Painter’s three children may be directly affected by the outcome of this appeal on remand in view of the SF-2808 mentioned above, they should be afforded an opportunity to intervene in the appeal. See 5 C.F.R. § 1201.34(a); *Boulware v. Office of Personnel Management*, 74 M.S.P.R. 159, 162-63 (1997); *Mroz v. Office of Personnel Management*, 71 M.S.P.R. 299, 302 (1996).

ORDER

¶11 Accordingly, we REMAND this appeal to the Dallas Regional Office to allow the parties the opportunity to present additional evidence and argument to determine whether Mr. Painter was sent adequate annual notification of his right to elect a former spouse survivor annuity after his December 11, 1998 divorce, and whether he intended to provide the appellant with a former spouse survivor annuity. The appellant's three children shall be afforded an opportunity to intervene. The administrative judge shall then issue a new initial decision in this appeal.

FOR THE BOARD:

Matthew D. Shannon
Acting Clerk of the Board
Washington, D.C.