

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE**

DOREEN CROSS,
Appellant,

DOCKET NUMBER
AT-0843-19-0760-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: March 2, 2020

Doreen Cross, Summerville, South Carolina, pro se.

Sherri McCall, Washington, D.C., for the agency.

BEFORE

Jeffrey S. Morris
Administrative Judge

INITIAL DECISION

On September 8, 2019, Doreen Cross appealed to the Board from the August 2, 2019, Office of Personnel Management (OPM) amended reconsideration decision denying her application for a former spouse survivor annuity based on the federal civil service of her deceased former husband, Wayne Cross. The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7701(a), 8461(e); 5 C.F.R. § 841.308. I held a hearing by telephone on February 27, 2020. For the reasons set forth below, OPM's reconsideration decision is AFFIRMED in part and REMANDED in part.

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ANALYSIS AND FINDINGS

Background

The following facts are undisputed. The appellant is the surviving former spouse of Wayne Cross, who was employed in the federal civilian service by the Department of the Navy and covered by the Federal Employees Retirement System (FERS). The appellant and Mr. Cross were married on August 3, 1982. They permanently separated on or about April 21, 1998. Mr. Cross retired from federal employment on or about May 9, 2005, indicating on his retirement application a maximum survivor annuity for the appellant. The couple divorced on March 27, 2015. Mr. Cross died on October 1, 2015. Following his death, the appellant applied for a former spouse survivor annuity under FERS based on Mr. Cross's federal service. OPM denied the application because (1) the couple's divorce ended her entitlement to the survivor annuity benefit; (2) the divorce decree did not expressly award a former spouse survivor annuity or direct Mr. Cross to elect to provide such an annuity; and (3) Mr. Cross did not elect to continue a former spouse survivor annuity for the appellant after their divorce. AF, Tab 9, p. 10.

Applicable law

The appellant bears the burden of proving, by preponderant evidence, that she is entitled to the survivor annuity benefits she seeks. *See* 5 C.F.R. § 1201.56(b)(2). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.4(q).

The appellant's entitlement to a survivor annuity as the deceased annuitant's former spouse is governed by the portion of the FERS statute codified at 5 U.S.C. § 8445. That provision essentially states that a former spouse of an annuitant is entitled to a survivor annuity if: (1) a divorce decree or court order

expressly provides for one;¹ or (2) the annuitant made an election to grant a survivor annuity within two years after the date on which the marriage dissolves.²

In addition, the Board's reviewing court has held that a former spouse may receive survivor annuity benefits absent a court order or timely election if: (1) the annuitant did not receive the required annual notice of his or her election rights, and (2) if there is evidence sufficient to show that the retiree indeed intended to provide a survivor annuity for the former spouse. *See Downing v. Office of Personnel Management*, 619 F.3d 1374, 1377 (Fed. Cir. 2010).³ The same court has also held that "an employee's continued acceptance of a reduced annuity following divorce, standing alone, adequately demonstrate[s] that employee's intent to provide a survivor annuity for the former spouse." *See Hernandez v. Office of Personnel Management*, 450 F.3d 1332, 1335 (Fed. Cir. 2006), citing *Wood v. Office of Personnel Management*, 241 F.3d 1364, 1368 (Fed. Cir. 2001). The appellant failed to prove her entitlement to a former spouse survivor annuity.

The first means for receiving a former spouse survivor annuity described above is not available to the appellant because the divorce decree did not state she is supposed to receive one. AF, Tab 9, p. 64. The second means is also

¹ Although this provision does not require "magic words," the intent to provide a survivor annuity must be "clear, definite, explicit, plain, direct, and unmistakable, not dubious or ambiguous." *See, e.g., Dodd v. Office of Personnel Management*, 108 M.S.P.R. 96, 100, ¶ 8 (2008).

² The agency maintained at the hearing that 5 U.S.C. § 8445 is inapplicable because it addresses deferred annuities. I disagree. The only reference to a deferred annuity in section 8445 is found in a parenthetical clause inapplicable to this case.

³ The requirement to provide such notice is set forth in 5 U.S.C. § 8339. I am aware that this statute pertains to retirees covered by the Civil Service Retirement System (CSRS), and no similar statute or regulation requires such notice be given to retirees under FERS. Nonetheless, the Board has indicated, albeit without directly finding, that the notice requirement applies to individuals covered under FERS when they retired. *See Larson v. Office of Personnel Management*, 93 M.S.P.R. 433, ¶ 7 (2003); *Balkovec v. Office of Personnel Management*, 83 M.S.P.R. 621, 623-24 (1999). Accordingly, I find that the notice requirement is applicable here.

unavailable because there is no evidence to suggest that Mr. Cross ever affirmatively elected to provide the appellant with a survivor annuity after the couple divorced.

As for the alternative means for proving entitlement to a former spouse survivor annuity, the applicable statute provides that Mr. Cross had two years following the divorce to make an election providing such an annuity to the appellant. 5 U.S.C. § 8445. OPM argues the absence of such an election was not due to a lack of knowledge on the part of Mr. Cross, because it maintains he was notified of the legal provision concerning post-retirement survivor elections for a former spouse in OPM's annual notices regarding survivor elections from late 2005 to late 2014 (*i.e.*, between his retirement and his death). Hearing Compact Disc (HCD), agency's final argument. The agency provided no documentary evidence in support of this argument.⁴ However, the appellant herself submitted one annual survivor election notice addressed to her former spouse, from December 2012, which she said located in a "burn pile" after his death. AF, Tab 19, pp. 15-16 of 76; HCD, testimony of appellant. The appellant further testified she found the notice confusing, and she acknowledged Mr. Cross might have read it but failed to understand it. HCD, testimony of appellant.

In my view, the presence of the 2012 annual survivor election notice among the decedent's papers makes it more likely than not that he did receive similar notices from OPM on an annual basis in the years between his retirement in 2005 and his death in 2015. Further, the fact that the 2012 notice was found in a "burn pile" strongly suggests to me that Mr. Cross was inclined to dispose of such documents, perhaps explaining the appellant's failure to find ones issued in other years. Finally, while I agree with the appellant that OPM's annual survivor

⁴ Typically, OPM will submit a sworn affidavit from the agency's Retirement Services Branch attesting that general notices regarding survivor elections were mailed to all annuitants every December during the pertinent time period. However, no such evidence was provided by the agency in this case.

election notices can be difficult to understand, I find that the one found in the current record correctly reflects applicable law by stating, in pertinent part:

3. Survivor Annuity Election for a Former Spouse

Eligibility and Time Limits – With some exceptions, retirees are eligible to elect or reelect a reduced annuity to provide a survivor annuity for a former spouse if they timely submit an election to OPM 1) within 2 years after the date the marriage ended in divorce or annulment or 2) within 2 years after the date another former spouse loses entitlement to a potential survivor annuity. *Please note that a new survivor annuity election is required within 2 years after the divorce if you wish to provide a former spouse annuity, even if at retirement you elected to provide a survivor annuity for that spouse.* The law provides for the continuation of a survivor reduction made at retirement after divorce if the annuitant reelects a survivor annuity for the former spouse within 2 years after the divorce. *Continuing the survivor reduction, by itself, does not demonstrate an unmistakable intent to make a former spouse survivor reelection.*

AF, Tab 19, p. 16 (emphasis added). Based on my finding that Mr. Cross likely did receive required annual notices of his election rights, the alternative method described above is inapplicable in the present case. In sum, the appellant failed to prove her entitlement to a former spouse survivor annuity.

Conclusion

It is apparent through testimony that the appellant and Mr. Cross remained devoted to each other (and their daughter Christin Cayce Cross, who testified credibly⁵) after their divorce. I have no doubt that Mr. Cross did intend until his death that the appellant would receive a former spouse survivor annuity based on his federal service, and I have great sympathy for the appellant under these circumstances. Unfortunately, I am not permitted under the law to rely upon such equitable considerations to justify the payment of annuity benefits if the statutory

⁵ Among other things, Christin Cayce Cross testified that she had no claim to or interest in any survivor annuity as a result of her father's federal service. HCD, testimony of Christin Cayce Cross.

eligibility requirements for receiving such benefits are not met. *See Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), 110 S.Ct. 2465 (1990). Therefore, because the appellant has not established her entitlement to receive a former spouse survivor annuity, I am obligated to uphold OPM's final decision denying her claim for such an annuity.

However, as to the overpayment of benefits asserted by OPM, I find no evidence in the record that the appellant was afforded an opportunity to request waiver of the asserted debt as provided for in 5 C.F.R. Part 845, Subpart C. Accordingly, I find that this issue must be returned to OPM in order to provide the appellant with her waiver rights (including reconsideration and Board appeal rights, if necessary and appropriate) before any collection of the asserted overpayment is made.

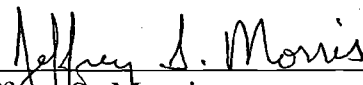
DECISION

The agency's reconsideration decision is AFFIRMED in part and REMANDED in part.

ORDER

I ORDER the agency to inform the appellant, within sixty (60) calendar days of the date of this Initial Decision, of her right to request waiver of the asserted overpayment, and to subsequently advise the appellant of her reconsideration and Board appeal rights, if necessary and appropriate, before any collection of the asserted overpayment is made.

FOR THE BOARD:



Jeffrey S. Morris
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 6, 2020, unless a petition for review is filed by that date. This is an important date because it is usually the

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last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. If you are represented, the 30-day period begins to run upon either your receipt of the initial decision or its receipt by your representative, whichever comes first. You must establish the date on which you or your representative received it. The date on which the initial decision becomes final also controls when you can file a petition for review with one of the authorities discussed in the “Notice of Appeal Rights” section, below. The paragraphs that follow tell you how and when to file with the Board or one of those authorities. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review.

If the other party has already filed a timely petition for review, you may file a cross petition for review. Your petition or cross petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file it with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

A petition or cross petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (<https://e-appeal.mspb.gov>).

NOTICE OF LACK OF QUORUM

The Merit Systems Protection Board ordinarily is composed of three members, 5 U.S.C. § 1201, but currently there are no members in place. Because a majority vote of the Board is required to decide a case, *see* 5 C.F.R. § 1200.3(a), (e), the Board is unable to issue decisions on petitions for review filed with it at this time. *See* 5 U.S.C. § 1203. Thus, while parties may continue to file petitions for review during this period, no decisions will be issued until at least two members are appointed by the President and confirmed by the Senate. The lack of a quorum does not serve to extend the time limit for filing a petition or cross petition. Any party who files such a petition must comply with the time limits specified herein.

For alternative review options, please consult the section below titled “Notice of Appeal Rights,” which sets forth other review options.

Criteria for Granting a Petition or Cross Petition for Review

Pursuant to 5 C.F.R. § 1201.115, the Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact. (1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision. (2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge’s credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

As stated in 5 C.F.R. § 1201.114(h), a petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

If you file a petition or cross petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. A petition for review

must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you or your representative more than 5 days after the date of issuance, 30 days after the date you or your representative actually received the initial decision, whichever was first. If you claim that you and your representative both received this decision more than 5 days after its issuance, you have the burden to prove to the Board the earlier date of receipt. You must also show that any delay in receiving the initial decision was not due to the deliberate evasion of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by fax or by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j). If the petition is filed electronically, the online process itself will serve the petition on other e-filers. *See* 5 C.F.R. § 1201.14(j)(1).

A cross petition for review must be filed within 25 days after the date of service of the petition for review.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTICE OF APPEAL RIGHTS

You may obtain review of this initial decision only after it becomes final, as explained in the "Notice to Appellant" section above. 5 U.S.C. § 7703(a)(1). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. 5 U.S.C. § 7703(b).

Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this decision when it becomes final, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

(1) Judicial review in general. As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date this decision becomes final. 5 U.S.C. § 7703(b)(1)(A).

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.ca9c.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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

(2) Judicial or EEOC review of cases involving a claim of discrimination. This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days after this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(2); *see Perry v. Merit Systems Protection Board*, 582 U.S. _____, 137 S. Ct. 1975 (2017). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. 5 U.S.C. § 7702(b)(1). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days after this decision becomes final** as explained above. 5 U.S.C. § 7702(b)(1).

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, N.E.
Suite 5SW12G
Washington, D.C. 20507

(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012. This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under 5 U.S.C. § 2302(b)(8) or other protected activities listed in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within **60 days of the date this decision becomes final** under the rules set out in the Notice to Appellant section, above. 5 U.S.C. § 7703(b)(1)(B).

If you submit a petition for judicial review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit 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, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

Contact information for the courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent as indicated this day to each of the following:

Appellant

Electronic Mail Doreen Cross
236 Cady Drive
Summerville, SC 29483

Agency Representative

Electronic Mail Sherri McCall
Office of Personnel Management
1900 E Street, NW
Washington, DC 20415

March 2, 2020

(Date)

/S/

Veronica Woodiest
Paralegal Specialist



U.S. MERIT SYSTEMS PROTECTION BOARD

Office of the Clerk of the Board

1615 M Street, N.W.
Washington, D.C. 20419-0002

Phone: 202-653-7200; Fax: 202-653-7130; E-Mail: mspb@mspb.gov

2021-1116

ATTESTATION

I HEREBY ATTEST that the attached index represents a list of the documents comprising the administrative record of the Merit Systems Protection Board in the appeal of Doreen Cross v. Office of Personnel Management, MSPB Docket No. AT-0843-19-0760-I-1, and that the administrative record is under my official custody and control on this date

on file in this Board

November 12, 2020

Date

Lisa L. White for

Jennifer Everling

Acting Clerk of the Board

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