

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK FIELD OFFICE

53046 A
53,046 A

RECEIVED

MAY 25 2000

NATIONAL CENTER
ON POVERTY LAW

AUDREY L. WILLIAMS,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
CSF 2 501 113

)
)
) DOCKET NUMBER
) NY-083 1-99-043 1-1-1
)
)
)

) DATE: November 22, 1999
)
)
)

Garv Stone, Esquire, Legal Services for the Elderly, New York, New York, for
the appellant.

Peggy G. Smith, Washington, D.C., for the agency

BEFORE

Barry G. Booker
Administrative Judge

INITIAL DECISION

INTRODUCTION

On August 31, 1999, the appellant timely filed her Board appeal seeking review of the Office of Personnel Management's (OPM) reconsideration decision of August 20, 1999, denying her request for survivor annuity benefits under the provisions of the Civil Service Retirement System (CSRS) based on the service of Willie J. Williams, Jr., deceased. The Board has jurisdiction over this matter under 5 U.S.C. § 8347(d) and 5 C.F.R. § 83 1.110 (1999). At the appellant's request, a hearing was conducted on **October** 28, 1999. For the reasons stated below, OPM's reconsideration decision is REVERSED.

ANALYSIS AND FINDINGS

Background

The record shows the decedent, Willie J. Williams, Jr., retired from federal service under the CSRS on September 1, 1989. See Initial Appeal File (IAF), Tab 7, Agency File (AF), Subtab 6, p.61; Individual Retirement Record, Standard Form (SF) 2806. At the time of retirement, the decedent was married to Elouise Williams and had elected a reduced annuity in order to provide his then current wife with survivor annuity benefits. See *id.*, Subtab 6, p. 52, Application for Immediate Retirement, SF-2801; see *also id.*, Subtab 6, p. 5 1, Alternative Annuity Election. The decedent's marriage to Elouise Williams ended on December 12, 1991 at her death. See *id.*, Subtab 6, p. 19. By notice dated January 22, 1992, OPM eliminated the reduction in the decedent's annuity and restored it to the life rate. See *id.*, Subtab 6, p.13. In addition, OPM informed the appellant that due to the change in his marital status, it was enclosing forms for his use in the event that he wished to designate new beneficiaries for his Federal Employees' Group Life Insurance and Civil Service Retirement Benefits. *Id.*

By letter dated August 23, 1994, the decedent wrote OPM and requested "papers, because [he] wanted to change [his] will." See *id.*, Subtab 6, p.20. On October 7, 1994, the decedent executed form 2823, Designation of Beneficiary, Federal Employees Group Life Insurance, naming the appellant as beneficiary. At the time, the decedent was not yet married to the appellant. He also executed SF-2808, on October 7, 1994, designating the appellant as the beneficiary of any lump sum death benefit payable under the Civil Service Retirement law. *Id.*, Subtab 6, p. 11.

On November 15, 1995, the decedent married the appellant. See IAF, Tab 7, AF, Subtab 6, p. 10. However, he did not file a written election of a reduced annuity to provide survivor annuity benefits for the appellant. On January 14, 1999, the decedent died. See *id.*, Subtab 6, p.17. On January 29, 1999, the appellant filed for survivor annuity benefits. *Id.*, Subtab 6, pp. 7-8. By letter dated April 26, 1999, OPM denied the request because the decedent had failed to notify OPM within two years of his remarriage that he wished to provide survivor **annuity benefits for the appellant as his** second wife. *Id.*, Subtab 6, p.5. By letter dated **April 30, 1999**, the **appellant sought**

reconsideration of OPM's initial determination. *Id.*, Subtab 3. In its reconsideration decision of August 20, 1999, OPM affirms its initial determination denying the appellant survivor annuity benefits. *Id.*, Subtab 2.

Burden of Proof

A party who asserts entitlement to retirement benefits bears the burden of proving by preponderant evidence that he meets the applicable criteria for such entitlement.' See *Fox v. Office of Personnel Management*, 50 M.S.P.R. 602, 605 (1991).

The appellant has met her burden of showing that the decedent did not receive notice of the statutory time limit for electing a survivor annuity benefit.

Pursuant to 5 U.S.C. § 8339(5)(C)(i), the decedent had two years from the date he remarried in which to irrevocably elect survivor annuity benefits for his new spouse.²

That section states:

Upon remarriage, a retired employee or Member, who was married at the time of retirement (including an employee or Member whose annuity was not reduced to provide a survivor annuity for the employee's or Member's spouse or former spouse as of the time of retirement) may irrevocably elect during such remarriage, in a signed writing received by the Office within 2 years after such remarriage or, if later, within 2 years after the death or remarriage of any former spouse of such employee or Member who was entitled to a survivor annuity under Section 8341(h) of this title (or of the last such surviving former spouse, if there was more than one), a reduction in the employee or Member's annuity under paragraph (4) of this subsection for the purpose of providing an annuity for such employee or Member's spouse in the event such spouse survives the employee or Member.

¹ "Preponderance of the evidence" is defined as the 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. { 1201.56(c)(2) (1999).

² Pursuant to Public Law (Pub. L.) 98-615, the Civil Service Retirement Spouse Equity Act of 1984, as amended by Pub. L. 99-25 1, Federal Employees Benefit Improvement Act of 1986, an annuitant who remarries after February 26, 1986, must make a request for survivor benefits in writing within two (2) years of the marriage to be eligible to elect survivor annuity protection for the new spouse.

Under 5 U.S.C. § 8339(j) and (k)(2), OPM is required by statute to notify annuitants annually of their survivor annuity election rights. *See Brush v. Office of Personnel Management*, 982 F.2d 1554, 1559-60 (Fed. Cir. 1992). However, the appellant asserts that the decedent never received notice of election rights as required by the statute.

There are three potential bases for waiving a statutory or regulatory deadline: (1) The statute or regulation itself specifies circumstances for a waiver; (2) affirmative misconduct by the agency warrants equitable estoppel of the statutory or regulatory provision; or (3) the agency fails to provide notice of election rights and corresponding deadlines, if such notice is required by statute or regulation. *See Thomas v. Office of Personnel Management*, 72 M.S.P.R. 77, 80 (1996). Here, the applicable statute does not specify circumstances for a waiver. Nor is there any evidence or claim of affirmative misconduct by the agency warranting equitable estoppel of the statutory provision.

The Board has held that where an appellant makes a nonfrivolous assertion that he was not notified of the election requirements, the burden shifts to OPM to show that it complied with the statutory annual notice requirements. *See Mroz v. Office of Personnel Management*, 71 M.S.P.R. 299, 302 (1996). In that regard, OPM avers that beginning October 1978, it has periodically mailed general notices to all annuitants on the civil service annuity rolls to advise them of the provisions of law governing the election of survivor annuity benefits and the two-year time limit for making survivor elections. *See* IAF, Tab 7, AF, Subtab 2. OPM alleges that during the two year period following the decedent's marriage to the appellant on November 15, 1995, the decedent was sent notices in January and December 1996, advising of the provisions of law governing the election of survivor annuity benefits and the two-year time limit for making survivor elections. *Id.* In support of its argument the record shows that by affidavit dated April 2, 1998, Mary Beth Smith-Toomey, Budget and Administrative Services Division, Office of Systems, Finance and Administration, Retirement and Insurance Service, OPM, declared that general notices regarding survivor elections required by Pub.L. 95-317, were sent to all annuitants in September 1989, September 1990, December 1991, December 1992, December 1993, December 1994, January 1996, December 1996, and December 1997. *See* IAF, Tab 7, AF, Subtab 2, Attachment. OPM argues that since the

decedent was in receipt of full retirement benefits after the death of his first wife in 1992, he should have known that an annuity reduction would be required for any future survivor election.

It has been held that an affidavit by an OPM official familiar with the history of OPM's notices stating that OPM general annual notices of election rights, including the election at issue in the present case, were sent to all annuitants at the relevant times constitutes probative evidence that, if un rebutted, proves OPM provided the required notices. See *Darsigny v. Office of Personnel Management*, 787 F.2d 1555, 1559 (Fed. Cir 1986); *Alton v. Office of Personnel Management*, 40 M.S.P.R. 292, 294-95 (1989).

In *Harris v. Office of Personnel Management*, 888 F.2d 121, 124 (Fed. Cir. 1989), the court held that "actual awareness" by the annuitant of the election right, based on receipt of OPM's annual notices prior to the remarriage or otherwise, was insufficient and that a determination must be made whether the annuitant received the notice from OPM within the required time limit after his marriage.

There is no dispute that the appellant failed to timely elect a reduced annuity for the appellant, his second wife, within the two year statutory time limit. The appellant testified that notwithstanding OPM's documentary evidence that the decedent was notified by mail of the two year election requirement, the decedent did not receive any such notice. See MSPB Hearing Tape Side A. Specifically, she testified that prior to his death, she maintained the household records and has no recollection of ever seeing a notification of the election requirement from OPM. *Id.* She testified that the decedent maintained his residence at 537 W. 148 Street, New York, New York, even though he took up residence with her both before and after their marriage in 1995. *Id.* She testified that she lives a couple of doors down from the decedent at 553 W. 148 Street. *Id.* She testified that the decedent was the superintendent of her building. *Id.* She testified that the decedent usually collected his own mail and invariably gave it to her for response because he suffered from seizures and at times became forgetful. *Id.* She testified that due to his medical condition, she did all the paperwork. *Id.* She testified that if the decedent had received notification from OPM in 1996 and 1997, as OPM maintains, she would have seen it since she first started handling the decedent's personal affairs in

1990. *Id.* She further testified that the decedent, who was 23 years her senior, always told her that she would receive his pension and be covered under his insurance in the event he predeceased her. *Id.* She testified that the subject would usually arise whenever the decedent's health would fail and he feared he was about to die. *Id.* She testified that during the last years of his life, the decedent's heart weakened, which ultimately led to open heart surgery immediately prior to his death. *Id.* She testified that one of the last conversations she had with the decedent about his pension took place the week he died while he was being prepared for surgery at St. Luke's Roosevelt Hospital. *Id.* She testified that it was always the decedent's intent to provide for her in the event he predeceased her as evidenced by the steps he took to make her the beneficiary of his death benefits even before they married. *Id.* She argues that if the decedent had been made aware of the election requirement he would have made a timely election. *Id.*

The appellant further testified that since she began handling the decedent's private affairs his mailbox has been broken into at least three times. *Id.* She testified that many of the residents in the decedent's building are elderly and receive some type of public assistance or retirement checks. *Id.* She testified that there have been problems with thieves breaking into the mailboxes looking to steal government checks. *Id.* She testified that she specifically recalls the break-ins started happening within a year after her marriage to the decedent. *Id.* She further testified that whenever the Postal carrier usually assigned to their route was out due to illness, there were problems with misdirected mail. *Id.*

In support of her testimony, the appellant offered the testimony of friends, family and neighbors who had conversations with the decedent about his belief that he had taken the necessary steps to provide for her in the event he predeceased her. Specifically, she offered the testimony of Ms. Rosalyn Hudson who testified that she lives in the building next to the appellant and has known her for the last ten years. *Id.* She testified that she saw Mr. and Mrs. Williams on a daily basis when the decedent would come by and drop off his mail. *Id.* She testified that on some occasions, the decedent's friend, Mr. Floyd Barren, would bring his mail to the appellant. *Id.* She testified that **she** was aware the decedent's health was failing and that he suffered from

seizures. *Id.* She testified that because the seizures affected the decedent's memory, he always gave his mail to the appellant. *Id.* She testified that she specifically recalls having many conversations with the decedent where he stated the appellant would get his pension after he died. *Id.* She testified that on those occasions where she was present when the decedent had to be rushed to the hospital, she heard him repeatedly tell the appellant not to worry about finances because she would get his pension in the event he predeceased her. *Id.*

The appellant also offered the testimony of the decedent's adult daughter, Ms. Lucille Barnes. Ms. Barnes testified that she spoke to her father once or twice a week up until his death and that she has personal knowledge that the appellant handled his affairs. See MSPB Hearing Tape Sides A and B. She testified that although she has no specific recollection of her father ever stating that he made a survivor annuity election naming the appellant as the beneficiary, she did have many conversations with him where he told her he wanted the appellant to receive his pension in the event of his death. *Id.*

The appellant also offered the testimony of Mr. Floyd Barrens. See MSPB Hearing Tape Side b. He testified that he has known the decedent since 1982 and lived in the same building. *Id.* In fact, he testified that his mail box was right next to the decedent's mail box and would often see him getting his mail. *Id.* He testified that during 1996 and 1997, the decedent's mail box was repeatedly broken into. *Id.* He testified that since he was retired and home during the day, the decedent asked him to collect his mail if he got to it before he did and give it to the appellant. *Id.* He further testified that the decedent was fond of telling him that if anything ever happened to him the appellant would be taken care of because she would receive his pension if he predeceased her. *Id.*

Ms. Esther Williams also testified on behalf of the appellant. *Id.* She testified that she was a close friend of the decedent the last 21 years of his life and that he was the godfather to her son. *Id.* She testified that the decedent spoke to her about his personal life and always bragged that because he was receiving a pension from the Post Office, the appellant would be taken care of in the event of his death. *Id.* She testified that she remembers when the decedent married the appellant and that he made such a statement at that time. *Id.* **She** testified that the last conversation she had with the decedent was

approximately one month prior to his death and- she specifically recalls the decedent telling her that the appellant would get his pension if he predeceased her. *Id.*

Ms. Alice Blanch Campbell also testified at the hearing. She testified that she knew the decedent the last 20 years of his life and spoke to him on a daily basis. *Id.* She testified that she has personal knowledge that because the decedent suffered from seizures, he gave his mail to the appellant. *Id.* She further testified that she can remember having a conversation with the decedent three or four years ago where he stated that if anything happened to him he wanted the appellant to receive his pension. *Id.*

The appellant also offered the sworn written statement of Mr. Carlos Zarate. See IAF, Tab 12. Mr. Zarate states that he is a partner in the firm that owns the building the appellant lives in. *Id.* He states that he met the decedent approximately three years ago when he was considering purchasing the property. *Id.* He states that since he needed someone to look after the property and report back to him if there was any trouble in the building the decedent agreed to be the building's superintendent in return for living in the appellant's apartment rent free. *Id.* He states that he usually spoke with the decedent twice a week when he visited the property. *Id.* He states that approximately six months ago he had a conversation with the decedent where the decedent told him he was worried about what would happen to his wife if he died. *Id.* He states that the decedent asked him if his wife could stay in the apartment after he died. *Id.* He states that the decedent assured him she would have some income because she would get his pension, his social security and his health insurance. *Id.* Mr. Zarate states that he assured the decedent it would not be a problem. *Id.*

To resolve credibility issues, the Board has charged administrative judges with identifying the factual issues in dispute, summarizing all the evidence on each disputed question of fact, state which version is believed, and explain in detail why the chosen version is more credible than the other version or versions of events. *See Brulotte v. United States Postal Service*, 44 M.S.P.R. 283 (1990); *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). Some of the factors to be considered in assessing the credibility of a witness are: (1) The witness's character; (2) any prior inconsistent

spouse in the event he predeceased her. I find the decedent's statements to friends, family and neighbors about his belief that his wife would **be provided for after his death** to be consistent with the actions of a diligent, considerate spouse who would have taken the necessary steps to insure the financial well-being of his wife had he received the required notice and been informed of the necessary steps. Based upon the credibility of the appellant's testimony as the keeper of the household records, and the corroborating testimony of friends, neighbors and family, I find that the appellant has provided preponderant evidence that rebuts OPM's presumptive evidence that the decedent received timely notice of his election rights. Accordingly, I find that the appellant is entitled to receive survivor annuity benefits.


DECISION

The agency's reconsideration decision is REVERSED.

ORDER

The agency is ORDERED to make the necessary adjustments to its records to provide a survivor annuity to the appellant.

FOR THE BOARD:


Barry G. Booker
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 27, 1999 unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you 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, The date on which the initial decision

becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. 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. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 204 19

If you file a 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. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

ATTORNEY FEES

If no petition for review is filed, you may ask for the payment of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable) by filing a

motion with this office as soon as possible, but no later than 60 calendar days after the date this initial decision becomes final. Any such motion must be prepared in accordance with the provisions of 5 C.F.R. Part 1201, Subpart H, and applicable case law.

ENFORCEMENT

If, after the agency has informed you that it has fully complied with this decision, you believe that there has not been full compliance, you may ask the Board to enforce its decision by filing a motion with this office no later than 30 calendar days after the date of the agency's notification of compliance.

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.

CERTIFICATE OF SERVICE'

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant

Audrey L. Williams
553 W. 148th Street, #1
New York, NY 10031-3718

Appellant's Representative(s)

Gary Stone
LEGAL SERVICE FOR THE ELDERLY
130 W. 42 Street, 17th Floor
New York, NY 10036-7803

Agency's Representative(s)

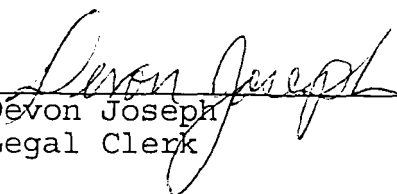
Peggy G. Smith
U.S. Office of Personnel Management
Disability, Reconsideration and Appeals
Division - Room 3468
P.O. Box 664
Washington, DC 20044

Other

Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

November 22, 1999

(Date)



Devon Joseph
Legal Clerk