

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

2007 MSPB 310

Docket No. DC-0831-07-0165-I-1

Elpidia L. Braza,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. SCF 3 014 140

December 18, 2007

Clarissa B. Reiman, Phoenix, Arizona, for the appellant.

Cynthia Reinhold, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

Member Sapin issues a separate dissenting opinion.

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115)

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113

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.

DISSENTING OPINION OF BARBARA J. SAPIN

in

Elpidia L. Braza v. Office of Personnel Management

MSPB Docket No. DC-0831-07-0165-I-1

¶1 My colleagues, in agreement with the administrative judge, would affirm the Office of Personnel Management’s (OPM) reconsideration decision denying the appellant’s application for a survivor annuity based on the service of her deceased husband, Emiliano Braza. For the reasons discussed below, I respectfully dissent from the majority and would GRANT the appellant's petition for review, REVERSE the initial decision and OPM’s reconsideration decision, and award the appellant a survivor annuity.

¶2 The appellant was born and raised in the Philippines. Although she graduated from high school there, she never attended college. Her native language is Tagalog. In 1965, she married Emiliano Braza, and moved to the United States. During the course of her lifetime here, the appellant became fluent in English. Nevertheless, the record shows that her husband handled all the family’s financial affairs. The appellant did not even know how much money her husband earned or what credit cards he possessed. She had never written a check until after his death.

¶3 Mr. Braza worked for the Postal Service for 22 years before he retired in 2003. Approximately two months before his retirement, he took the appellant to a local bank where, for the first time, he presented her with a “Spouse’s Consent to Survivor Election Form (Standard Form 2801-2) and asked her to sign it before a notary public there. Neither Mr. Braza nor the notary provided the appellant with the opportunity to review the form and they did not explain the form’s significance to her. Because she trusted her husband, the appellant signed the form, purportedly consenting to Mr. Braza’s election of “No regular or insurable interest survivor for my current spouse.” Although the appellant speaks English

well, she did not have the education or financial background to understand that her signature on the OPM form would result in the relinquishment of her statutory right to a survivor annuity. *

¶4 Upon the death of the appellant's husband in 2006, she applied for a monthly survivor annuity. OPM denied the request, however, finding that her husband had not elected survivor benefits for her. IAF, Tab3, subtabs 2a, 2c.

¶5 On appeal, the administrative judge affirmed OPM's decision, finding that the appellant's request for a survivor annuity must be denied based upon *Steele v. Office of Personnel Management*, 57 M.S.P.R. 458 (1993), *aff'd*, 50 F.3d 21 (Fed. Cir. 1995) (Table), where the Board denied a request for a survivor annuity under similar circumstances. IAF, Tab 9. The administrative judge also stated, however, that he believed that *Steele* was wrongly decided, and that the better view would be to find that the appellant's consent to waiving her survivor rights was not valid because she was not sufficiently educated to understand the effect of her actions when she signed the SF-2801-2. *Id.* The administrative judge further found that the equitable estoppel analysis in *Office of Personnel Management v. Richmond*, 496 U.S. 414, 416, 434 (1990), applied by the Board in *Steele*, should not apply in these circumstances, and that awarding the appellant the survivor benefits at issue was consistent with the legislative intent in passing the Civil Service Retirement Spouse Equity Act of 1984. *Id.*

¶6 In her petition for review, the appellant asserts that the administrative judge correctly explained why the Board's decision in *Steele* was incorrect and why *Richmond* should not preclude her from receiving the survivor benefits at issue PFR File, Tab 1.

* The foregoing facts, which are undisputed, are set forth in a July 2006 statement signed by the appellant and submitted to OPM. *See* IAF, Tab 3, subtab 2b, exhibit B.

¶7 I agree that, under current Board precedent, OPM's final decision must be affirmed. However, I further agree, based on the extensive analysis set forth in the initial decision, that the Board's *Steele* decision improperly relied on *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), failed to adequately address Congress's mandate that a surviving spouse is *entitled* to a CSRS survivor annuity unless the entitlement is knowingly and intentionally waived and, therefore, that *Steele* was wrongly decided. In reviewing the judge's initial decision, I am particularly persuaded by the discussion of the Board's decisions involving the waiver of other important statutory benefits in the context of Board appeals. *See* initial decision at 11-13. That is, that the waiver of a statutory right requires both comprehension of the right, as well as an informed, intentional relinquishment of the right.

¶8 In addition, I note that neither *Steele* nor the Federal Circuit's decision in *Power v. Office of Personnel Management*, 71 F. App'x 66 (Fed. Cir. 2003), are published decisions and, consequently, are not binding on the Board. As a result, I would find, for the reasons set forth by the judge, that the Board's decision in *Steele* should be overruled. Pursuant to this finding, I would conclude that the appellant's consent to waiving her survivor rights was not valid because she was not sufficiently advised of the effect of her action when she signed the SF-2801-2 and did not have the educational background to otherwise understand it. Accordingly, I would reverse OPM's reconsideration decision and grant the appellant's application for survivor benefits.

Barbara J. Sapin
Member