

No. 2024-1774

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

DIRECTOR OF THE OFFICE OF PERSONNEL MANAGEMENT,
Petitioner,

v.

RONALD L. MOULTON, MERIT SYSTEMS PROTECTION BOARD,
Respondents.

Petition for Review From the Merit Systems
Protection Board in Case No. DE-0841-18-0053-I-1

BRIEF OF PETITIONER

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, petitioner's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Petitioner's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

**THE UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

DIRECTOR OF THE OFFICE OF)
PERSONNEL MANAGEMENT,)

Petitioner,)

v.)

No. 2024-1774

RONALD L. MOULTON, MERIT)
SYSTEMS PROTECTION BOARD,)

Respondents.)

BRIEF OF PETITIONER

STATEMENT OF JURISDICTION

This Court possesses jurisdiction over this petition for review pursuant to 5 U.S.C. § 7703(d), the Court having granted the petition of the Director of the Office of Personnel Management (OPM). 5 U.S.C. § 7703(d); 28 U.S.C. § 1295(a)(9). The OPM Director has determined that the Merit Systems Protection Board (MSPB or board) “erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.” 5 U.S.C. § 7703(d).

The board possessed jurisdiction over this case pursuant to 5 U.S.C. §§ 8461(e) and 7701(d). The board’s opinion became final upon issuance on

November 28, 2023, 5 C.F.R. § 1201.113(b), and the Director’s petition was filed within 60 days. 5 U.S.C. § 7703(d); Fed. Cir. R. 47.9(a).

STATEMENT OF THE ISSUE

Some Federal retirees receive a temporary “annuity supplement” in addition to their basic annuity. Section 8421(c) of Title 5 governs how OPM must treat an annuity supplement when a court order expressly divides an employee annuity (in divorce proceedings, for example). Under that provision, OPM must apportion the annuity supplement owed to a Federal retiree “in the same way” as a basic annuity. Consistent with the plain language of section 8421(c), OPM has included annuity supplements in the computation of a court-ordered apportionment when a court order expressly divides an employee annuity, regardless of whether the court order explicitly references the annuity supplement.

The question presented in this appeal is whether the board misinterpreted 5 U.S.C. § 8421(c) by concluding that OPM cannot divide the annuity supplement at all, unless the division of the annuity supplement is expressly provided for in a court order.

STATEMENT OF THE CASE

I. Nature of the Case

This case concerns how OPM must apportion a retirement annuity supplement pursuant to a court order (such as a divorce decree). On November 28,

2023, the board affirmed the initial decision of an administrative judge determining that 5 U.S.C. § 8421(c) allows OPM to divide an annuity supplement only when that annuity supplement is expressly addressed in a court order. Appx1-20.¹

II. Statutory Background

Under the Federal Employees' Retirement System (FERS) Act, Federal employees hired after December 31, 1983, are eligible for three Federal benefits: FERS, which is a defined benefit plan; the Thrift Savings Plan (TSP), a defined contribution plan; and a Social Security benefit. To obtain Social Security benefits, a retiree must be at least age 62. 42 U.S.C. § 402.

Because some Federal employees are eligible to retire under FERS prior to reaching age 62 (and thus before they become eligible for Social Security benefits), Congress enacted 5 U.S.C. § 8421. Section 8421 provides an annuity supplement to retirees until they reach age 62, when they are entitled to a Social Security benefit. *Id.* § 8421(a)(3)(B).

This case raises the question of how OPM should apportion the annuity supplement between an annuitant and another individual (such as a former spouse) pursuant to a court order (such as a divorce decree). Section 8467(a), which provides the general rule that applies to court orders, states:

Payments . . . which would otherwise be made to an employee, Member, or annuitant . . . based on service of

¹ "Appx__" refers to pages in the joint appendix.

that individual shall be paid (in whole or part) by [OPM] . . . to another person if and to the extent expressly provided for in the terms of . . . any court decree of divorce, annulment, or legal separation.

5 U.S.C. § 8467(a)(1); *see also* 5 C.F.R. 838, subparts A through F. Section 8421 provides sets forth how the rule is applied in the context of the annuity supplement and provides that the amount of the annuity supplement apportioned “shall, for purposes of section 8467, be treated in the same way as an amount computed under” the basic FERS annuity. *Id.* § 8421(c).

III. Statement Of Facts And Course Of Proceedings Below

A. Mr. Moulton’s Federal Service And Annuity Computation

Mr. Moulton was an Air Traffic Controller (ATC). Appx2. Because he was subject to mandatory separation before age 62, he qualified for a section 8421 annuity supplement. 5 U.S.C. § 8425(a). When Mr. Moulton retired in 2010, his annuity was subject to a Colorado state court divorce decree that expressly awarded his former spouse, Jill Moulton, a portion of his FERS gross monthly annuity:

The Employee is (or will be) eligible for retirement benefits under the Federal Employee Retirement System based on employment with the United States Government. The Former Spouse is entitled to a pro rata share of the Employee’s gross monthly annuity under the Federal Employees Retirement System, including any benefit the Employee earns based on special ATC service.

Appx23-24.

When initially computing the share of benefits due to Ms. Moulton, OPM incorrectly divided Mr. Moulton's gross basic annuity because it did not include the annuity supplement in the computation of Ms. Moulton's apportionment.

Appx2. In August 2016, OPM notified Mr. Moulton of the error in computing the division of his annuity and informed him that he had been overpaid (and Ms. Moulton had been underpaid) by \$24,535.² Appx3. Mr. Moulton requested reconsideration, which OPM denied. Appx3.

B. MSPB Proceedings

After OPM denied Mr. Moulton's request for reconsideration, he challenged OPM's decision at the MSPB. Appx4. The Director intervened in the MSPB proceedings as a matter of right under 5 U.S.C. § 7701(d). Appx5. Mr. Moulton's former spouse also intervened. Appx5.

In April 2018, an MSPB administrative judge reversed OPM's decision. Appx5. The administrative judge determined that section 8421 was subject to

² While Mr. Moulton's board appeal was pending, on March 13, 2018, OPM issued Mr. Moulton a final decision on his overpayment informing him that using its authority under 5 U.S.C. § 8470(b), OPM had determined he was entitled to waiver of the annuity overpayment he received from July 1, 2010, until June 30, 2016. OPM determined that he was not at fault for creating the overpayment and that collection would be against equity and good conscience because of OPM's delay in adjusting his annuity in accordance with 5 U.S.C. § 8421(c). *See* 5 C.F.R. § 845.302-303.

multiple interpretations. Appx5. The administrative judge declined to defer to OPM's interpretation because OPM's regulations did not directly address the purpose of section 8421(c) or otherwise interpret that section. Appx5. Instead, the administrative judge read the statute as allowing OPM to divide an annuity supplement only when a court order expressly provides for such division. Appx5. Because the court order in this case did not expressly divide the annuity supplement, the administrative judge determined that OPM erred in apportioning the annuity supplement in the same way as the basic annuity. Appx5-6. OPM petitioned for review with the full board.³ Appx6.

On November 28, 2023, the board issued a precedential decision. The board concluded that the plain language of 5 U.S.C. § 8421(c) allows OPM to divide a FERS annuity supplement only if a court order expressly requires division of that benefit. Appx10. According to the board, because section 8467 requires OPM to divide a FERS basic annuity only when a court order expressly divides the benefit,

³ While OPM's petition for review was pending, an MSPB administrative judge in another section 8421 case adopted OPM's interpretation of the statute. *Kuebbeler v. OPM*, No. AT-0843-19-0356-I-1, 2019 WL 4252309 (M.S.P.B. Sept. 4, 2019). In that case, the administrative judge held that 5 U.S.C. § 8421(c) is "clear and unambiguous" and "require[es] OPM to include any employee's FERS annuity supplement as part of an ex-spouse's share of any FERS annuity divided pursuant to court order without the need for the court order to separately direct OPM to include such annuity supplement." *Id.* Mr. Kuebbeler filed a petition for review of the board's initial decision but withdrew his appeal while the petition for review was pending. The full board dismissed Mr. Kuebbeler's appeal as withdrawn.

the direction in section 8421(c) to treat the annuity supplement “in the same way” means that OPM may divide the FERS annuity supplement only when a court order expressly divides the supplement. Appx10. Accordingly, the board denied OPM’s petition for review and affirmed the administrative judge’s reversal of OPM’s final decision. Appx14.

C. The Court Grants The Director’s Petition

The OPM Director petitioned this Court for review of the board’s decision, urging that the board “erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board’s decision will have a substantial impact on a civil service law, rule, regulation, or policy directive.” 5 U.S.C. § 7703(d). On May 3, 2024, this Court granted the petition.

SUMMARY OF THE ARGUMENT

This case concerns the board’s erroneous interpretation of the plain language of 5 U.S.C. § 8421(c). Contrary to the statute’s plain language requiring that an annuity supplement be divided “in the same way” as a basic annuity, the board determined that OPM may only divide an annuity supplement if a court order expressly divides this benefit. If a court order is silent as to an annuity supplement, board precedent now requires OPM to divide that supplement differently than it does a basic annuity, in violation of the statute.

OPM's interpretation of section 8421(c) is consistent with the statute's plain language and statutory structure of the FERS Act. The only reasonable interpretation of section 8421(c) is that the basic annuity and annuity supplement are considered part of the same retirement payment⁴ and thus the annuity supplement must be divided in the same way that the basic annuity is divided. The statute does not provide for any differences in how the annuity supplement and basic annuity should be divided and instead places the section covering annuity supplements under the subchapter generally applying to the basic annuity.

Moreover, unlike OPM's interpretation, the board's interpretation fails to give meaning to the various provisions of the statutory scheme and instead renders section 8421(c) superfluous. Under the board's interpretation of section 8421(c), OPM may only divide an annuity supplement if it is expressly addressed in a court order. However, section 8647, which is the general rule that would apply to annuity supplements in the absence of section 8421, provides that payments may only be divided if addressed in a court order. Accordingly, the effect of the statute under the MSBP's interpretation of section 8421(c) is exactly the same as if that provision had never been enacted. Instead, the reasonable reading of section

⁴ Indeed, the basic annuity and annuity supplement both make up the "employee annuity" as defined under 5 C.F.R. § 838.103.

8421(c) is that annuity supplements are to be divided in the same way as the basic annuity, even if annuity supplements are not specifically addressed in a court order.

ARGUMENT

I. Standard Of Review

This Court reviews the board's legal determinations, including its interpretation of a statute or regulation, *de novo*. See, e.g., *Augustine v. Dep't of Veterans Affairs*, 503 F.3d 1362, 1365 (Fed. Cir. 2007). The Court must affirm any board actions, findings, or conclusions unless they are found to be “(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.” 5 U.S.C. § 7703(c).

II. The Plain Language Of 5 U.S.C. § 8421(c) Requires OPM To Divide An Annuity Supplement “In The Same Way” As The Basic Annuity, Even When The Annuity Supplement Is Not Expressly Mentioned In A Court Order

A. OPM's Interpretation Gives Meaning To Sections 8421 And 8467

Section 8421 directs OPM to apportion annuity supplements “in the same way” as the basic annuity. The question the parties dispute is whether “be treated in the same way” means “be subject to the same rule” (*i.e.*, allocate only if expressly mentioned in a court order) or “be subject to the same allocation.”⁵ In

⁵ As illustrated above, this case is fundamentally about the proper apportionment of annuities between Federal retirees and individuals, such as

context, the only reasonable interpretation of section 8421's instruction is that the annuity supplement must be subject to the same allocation as the basic annuity.

Section 8467, titled "Court orders," establishes the general rule for when benefits ordinarily due an annuitant must be paid to another individual under a court order: "if and to the extent expressly provided for in the terms of" the court order. 5 U.S.C. § 8467(a)(1). Section 8421(c) applies section 8467's general rule to the specific context of the annuity supplement, directing that the supplement be treated the same way as the basic annuity payments. The section states: "An amount under this section shall, for purposes of section 8467, be treated in the same way as an amount computed under section 8415." 5 U.S.C. § 8421(c). Section 8415, in turn, provides the rules OPM uses to compute the basic FERS annuity.

Together, these provisions plainly require the annuity supplement to be apportioned "in the same way" as the basic annuity amount, regardless of whether the annuity supplement is explicitly identified in a court order. Stated differently, for purposes of court orders, the basic annuity amount and the annuity supplement

former spouses of retirees, receiving court-ordered benefits. OPM's interpretation does not result in the Government receiving a single dollar of a retiree's annuity, but does result in equitable treatment between a retiree and (most often) their former spouse.

are considered to be part of the same retirement payment.⁶ Thus, if the basic annuity portion of that payment is explicitly divided, the annuity supplement must be divided “in the same way.”

This construction harmonizes and gives effect to both section 8421 and section 8467. *See Splane v. West*, 216 F.3d 1058, 1068 (Fed. Cir. 2000) (“We must construe a statute, if at all possible, to give effect and meaning to all its terms.”); *Mittleman v. Postal Regulatory Comm’n*, 757 F.3d 300, 306 (D.C. Cir. 2014) (quoting *New Process Steel, L.P. v. National Labor Relations Bd.*, 560 U.S. 674, 680 (2010)) (holding that courts must attempt “to harmonize and give meaningful effect to” all provisions in a statute). Section 8467 governs when the basic annuity may be divided, and section 8421 provides that the annuity supplement should be divided in the same way.

This construction is also consistent with the “commonplace [rule] of statutory construction that the specific governs the general.” *Biogen MA, Inc. v. Japanese Foundation for Cancer Research*, 785 F.3d 648, 657 (Fed. Cir. 2015)

⁶ Indeed, OPM’s regulations confirm this point. Since 1992, OPM’s regulations have defined an “employee annuity” as any “recurring payments under [the Civil Service Retirement System] or FERS made to a retiree.” 5 C.F.R. § 838.103. The annuity supplement is paid monthly along with the basic annuity amount, *see* 5 U.S.C. § 8421(b)(1); 5 C.F.R. § 842.502, and so, under the regulations, the annuity supplement is necessarily a “recurring payment” that is part of the “employee annuity.” Accordingly, when a court order expressly apportions an annuitant’s “employee annuity,” that division necessarily encompasses the supplement as well as the basic annuity.

(quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). That rule should be given particular force here, “where Congress ‘has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.’” *Id.* (quoting *RadLAX*, 566 U.S. at 645).

Indeed, when Congress first created FERS under the Federal Employees’ Retirement System Act of 1986, Pub. Law 99-335, 100 Stat. 521 (1986), the benefit structure of FERS—which included a defined FERS benefit, a Social Security benefit, and a Thrift Savings Plan (often described as a “three-legged stool”)—was designed to be different from, but on parity with, the overall benefits provided under the previous system, the Civil Service Retirement System (CSRS). *See Supplemental Civil Service Retirement Plan: Hearing before the H. Comm. on Post Office and Civil Service*, 99th Cong. 1-2 (1985) (“the supplemental plan [(FERS)], as coordinated with Social Security, must be compatible with existing systems [(CSRS)] to preclude a situation where employees working side by side would perceive themselves as being treated differently”). Congress recognized, however, that within this statutory framework there was a structural problem: FERS employees who retired before age 62 would not be eligible for Social Security benefits upon separation. Therefore, these employees would essentially be missing one portion of the three-legged stool. *See Supplemental Civil Service Retirement Plan, Part II: Hearing before the H. Comm. on Post Office and Civil*

Service, 99th Cong. 12 (1985) (comments made by Mr. Hudstead, a Representative of the Hay/Huggins Co., a private company Congress commissioned to aid it in its construction of FERS describing why a supplement was necessary to the statutory framework). The bill creating the annuity supplement (S.1527), therefore, provides for a FERS supplement that is approximately equal to the Social Security benefit payable at age 62 to make sure that those retiring under FERS before age 62 had equivalent benefits to others retiring under FERS.

Congress recognized there may be some confusion as to how to treat the FERS annuity supplement for purposes of court-ordered division under 5 U.S.C. § 8467 because of this statutory framework. For that reason, Congress enacted 5 U.S.C. § 8421(c) to provide clear instructions to OPM that when a court order divides the FERS portion of the three-legged stool, OPM should not apply that division only to the FERS basic annuity. It must also apply the division to any FERS annuity supplement payable, and that it must treat these benefits as if they were one (“in the same way”).

Further, as a district court considering the same issue raised in this appeal reasoned, OPM’s interpretation is consistent with the overall structure of the FERS Act. *Federal Law Enforcement Officers Assoc. v. Ahuja*, No. 19-735, 2021 WL 4438907, at *5 (D.D.C. Sept. 28, 2021), *vacated*, 62 F.4th 551 (D.C. Cir. 2023)

(*FLEOA*).⁷ In *FLEOA*, the district court agreed with OPM that sections “8421(c) and 8467 unambiguously require OPM to *divide* the annuity supplement ‘in the same way’ as basic annuity when a court order directs a division of federal retirement annuity.” *Id.* (emphasis in original). “In other words, to ‘treat’ the annuity supplement ‘in the same way’ means to divide it ‘in the same way’ as [the] basic annuity; not . . . to require a court order expressly and separately directing that the annuity ‘supplement’ be divided.” *Id.* The district court noted that “the structure and context of the statutory scheme support this conclusion.” *Id.* Specifically, the district court noted that the annuity supplement “is located within the subchapter entitled ‘Basic Annuity.’” Thus, “the subchapter about [the] ‘basic annuity’ encompasses . . . the annuity supplement,” and “it is logical that if a court order directs division of [the] basic annuity, that order would also encompass division of the annuity supplement ‘in the same way,’ without the need to distinguish between the two.” *Id.*

Finally, in addition to being consistent with the statute’s plain language and longstanding rules of statutory interpretation, OPM’s interpretation makes practical sense. Marital courts may not know at the time of a divorce whether an employee

⁷ The United States Court of Appeals for the District of Columbia held that the district court lacked jurisdiction over the case, and thus vacated the district court’s opinion and remanded the case with instructions to dismiss for lack of jurisdiction. *FLEOA*, 62 F.4th at 567.

will receive an annuity supplement in the future. Although some Federal employees, like Mr. Moulton, are subject to mandatory separation provisions, most Federal employees are not. Thus, a state marital court typically cannot know exactly when a Federal employee will retire and whether that employee will qualify for the annuity supplement. Under OPM's interpretation, this uncertainty is accounted for by dividing the supplement "in the same way" as the basic annuity. Under the board's interpretation, state courts, which may not even be aware that an annuity supplement exists, must speculate, sometimes years or even decades in advance, as to whether an employee will be entitled to an annuity supplement if the court intends to subject the supplement to division. Further, the board's interpretation invites (and even mandates) OPM to embroil itself in interpreting court orders to assess whether they reference an annuity supplement with the requisite specificity. It makes far more sense for OPM to simply apportion the entire annuity when a court order says to do so. These practical considerations further support the plain reading of section 8421(c) that annuity supplements must be divided "in the same way" as the basic annuity, even if the supplement is not expressly addressed in the court order.

Accordingly, OPM's reading of the statute is consistent with its plain language and common sense.

B. The Board's Interpretation Is Contrary To Fundamental Principles Of Statutory Construction

Not only is OPM's interpretation consistent with the statute's plain language, but also the board's interpretation of the statute violates fundamental principles of statutory construction. According to the board, section 8421(c)'s mandate that the FERS supplement and the basic annuity be treated "in the same way" for purposes of section 8467 means only that OPM must divide the annuity supplement if the court order explicitly requires such a division. However, this reading renders section 8421(c) superfluous. *See Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020) (rejecting an interpretation of a statute that would render a term superfluous). Section 8467 already applies to all "[p]ayments under this chapter." 5 U.S.C. § 8467(a). As the *FLEOA* court explained, section 8421 falls under the same chapter as section 8467. 2021 WL 4438907, at *5. Absent section 8421(c), section 8467, which applies to annuity supplements, would require supplements to be apportioned only if required by a divorce decree or similar court order. Thus, section 8467 already accomplishes everything that the board attributes to section 8421(c). Put another way, section 8421(c) is designed to depart from how section 8467 would otherwise apply to an annuity supplement, by treating an express division of a basic annuity as applying to the supplement even in the absence of an express court order covering the supplement.

Notably, “the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.” *Marx v. General Revenue Corp.*, 568 U.S. 371, 386 (2013). Here, the two provisions at issue are not only a part of the same statutory enactment, but one explicitly cross-references the other. In these circumstances, where the board’s interpretation renders section 8421(c) superfluous, the board’s interpretation should be rejected.

Further, in addressing a different annuity—a survivor annuity—Congress directs OPM to pay a former spouse the annuity “if and to the extent expressly provided for . . . in the terms of any decree or divorce or annulment or any court order.” 5 U.S.C. § 8341(h)(1). That Congress elected not to include such language in section 8421(c) further undermines the board’s interpretation. *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).

In short, the MSPB’s interpretation fails to give meaning to *both* section 8421 and section 8467. Its interpretation is thus not reasonable and should be rejected. OPM’s interpretation, on the other hand, affords meaning to both

provisions within the statutory scheme and is thus the only reasonable interpretation of the statute.

CONCLUSION

For these reasons, we respectfully request that this Court reverse the MSPB's decision.

Respectfully submitted,

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