

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

2008 MSPB 27

Docket No. AT-0831-07-0410-I-1

**Carolyn Z. Dodd,
Appellant,
v.
Office of Personnel Management,
Agency,
and
Eric L. Dodd,
Karen R. Dodd,
Intervenors.**

OPM Claim No. CSA 4 314 546

February 1, 2008

Carolyn Z. Dodd, McDonough, Georgia, pro se.

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

William C. Kimmelman, Esquire, Swanton, Ohio, for the intervenors.

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 the initial decision that sustained the Office of Personnel Management's (OPM's) reconsideration decision regarding the calculation of her former spouse survivor annuity. Additionally, Karen Dodd has moved to intervene. For the reasons set forth below, we GRANT Karen Dodd's motion to intervene, GRANT the appellant's petition, REVERSE the initial decision, and DO NOT SUSTAIN OPM's reconsideration decision.

BACKGROUND

¶2 The appellant and her former husband, Eric Dodd, were both employed by the Federal government. Initial Appeal File (IAF), Tab 3, Subtab 2D at 9, 14. During their divorce proceedings, they signed a December 14, 1989 Amended Separation Agreement (Agreement), pursuant to which they agreed as follows:

11. Pensions. Husband and Wife both shall receive pensions from their employer, the FAA. These pensions shall be accounted for as follows: Husband and Wife shall divide their pensions equally for that amount which had accrued up to the date of filing the Dissolution of Marriage. Each party shall receive their share of the other party's pension upon the retirement of the vested party. The payment shall be made as a lump sum or a monthly stipend until paid in full, at the option of the payor. Wife shall, therefore, receive \$21,055.40 payable from Husband in a lump sum or at the rate of \$500.00 per month. Husband shall receive from Wife the sum of \$2,418.03 payable in a lump sum or at the rate of \$50.00 per month. *Also, each party shall retain each other as a listed survivor on their annuity, which states that the survivor listed shall receive 55% of the pension upon the death of the pension owner, but only 25% upon remarriage.*

Id. at 14 (emphasis added). The Agreement was incorporated into a Final Decree of Dissolution of Marriage issued by the Common Pleas Court of Erie County, Ohio, on January 8, 1990. *Id.* at 1, 3.

¶3 Mr. Dodd subsequently married Karen Dodd and, upon his retirement in 2006, he elected a maximum survivor annuity, equal to 55 percent of his basic

annuity, for Karen Dodd. *Id.* at 21. OPM issued initial and reconsideration decisions informing the appellant that, pursuant to the above language of the Agreement, she was entitled to only 25 percent of the maximum survivor annuity benefit and that her survivor annuity would be reduced, apparently from \$4,244 per month to \$1,929 per month. IAF, Tab 1 at 18, Tab 3, Subtabs 2A at 3-5, 2C.

¶4 The appellant filed an appeal of OPM's reconsideration decision, claiming that she continued to be entitled to a 55 percent survivor annuity as long as she did not remarry. IAF, Tab 1 at 4, 8. Mr. Dodd was included in the appeal as an intervenor. IAF, Tabs 5, 7. The administrative judge concluded that the Agreement was ambiguous with regard to whose remarriage would trigger a reduction in the appellant's survivor annuity, but that it was clear the appellant was at least entitled to a 25 percent survivor annuity. IAF, Tab 7, Initial Decision (ID) at 4-6. Therefore, the administrative judge affirmed OPM's reconsideration decision. ID at 6.

¶5 The appellant has filed a petition for review of that decision in which she continues to argue that she is entitled to a 55 percent survivor annuity unless she remarries. Petition for Review File (PFRF), Tab 1. Thereafter, the Board ordered the parties to address whether and how the Board should apply certain guidelines explaining how OPM will interpret terms and phrases frequently seen in awarding survivor's benefits, including the following:

Orders that provide *full* survivor annuity benefits to a former spouse with the contingency that the employee or annuitant may elect a *lesser* benefit for the former spouse upon his or her remarriage will be interpreted to provide only a full survivor annuity benefit to the former spouse. In order to provide full survivor annuity benefits to a former spouse with the contingency that the employee or annuitant may provide a lesser survivor annuity benefit to the former spouse in order to provide survivor annuity benefits for a subsequent spouse, the order should allow a reduction in the former spouse benefit contingent upon the employee's or annuitant's *election* of survivor annuity benefits for a subsequent spouse. A reduction in the amount of survivor benefits provided to the former spouse will not be permitted if it is contingent upon the employee's or annuitant's

remarriage rather than his or her *election* of survivor annuity benefits for a subsequent spouse. (See 5 CFR 838.1004(b).)

PFRF, Tab 4 (citing 5 C.F.R. pt. 838, subpt. J, app. B, sec. III, subsec. G (2007) (“Guidelines for Interpreting State Court Orders Awarding Survivor Annuity Benefits to Former Spouses,” sec. III, “Specificity Required to Award a Former Spouse Annuity”)). The Board also notified Mr. Dodd’s current spouse, Karen Dodd, that she could intervene in the proceedings, and she filed a motion to do so. PFRF, Tabs 5, 6 at 3.

¶6 In response to the Order, the intervenors assert that, because OPM’s guidelines were not in effect at the time the Agreement was drafted, it would be inappropriate to apply them in this case. PFRF, Tab 6 at 7-8. Additionally, the intervenors contend that the appellant should only receive a 25 percent survivor annuity, or Karen Dodd will receive none, and that any ambiguity in the Agreement should be construed against the appellant because her attorney drafted it. *Id.* at 8-9. The appellant responds that she is entitled to a 55 percent survivor annuity and that Mr. Dodd failed to comply with OPM’s requirement that he notify it of his remarriage within a certain time period. PFRF, Tab 7 at 4-7.

¶7 OPM states in response to the Order that it did not receive the Agreement until 2002, so 5 C.F.R. part 838, subparts A-I apply in this case, not subpart J, which was cited in the Order. PFRF, Tab 8 at 2-3, Tab 10 at 2-3.¹ OPM asserts that one could read the “upon remarriage” reduction provision of the Agreement in multiple, reasonable ways, and that its role is not to interpret ambiguous language. PFRF, Tab 8 at 4-5. Nonetheless, OPM opines that, if it interpreted the “but only 25% upon remarriage” provision to mean the appellant’s remarriage, it would likely accept the Agreement for processing, but not if it

¹ The record closed for the parties’ responses to the Board’s Order on November 5, 2007. PFRF, Tab 4 at 1, 3-4. Nevertheless, we have considered all of the parties’ responses to the Order, including those submitted by OPM and the appellant after November 5, 2007. *See* PFRF, Tabs 6-11.

interpreted the provision to mean Mr. Dodd's remarriage. *Id.* at 5. OPM thus appears to contend that its reconsideration decision is incorrect.

ANALYSIS

¶8 The appellant, as the applicant for benefits, bears the burden of proving entitlement to a survivor annuity by preponderant evidence. *See Cheeseman v. Office of Personnel Management*, 791 F.2d 138, 140-41 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1037 (1987); *Ingle v. Office of Personnel Management*, 102 M.S.P.R. 202, ¶ 4 (2006) (citing 5 C.F.R. § 1201.56(a)(2)). A former spouse's entitlement to a survivor annuity is set forth in 5 U.S.C. § 8341(h)(1), which Congress enacted as part of the Spouse Equity Act of 1984, and which provides that "a former spouse of a deceased . . . annuitant . . . is entitled to a survivor annuity . . . to the extent expressly provided for . . . in the terms of any decree of divorce . . . or any court order or court-approved property settlement agreement incident to such decree." *See Ingle*, 102 M.S.P.R. 202, ¶ 4; *see also* 5 U.S.C. § 8345(j)(1). While the requirement that a survivor annuity be "expressly provided for" is substantive, the provision does not require "magic words," but only that the intent to provide the survivor annuity be clear, definite, explicit, plain, direct, and unmistakable, not dubious or ambiguous. *Ingle*, 102 M.S.P.R. 202, ¶ 4.

¶9 Here, it is undisputed that the Agreement expressly provides a survivor annuity for the appellant. The issue is whether the amount of that survivor annuity is to be reduced upon the remarriage of the appellant or upon the remarriage of her former spouse.

¶10 OPM's regulations at 5 C.F.R. part 838, subparts A-I, apply to court orders affecting retirement benefits received by OPM on or after January 1, 1993, such as the Agreement in this case.² 5 C.F.R. § 838.101(c)(1); *Kimble v. Office of*

² Subpart J of 5 C.F.R. part 838 only applies to court orders affecting retirement benefits received by OPM before January 1, 1993. 5 C.F.R. § 838.101(c)(2). Mr. Dodd

Personnel Management, 103 M.S.P.R. 175, ¶ 7 (2006). A regulation contained in 5 C.F.R. part 838, subpart I, provides as follows:

(1) A court order that awards a former spouse survivor annuity while authorizing the employee or retiree to elect a lesser former spouse survivor annuity upon the employee's or retiree's remarriage satisfies the requirements of § 838.805, and provides the former spouse survivor annuity at the rate initially provided in the court order *but does not allow the employee or retiree to elect a lesser benefit for the former spouse*.

(2) To provide full survivor annuity benefits to a former spouse while authorizing the employee or retiree to elect a lesser former spouse survivor annuity benefit in order to provide survivor annuity benefits for a subsequent spouse, the court order must provide for a reduction in the former spouse survivor annuity upon the employee's or retiree's election of survivor annuity benefits for a subsequent spouse.

(3) A reduction in the amount of survivor benefits provided to the former spouse does not satisfy the requirements of § 838.805 if it is contingent upon the employee's or annuitant's remarriage rather than his or her election of survivor annuity benefits for a subsequent spouse.

5 C.F.R. § 838.921(d) (emphasis added). Pursuant to 5 C.F.R. § 838.805(a), for a court order awarding a former spouse survivor annuity to be acceptable for processing, it must provide "sufficient instructions and information so that OPM can determine the amount of the former spouse's monthly benefit using only the

contents that he submitted a Designation of Beneficiary form to OPM in July 1990, and that he believes he submitted a copy of the Final Decree of Dissolution of Marriage in August 1990. PFRF, Tab 9 at 3-4, 6. The Designation of Beneficiary form is for lump-sum death benefits, not survivor annuities, however. *Id.* at 6. Moreover, OPM submitted evidence showing that although the Agreement was dated before January 1, 1993, it was not received by OPM until 2002. PFRF, Tab 10 at 5-11. The intervenors have not submitted any contrary evidence. Because the OPM guidelines applicable to court orders received before January 1, 1993, are quite similar to the regulations applicable to court orders received by OPM on or after January 1, 1993, the result in this matter would be the same even if OPM had received the Agreement before January 1, 1993. *Compare* 5 C.F.R. pt. 838, subpt. J, app. B, sec. III, subsec. G, *with* 5 C.F.R. § 838.921(d).

express language of the court order, subparts A, G[,] and I of [5 C.F.R. part 838], and information from normal OPM files.”

¶11 Neither the Board nor the United States Court of Appeals for the Federal Circuit has previously interpreted 5 C.F.R. § 838.921(d). When the intent of Congress in enacting legislation is expressed unambiguously, agencies and reviewing authorities must give effect to that intent. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). When the statute in question is silent or ambiguous, however, and when the agency responsible for administering the statute has promulgated regulations interpreting it, that agency's interpretation is entitled to deference. *See id.* at 843-44. OPM has the statutory authority to promulgate regulations to “carry out” the provisions of the Civil Service Retirement System and Federal Employees’ Retirement System. 5 U.S.C. §§ 8347(a), 8461(g). OPM promulgated 5 C.F.R. § 838.921(d) as part of its administration of these retirement systems. Because the relevant statutes are silent regarding whether a former spouse survivor annuity may be reduced upon the employee’s or retiree’s remarriage, the Board will defer to OPM’s regulation on the matter.

¶12 Subsection (d)(1) of 5 C.F.R. § 838.921 provides that a court order containing a provision allowing for the reduction of a former spouse survivor annuity upon the remarriage of the employee or retiree will be acceptable for processing by OPM, but that OPM will not give effect to the reduction provision. Subsection (d)(3) of 5 C.F.R. § 838.921 provides that a reduction in a former spouse survivor annuity that is contingent upon the employee’s or annuitant’s remarriage will not be acceptable for processing by OPM. Reading the regulation as a whole, we interpret it to mean that the *particular portion* of a court order providing for a reduction in the former spouse’s survivor annuity upon the employee’s or annuitant’s remarriage will not be processed by OPM, and the former spouse will receive an unreduced survivor annuity. *See* 5 C.F.R. § 838.921(d)(1), (3). The remainder of the court order will be acceptable for

processing by OPM. *See id.* If Mr. Dodd wished to reduce the appellant's survivor annuity after his remarriage, he should have obtained an acceptable court order that provided for a reduction in the appellant's survivor annuity upon Mr. Dodd's election of survivor annuity benefits for Karen Dodd, not upon Mr. Dodd's remarriage. *See* 5 C.F.R. § 838.921(d)(2), (3). The Agreement contains no provision for a reduction in the appellant's survivor annuity upon Mr. Dodd's election of survivor annuity benefits for a subsequent spouse. IAF, Tab 3, Subtab 2D at 14.

¶13 The portion of the Agreement at issue provides that “each party shall retain each other as a listed survivor on their annuity, which states that the survivor listed shall receive 55% of the pension upon the death of the pension owner, but only 25% upon remarriage.” *Id.* The maximum payable survivor annuity is 55 percent of the retiree's annuity. *Landrith v. Office of Personnel Management*, 99 M.S.P.R. 76, ¶ 6 (2005) (citing 5 U.S.C. §§ 8339(k)(1), 8341(c)). As OPM noted in its response to the Board's Order, the language at issue may be read in three different and equally reasonable ways: (1) that the appellant's survivor annuity would be reduced to 25 percent upon Mr. Dodd's remarriage so that he could provide a partial survivor annuity for his current spouse; (2) that the appellant's survivor annuity would be reduced to 25 percent upon her remarriage because her income would be increased by her new spouse's earnings; or (3) that the appellant's survivor annuity would be reduced to 25 percent upon either party's remarriage. *See* PFRF, Tab 8 at 4.

¶14 Because this provision of the Agreement is susceptible to more than one reasonable interpretation, it is ambiguous. *See Landrith*, 99 M.S.P.R. 76, ¶ 7. To interpret this portion of the Agreement, the Board would have to consider extrinsic evidence to determine the intent of the parties at the time the Agreement was made. *See Raymond v. Department of the Army*, 102 M.S.P.R. 665, ¶ 8 (2006). Generally, the Board will not undertake its own determination of spousal

entitlements and awarding survivor benefits based on ambiguous state court orders. *Hahn v. Office of Personnel Management*, 71 M.S.P.R. 154, 156 (1996).

¶15 However, the Board need not resolve the ambiguity in this matter because, based on the facts of the case, the result will be the same no matter which way the Agreement is interpreted. If the Agreement means that the appellant's survivor annuity will be reduced to 25 percent upon the remarriage of Mr. Dodd, or upon the remarriage of either Mr. Dodd or the appellant, the reduction provision is ineffective and the appellant will retain her 55 percent survivor annuity pursuant to 5 C.F.R. § 838.921(d). If, on the other hand, the provision means that the appellant's survivor annuity will be reduced upon her own remarriage, because she has not remarried, she continues to be entitled to a 55 percent survivor annuity.

ORDER

¶16 We ORDER OPM to correct its records to reflect that the appellant's entitlement to a survivor annuity of 55 percent under the Agreement has not been affected by Eric Dodd's remarriage or election of survivor annuity benefits for his subsequent spouse. OPM must complete this action no later than 20 days after the date of this decision.

¶17 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).

¶18 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).

¶19 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 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, <http://fedcir.gov/contents.html>. 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.