No. 24-1774

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 of Final Order of the
Merit Systems Protection Board in No. DE-0841-18-0053-I-1

OPPOSITION TO PETITIONER'S MOTION FOR STAY PENDING APPEAL

J. KAIN DAY
RACHEL G. MILLER-ZIEGLER
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Avenue NW
Suite 500E
Washington, DC 20001
Telephone: (202) 220-1100

Email: kain.day@mto.com
rachel.miller-ziegler@mto.com

Counsel for Respondent Ronald L. Moulton

March 25, 2025

CERTIFICATE OF INTEREST

Counsel for Ronald L. Moulton certifies the following:

1. The full name of every party represented by me is:

   Ronald L. Moulton

2. The names of the real parties in interest represented by me are:

   None other than Ronald L. Moulton.

3. All parent corporations and any publicly held companies that own 10% or more of stock in the parties represented by me are:

   N/A

4. The names of all law firms and the partners or associates that appeared for the parties now represented by me before the originating court or that are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   N/A

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal is:

   N/A

6. Organizational Victims and Bankruptcy Cases: Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees) are not applicable because this is not a criminal or bankruptcy case. See Fed. Cir. R. 47.4(a)(6).

   N/A

DATED: March 25, 2025

By: /s/ *J. Kain Day*
J. Kain Day

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

ADMINISTRATIVE DECISIONS

TABLE OF AUTHORITIES
(Continued)

Page(s)

INTRODUCTION

Boiled down, the Director of the Office of Personnel Management (OPM) asks this Court for the extraordinary remedy of a stay pending review because, otherwise, the federal government would be obligated to pay an individual around $29,000. That is irreparable harm, according to OPM, because it might not be fully successful in exercising its *legal right* to recoup those funds—including by offsetting Mr. Moulton's ongoing annuity payments—if it wins on appeal. At most, OPM speculates about "some 'possibility of irreparable injury,'" which is insufficient as a matter of law. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (citation omitted). On that basis alone, the Court should deny OPM's motion.

In any event, none of the remaining factors supports a stay. First, OPM cannot establish a likelihood of success on the merits. Its statutory interpretation arguments are flawed and inconsistent with the text, structure, and purpose of the statutory scheme. Second, Mr. Moulton will suffer significant injury if a stay is granted. A stay would further delay Mr. Moulton's access to benefits that ought to have been paid almost a decade ago, and OPM is likely to deny him interest on those back benefits. Third, the public interest factor is subsumed by the other factors. While resolution of this *case* will impact many other pending disputes, the *stay* OPM requests will have no concrete impact beyond the harm to Mr. Moulton.

As the Merit Systems Protection Board has already concluded, OPM is not entitled to a stay. Appx38-44. This Court should likewise deny OPM's motion.

BACKGROUND

In 2010, Ronald L. Moulton retired from his 25-year-long career as an air traffic controller with the Federal Aviation Administration. J.A. 150-151.[1] His decades-long service entitled him to retirement benefits under the Federal Employees Retirement System (FERS), a retirement system administered by the Office of Personnel Management. *See* 5 U.S.C. ch. 84. That system has three core retirement benefits: a basic annuity (a government pension), the Thrift Savings Plan (the federal government's version of 401(k) savings), and Social Security. Collectively, these benefits ensure financial stability for former federal employees.

When Mr. Moulton retired, he was eligible to receive most of his FERS benefits immediately, but he was too young to begin drawing Social Security benefits, which are available only to retirees who are age 62 or older. *See* 42 U.S.C. § 402. For federal retirees in Mr. Moulton's position, Congress provided an additional FERS benefit: the annuity supplement. 5 U.S.C. § 8421. The annuity supplement bridges the gap, providing early retirees with an approximation of their Social Security benefits until they reach age 62.

[1] Cites to the "J.A." refer to the Joint Appendix filed with the parties' briefs. *See* Docket No. 30.

Although FERS benefits are generally provided to the retiree who worked in public service, Congress also recognized that a federal employee might agree to allocate some portion of her benefits to a former spouse. *E.g.*, 5 U.S.C. §§ 8418 (survivor election), 8467 (court-ordered division). Mr. Moulton, for example, agreed to share some of his FERS benefits with his ex-wife, Jill Moulton. The couple's divorce decree expressly allocated Ms. Moulton a share of Mr. Moulton's basic annuity, J.A. 128, but it did not address the annuity supplement, *see* J.A. 36-40. This appeal must decide whether the divorce decree nonetheless requires division of Mr. Moulton's annuity supplement.

The plain statutory text answers that question. Two statutes—Section 8421(c) and Section 8467 in Title 5—establish a straightforward rule. First, Section 8467(a) creates an express-order requirement: no FERS payment can be split unless "expressly provided for in the terms of" a divorce decree. 5 U.S.C. § 8467(a). Then, Section 8421(c) clarifies that rule applies equally to the annuity supplement: the annuity supplement "shall, for purposes of section 8467, be treated in the same way" as the basic annuity. *Id.* § 8421(c). Rephrased, the annuity supplement is subject to the same *rules* as the basic annuity, i.e., the rules set forth in Section 8467, but it is not apportioned as *part* of the basic annuity.

The other traditional tools of statutory interpretation confirm the plain meaning of Section 8421(c). When Congress wants to incorporate procedural

provisions, as it did in Section 8421(c), it often does so with "treated . . . as" or "in the same way" phrasing. *See, e.g.*, 5 U.S.C. § 8442 (addressing allocation of the "supplementary annuity"). Moreover, no canon of interpretation or policy preference undermines the plain text of Section 8421(c). In fact, this interpretation of Section 8421(c) comports with clear congressional intent.

For thirty years, OPM adhered to the plain meaning of Section 8421(c). It "considered the Annuity Supplement to be a Social Security-type benefit," which was presumptively "not allocable as between former spouses." *See* J.A. 182. Only a "state court order [that] expressly addressed the Annuity Supplement" could result in division. *See* J.A. 182.

But OPM changed course in 2016—six years *after* Mr. Moulton began receiving retirement benefits. And it did so without providing notice. J.A. 182. As OPM's own Office of the Inspector General recognized, "retirees and the former spouses learned of OPM's decision only when their annuity amounts changed—many years after the parties had divorced, after a state court had ordered a former spouse's marital share, and after OPM had accepted the state court order for processing." J.A. 182. Now, OPM contends that Section 8421(c) makes the basic annuity and annuity supplement "part of the same retirement payment." Mot. 6.

More than a year ago, the Merit Systems Protection Board rejected OPM's reinterpretation. Appx18 (J.A. 1). It construed Section 8421(c) in accordance with

its plain terms, which unambiguously require a court order that *expressly* addresses the retirement annuity supplement before splitting that supplement. *See* Appx31 (J.A. 14). The Board accordingly ordered "OPM to rescind its December 12, 2017[,] final decision, stop apportioning the annuity supplement, and refund all previously apportioned annuity supplement amounts to the appellant." *Id.*

Based on that order, OPM is now obligated to pay Mr. Moulton seven years' worth of benefits. Starting in 2016, when it changed its policies, OPM began allocating a portion of Mr. Moulton's annuity supplement to his ex-wife. And it continued doing so at least through 2023. *Cf.* Mot. 10. In total, Mr. Moulton is owed approximately $29,000 in back retirement benefits.[2] For this reason, it is not accurate to say Mr. Moulton stands to lose "no money" "from an adverse decision in this case." Mot. 10. In the unlikely event OPM is successful on appeal, Mr. Moulton would be denied thousands of dollars. *See id.* (recognizing Mr. Moulton is entitled to be "repaid" a portion of his annuity under the Board decision).

Soon after the Board's merits decision, OPM sought review of the Board's decision and a stay pending review. *See* Appx1 (Petition for Review, filed January

[2] Although this number is not in the record, it can be estimated based on the six years' worth of benefits OPM originally sought to claw back from Mr. Moulton. Those benefits totaled $24,535, Appx6 (J.A. 3), so the amount Mr. Moulton is owed would be in the same ballpark. The $29,000 figure is a rough estimate.

30, 2024); J.A. 55 (Certified List, noting Board stay request was filed on December 18, 2023). More than a year passed before the Board denied OPM's stay request—during which the parties fully briefed this petition for review, which now sits ready to be calendared for argument. *See* Appx38 (Order Denying Stay, dated February 24, 2025). Another month passed before OPM requested a stay from this Court.

LEGAL STANDARDS

"A stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427 (quotation marks and citation omitted). Thus, the party requesting a stay must establish that the particular circumstances of the case justify an exercise of judicial discretion based on four factors:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 433-34 (citation omitted). The first two factors are the "most critical." *Id.* Accordingly, "more than a mere possibility of relief is required," and "simply showing some possibility of irreparable injury" is insufficient. *See id.* (cleaned up and citations omitted). "Once an applicant satisfies the first two factors," courts

continue on to consider the harm to the other parties and the public interest. *Id.* at 435.[3]

ARGUMENT

I. OPM Has Not Established a Likelihood of Success

This motion presents an unusually well-developed record for evaluating OPM's likelihood of success. Because OPM waited more than a year before seeking a stay, the parties and amicus curiae have already completed briefing on the merits. *See* Docket Nos. 19-21, 28-29. As the Board's brief and Mr. Moulton's brief explain, the Board correctly interpreted Section 8421(c), and OPM's arguments to the contrary are unavailing. *See* Docket Nos. 20-21. Rather than rehashing the merits briefing here, it suffices to address only the points raised in OPM's motion. *Cf. Promptu Sys. Corp. v. Comcast Cable Commc'ns, LLC*, 92 F.4th 1384, 1385 (Fed. Cir. 2024) (incorporation by reference cannot be used to exceed word count).

[3] OPM cites decades-old precedent that suggests a sliding-scale approach to stay motions, where "a strong showing on one factor balances a weaker showing on another factor." Mot. 4. The cited authorities are of questionable validity after the Supreme Court's decision in *Winter v. NRDC*, 555 U.S. 7, 22 (2008), and the application of that decision to stay motions in *Nken*, 556 U.S. at 434. Because OPM's motion fails under any standard, the Court need not resolve that question here. *See Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (noting, but not deciding, a similar question).

In short, OPM has failed to prove any likelihood of success for its statutory-interpretation arguments.

Primarily, OPM misunderstands the text in Section 8421(c). *See* Mot. 5-6. That statute requires the annuity supplement to be "treated in the same way" as the basic annuity "for purposes of Section 8467." 5 U.S.C. § 8421(c). The phrase "treated . . . as" means to "regard and handle in a certain way." *Treat*, American Heritage Dictionary (3d ed. 1992). And a "way" is "[a] manner or method of doing"—as in there are "several ways of solving this problem." *Way*, American Heritage Dictionary (3d ed. 1992). Thus, the statute's direction that the annuity supplement shall be "treated in the same way" as the basic annuity means that supplement should be handled using the same method as the basic annuity. It does not mean, as OPM suggests, "the basic annuity amount and the annuity supplement are considered to be part of the same retirement payment." Mot. 6.

It is telling that OPM's understanding of the statutory text has shifted over time. In its principal brief, OPM argued that "the only reasonable interpretation" of the text is that "the basic annuity and annuity supplement are considered part of the same retirement payment." Docket No. 19 at 8. In reply, after Mr. Moulton pointed out the flaws in that argument, OPM pivoted—claiming that its interpretation "does not hinge on the Court determining that the basic annuity and annuity supplement are part of the same payment." Docket No. 29 at 4-5. Now, OPM is back to arguing

the "the basic annuity amount and the annuity supplement are considered to be part of the same retirement payment." Mot. 6. It cannot be *likely* that OPM will succeed in convincing the Court to adopt its understanding of the statutory text when OPM itself cannot stick with a single interpretation.

What is more, the interpretation OPM offers is flatly inconsistent with the statutory language. That language requires the annuity supplement to be "treated in the same way" as the basic annuity "for purposes of Section 8467." 5 U.S.C. § 8421(c). Yet OPM reads this text as "designed to *depart from* how section 8467 would otherwise apply to an annuity supplement." Mot. 6 (emphasis added). OPM offers no explanation for why Congress sought to effect a *departure* from the ordinary rule by enacting language that expressly requires treatment in the *same way*.

Separate from the flaws in its plain-text arguments, OPM misapplies the canon against surplusage. Mot. 6. That canon does not apply when Congress "simply intended to remove any doubt" by including language that, although "technically unnecessary," provides clarity in the statutory scheme. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 226-27 (2008). As OPM has already conceded, absent Section 8421(c) 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." Docket No. 19 at 13. OPM does not engage with this concession in its motion, Mot. 6, or its reply brief on the merits, Docket No. 29 at 7-10.

At bottom, the parties agree that Congress enacted Section 8421(c) as "clear instructions to OPM" on how the annuity supplement should be treated for purposes of Section 8467(a). *See* Docket No. 19 at 13. The parties' dispute turns on the *content* of that instruction: whether the annuity supplement should be treated under the same rule applicable to the basic annuity or as part-and-parcel of the basic annuity. *See id.* at 9 (characterizing parties' dispute). The canon against surplusage has no impact on the answer to that question. Under any party's interpretation, Section 8421(c) "remove[s] any doubt" from the meaning of the statutory scheme. *Ali*, 552 U.S. at 226.

Finally, OPM's reliance on a district court decision adopting its interpretation cannot support a stay. *See Federal Law Enforcement Officers Assoc. v. Ahuja*, No. 19-cv-735, 2021 WL 4438907, at *5 (D.D.C. Sept. 28, 2021) (vacated on other grounds). At best, this shows a "fair ground for litigation," which justifies a stay only if the equities tip *decidedly* in OPM's favor. *See Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990) (citation omitted) (applying the now-questionable sliding-scale test). As explained below, the equities decidedly favor Mr. Moulton.

II. OPM Will Not Suffer Irreparable Harm Absent a Stay

Speculation about the possibility of irreparable injury cannot justify a stay, *Nken*, 556 U.S. at 434, let alone tip the "balance of hardships . . . decidedly" towards

OPM such that a minimal showing on the merits is enough, *Standard Havens*, 897 F.2d at 513 (citation omitted). Yet OPM relies on nothing more than speculation, and on that basis alone, this Court should deny its motion.

OPM argues that it may not be able to recoup the funds it owes Mr. Moulton—around $29,000—if it is forced to pay him now, rather than after resolution of this petition for review. *See* Mot. 8-9. According to OPM, "there is no *guarantee* that OPM" could collect those funds from Ms. Moulton immediately, and the payment to Mr. Moulton "*may* not be reparable *if* OPM cannot" recover the funds after the appeal. *Id.* (emphases added). These claims, by their own wording, reveal their speculative nature. OPM points to no authority establishing that it cannot recover the funds, nor does it identify any facts suggesting it would not recover if successful on appeal. In fact, OPM has a legal right to recoup overpayments, 5 C.F.R. §§ 845.201-209, and it can do so by deducting from Mr. Moulton's ongoing annuity payments, *see id.* § 845.206. Certainly, OPM claims it might "choose to waive" its recovery rights, *see* Mot. 8 (addressing collection from Ms. Moulton), but "[a] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted." 11A Wright & Miller, Federal Practice and Procedure § 2948.1 (3d. ed. 2024) (discussing preliminary injunctions).[4]

[4] To be clear, Mr. Moulton is not abandoning his right to seek a waiver should any overpayment occur.

Even if this argument established *some* irreparable injury, it is certainly not enough injury to justify OPM's weak showing on the merits. The bare possibility that OPM will be unable to recover funds, balanced against the hardships imposed on Mr. Moulton if a stay issues (*see infra* § III), mean the equities do not "decidedly" favor OPM. *See Standard Havens*, 897 F.2d at 513.

Stretching to find support for its position, OPM cites to the Eleventh Circuit's decision in *Dixon v. United States*, 900 F.3d 1257 (11th Cir. 2018). It claims that decision explains "why courts grant stays of money judgments pending appeal," Mot. 9, but that decision only supports Mr. Moulton. It explains the purpose of a stay pending appeal "is to protect the judgment debtor from satisfying the judgment only to find that restitution is *impossible* after reversal on appeal." *Dixon*, 900 F.3d at 1268 (emphasis added and citation omitted). In the ordinary case, this makes sense: parties do not often have an ongoing relationship that would allow for collecting monetary relief through offset, so recovery may be difficult or impossible. Here, the opposite is true. OPM has a right to recover the funds, and the parties have an ongoing relationship that makes it easy to do so.

Finally, OPM claims that, "absent a stay pending appeal, the MSPB will likely resolve the other pending cases in the same manner that it resolved this case." Mot. 9. Not so. The Board is already holding all impacted cases pending resolution of this appeal. *E.g.*, *Knowles v. OPM*, No. DC-0841-20-0074-I-10, 2025 WL 707685

(M.S.P.B. Feb. 27, 2025). In fact, the Board has been holding those cases ever since initial decision underlying this petition for review—which issued in September 2019. *Id.* (explaining this particular appeal had been dismissed and refiled ten times). That avoids the need for OPM to issue any other corrective payments, dispensing with OPM's argument on that score. Mot. 9.

III. A Stay Will Significantly Harm Mr. Moulton

Unlike OPM, Mr. Moulton may suffer irreparable injury if the Court grants a stay. Interest may not be available on back retirement benefits. *See Wallace v. OPM*, 283 F.3d 1360 (Fed. Cir. 2002) (interpreting Back Pay Act). And presumably, OPM will argue that rule applies here, potentially precluding Mr. Moulton from recovering interest. For that reason, even if he wins, Mr. Moulton may not be "made whole." *Contra* Mot. 10. And a stay would exacerbate that potential injury—further delaying Mr. Moulton's access to funds that OPM should have paid years ago.

OPM's arguments to the contrary are flawed. It strains credulity for OPM to rely on precedents holding "[t]he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." Mot. 10 (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). After all, as explained above, OPM's alleged harm is purely monetary, and unlike Mr. Moulton, OPM has a largely unfettered right to recoup its losses. *See* 5 C.F.R. § 845.205(b) (noting interest can be

recovered).[5] If Mr. Moulton's harm does not qualify as irreparable injury, the same would be true of OPM's alleged harm, and the Court would be required to deny its motion. *See Nken*, 556 U.S. at 434 (requiring more than "some possibility of irreparable injury").

IV. The Public Interest Is Captured Through the Other Factors

Finally, as explained above (*see supra,* pp. 12-13), OPM's stay motion will have no impact beyond its effects on the parties. The Board is already holding cases that raise the same issue of statutory interpretation, irrespective of whether this petition for review is stayed. For that reason, and also because the government is a party, the other factors capture all relevant equities, and the public interest has no additional impact on the stay analysis.

CONCLUSION

All four stay factors weigh against OPM. Therefore, the Court should deny OPM's request.

DATED: March 25, 2025

MUNGER, TOLLES & OLSON LLP

By: */s/ J. Kain Day*
J. Kain Day
Counsel for Ronald L. Moulton

[5] It is not clear from the record whether OPM generally seeks to recover interest, but the prior claw back request suggests it would not. Even so, this would be another instance in which OPM has chosen not to exercise its right, and that cannot be the basis for irreparable harm.

CERTIFICATE OF COMPLIANCE

1. This Opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d), because it contains 3,364 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED: March 25, 2025

By: /s/ *J. Kain Day*
J. Kain Day

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system on March 25, 2025.

I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: March 25, 2025

By: */s/ J. Kain Day*
J. Kain Day