PBGC
Protecting America's Pensions
Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

January 31, 2020

[Attorney for Spouse #1]

Re: Appeal 2018-[redacted] Estate of [Participant]; Case No. 202057; Horizon NR, LLC Employee Pension Plan (the "Horizon Plan")

Dear Attorney for Spouse #1:

We are responding to your appeal on behalf of your client, Spouse #1, ex-wife of the late Participant. You appealed PBGC's August 8, 2018 determination that an [redacted] Divorce Decree (also referred to as the "Domestic Relations Order" or "DRO") submitted to PBGC for qualification is not a Qualified Domestic Relations Order ("QDRO"). For the reasons stated below, the Appeals Board is denying your appeal.

Background

PBGC provides pension insurance in accordance with the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA").[1] If a plan sponsor of a tax-qualified defined benefit pension plan is unable to support its plan, PBGC becomes trustee of the plan and pays benefits pursuant to the terms of the plan, subject to limitations set by Congress under ERISA.

The Horizon Plan terminated on March 31, 2004, without sufficient assets to provide all benefits PBGC guarantees under ERISA. PBGC subsequently became trustee of the Horizon Plan on June 24, 2004. The terms of the plan in effect when Participant terminated employment[2], the

[1] 29 United States Code ("U.S.C.") §§ 1301-1461; ERISA §§ 4001-4402.

[2] The Decree of Legal Separation references section 3.8 of the Peter Cave Coal Retirement Plan. Following several mergers, Participant was a participant in the Mining Companies Employees' Pension Plan when he and Spouse #1 divorced. Participant terminated employment on [redacted]. The applicable plan document, with regard to this appeal, is the plan document in effect when Participant terminated employment, *i.e.*, the Wolf Creek Collieries Company Employees' Pension Plan, as amended and restated effective January 1, 1985. The Mining Companies Employees' Pension Plan was adopted as an amendment and a complete restatement of the Wolf Creek Collieries Employees' Company Pension Plan, effective December 31, 1991. Effective January 1, 1999, the Mining Companies Employees' Pension Plan was amended and restated and renamed the AEI Resources, Inc. Employee Pension Plan. Effective January 1, 2002, the AEI Resources, Inc. Employee Pension Plan was renamed the Horizon NR, LLC Employee Pension Plan, which is the plan trusteed by PBGC. References to the "Plan" herein are to the Wolf Creek Collieries Company Employees' Pension Plan, as amended and restated effective January 1, 1985.

provisions of ERISA, and PBGC's regulations determine the benefits PBGC can pay.[3]

When PBGC becomes trustee of a terminated plan, PBGC collects participant data and plan documents from the former plan administrator. PBGC then audits that information. PBGC relies on the information it receives from a former plan administrator unless PBGC's audit of that information shows that it is wrong, or a participant or alternate payee supplies PBGC with documents indicating that the information is wrong or incomplete.

PBGC's records, including those submitted with your appeal, provide the following relevant information and timeline:

- Participant was born in 1939.
- Spouse #1 was born in 1947.
- Spouse #2 was born in 1953.
- Participant and Spouse #1 married in February 1964.
- In July 1992, Judge [redacted], [redacted], [redacted], Kentucky, issued Findings of Fact, Conclusions of Law, and Decree of Legal Separation (the "Decree of Legal Separation") relating to Participant and Spouse #1.[4] Paragraph 6 of the Decree of Legal Separation provides:

  > The Respondent, [Participant], agrees to irrevocably designate the Petitioner, [Spouse #1], as the surviving beneficiary pursuant to Section 3.8 of the Peter Cave Coal Retirement Plan and upon retirement under the plan to select the "100% Joint & Survivorship" benefit option with the Petitioner, [Spouse #1], as the beneficiary.

- In October 1992, Judge [redacted] signed the Final Judgment (the "Divorce Decree") dissolving Participant and Spouse #1's marriage.[5] Paragraph 2 of the Divorce Decree provides:

  > . . . the Agreement [Decree of Legal Separation] reached by the parties settling all property rights or controversy is fair and equitable and is hereby adopted and approved by the Court and incorporated into and made a part of this Decree of Dissolution [Divorce Decree].

- There is no record that either Participant or Spouse #1 or their representatives ever submitted the Divorce Decree (the "DRO") to the prior Plan administrator.
- Participant and Spouse #2 married in 1993.
- Effective July 1, 1994, Participant began receiving a monthly benefit under the Plan, in the form of a Joint and 100% Survivor Annuity ("J&100%SA"); Participant elected Spouse #2 as his beneficiary for the J&100%SA.[6]

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[3] Following the Plan's termination, PBGC became responsible for determining whether a domestic relations order is qualified.

[4] *See* Enclosure 1.

[5] *See* Enclosure 2.

[6] A copy of Participant's benefit election form signed by him on June 22, 1994 is provided at Enclosure 3. Spouse #2 is described as "Spouse" on the "Relationship to Participant" line of the form.

- Participant died in March 2018.
- PBGC has been paying Spouse #2 a J&100%SA since Participant's death.

Correspondence Regarding Spouse #1's Claim to a Benefit

On April 8, 2018, Spouse #1 submitted to PBGC the Decree of Legal Separation and Divorce Decree. Spouse #1 asserted, "according to these records [and] findings I, [Spouse #1] should be awarded this Pension Benefit." Soon thereafter, in your April 25, 2018 letter to PBGC, you stated the following:

> I represent [Spouse #1] who is the beneficiary on her former husband's policy. According to the Judgment of the Martin Circuit Court . . . [Spouse #1] was to be designated as beneficiary on her former husband's retirement plan. I would call your attention to Paragraph Six [6] of the Findings of Fact. [Spouse #1] was unaware that her former husband had failed to designate her as beneficiary in accordance with the Court's Judgment until after her former husband's death.

You enclosed the Decree of Legal Separation and Divorce Decree with your appeal letter.

PBGC's Determination

On August 8, 2018, PBGC determined that the Divorce Decree is not a QDRO pursuant to section 206(d)(3)(B) of ERISA. PBGC stated the following, in relevant part:

> . . . [O]nce benefit payments have commenced, PBGC may not qualify a DRO that would require a change in the benefit form payable or the designated contingent annuitant (beneficiary). Such a change requires PBGC to reannuitize a benefit, which is prohibited by PBGC and Department of Labor regulations and, therefore, is a disqualifying defect in any DRO submitted after a participant's benefit commencement.
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> PBGC has determined that the Order is NOT a qualified domestic relations order (a "QDRO") under Section 206(d)(3)(B) of ERISA, 29 U.S.C. §1056(d)(3)(B) for the following reasons:
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> - Section 6 of the Order would require a reannuitization of the participant's benefit, in violation of ERISA § 206(d)(3)(D)(i). At the time the participant commenced benefits, the participant elected a form that did not provide survivor benefits to the alternate payee. Nor had either party provided a copy of the Order to the plan administrator, for review for qualification. A change in form or beneficiary now – that is, after benefit commencement – would require PBGC to reannuitize the participant's benefit after the participant's death. PBGC regulations prohibit this type of post-commencement change. 29 [Code of Federal Regulations] C.F.R. § 4022.8(d). The Order, which provides that [Spouse #1] should be treated

as the contingent beneficiary, is clearly contrary to this limitation on changes in benefit form.

- Department of Labor regulations provide that a domestic relations order that requires a plan to "provide any type or form of benefit, or any option, not otherwise provided under the plan" is not a QDRO because such a change would violate ERISA § 206(d)(3)(D)(i). See C.F.R. § 2530.206(c) Ex. 3 and § 2530.206(d)(2) Ex. 4.

. . .

Because PBGC has determined that the Order is **not** a qualified domestic relations order, PBGC is not bound by the Order. Moreover, because the participant is now deceased, no benefits payable to the participant remain to be awarded to an alternate payee of the participant. Because the lifetime value of the benefit is exhausted upon the death of the participant and the form of benefit cannot be changed after the benefit commenced, PBGC would be unable to qualify any DRO submitted at this time, pursuant to its written procedures. See p. 3 of PBGC's written QDRO procedures, *Qualified Domestic Relations Orders & PBGC* . . . .

. . .

Your Appeal on Behalf of Spouse #1

On August 30, 2018, you appealed PBGC's determination on behalf of Spouse #1. In the appeal, you stated that Participant violated the Divorce Decree by not naming Spouse #1 as his designated beneficiary. The appeal asserted, in part, the following:

The essential facts are not in dispute. [Spouse #1] and [Participant] were divorced in October 1992, and the property was divided pursuant to a property settlement agreement dated July 1992, which was incorporated in the Divorce Judgment. As set forth in Paragraph Six [6] of the Findings of Fact, [Participant] was ordered by the Court to designate [Spouse #1] as the beneficiary under his employer plan.

. . .

In direct violation of the Court's Judgment, [Participant] failed to make the necessary designation. Subsequently, [Participant] elected to commence benefits on July 1, 1994, but again in direct violation of the Court's Order failed to elect a form consistent with the requirements of the Court Judgment nor did he make the Pension Plan aware of any Order requiring [Spouse#1] to be treated as his spouse with respect to the benefit.

[Participant] passed away [in March 2018]. [Spouse #1] submitted the Court's Judgment to the PBGC on April 8, 2018. The PBGC denied the claim as shown by the denial letters dated August 8, 2018 . . . .

> Counsel's understanding of the basis of the denial is threefold. First, the claim that the necessary information was not contained in the Divorce Judgment sufficient to satisfy the requirements for a QDRO. Second, that the Divorce Judgment was not timely submitted since [Participant] had passed away [in March 2018] but the Court Judgment was not submitted to PBGC until April 8, 2018. Third, that the Divorce Judgment would require a recalculation of benefits which is not permitted under 29 CFR 2530.206.
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> . . .

Among other things, you contended in your appeal that the Sixth Circuit's decision in *Sun Life Assurance Company of Canada v. Jackson* supports the conclusion that the DRO meets the conditions of section 206(d)(3) of ERISA and that the DRO "could be pursued posthumously."[7] You also contended that the Third Circuit's decision in *Files v. ExxonMobil Pension Plan* supports your position that payment to Spouse #1 would not violate section 206(d)(3) by changing the Plan benefit otherwise payable.[8] Finally, you asserted that PBGC's reliance on Department of Labor regulation 29 C.F.R. section 2530.206 does not support the denial of benefit payments to Spouse #1.

As part of your claim for relief, you asserted that the Appeals Board must reverse PBGC's determination and "put [Spouse #1] in 'pay status.'"

The Appeals Board's Letter to Spouse #2

Pursuant to PBGC's regulation 29 C.F.R. section 4003.57, the Appeals Board notified Spouse #2, by letter dated July 24, 2019, that it had received an appeal from you on Spouse #1's behalf.[9] We explained that the appeal asserts that Spouse #1 is the rightful beneficiary of the $564.56 monthly benefit Spouse #2 has received from PBGC since the death of Participant. We explained that you disputed PBGC's August 8, 2018 determination that the Divorce Decree is not a QDRO pursuant to section 206(d)(3)(B) of ERISA.

The Board noted that the July 24, 2019 letter makes Spouse #2 a party to the appeal. In accordance with the provisions of 29 C.F.R. section 4003.57(b), Spouse #2 was granted 45 days from the date of the letter to submit written comments or to request to appear before the Board.

On August 7, 2019, Spouse #2 responded to the Board's July 24, 2019 letter.[10] She stated the following, in part:

> . . . We were married for a year or so and wanted to buy a home. [Participant] decided to go ahead and take his pension early so that we could buy our home.

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[7] 877 F.3d 698 (6th Cir. 2017), at Enclosure 4.
[8] 428 F.3d 478 (3d Cir. 2005), at Enclosure 5.
[9] *See* Enclosure 6.
[10] *See* Enclosure 7.

> [Participant] and I went and we signed the papers so that I would receive the same amount that he [drew] every month . . . .
>
> [Participant] always said he was so glad we had fixed his pension for me to receive the same amount. . . .

Legal Background

The Terms of the Plan

The Plan document relevant to your appeal is the Wolf Creek Collieries Company Employees' Pension Plan, as amended and restated effective January 1, 1985. Section 1.2 of the Plan defines a "Beneficiary" as the person or entity designated by a participant to receive benefits under Article IV or Section B of Article VI after the death of the same. [11]

Section 1.8 of the Plan defines a "Contingent Annuitant" as a person designated by the participant to receive a benefit payable under Option 2 of Section A of Article V or Section B of Article V after the participant's death.

Article V, Section A of the Plan provides the forms of retirement benefits payable under the Plan and how these forms can be elected. Option 1 is the Straight Life Option with no survivor benefits ("SLA"), which is the normal form of benefit for an unmarried participant. Option 2 is the Joint and Last Survivor Option, which allows a participant to elect a 100%, 66 2/3% or 50% joint and survivor benefit, payable after the participant's death to the designated contingent annuitant. In addition, Article V, Section A provides that no election or revocation of a form of benefit may be made once the participant has commenced retirement payments.

Article V, Section B of the Plan states that unless a married participant has elected an option under Article V and has not revoked it, he is automatically assumed to have elected a 50% joint and survivor benefit ("J&50%SA"). Article V, Section B also contains provisions for electing or revoking an election of a form of benefit and the required period for the same, as well as the spousal consent requirement to waiver of the J&50%SA.

Article VI of the Plan provides that the Plan administrator must comply with the terms of a QDRO, which is defined in the same manner as set out in section 206(d)(3) of ERISA. Consistent with section 206(d)(3)(K) of ERISA, the Plan defines an alternate payee as a "[p]articipant's spouse, former spouse, child, or other dependent who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable under the Plan with respect to such Participant."

Sections 205 and 206 of ERISA

Section 205(a) of ERISA requires that pension plans pay the accrued benefit of a married participant who does not die before the annuity starting date in the form of a qualified joint and survivor annuity ("QJSA"). Section 205(d)(1) of ERISA defines QJSA as:

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[11] *See* Enclosure 8.

> an annuity – (A) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of . . . the amount of the annuity which is payable during the joint lives of the participant and the spouse, and (B) which is the actuarial equivalent of a single annuity for the life of the participant.

ERISA permits participants to waive the QJSA during the applicable election period. Such waiver is not effective, however, unless the participant's spouse consents to the waiver.

Under the "anti-alienation rule" of section 206(d)(1) of ERISA, "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."[12] ERISA section 206(d)(3)(A) provides an exception to the anti-alienation rule, which states that section 206(d)(1) does not apply to a domestic relations order determined to be a qualified domestic relations order, or QDRO.[13] Under ERISA, a QDRO is a domestic relations order that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and which meets the requirements of ERISA sections 206(d)(3)(C) and 206(d)(3)(D)."[14]

Section 206(d)(3)(C) of ERISA specifies the informational requirements for a domestic relations order:

> (C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies—
> (i) the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
> (iii) the number of payments or the period to which each order applies; and
> (iv) each plan to which such order applies.

Under Section 206(d)(3)(D) of ERISA, a domestic relations order, or DRO, may be a QDRO unless it fails the meet one or more of the requirements in the following subparagraph:

> (D) A domestic relations order meets the requirements of this subparagraph only if such order—
> (i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
> (ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

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[12] Section 206(d) of ERISA is applicable to defined benefit plans, as well as to ERISA-covered individual account plans (*e.g.*, defined contribution plans) over which PBGC has no jurisdiction.
[13] Parallel provisions regarding QDROs also appear at § 414(p) of the Internal Revenue Code.
[14] *See* ERISA § 206(d)(3)(B)(i) (definition of a QDRO).

(iii) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

Under ERISA section 206(d)(3)(F), a *former* spouse of a participant is treated as a surviving spouse of the participant under section 205 regarding the entitlement to a survivor annuity benefit and, if married for at least 1 year, is treated as meeting the marriage requirements under section 205 "*to the extent provided in any QDRO.*"

Section 206(d)(3)(J) of ERISA provides that "[a] person who is an alternate payee under a qualified domestic relations order shall be considered for purposes of any provision of this chapter [of ERISA] a beneficiary under the plan."

Pursuant to section 206(d)(3)(K) of ERISA, "the term 'alternate payee' means any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant."

Regulation Issued by the U.S. Department of Labor

In section 1001 of the Pension Protection Act of 2006, Congress directed the Secretary of Labor to do the following:[15]

> . . . [I]ssue regulations under section 206(d)(3) of the Employee Retirement [Income] Security Act of 1974 [ERISA] and section 414(p) of the Internal Revenue Code of 1986 which clarify that—
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> (1) a domestic relations order otherwise meeting the requirements to be a qualified domestic relations order, including the requirements of section 206(d)(3)(D) of such Act [ERISA] and section 414(p)(3) of such Code, shall not fail to be treated as a qualified domestic relations order solely because—
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> (A) the order is issued after, or revises, another domestic relations order or qualified domestic relations order; or
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> (B) of the time at which it is issued; and
>
> (2) any order described in paragraph (1) shall be subject to the same requirements and protections which apply to qualified domestic relations orders, including the provisions of section 206(d)(3)(H) of such Act and section 414(p)(7) of such Code.

On June 10, 2010, the U.S. Department of Labor's Employee Benefits Security Administration ("EBSA") issued a final rule (the "DOL regulation") related to domestic relations orders under ERISA section 206(d)(3).[16] Among other things, the DOL regulation addresses subsequent domestic relations orders, the timing of domestic relations orders, and requirements and protections under section 206(d)(3) of ERISA.

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[15] *See* Pub. L. No. 109-280.

[16] *See* 75 Fed. Reg. 32846 (June 10, 2010), at Enclosure 9.

Discussion

Introduction

A DRO issued by a state court gives the alternate payee rights with respect to the participant's pension benefit. Under ERISA, however, these rights do not become enforceable until the DRO is submitted to the plan and the plan administrator determines that it is a QDRO.[17]

ERISA section 206(d)(3)(B) provides that, to be qualified, a DRO must meet the requirements of both ERISA section 206(d)(3)(C) and section 206(d)(3)(D). In your appeal on behalf of Spouse #1, you asserted that one of the reasons for PBGC's determination that the DRO was not a QDRO was that it did not meet the requirements of ERISA section 206(d)(3)(C).[18]

PBGC did not determine that the DRO could not be qualified due to lack of compliance with ERISA section 206(d)(3)(C).[19] Rather, PBGC determined the DRO could not be qualified based on ERISA section 206(d)(3)(D)(i), Department of Labor regulation section 2530.206, and PBGC regulation section 4022.8(d).

The Appeals Board assumes for purposes of this decision that the DRO satisfies the requirements of section 206(d)(3)(C) of ERISA. Specifically, the DRO:

- is an order that was issued by a state court that had the power to do so [the [redacted], Kentucky Circuit Court],
- related to the marital property rights to a former spouse [Spouse #1],
- named the alternate payee [Spouse #1] and the affected plan participant [Participant], and PBGC has the mailing addresses of each,
- specified the percentage [100%] of the participant's [Participant's] benefit [the 100% survivor annuity] to be paid to Spouse #1,
- stated the time period to which the DRO applies [the remainder of Spouse #1's lifetime after Participant died], and
- stated the name of the affected plan as the "Peter Cave Coal Retirement Plan," which was a predecessor plan.

However, and as discussed in more detail below, the Appeals Board upholds PBGC's determination that the DRO cannot be qualified as a QDRO pursuant to ERISA section 206(d)(3)(D)(i) because the DRO requires PBGC to provide a type or form of benefit, or an option,

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[17] In *Files v. ExxonMobile Pension Plan*, one of the cases you cite, the court stated that the QDRO provisions of ERISA do not "suggest that an alternate payee has no interest in plan benefits until she obtains a QDRO" but they "prevent enforcement of that already-existing interest until the QDRO is obtained." 428 F.3d at 489. (citing *Trs. Of Directors Guild of Am. Producer Pension Benefits v. Tise*, 234 F.3d 415, 421 (9th Cir. 2000).

[18] 29 U.S.C. § 1056(d)(1)(C).

[19] In PBGC's August 8, 2018 letter, PBGC noted that apart from the DRO's naming Spouse #1 as the surviving beneficiary pursuant to the Plan, and that upon his retirement, Participant was to select the 100% Joint & Survivorship option, with Spouse #1 as the beneficiary, no DRO providing a fuller treatment of the division of pension assets was obtained. We suppose that this statement may be read as suggesting that PBGC made a determination that the DRO was not in compliance with ERISA § 206(d)(3)(C). However, PBGC's determination that the DRO was not qualified was based on ERISA §206(d)(3)(D)(i).

that is not otherwise provided under the Plan. In addition, the Board finds that PBGC correctly determined that qualification of the DRO would be inconsistent with PBGC regulation section 4022.8(d). The Board also finds that well-established caselaw can be applied to preserve Spouse #2's survivor annuity benefit from being assigned to Spouse #1.

The DRO Cannot Require PBGC to Provide a Type or Form of Benefit, or an Option, Not Provided Under the Plan

As cited above, ERISA section 206(d)(3)(D)(i) provides that a domestic relations order can be qualified only if such domestic relations order "does not require a plan to provide a type or form of benefit, or any option, not otherwise provided under the plan."

Forms of benefit payment and options related to benefit payments are specifically addressed in the Plan terms. The Plan provides an automatic form of benefit, *i.e.*, Joint and 50% Survivor Annuity ("J&50%SA"), available to a married participant.[20] The Plan provides the Straight Life Option, *i.e.*, a Single Life Annuity without a survivor benefit ("SLA"), which is an unmarried participant's automatic form of benefit.[21] The Plan also provides the Joint and Last Survivor Option, which includes the optional forms of benefit, *i.e.*, J&100%SA, J&66-2/3%SA, which are available only to married participants.[22] A participant may waive the J&50%SA with spousal consent, which is what Spouse #2 did to receive the J&100%SA.[23]

The Plan expressly prohibits any changes in the form of benefit or changes of beneficiary of a joint and survivor form of benefit a participant elected at retirement by stating, "[a]fter retirement allowance payments have commenced, no future elections or revocations of an option will be permitted under any circumstances."[24] Notably absent from the Plan's list of optional benefits is a benefit payable to an alternate payee for the life of another beneficiary.

In the preamble to the DOL regulation, EBSA states ". . . any domestic relations order received by a plan after the original annuity starting date of the participant that would require reannuitization with a new annuity starting date would violate section 206(d)(3)(D)(i), unless the plan specifically provides for such an option."[25] Nowhere does the Plan provide for "any type or form of benefit or any option" that permits the benefit of a participant or beneficiary to be terminated or revoked once payment has commenced. Further, the Plan does not provide for the reannuitization of a participant's or beneficiary's benefit after the annuity starting date.

The Appeals Board finds that the situation in this case is addressed in Example 4 of section 2530.206(d)(2) of the DOL regulation.[26] Example 4 in DOL regulation section 2530.206(d)(2) provides the following, in relevant part:

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[20] *See* Enclosure 8, Article V, Section B.
[21] *See* Enclosure 8, Article V, Section A, Option 1.
[22] *See* Enclosure 8, Article V, Section A, Option 2.
[23] *See* Enclosure 8, Article V, Section B.
[24] *See* Enclosure 8, Article V, Section A.
[25] *See* 75 Fed. Reg. at 32848.
[26] In your appeal you asserted that PBGC should rely on Example 1 of DOL Regulation section 2530.206(c)(2) in Spouse #1's case. Example 1 of DOL regulation 2530.206(c)(2) states, in relevant part, "order does not fail to be

> . . . The plan does not allow reannuitization with a new annuity starting date, as defined in section 205(h)(2) of ERISA (and as further explained in 26 CFR 1.401(a)-20, Q&A–10(b)). Pursuant to paragraph (c)(1) of this section [regarding the timing of domestic relations orders], the order does not fail to be a QDRO solely because it is issued after the annuity starting date, but the order would fail to be a QDRO under section 206(d)(3)(D)(i) and paragraph (d)(1) of this section because the order requires the plan to provide a type or form of benefit, or any option, not otherwise provided under the plan. . . .

While the facts in Example 4 differ from the facts of this appeal in that Example 4 references a scenario whereby the divorce occurs after the annuity starting date, the above quoted text is applicable in the context of this appeal. Specifically, like the plan in Example 4, above, the Plan does not permit the reannuitization of a participant's or beneficiary's benefit after the original annuity starting date. Just as reannuitizations are described in the preamble to the DOL regulation,[27] this appeal proposes "to substitute one measuring life for another," by substituting Spouse #1's life for Spouse #2's life. The Appeals Board concludes that such a result would require the PBGC-payable benefit to be reannuitized. The DRO therefore cannot be qualified pursuant to ERISA section 206(d)(3)(D)(i) because it requires PBGC to provide a type or form of benefit, or an option, not otherwise provided under the Plan.

Therefore, as stated above, the Appeals Board concludes that the DRO cannot be qualified under ERISA section 206(d)(3)(D)(i) because it requires PBGC to provide a type or form of benefit, or an option, not otherwise provided under the Plan. Accordingly, because the DRO is not a QDRO, Spouse #1 cannot be treated as Participant's surviving spouse under section 205 of ERISA for purposes of entitlement to the survivor annuity benefit under Participant's J&100%SA.

Further, the Board notes that PBGC regulation section 4022.8(d) prohibits a change in the form of benefit following commencement of benefit payments.[28] PBGC regulation section 4022.8(d), *Change in benefit form*, provides that "[o]nce payment of a benefit starts, the benefit form cannot be changed." The Board concludes that any change in the benefit form currently being paid to Spouse #2 would be inconsistent with PBGC regulation section 4022.8(d).

Caselaw from Several Federal Courts of Appeal Supports the Determination

Several federal courts of appeal have held that the spouse who is married to the participant on the annuity starting date has an irrevocable right to a survivor benefit. Accordingly, these courts have held that when a participant is married to a subsequent spouse on the annuity starting date, a DRO submitted after that date cannot be qualified if it assigns the survivor benefit a former

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treated as a QDRO solely because it was issued after the death of Participant." Our finding that the DRO cannot be qualified is not based on the DRO's date of issuance, the date PBGC was notified of the DRO's existence, nor the date PBGC received the DRO. The DRO therefore cannot be qualified pursuant to ERISA section 206(d)(3)(D)(i) because it requires PBGC to provide a type or form of benefit, or an option, not otherwise provided under the Plan.

[27] *Id.*

[28] 29 C.F.R. § 4022.8(d).

spouse.[29] In such a case, because the subsequent spouse had an irrevocable right to the survivor benefit on the annuity starting date, the survivor benefit is not "payable with respect to a participant under a plan" and thus does not satisfy the definition of a QDRO in section 206(d)(3)(B)(i)(I).[30]

In this case, Spouse #2 was married to Participant when he started his annuity on July 1, 1994. Accordingly, Spouse #2 had an irrevocable right to the survivor benefit on that date. When Spouse #1 submitted the DRO on April 8, 2018, the survivor benefit was payable to the beneficiary (Spouse #2) and thus "not payable with respect to [the] participant" (Participant). Consequently, the DRO that assigned the survivor benefit to Spouse #1 is not a QDRO.

The Arguments in the Appeal Are Not Persuasive

The appeal has offered arguments for why PBGC should regard the DRO as a QDRO. First, you have claimed that the information provided in the DRO was sufficient to satisfy the requirements for a QDRO. As discussed on page nine of the decision, we have accepted, for purposes of deciding the appeal, that the DRO does provide the information required for a QDRO under ERISA section 206(d)(3)(C).

Your second argument is that the DRO was submitted in a timely manner. However, there is no evidence that it was ever submitted to the Plan administrator. Instead, it was submitted to PBGC after Participant had passed away on March 27, 2018. We agree with you that the mere timing of the submission cannot be the sole basis for refusing to qualify the DRO[31].

You cite the Sixth Circuit's decision in *Sun Life [Assurance] Company v. Jackson*[32] and the Third Circuit's decision in *Files v. ExxonMobile Pension Plan*[33] in support of your argument that the DRO was timely submitted to PBGC. These cases, however, are distinguishable.

The issue in the *Sun Life* case was whether the daughter of the deceased participant in an employer-sponsored life insurance plan was the beneficiary pursuant to a DRO entered after the divorce of the daughter's parents but submitted after her father died. The participant had previously named his brother as the sole beneficiary of the plan benefit and never revised his beneficiary designation with the plan to reflect the terms of the DRO. The court held that the daughter, not her uncle, was entitled to the proceeds of the life insurance even though the DRO was submitted after her father died.

The DRO at issue in *Sun Life* was significantly different from the one involved here. The DRO in *Sun Life* related to life insurance proceeds, not a pension annuity. ERISA's requirement

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[29] *See Vanderkam v. Pension Benefit Guar. Corp.*, 943 F. Supp. 2d 130, 137 (D. D.C. 2013), *aff'd sub nom* 773 F.3d 883, 886 (D.C. Cir. 2015); *Carmona v. Carmona*, 603 F.3d 1041, 1059-1060 (9th Cir. 2010); *Rivers v. Cent. & S.W. Corp.*, 186 F.3d 681, 683-684 (5th Cir. 1999); *Hopkins v. AT&T Global Info. Solutions. Co.*, 105 F.3d 153, 157 (4th Cir. 1997); PBGC Appeals Board decision 2010-11-24 (Huffy Corp.), pages 16-17 (Nov. 24, 2010); (a copy may be accessed at www.pbgc.gov/sites/default/files/legacy/docs/apbletter/Decision--Huffy-Corp-2010-11-24.pdf.). *See* relevant caselaw at Enclosures 10-14.

[30] *See e.g., Hopkins,* 105 F.3d at 157.

[31] *See* section 1001 of the Pension Protection Act discussed on page 8 above.

[32] 877 F.3d 698 (6th Cir. 2017). *See* Enclosure 4.

[33] 428 F.3d 478 (3d Cir. 2005), *cert. denied*, 547 U.S. 1160. *See* Enclosure 5.

that a participant's benefit be in the form of an annuity that provides a survivor benefit to his spouse does not apply to life insurance proceeds. Further, in *Sun Life* there was no issue of whether a former spouse had an irrevocable right to a survivor benefit. Finally, the *Sun Life* DRO did not require the insurance plan to provide a type or form of benefit, or any option, not otherwise provided under the plan. There was a specified amount payable under the life insurance policy. The court had to look only at whether the DRO met all of the requirements of ERISA section 206(d)(3). Because the court found that all of those requirements were met, it qualified the DRO and directed Sun Life to pay the proceeds to the daughter.

We agree that the mere timing of the submission cannot be the basis for refusing to qualify the DRO. The DRO was not submitted for qualification until after Participant had named Spouse #2 as his survivor beneficiary, retired, and died. The Plan did not allow for any further elections following a participant's retirement, which included an election changing the beneficiary of the J&100%SA benefit. Consequently, the DRO would require PBGC to provide an option that is not available under the Plan, violating ERISA section 206(d)(3)(D)(i).

Your third argument is that the DRO does not run afoul of ERISA section 206(d)(3)(D)(ii) because it does not require a reallocation of benefits. In support, you relied on the Third Circuit's decision in *Files v. ExxonMobile Pension Plan*[34] as the basis for your claim that the payment of benefits to Spouse #1 would not change the benefits otherwise payable.

In *Files*, the court found that a property settlement agreement gave the alternate payee a 50% separate interest in the participant's benefit. The court held that the alternate payee could enforce that interest even after the participant died by submitting the agreement to the plan for qualification.

The relevant facts in *Files,* however, are different than those in the present case. First, the participant in *Files* died before his annuity starting date. Second, the plan administrator was put on notice that there was a DRO before the participant died. Third, when the participant died, there was no subsequent spouse with a claim for a survivor annuity benefit under the plan and section 205(a)(2) of ERISA.

In addition, unlike the Divorce Decree in this case, the property settlement agreement in *Files* gave the former spouse her own interest in a percentage of the participant's benefit. Here, the Divorce Decree gave Spouse #1 the right to be named as the beneficiary of Participant's joint and survivor benefit. That distinction does not, by itself, prevent Spouse #1 from having the Divorce Decree qualified after Participant's death. But, the circumstances in this case preclude PBGC from qualifying the DRO.

As discussed, because Spouse #1 did not have an enforceable right to the survivor benefit through a QDRO, Spouse #2 became irrevocably entitled to the survivor benefit when Participant retired. And because Spouse #2 was already named as the survivor beneficiary, changing the beneficiary from Spouse #2 to Spouse #1 would require PBGC to provide an option not otherwise provided under the plan. Accordingly, the Divorce Decree cannot be qualified.

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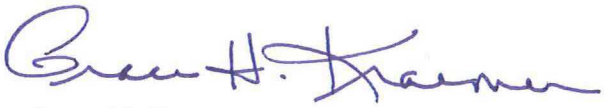
[34] 428 F.3d 478 (3d Cir. 2005), *cert. denied*, 547 U.S. 1160. *See* Enclosure 5.

Decision

Having applied the terms of the Plan, the provisions of ERISA, and PBGC's regulations to the facts of Spouse #1's case, we have decided that PBGC correctly determined that the October 23, 1992 Divorce Decree is not a QDRO. Therefore, we are denying your appeal made on behalf of Spouse #1.

This decision is PBGC's final action regarding your appeal. Spouse #1 may, if she wishes, seek review of this decision in an appropriate federal district court.

Sincerely,



Grace H. Kraemer
Chair, Appeals Board

cc: Spouse #1
[redacted]
Spouse #2

14 Enclosures (redacted as needed to protect the privacy of the parties)

1. [redacted] Findings of Fact, Conclusions of Law, and Decree of Legal Separation (4 pages)
2. [redacted] Divorce Decree (2 pages)
3. Participant's benefit election form signed on June 22, 1994 (6 pages)
4. *Sun Life Assurance Company of Canada v. Jackson*, 877 F.3d 698 (6th Cir. 2017). (7 pages)
5. *Files v. ExxonMobil Pension Plan*, 428 F.3d 478 (3d Cir. 2005). (11 pages)
6. Appeals Board's July 24, 2019 letter to Spouse #2 (8 pages)
7. Spouse #2's August 7, 2019 letter to the Appeals Board (2 pages)
8. Excerpt from the Wolf Creek Collieries Company Employees' Pension Plan, As Amended and Restated effective January 1, 1985 (25 pages)
9. 75 Fed. Reg. 32846 (10 pages)
10. *VanderKam v. Pension Ben. Guar. Corp.*, 943 F.Supp.2d 130 (D.D.C. 2013). (18 pages)
11. *VanderKam v. VanderKam,* 776 F.3d 883 (D.C. Cir. 2015). (9 pages)
12. *Carmona v. Carmona*, 603 F.3d 1041 (9th Cir. 2010). (19 pages)
13. *Rivers v. Cent. & S.W. Corp.*, 186 F.3d 681 (5th Cir. 1991). (3 pages)
14. *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997). (5 pages)