2021-1116

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DOREEN CROSS,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

APPEAL FROM THE MERIT SYSTEMS PROTECTION BOARD IN CASE NO. AT-0843-19-0760-I-1, JUDGE MORRIS

CORRECTED BRIEF OF RESPONDENT

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, counsel for respondent-appellee states that she is unaware of any other appeal from this civil action that previously was before this Court. Counsel is also unaware of any case pending in this Court or any other court that may directly affect or be affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUES

1. Whether the Court possesses jurisdiction to consider a petition for review filed within 60 days of the extended deadline by which petitioner should have filed her petition for further review of the Merit System Protection Board's initial decision, where the Board exercised its authority pursuant to section 7701(e)(1) to extend the date by which its initial decision became final for the purposes of appeal.

2. Whether the Merit Systems Protection Board's decision to deny a survivor's annuity to a former spouse of a retired employee was supported by substantial evidence, when the employee failed to execute a new survivor annuity election after his divorce.

3. Whether an annual notice to a retired employee sufficiently advised him of the obligation to execute a new survivor annuity election following a divorce, when that instruction was one of several scenarios addressed in the notice.

STATEMENT OF THE CASE

I. Nature Of The Case

Petitioner Doreen Cross appeals a March 2, 2020 decision by the Merit Systems Protection Board (MSPB or Board), which affirmed in part the decision of the Office of Personnel Management (OPM) to deny Ms. Cross a survivor annuity arising from her former husband's Federal service.

II. Statement Of Facts And Course Of Proceedings Below

The material facts in this case are not in dispute. Ms. Cross is the surviving former spouse of Wayne Cross, who was employed in the federal civilian service and covered by the Federal Employees Retirement System (FERS). Appx2.[1] Petitioner and Mr. Cross were married on August 3, 1982, and permanently separated on April 21, 1998. *Id.* On May 9, 2005, Mr. Cross retired from federal employment and indicated on his retirement application a maximum survivor annuity for Ms. Cross. *Id.* OPM issues annual notices to all retirees with such annuities, which advise them of certain rights they retain related to such annuities. Appx3.

Approximately ten years later, on March 27, 2015, the couple divorced. Appx2. The divorce decree did not reference the survivor annuity. *See* Appx3-4. Mr. Cross died on October 1, 2015. Appx2. Following Mr. Cross's death, Ms. Cross applied for a former spouse survivor annuity under FERS. *Id.* OPM denied the application on August 2, 2019, and Ms. Cross appealed to the Board on September 8, 2019. Appx1. Before the Board, OPM argued that Mr. Cross was notified of the legal provision concerning survivor elections for a former spouse through annual OPM notices regarding survivor elections sent from 2005 to 2014.

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1 "Appx__" refers to pages in the joint appendix. "Pet. Br. __" refers to pages in Ms. Cross' opening brief, *see* ECF 20.

Appx4. Although the agency could not produce any such notices, Ms. Cross submitted a notice from December 2012, addressed to Mr. Cross, and which she located in a "burn pile" after his death. *Id.* That notice provided, in pertinent part, as follows:

> **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*.

Appx5.

On March 2, 2020, the Board issued an initial decision affirming in part and remanding in part OPM's reconsideration decision. *Id.* The administrative judge found that Ms. Cross did not establish her entitlement to receive a former spouse survivor annuity and thus upheld OPM's final decision denying her claim. *Id.* The judge also found no evidence in the record that Ms. Cross was given an opportunity to request waiver of the agency's claim for overpayment of benefits,

and remanded that issue to the agency. *Id.* The Board's initial decision included a notice to Ms. Cross, stating that the initial decision would become final on April 6, 2020, unless a petition for review was filed by that date. Appx6.

On April 6, 2020, Ms. Cross filed her first motion for a 30-day extension, Appx21, which the Board granted on April 7, 2020, stating that a petition must be filed by May 6, 2020 or else the decision would become final. Appx23. Ms. Cross went on to file four additional motions to extend the deadline for filing her petition, culminating with a final motion dated August 4, 2020. Appx25-41. On August 5, 2020, the Board ordered one last extension, noting that if a petition for review was not filed on or before September 3, 2020, the decision would become final on that date. Appx42-43. The Court received Ms. Cross's petition for review on October 25, 2020. ECF 1-2 at 1. The only issue on appeal here is whether the Board correctly upheld OPM's denial of Ms. Cross' application for former spouse survivor annuity.

SUMMARY OF THE ARGUMENT

The Court possesses jurisdiction to consider Ms. Cross' appeal because the Board's decision became final on September 3, 2020, and Ms. Cross filed her petition for appeal within 60 days of that date. The Board has the authority to extend the date on which its decisions become final, and the Court cannot accept a petition for appeal from a decision that is not yet final.

Nevertheless, the Board properly sustained OPM's denial of Ms. Cross' survivor annuity, because a preponderance of the evidence supports the Board's finding that Mr. Cross failed to re-elect a survivor annuity on Ms. Cross' behalf following their divorce. Moreover, Mr. Cross had adequate notice that re-election after divorce was required, because OPM provided Mr. Cross and all other annuitants with annual written notices of that requirement each year since 2005.

Accordingly, the Court should affirm the Board's decision.

ARGUMENT

I. Standard Of Review

This Court reviews MSPB decisions under 5 U.S.C. § 7703(c), which requires that the Board's decision be affirmed unless this Court determines that it was: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." *Id.*; *see Einboden v. Dep't of the Navy*, 802 F.3d 1321, 1324 (Fed. Cir. 2015). "[T]he arbitrary and capricious standard is extremely narrow." U.*S. Postal Serv. v. Gregory*, 534 U.S. 1, 6-7 (2001). Under this standard, the MSPB receives "wide latitude" and "[i]t is not for the Federal Circuit to substitute its own judgment for that of the Board." *Id.* at 7 ("The role of judicial review is only to ascertain if the Board has met the minimum standards set forth in the statute.").

Ms. Cross bears the burden of establishing that the MSPB committed reversible error. *Jones v. Dep't of Health & Human Servs.*, 834 F.3d 1361, 1366 (Fed. Cir. 2016); *Fernandez v. Dep't of the Army*, 234 F.3d 553, 555 (Fed. Cir. 2000). Questions of law, including statutory interpretation, are reviewed de novo. *Fitzgerald v. Dep't of Homeland Sec.*, 837 F.3d 1346, 1353 (Fed. Cir. 2016). Factual findings must be "supported by substantial evidence." *Tartaglia v. Dep't of Veterans Affairs*, 858 F.3d 1405, 1408 (Fed. Cir. 2017). Under the substantial evidence standard, the Court reverses a factual finding "only if it is not supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1298 (Fed. Cir. 2002) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see Jones*, 834 F.3d at 1366 ("Substantial evidence is more than a mere scintilla of evidence, but less than the weight of the evidence.").

II. The Court Does Possess Jurisdiction To Review Ms. Cross' Appeal Because A Pending Decision Of The Board Cannot Be Appealed Until It Has Become Final

The Court possesses jurisdiction to consider Ms. Cross' appeal because she filed her appeal within 60 days of the date the Board's decision became final.[2] The

[2] Upon further review of the history of Ms. Cross' proceedings before the Board and the Board's explanation of its orders in its response to the Court's order dated March 2, 2021, we have revised our position concerning jurisdiction as stated in our response to the Court's order dated December 29, 2020.

finality of a Board decision determines whether a petitioner can appeal that decision to this Court.

An initial decision of the Board does not automatically become final upon issuance. *See* 5 U.S.C. § 7701(e)(1). Rather, a party has 35 days from the "date of issuance of the initial decision" in which to file a petition for review with the Board. 5 C.F.R. § 1201.114(e). If no petition is filed, then the decision becomes final either within 35 days of the date of issuance, or on the date stated in the initial decision. 5 U.S.C. § 7701(e)(1); *see also Foster v. Dep't of the Army*, 832 F. App'x 697, 699 n.4 (Fed. Cir. 2020) (finding that initial decision became final on date provided in notice of initial decision). Before the decision becomes final, the Board may also, for good cause shown, extend the finality period to allow an employee additional time in which to file a petition for review. 5 U.S.C. § 7701(e)(1); 5 C.F.R. § 1201.114(f). In granting such an extension, the Board delays the date on which the decision becomes final.[3] *Id.*

Before a Board decision becomes final, it is considered to be pending, and no party can appeal a pending decision to the Court. *See* 5 U.S.C. § 7703(b)(1)(A);

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3 The Board can delay the date of finality as long as the decision has not *yet* become final. In *Nacos v. Dep't of Commerce*, the Court determined it did not possess jurisdiction because the Board granted an extension *after* the decision had already become final, and the petitioner filed a petition for review with the Court more than 60 days after that finality date. 213 Fed. Appx. 987, 988 (Fed. Cir. 2007) (non-precedential).

5 C.F.R. § 1201.113(b); *see also Howell v. Merit Sys. Prot. Bd.*, 785 F.2d 282, 284 (Fed. Cir. 1986) (noting that when seeking review of a Board decision, "[i]f nothing is done to avoid finality, the period for judicial review begins running" from the date the decision becomes final); *McDaniel v. U.S. Postal Serv.*, 82 F.3d 432 (Fed. Cir. 1996) (finding appellant could not appeal to the Court because the initial decision did not become final when appellant timely petitioned the Board for review of the initial decision); *Kennedy v. Dep't of Air Force*, No. 2009-3138, 2009 WL 2518615, at *1 (Fed. Cir. Aug. 14, 2009) (finding that time for filing appeal with Court began running on the date Board decision becomes final). Accordingly, the Court cannot review interlocutory appeals from initial Board decisions.

Thus, the question is entirely one of the Board's own statutory and regulatory procedures, as well as the Court's statutory limits as to when it possesses jurisdiction over appeals. To find that the Court's own appeal deadlines are determined without consideration of the Board's ability to extend its own deadlines would be contrary to statutory intent, and would negate the Board's ability to follow its own statutes and regulations.[4]

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[4] We note that although we agree with Ms. Cross in outcome, we do not agree with Ms. Cross' argument that jurisdiction is based on a petitioner's reasonable belief. *See* Pet. Br. at 12. While we are sympathetic to *pro se* litigants, the determination of jurisdiction is statutory and not subject to equitable considerations. *Arnold v. Wood*, 238 F.3d 992, 996 (8th Cir. 2001) ("Since the

Here, the Board's initial decision noted that it would become final on April 6, 2020. Appx6. On that date, Ms. Cross filed her first motion for a 30-day extension, Appx21, which the Board granted on April 7, 2020, stating that a petition must be filed by May 6, 2020 or else the decision would become final. Appx23. Ms. Cross went on to file four additional motions to extend the deadline for filing her petition, culminating with a final motion dated August 4, 2020. Appx25-41. In each order granting the extension motions, the Board extended the deadline for when the decision would become final. *Id.* On August 5, 2020, the Board ordered one last extension, noting that "appellant may file a petition for review on or before September 3, 2020," and that "[i]f petition is not filed by September 3, 2020, the administrative judge's March 2, 2020 initial decision will remain the final decision of the Board and any further right of appeal must then be exercised in accordance with the provisions as stated in that initial decision." Appx42-43. Ms. Cross did not file any petition for review with the Board from August 5, 2020, through September 3, 2020. Nor did Ms. Cross file another motion for extension. Accordingly, the Board's initial decision became final on September 3, 2020. 5 U.S.C. § 7701(e)(1); *see also Foster*, 832 F. App'x 699 n.4.

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doctrine is equitable in character, we must interpret it narrowly, and apply it sparingly, lest its operation defeat the statutory scheme of appellate jurisdiction crafted by Congress.").

Pursuant to 5 U.S.C. § 7703(b)(1)(A), Ms. Cross was then required to file a petition for review with the Court within 60 days after the Board issued notice of the final decision. This deadline is computed from September 3, 2020, the date on which the Board decision became final, and thus fell on November 2, 2020. *See Williams v. Dep't of Hous. & Urb. Dev.*, 117 F. App'x 109, 110 (Fed. Cir. 2004). Because Ms. Cross filed her petition for review with the Court on October 25, 2020, her petition was timely filed and the Court does possess jurisdiction over this appeal. Pet. for Review, ECF 1-2 at 1.

III. The MSPB Reasonably Found That Ms. Cross Is Not Entitled To A Spouse Survivor Annuity By Statute, Election, Or Court Order

There is no legal basis on which to award Ms. Cross a survivor's annuity, because her divorce terminated any statutory basis for benefits, her spouse did not re-elect to grant her such benefits following that divorce, and no court order conferred those benefits prior to the death of her husband. Ms. Cross argues that she does qualify under the applicable laws to receive such benefits.

A spouse of a deceased FERS retiree may recover a survivor annuity by statute when she is a "widow" or "the surviving spouse" of an employee, provided the marriage lasted for at least nine months. *See* 5 U.S.C. § 8442. After a divorce, the surviving spouse no longer meets the statutory definition of a "widow," so cannot qualify as an annuitant. *See Id.* § 8441(1)(A)-(B). Accordingly, Ms. Cross' divorce from Mr. Cross terminated the survivor annuity that he had elected at

retirement on her behalf, and Ms. Cross is therefore not entitled to a survivor annuity under 5 U.S.C. § 8442.

Although Mr. Cross' survivor annuity election at retirement terminated upon divorce, Mr. Cross could have elected to designate his former spouse a survivor annuity benefit after their divorce. 5 U.S.C. § 8445(a) ("[A] former spouse . . . is entitled to an annuity under this section, if and to the extent expressly provided for in an election . . . or in the terms of any decree of divorce or annulment or any court orer or court-approved property settlement agreement incident to such decree."). In order to do so, the election of a survivor benefit must be "expressly provided for" and must be received by OPM within two years of divorce. *Id.* Even where an employee passes away prior to the end of the two year period, the Court has determined that the employee must still make the election. *See Briggs v. Office of Personnel Management*, 476 F. App'x 265, 267, 270 (Fed. Cir. 2012). However, Mr. Cross did not make that election. Therefore, Ms. Cross cannot establish entitlement to a survivor annuity benefit under 5 U.S.C. § 8445.

Finally, a court may award a former spouse a survivor annuity benefit "if and to the extent expressly provided for" in the terms of a court order. *Id.* § 8445(f)(1). The divorce decree issued to Ms. Cross and Mr. Cross did not state that Ms. Cross should receive a former spouse survivor annuity, nor was there a court order providing for one. Appx3. Additionally, there was no evidence to

suggest Mr. Cross ever affirmatively elected to provide the appellant with a survivor annuity after the divorce. Appx3-4.

Thus, the Board correctly found that substantial evidence supports OPM's decision that no statute, election or valid court order justifies granting Ms. Cross a survivor annuity.

IV. Mr. Cross Received Sufficient Notice Of The Requirement That Any Survivor Annuity Must Be Re-Elected Following His Divorce

OPM is required to provide employees and former employees with information about their rights so that they may preserve and manage their retirement benefits. Ms. Cross concedes that Mr. Cross was provided a notice that included the information that he must submit a new survivor annuity election following a divorce. Pet. Br. at 17. However, she asserts that this notice was not sufficient because it did not come in the period following his divorce but prior to his death. *Id.* at 17-18. Ms. Cross does not allege that the notice was in any other way unclear or that Mr. Cross did not understand the instructions provided. Regardless of whether OPM sent a notice between the divorce and Mr. Cross' death, OPM met all of the legal requirements for an effective notice, and the language in the notice was clear, accessible, and brief.

OPM is obligated under 5 U.S.C. § 8339 to provide annual notices to annuitants of their survivor annuity election rights. This legislative note provides the following instruction:

> The Director of the Office of Personnel Management shall, on an annual basis, inform each annuitant of such annuitant's rights of election under sections 8339(j) and 8339(k)(2) of title 5 United States Code.

See also 5 C.F.R. § 831.681 ("At least once every 12 consecutive months, OPM will send a notice to all retirees to inform them about the survivor annuity elections available to them, under sections 8339(j), 8339(k)(2), and 8339(o) of title 5, United States Code"). Among the topics OPM was obliged to address, was the right of a retiree to elect to provide a former spouse with a survivor annuity benefit. 5 U.S.C. § 8339(j)(3). Accordingly, the Board determined that OPM had sent the same annual notice of annuitant's survivor annuity election rights to Mr. Cross since 2005, all of which likely contain this specific language, in relevant 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*.

Appx5.

The Court has specifically found that the language provided in this notice informs annuitants of their rights to elect survivor annuities on behalf of former spouses within two years of divorce, in compliance with 5 U.S.C. § 8339. *See Downing v. Office of Personnel Management*, 619 F.3d 1374, 1377, n.2 (Fed. Cir. 2010) (*hearing en banc denied*) ("Mr. Downing further received adequate notice through the annual forms sent to Mr. Downing in December 2006 and 2007, which were sent after his divorce was finalized and reminded him that he was required to make a reelection within two years."); *see also Williams v. Office of Personnel Management*, 646 Fed. Appx. 976, 980 (Fed. Cir. 2016) ("an annual notice is deficient when it fails to inform an annuitant that, even if he had previously elected a spousal annuity when married, he must make a new election after his divorce."). In contrast, this Court has found the OPM's notices did not meet the legal standard only when "none of them contain[ed] any statement 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." *Simpson v. Office of Personnel Management*, 347 F.3d 1361, 1365 (Fed. Cir. 2003).

Thus, as with the annuitants in *Downing* and *Williams*, OPM sent Mr. Cross legally sufficient annual notices of his former spouse survivor annuity election rights each year following his retirement from Federal service, which reminded

him he had a right to elect a survivor annuity on behalf of his former spouse within two years of divorce. OPM properly informed Mr. Cross in these notices that his election at retirement would terminate upon divorce, and that if he wanted to continue a survivor annuity election on behalf of his former spouse, he would need to re-elect a survivor annuity for her within two years of their divorce. As a result, OPM complied with statutory and regulatory provisions under 5 U.S.C. § 8339 and 5 C.F.R. § 831.681 requiring that OPM provide Mr. Cross with notice of his survivor annuity election rights.

Furthermore, Ms. Cross' assertion that OPM's notices are legally deficient because one was not sent to Mr. Cross in the period following his divorce and prior to his death, Pet. Br. at 17, is without legal basis. Mr. Cross was put on notice each year from 2005 to 2014 that he would need to re-elect a survivor annuity for Ms. Cross within two years of their divorce. *See* Appx5. Additionally, none of the cases cited by Ms. Cross support this argument. For a former spouse to receive survivor annuity benefits absent a court order or timely election, the annuitant must not have received the required annual notice of the election rights, *and* there must be evidence sufficient to demonstrate the retiree did intend to provide the survivor annuity for the former spouse. *Downing*, 619 F.3d at 1377; *Briggs*, 476 Fed. App'x at 270. Thus, both conditions must be met for the former spouse to receive the annuity.

In each case Ms. Cross cites in support of her position, both conditions are in fact met, which is not the case here. *See Hernandez v. Office of Personnel Management*, 450 F.3d 1332, 1335 (Fed. Cir. 2006) (finding entitlement to annuity where OPM notice was insufficient and sufficient evidence existed of retiree's intent); *Wood v. Office of Personnel Management*, 241 F.3d 1364 (Fed. Cir. 2001) (determining notice to be confusing and thus failed to provide adequate information); *Vallee v. Office of Personnel Management*, 58 F.3d 613 (Fed. Cir. 1995) (finding for petitioner where OPM entirely failed to provide required notice); *Brush v. Office of Personnel Management*, 982 F.2d 1554 (Fed. Cir. 1992) (finding for petitioner where OPM entirely failed to provide required notice); *Hairston v. Office of Personnel Management*, 318 F.3d 1127 (Fed. Cir. 2003) (finding notice not provided when failed to inform retiree of need to affirmatively elect a former spouse annuity). Accordingly, none of the cases cited are similar to the situation here and thus do not apply.

CONCLUSION

For these reasons, we respectfully request that the Court affirm the decision below.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Respondent's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This Brief was printed in Times New Roman font at 14 points. According to the word-count calculated by Microsoft Word, this brief contains a total of 4,089 words, which is within the 14,000 word limit.

/s/ Ioana Cristei
IOANA CRISTEI

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 12th day of May, 2021, a copy of the foregoing "CORRECTED BRIEF OF RESPONDENT" was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Ioana Cristei