



Pension Benefit Guaranty Corporation
1200 K Street, N.W., Washington, D.C. 20005-4026

April 30, 2018

, Esq.

Re: Appeal 2017- (); Case No. 206371 (Delphi Hourly-Rate Employees Pension Plan (the "Delphi Hourly Plan" or the "Plan"))

Dear :

The Appeals Board is responding to the appeal of PBGC's benefit determination of September 27, 2016, under the Delphi Hourly Plan, issued to your client, (" "). PBGC determined that PBGC-payable monthly benefit should be \$1,631.19 before August 1, 2018, and \$1,417.53 on and after August 1, 2018.

benefit is currently being paid in the form of a Joint and 65% Survivor Pop-up Annuity ("J&65%SA" or "J&65%SA with Pop-up"), and (" "), his former spouse, is the designated beneficiary of the survivor's benefit. You contend that PBGC should allow to cancel the survivor benefit election and have his benefit increased to the amount of a straight-life annuity.

I. Summary of decision

We find that PBGC does not guarantee the straight-life annuity benefit resulting from an election under Section 5(a) of the Plan to cancel the survivor benefit. Under Title IV of the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA") and PBGC regulations, a participant must have met all conditions for receiving a benefit *before* a pension plan's termination date for the benefit to be guaranteed. One of the Plan's conditions for canceling the survivor benefit election under Section 5(a) is written waiver of her survivor benefit, witnessed by a notary public. Because did not obtain such a waiver from before the Plan's termination, PBGC cannot guarantee the resulting straight-life annuity benefit. Hence we must deny appeal.

II. Background

PBGC is the United States government agency that insures pensions in accordance with Title IV of ERISA. If a plan sponsor is unable to support its defined benefit pension plan, PBGC becomes the statutory trustee of the plan and pays guaranteed pension benefits according to the plan provisions, subject to legal limits set by Congress under ERISA.

General Motors Corporation ("GM") spun off Delphi Automotive Systems Corporation ("Delphi") effective January 1, 1999. As part of that arrangement, Delphi agreed to sponsor a new pension plan for its hourly employees to replace their previous coverage under the GM Retirement Program for Hourly Employees ("GM Hourly Plan"). The Delphi Hourly Plan's original effective date was also January 1, 1999.

When the Delphi Hourly Plan terminated on July 31, 2009, it did not have sufficient assets to provide all benefits provided under the Plan, and PBGC became the statutory trustee on August 10, 2009. PBGC pays benefits based on the terms of the Plan, the provisions of ERISA, and PBGC's regulations and policies.

When PBGC becomes statutory trustee of a terminated plan, PBGC collects participant information and copies of the plan's governing documents from the plan's administrator and audits that data. PBGC relies on the information it receives from a plan administrator unless PBGC's audit of that information shows that it is incorrect, or a participant supplies PBGC with documents showing that the information is incorrect.

PBGC records contain the following information relevant to [redacted] pension benefit:

- [redacted] was born on June 23, [redacted];
- He was hired on June 7, [redacted], as an hourly employee of GM;
- His employment transferred from GM to Delphi, effective January 1, 1999;
- The liability for his benefit under the GM Hourly Plan transferred to the Delphi Hourly Plan effective January 1, 1999;
- [redacted] married [redacted] on August 23, [redacted];
- He terminated employment on August 31, [redacted];
- When his employment terminated, he was eligible for a 30-year type retirement;
- [redacted] began receiving an adjusted Plan benefit of \$2,910.08 per month as a J&65%SA with Pop-up on September 1, [redacted], his actual retirement date ("ARD");¹
- [redacted] and [redacted] divorce became final on May 8, [redacted];²
- The Plan terminated on July 31, 2009, and PBGC became the statutory trustee on August 10, 2009; and
- On March 1, 2010, PBGC reduced [redacted]'s estimated PBGC-payable monthly benefit to \$1,524.23 in the form of the J&65%SA with Pop-up.

¹ See Pension Election Confirmation Statement dated August 22, [redacted], provided as Enclosure 1.

² In the divorce decree, [redacted] is listed as the Plaintiff and [redacted] is listed as the Defendant. After the divorce, name reverted to [redacted] (her maiden name), but she has since remarried and is now known as [redacted].

On January 18, 2011, [redacted] contacted PBGC regarding his divorce from [redacted]. His letter states in relevant part the following:

On the date of my retirement, September 1, [redacted], I had elected the annuity 65% survivor benefit with pop-up. Circumstances followed and on the date May 8, [redacted] the Judgment of Divorce was granted.

Enclosed is a copy of the divorce decree. On page 3 (highlighted) is the judgment concerning pension. My ex-wife, [redacted] cannot claim beneficiary. I should have the option to switch to the straight life annuity and receive full benefit as of May 8, [redacted].

PBGC responded to [redacted] letter of January 18, 2011, on January 31, 2011. PBGC stated:

We have received your inquiry regarding changing your elected form of benefit.

If you elected the normal form of benefit for a married participant before the plan ended, *the plan would have permitted you to change your benefit to a straight-life annuity [“SLA”] if your marriage ended in divorce and your former spouse agreed, and then to revert back to a joint-and-65%- survivor annuity if you remarried.*

The normal form of benefit for an unmarried participant for the hourly plan * * * is a straight-life annuity. If you were single when you retired and you elected the straight-life annuity before the plan ended, the plan would have permitted you to change your benefit to a joint-and-65%-survivor annuity if you later married.

PBGC will not allow these changes, however, we will honor such changes made before the plan ended. *Any such changes must have been completed prior to the Date of Plan Termination (July 31, 2009) for PBGC to honor the change. If you have confirmation that the change was made by a prior administrator, you may send a copy to PBGC for review.*

(Emphasis added.)

PBGC records relating to your benefit do not include any documents confirming a change in your benefit form before the Plan’s termination on July 31, 2009.

III. PBGC's determination of September 27, 2016

On September 27, 2016, PBGC issued a benefit determination letter to [redacted] stating that he is entitled to a monthly benefit of \$1,631.19, paid as a J&65%SA with Pop-up.³ PBGC's benefit determination letter informed [redacted] that his monthly benefit entitlement of \$1,631.19 includes a supplement that is payable until he reaches age 62 and one month and is more than the estimated monthly benefit of \$1,524.23 that he is currently receiving. The benefit determination letter further informed [redacted] that his monthly benefit entitlement effective August 1, [redacted], will be \$1,417.53 at age 62 and one month, when the supplement is no longer payable.

A Benefit Determination Statement dated June 6, 2016, was included with the benefit determination letter.⁴ The Benefit Determination Statement informed [redacted] that two of ERISA's benefit limitations apply to his benefit. Those limitations are the Accrued-at-Normal ("AAN") limitation and the Maximum Guaranteed Benefit ("MGB") limitation. The Benefit Determination Statement showed how PBGC calculated [redacted] benefit under the Plan and reduced [redacted] benefit for the AAN and MGB limitations. The Benefit Determination Statement also informed [redacted] that his monthly benefit before August 18, [redacted], includes an increase of \$106.97 per month under section 4022(c) of ERISA.⁵

Because of benefit payments that [redacted] received immediately after the Plan terminated that were above ERISA's benefit limitations, the benefit determination letter states that PBGC must adjust his monthly benefit to account for a net overpayment of \$181.51. As explained in Section VIII below, [redacted] no longer has a net overpayment because he has been underpaid by \$106.96 per month since March 1, 2010.

IV. [redacted] appeal of PBGC's determination

After [redacted] received a filing extension, you filed a timely appeal by email on his behalf. Specifically, your appeal of January 6, 2017, states in relevant part the following:

Given the short-term marriage between Mr. [redacted] and his ex-wife, it had never been the intent of either individual that Mrs. [redacted] (now remarried) should continue as the designated beneficiary and 'elected' surviving spouse. Indeed, the intent that Mrs. [redacted] should not be entitled to claim any benefits from Mr. [redacted] pension was clearly and unambiguously expressed by them in their **stipulated** divorce judgment of [redacted]

³ The J&65%SA with Pop-up is a form of benefit providing that if the participant dies first, the spouse will receive 65% of the participant's monthly benefit for life. If the participant's spouse dies first, the participant's monthly benefit will "pop-up" to the monthly amount of a straight-life annuity.

⁴ The Appeals Board found a small error in the Benefit Determination Statement of June 6, 2016. A revised Benefit Determination Statement is provided at Enclosure 2. The only change is reflected on page 7, at Line 29, of the revised Benefit Determination Statement, and we explain this change in footnote 6 below.

⁵ Under section 4022(c) of ERISA, PBGC allocates to a participant's nonguaranteed benefit a portion of PBGC's recoveries on claims against the plan sponsor and the members of its controlled group for unfunded benefit liabilities at plan termination. PBGC allocated \$106.97 to the nonguaranteed portion of [redacted] monthly supplement, increasing his total monthly benefit before August 1, [redacted], to \$1,631.19. See Enclosure 2, at 6, Lines 25-26.

May 8, . The relevant provision in the divorce judgment read as follows:

That Plaintiff and Defendant shall each receive, free and clear of any claim of the other, any present and all future pension, annuities, profit sharing, 401K and retirement benefit plans in their respective names.

(Judgment of Divorce, entered May 8, at p. 3 – **Exhibit 4**).

Furthermore, for purposes of pursuing this appeal, Mr. , through undersigned counsel, sought, via motion, and was awarded a clarifying post-judgment order from the divorce court (

that provides as follows:

1. This Court clarifies that the entered judgment of divorce did not intend to bestow upon Defendant any surviving spouse benefits derived from Plaintiff's (GM and Delphi) pension plans.
2. This Court directs Defendant to sign, execute, or effectuate all requisite documents and legal instruments that the plan administrators (GM and/or PBGC) might require in order for the parties' contracted intent to be fully effectuated.

(Order, entered January 3, – **Exhibit 5**).

Michigan adheres to the view espoused by the **majority** of federal circuits that a party's decision to forego benefits from the other spouse's (ERISA-governed) pension plan through the operation of a stipulated divorce judgment **constitutes a waiver of beneficiary rights as it does not invoke ERISA's pre-emption section**. [Footnote: ERISA's pre-emption section, 29 U.S.C. § 1144(a), states that ERISA shall supersede any and all **State laws** [rather than contractual arrangements] insofar as they may now or hereafter relate to any employee benefit plan covered by ERISA. *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 . . . (2001). (Internal quotation marks omitted.)] *MacInnes v MacInnes*, 260 Mich App 280, 284; 677 NW2d 889 (2004) (“[h]aving concurred with the majority view in the federal circuits and concluded that giving effect to the above provision does not compromise the purpose and goals of ERISA . . . , we hold that defendant waived his rights to the life insurance proceeds at issue and thus is not entitled to retain them”).

The cases wherein federal district courts did not find the decision of the PBGC (not to allow a change of beneficiary designation after the termination date of the plan) to be arbitrary and capricious are distinguishable from the facts of this case because those cases did not involve the survivor spouse's **undisputed voluntary waiver** of his/her

rights to benefits. See e.g., *Vanderkam v. Pension Benefit Guaranty Corp.*, 943 F.Supp.2d 130, 141 (2013).

However, under the facts of this case, a decision not to allow Mr. [redacted] to remove Mrs. [redacted] as his surviving-spouse/beneficiary would be arbitrary and capricious.

For the foregoing reasons, Mr. [redacted] requests that the PBGC recalculate his pension benefits as a straight life annuity, rather than a joint and-65% survivor 'pop-up' annuity.

(Emphasis in Original.)

[redacted] appeal does not contest the calculation of his monthly benefit under the Plan or the amount by which PBGC reduced his benefit to account for the AAN and MGB limitations under ERISA.⁶

After reviewing [redacted] appeal, the Board notified [redacted] pursuant to PBGC regulation that the Board's decision on the appeal could adversely affect her.⁷ By letter dated May 11, 2017, the Appeals Board informed [redacted] that "[b]ecause a decision by the Appeals Board regarding Mr. [redacted] appeal could affect your entitlement to a surviving spouse benefit under the Delphi Hourly Plan, we are providing you the opportunity to submit written comments concerning this matter." The Board received no written response from [redacted], but the Board contacted her to confirm that she received the letter.⁸

V. Issue presented by [redacted] appeal

The issue presented by [redacted] appeal is whether PBGC guarantees the straight-life annuity form of benefit resulting from the post-termination cancellation of the survivor benefit election.⁹ As explained below, we find that PBGC does not guarantee the increased benefit

⁶ Under the AAN limitation, PBGC may not *guarantee* more than the amount of a participant's benefit payable as a straight-life annuity at normal retirement age. See 29 Code of Federal Regulations ("CFR") § 4022.21. As shown on [redacted] revised Benefit Determination Statement, that amount is \$1,570.31 per month. See Enclosure 2, at 4, Line 1. The AAN limitation would prevent PBGC from guaranteeing most of the "pop-up" or increase of monthly benefit above \$1,570.31, if [redacted] predeceases [redacted] before August 18, [redacted] monthly benefit is \$1,631.19 before August 1, [redacted], only because PBGC shares a portion of its recoveries under section 4022(c) of ERISA. [redacted] monthly benefit would pop-up by only \$8.78 per month to \$1,639.97, if [redacted] predeceases [redacted] before August 1, [redacted]. See Enclosure 2, at 7, Line 29. On and after August 18, [redacted], because the supplement is no longer payable, and no additional section 4022(c) benefits are allocable, [redacted] monthly benefit entitlement is \$1,417.53. See Enclosure 2, at 6, Line 24. [redacted] monthly benefit would increase by \$106.69 to \$1,524.22, the amount of a straight-life-annuity benefit, if [redacted] predeceases [redacted] on or after August 18, [redacted]. See Enclosure 2, at 7, Line 30.

⁷ 29 CFR § 4003.57(a).

⁸ Telephone conference with [redacted] (February 14, [redacted]).

⁹ Although [redacted] has not submitted [redacted] waiver, the Appeals Board decides that requiring [redacted] to do so now would be futile given PBGC's long-standing position, posted publicly on its website and conveyed privately to

amount payable as a straight-life-annuity form of benefit. Therefore, we uphold PBGC's determination and deny appeal.

VI. Statutory background, Plan provisions, and prior Appeals Board decisions

A. Relevant provisions of ERISA and PBGC regulations

PBGC guarantees benefits based on the terms and provisions of a PBGC-insured pension plan, but PBGC's guarantee is subject to the provisions of ERISA and PBGC's regulations. Under section 4022(a) of ERISA, PBGC guarantees the payment of nonforfeitable benefits under a PBGC-insured pension plan that terminates, subject to limitations under Title IV of ERISA, including the AAN and MGB limitations.¹⁰

PBGC's benefit payment regulation establishes specific requirements for PBGC's guarantee.¹¹ Under section 4022.3(a),¹² PBGC "will guarantee the amount, as of the termination date, of a benefit provided under a plan to the extent that the benefit does not exceed the limitations in ERISA and in subpart B [of PBGC regulations], if—

- (1) The benefit is, on the termination date, a nonforfeitable benefit;
- (2) The benefit qualifies as a pension benefit as defined in § 4022.2; and
- (3) The participant is entitled to the benefit under § 4022.4."

In this decision, we focus primarily on the first and third of these requirements. The first requirement for PBGC's guarantee is a nonforfeitable benefit. To have a nonforfeitable benefit under a pension plan, a participant must have satisfied the conditions of the plan necessary to establish the right to receive the benefit on or before the date the plan terminated.¹³

Under the third requirement, a participant must be entitled to the benefit to be guaranteed. To be entitled to a guaranteed benefit under section 4022.4(a) of PBGC's regulations, the

in correspondence, that PBGC would honor cancellations of the survivor benefit only if completed before Plan termination. See www.pbgc.gov/wr/large/delphi/delphifaq (Q&A no. 14).

¹⁰ See ERISA §§ 4022(a) and (b), 4001(a)(8) (defining "nonforfeitable benefit") and 4061 (amounts payable by PBGC); 29 United States Code ("USC") §§ 1322, 1301(a)(8), and 1361. The Appeals Board will refer in this decision to provisions of ERISA rather than the USC.

¹¹ 29 CFR part 4022.

¹² See 29 CFR § 4022.3(a).

¹³ See ERISA § 4001(a)(8); 29 CFR §§ 4022.3; *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 637-638 (1990) ("nonforfeitable benefits, i.e., those benefits which participants have earned under the plan terms as of the date of termination," citing section 4001(a)(8) and 4022(a)); see also *Deppenbrook v. Pension Benefit Guar. Corp.*, 778 F.3d 166, 169 (D.C. Cir. 2015) ("PBGC guarantees only those benefits that are nonforfeitable as of the plan termination date.") (citing *LTV Corp.* and PBGC regulation 4022.3(a)(1)).

participant must satisfy at least one of the conditions for benefit entitlement.¹⁴ A “participant is entitled to a benefit *if under the provisions of a plan*”:

- (1) The benefit was in pay status on the termination date of the plan.
- (2) The benefit is payable in an optional life-annuity form of benefit that the participant or beneficiary elected on or before the termination date of the plan or, if later, the date on which PBGC became statutory trustee of the plan.
- (3) Except for a benefit described in paragraph (a)(2) of this section, before the termination date . . . the participant had satisfied the conditions of the plan necessary to establish the right to receive the benefit prior to such date . . . other than application for the benefit, satisfaction of a waiting period described in the plan or retirement; or
- (4) Absent an election by the participant, the benefit would be payable upon retirement.

(Emphasis added.)

B. Relevant Plan provisions

The Plan document in effect when the Delphi Hourly Plan terminated was the Delphi Hourly-Rated Employees’ Pension Plan, effective October 1, 2003.¹⁵ All defined benefit pension plans like the Delphi Hourly Plan must provide the pension benefits of participants in the form of a qualified joint and survivor annuity (“QJSA”).¹⁶ A QJSA is an annuity for the life of the participant and a survivor annuity for “the life of [the participant’s] spouse” that is at least 50 percent of the amount of the annuity payable for the joint lives of the participant and spouse.¹⁷

The Plan’s QJSA is the J&65%SA form of benefit as described in Plan Section 5. It is an annuity for the life of a participant and a survivor annuity for the “designated spouse” that is *at least* 50 percent of the amount of the annuity payable for the joint lives of the participant and spouse.¹⁸ If a participant predeceases his designated spouse, the designated spouse receives the survivor’s benefit (i.e., 65% of the joint benefit) for the spouse’s remaining lifetime. If a spouse predeceases the participant, the participant’s benefit increases to an amount equal to what the participant would have received absent the survivor election. Because the participant’s benefit

¹⁴ 29 CFR § 4022.4(a). The regulation lists five conditions, but the fifth condition (section 4022.4(a)(5)) involves a “benefit that returns all or a portion of a participant’s accumulated mandatory employee contributions upon death.” We did not include this condition, as the Plan did not accept or require employee contributions.

¹⁵ See Enclosure 3 for a copy of the relevant Delphi Hourly Plan provisions.

¹⁶ ERISA § 205(a)(1).

¹⁷ ERISA § 205(d)(1).

¹⁸ See Enclosure 3, Article II, Section 5(a). Although the 2003 Plan does not define “designated spouse,” it states in Section 5(b): “The beneficiary of a survivor benefit election shall be only the person who is the employee’s spouse at such time and who has been such spouse for at least one year immediately prior to the effective date of such election.”

“pops up” automatically on the death of a spouse, the retirement type is sometimes referred to as the J&65%SA with Pop-up.

The J&65%SA with Pop-up was the default form of benefit for married participants. Section 5(a) of the Plan provides that, upon retirement, a married participant “shall be deemed to have elected automatically a reduced amount of monthly basic benefit” to provide “a survivor benefit” for his “designated spouse.”¹⁹ Under ERISA, pension plans must allow participants to waive the QJSA during the “applicable election period” so long as the participant’s spouse consents in writing to the election and the spouse’s consent is witnessed by a notary public.²⁰

As required under ERISA, the Plan allowed a participant to waive the J&65%SA form of benefit under Section 5(a) by obtaining his or her spouse’s notarized written consent within the statutory election period before retirement. The Plan established guidelines for the effective date of the election and the right, with spousal consent, to prevent the automatic election of the J&65%SA from being effective, as follows:

- The automatic election provided in this subsection (a) shall become effective on the later of (i) the commencement date of the employee’s monthly benefit. . . or (iii) the one-year anniversary of the marriage; and
- An employee, with the written consent of the spouse (witnessed by a notary public), may ‘prevent the automatic election’ of the benefit provided in Section 5(a) by submitting a notarized election form to the Delphi Plan within the 90-day period prior to the effective date of the automatic election.²¹

did not elect to waive (with consent) the J&65%SA form of benefit before his retirement in 2006.

The Plan provided several options that permitted participants to change their form of benefit after retirement. For example, even if a participant elected the automatic form for married participants, i.e., the J&65%SA with Pop-up, the survivor benefit election is not necessarily final under the Plan. Section 5(a) of the Plan permitted an employee to cancel the survivor benefit election under the following circumstances:

*In the event (1) * * * (2) [employee and designated spouse] are divorced by court decree and (i) a Qualified Domestic Relations Order within the meaning of I.R.C. Section 414(p) so provides, or (ii) written consent of the former spouse which acknowledges the effect of the cancellation and is witnessed by a notary public is*

¹⁹ See Enclosure 3, Article II, Section 5(a).

²⁰ ERISA § 205(c).

²¹ See Enclosure 3, Article II, Section 5(a). The Pension Protection Act of 2006 (Pub. L. No. 109-280) increased the “applicable election period” for benefit elections from 90 days to 180 days, with this change taking effect for plan years beginning after December 31, 2006. This legislative change thus took effect after retired. Before the Delphi Plan terminated, Delphi amended the 2003 Plan to incorporate the changes required by the Pension Protection Act of 2006.

obtained, such employee may cancel the survivor benefit election and have the monthly basic pension benefit restored to the amount payable without such election, effective . . . (ii) the first day of the third month following the month in which the Corporation receives such employee's written revocation of the election because of divorce, on a form approved by the Corporation and accompanied by evidence satisfactory to the Corporation of a final decree of divorce.

(Emphasis added.)²²

Thus, the Delphi Hourly Plan allowed a divorced participant to cancel the survivor benefit election upon submitting either a (1) Qualified Domestic Relations Order (“QDRO”);²³ or (2) the former spouse’s written, notarized consent to the survivor benefit cancellation. Under the Plan’s terms, if a divorced participant met either one of these conditions (i.e., a QDRO or waiver), the survivor benefit election is canceled, and the participant’s benefit is “restored to the amount payable without such election.” Although the J&65%SA with Pop-up is the automatic form of benefit payable to married participants, i.e., the form of benefit payable without a married participant’s election, the Plan administrator construed Section 5(a) to mean that the participant’s benefit would be restored to the amount payable to an unmarried participant.

Like the Plan’s provision canceling the survivor benefit election under Section 5(a), the Plan also permitted participants to elect surviving spouse coverage after retirement under certain circumstances. As referenced above in the letter of January 31, 2011, under Section 8 of the Plan, a participant who was single at retirement but later remarried could elect surviving spouse coverage for his or her new spouse within 18 months of marriage.²⁴ Alternatively, a participant who was married at retirement but who later canceled the survivor benefit election under Section 5(a) and subsequently remarried could elect surviving spouse coverage for his or her new spouse.²⁵ Because a participant’s election under Section 8 would require the Plan to change the form of benefit from a straight life annuity to a QJSA, a reannuitization of the participant’s benefit would be required.²⁶

²² See Enclosure 3, Article II, Section 5(a) (emphasis added). See also Delphi Hourly Plan Summary Plan Description (“If Your Spouse Dies or You Are Divorced After Retirement”), at 97, provided as Enclosure 4.

²³ Generally, a QDRO is a domestic relations order issued by a state domestic relations court that assigns all or a portion of benefits with respect to a participant under a pension plan to an alternate payee, who may be a former spouse, and which meets certain other requirements under ERISA. See ERISA § 206(d)(3)(B); Internal Revenue Code § 414(p)(1)(B) (parallel Code provision).

²⁴ See Enclosure 3, Article II, Section 8(g) of the Plan.

²⁵ See *id.* If the participant added his or her new spouse to health care or life insurance coverage within 12 months of the marriage or remarriage, the participant would be deemed to have automatically elected surviving spouse coverage, effective on the one-year anniversary of the marriage.

²⁶ Cf., *Final Rule Relating to Time and Order of Issuance of Domestic Relations Orders*, 75 Fed. Reg. 32846, 32848 (June 10, 2010).

C. Prior decisions of the Appeals Board

In previous appeals involving Section 5(a) of the Delphi Hourly Plan and the Delphi Salaried Plan, the Appeals Board considered whether a divorced participant's cancellation of the survivor's benefit election is a "built-in" feature of the J&65%SA with Pop-up or, instead, results in a subsequent change in benefit form.²⁷ The Board decided that the cancellation/restoration feature of Section 5(a) is not a "built-in" feature of the J&65%SA like the increase in the participant's benefit upon the spouse's death—i.e., the "pop-up" feature of the J&65%SA. The Board concluded that the cancellation/restoration feature is distinguishable from the "pop-up" feature on death for two reasons. First, in the case of a spouse who predeceases the participant, the spouse is never divested of the survivor benefit that was elected at retirement. Second, unlike the "pop-up" feature, the cancellation/restoration feature is not triggered by the spouse's death, an involuntary occurrence. Rather, the participant must meet one of two conditions imposed under the Plan, i.e., a QDRO, or a written, notarized spousal waiver, both of which may be opposed by the participant's spouse.

The Board further decided that the cancellation of the survivor benefit election was a change in benefit form prohibited by PBGC regulations for at least two reasons. The Board observed that the features of the Plan's J&65%SA indicated that it was intended to be the Plan's QJSA under ERISA, which provides a "survivor annuity for the life of the spouse."²⁸ If the survivor benefit is canceled under Section 5(a), the Board reasoned, it can no longer be a QJSA under ERISA. Additionally, if the survivor benefit is canceled, the divorced participant's benefit increases for his or her life—effectively creating a straight-life annuity form of benefit with a new effective date.²⁹ Although the previous appeals involved QDROs, the Board's decision expressly applied with equal force to a written, notarized spousal waiver, which is the subject of this appeal.³⁰

²⁷ See e.g., "Delphi Hourly-Rate Employees Pension Plan 2012-11-14" at www.pbgc.gov/prac/appeals-board/appeals-decisions. (Last visited April 30, 2018.)

²⁸ ERISA § 205(d)(1)(A).

²⁹ Noting that the "restoration" of the benefit is effective on "the first day of the third month following the month in which the Corporation receives such employee's written revocation of the election because of divorce," the Board viewed the participant as receiving a new "annuity starting date" within the meaning of ERISA § 205(h)(2), but did not find that a reannuitization would be required, as it would be for the election under Section 8 of the Plan.

³⁰ In previous appeals involving divorced participants under the Delphi Hourly and Salaried Plans, the Appeals Board decided that domestic relations orders ("DRO") compelling waiver of a spouse's survivor benefit could not be QDROs under ERISA. In upholding PBGC's determinations denying the cancellations of survivor benefit elections, the Board relied in part on the Supreme Court's decision in *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, which held that a QDRO is not a valid method of effecting a spousal waiver of survivor benefits under ERISA. 555 U.S. 285, 296-297 (2009).

VII. Analysis of appeal

A. PBGC cannot guarantee the increase in benefit resulting from the post-termination cancellation of the survivor benefit election

As stated above, under PBGC's regulations, PBGC guarantees a pension benefit (subject to statutory limits) if the benefit is, on the plan's termination date, (1) a nonforfeitable benefit; (2) the benefit is a pension benefit; and (3) the participant is entitled to the benefit.³¹ In this appeal, the Board focuses only on the first and third requirements. Section 4001(a)(8) of ERISA defines the term "nonforfeitable benefit." PBGC regulations address when a participant is entitled to a benefit.

1. *The increased benefit resulting from the cancellation of the survivor benefit election is not a nonforfeitable benefit*

claim under Section 5(a) of the Plan is based on purported waiver of her survivor's benefit under the parties' judgment of divorce. did not, however, obtain a separate written, notarized waiver of the survivor's benefit that acknowledges the effect of the cancellation, as required under Section 5(a) of the Plan, and the Plan's administrator would have required him to do so before approving his election to cancel the survivor benefit election and increasing his benefit.

PBGC's guarantee of benefits under ERISA extends only to benefits for which the Plan's conditions have been met before termination. As explained above, PBGC guarantees "nonforfeitable benefits" within the meaning of section 4001(a)(8) of ERISA. A nonforfeitable benefit is a benefit under a PBGC-insured plan for which the participant has met the conditions for entitlement before the termination date of a pension plan.³²

cannot show that the benefit resulting from the cancellation of the survivor benefit election is a nonforfeitable benefit under sections 4001(a)(8) and 4022(a) of ERISA. To cancel the J&65%SA form of benefit and receive an increased benefit in the straight-life-annuity form,

had to meet one of the conditions for entitlement under Section 5(a) of the Plan before the Plan terminated on July 31, 2009. We find that satisfied neither condition. Although the Michigan state court ordered , on January 3, , to sign any documents required by either GM or PBGC, the Plan had long since terminated, and PBGC had become the statutory trustee under Title IV of ERISA. Thus, at Plan termination on July 31, 2009, the Plan's conditions for entitlement for receiving the straight life annuity form of benefit had not been met.³³ As such, the straight life annuity form of benefit was *not* a nonforfeitable benefit, and therefore ineligible for PBGC's guarantee.

³¹ 29 CFR § 4022.3(a).

³² ERISA § 4001(a)(8); 29 CFR § 4022.3(a)(1) and (3).

³³ Cf. *Deppenbrook*, 778 F.3d at 172-173 (participant's shutdown benefit did not become nonforfeitable because employee did not meet condition of break in continuous service before plan termination); *Fetty v. Pension Benefit Guar. Corp.*, 915 F. Supp. 230, 235 (D. Col. 1996) (participants who met all conditions before plan termination date for 70/80 and Rule of 65 benefits except for a "break in Continuous Service by reason of a layoff" did not have

2. *did not meet the requirements for PBGC's guarantee under PBGC's regulations on benefit entitlement*

In addition to the nonforfeitable benefit requirement under ERISA § 4001(a)(8), [redacted] had to be entitled to the benefit under section 4022.4(a) of PBGC regulations. The regulation states that a participant is entitled to a benefit “if under the provisions of a plan,” the participant meets one of the conditions under the regulation.³⁴ The Appeals Board listed four conditions for entitlement above, and we address them separately here.

The first condition of the regulation is that, under the provisions of the Plan, the benefit was in pay status on the termination date of the Plan.³⁵ Although the J&65%SA benefit was in pay status—a benefit to which [redacted] was clearly entitled—the straight life annuity form of benefit was not in pay status when the Plan terminated. [redacted] cannot satisfy this condition of the regulation.

The second condition of the regulation specifies that, under the provisions of the Plan, the benefit is payable in an optional life-annuity form that the participant elected on or before the termination date.³⁶ As explained above, [redacted] elected the Plan’s normal form of benefit for married participants, the J&65%SA, which was in pay status before the Plan’s termination date; but he did not elect (with [redacted] consent) the straight-life-annuity form of benefit before the Plan’s termination date. [redacted] seeks to change—post-termination—the J&65%SA form of benefit to the straight-life-annuity form of benefit. [redacted] cannot satisfy this condition of the regulation.

Like the definition of a “nonforfeitable benefit” under section 4001(a)(8) of ERISA, the third condition of the regulation specifies that, under the provisions of the Plan, a participant has satisfied the plan’s conditions necessary to establish the right to receive the benefit on or before the plan’s termination date, other than applying for the benefit or satisfying a waiting period.³⁷ As discussed above, the Plan required the participant to obtain either a QDRO or a written spousal waiver witnessed by a notary public to cancel the J&65%SA form of benefit. [redacted] retired and commenced his J&65%SA benefit effective September 1, [redacted] and divorced effective May 8, [redacted]. We find that [redacted] did not present the Plan’s administrator with either a QDRO (which would not have sufficed under the Board’s previous decisions) or a written, notarized spousal waiver before the Plan’s termination on July 31, 2009. Because [redacted] did not meet either condition before the Plan’s termination date, he cannot satisfy this condition of the regulations.

nonforfeitable benefits); *Moore v. Pension Ben. Guaranty Corp.*, 566 F. Supp. 534, 535 (E.D. Pa. 1983) (Participant did not meet conditions at plan termination date for 30-year benefit because of seven-month shortfall in service).

³⁴ 29 CFR § 4022.4(a) (emphasis added).

³⁵ 29 CFR § 4022.4(a)(1).

³⁶ 29 CFR § 4022.4(a)(2).

³⁷ 29 CFR § 4022.4(a)(3).

The fourth condition specifies that, under the provisions of the Plan, the benefit would be payable upon retirement, in the absence of an election of a different option—in other words, the benefit that would be payable on retirement as the normal, automatic form of benefit.³⁸ The J&65%SA is the automatic form of benefit under the Plan for married participants at retirement—not the straight life annuity form. The straight life annuity form of benefit (without the survivor benefit) is not the benefit that would have been payable upon retirement for a married participant, absent an election and spousal waiver. cannot satisfy this condition of the regulation.

In summary, the Appeals Board concludes that PBGC does not guarantee the straight life annuity form of benefit under the Plan, if obtained post-termination through cancellation of the survivor benefit election under Section 5(a) of the Plan. PBGC guarantees J&65%SA form of benefit, which is in pay status.

B. arguments for an increased PBGC-guaranteed benefit fail because he did not obtain waiver under the Plan before it terminated

In appeal, you contend that waived all claims against pension in the parties' divorce proceedings and should not be entitled to the survivor benefit under J&65%SA benefit. You base argument, in part, on the following paragraph in the Judgment of Divorce, which was entered on May 8, :

That Plaintiff and Defendant shall each receive, free and clear of any claim of the other, any present and all future pension, annuities, profit sharing, 401K and retirement benefit plans in their respective names.

You state that the Michigan state court issued an order clarifying the court's intent not to give any benefit under pension plan and ordering to sign any instrument necessary to effectuate the parties' intent. You argue that a party's waiver of benefits is not preempted under ERISA, citing *MacInnes v. MacInnes*.³⁹ The Appeals Board's decision is not, however, based on ERISA's preemption of purported waiver of her survivor's benefit in the parties' divorce decree. Rather, the Board's decision is based on the terms of the Plan and the provisions of Title IV of ERISA.

Before the Plan terminated, the Plan administrator could not have approved election to cancel survivor benefit under section 404(a)(1)(D) of ERISA without waiver.⁴⁰ While the judgment of divorce recited that and would receive present and future pensions, etc., in their respective names, the judgment of divorce did not specifically include the requirements of a waiver under Section 5(a) of the Plan, i.e., "*written consent of the*

³⁸ 29 CFR § 4022.4(a)(4).

³⁹ 260 Mich. App. 280, 284, 677 NW2d 889 (2004).

⁴⁰ See *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. at 300 (2009). The Court rejected the argument that ERISA's anti-alienation rule preempted federal common law waivers of benefits but held that such waivers did not trump the Plan administrator's obligation to follow the plan documents under section 404(a)(1)(D) of Title I of ERISA.

former spouse which acknowledges the effect of the cancellation and is witnessed by a notary public.”

After the Plan terminated, PBGC could no longer accept [redacted] waiver. Under Title IV of ERISA, PBGC guarantees only “nonforfeitable benefits” of terminated pension plans, as described in section 4022(a) of ERISA. The Board has explained why the increased benefit under Section 5(a) is not a “nonforfeitable benefit”: [redacted] did not satisfy the conditions for the benefit under the Plan—namely, [redacted] written, notarized waiver—before the Plan’s termination date of July 31, 2009. [redacted] also could not satisfy the requirements under PBGC’s regulation on benefit entitlement.

You also assert that this case is distinguishable from cases like *Vanderkam v. Pension Benefit Guar. Corp.*, because [redacted] waiver was voluntary and undisputed.⁴¹ The Appeals Board agrees that [redacted] appeal may be distinguishable from *Vanderkam* and similar cases, but for different reasons.⁴² The appeals courts in four circuits, including the D.C. Circuit, have held that the spouse of a participant who retires with a QJSA acquires a *vested right* in the survivor benefit that cannot be waived. The pension plans involved in those cases did not, however, expressly permit retired divorced participants to cancel a previous survivor benefit election with their spouses’ written, notarized consent. Based on our research, the federal courts have not considered the validity of a spouse’s post-retirement waiver of the survivor’s benefit where an ongoing pension plan expressly permitted such changes after the participant’s retirement.

Whether the federal courts would permit waiver of the survivor’s benefit in an ongoing pension plan is not clear, but the Appeals Board need not decide the question for the purposes of [redacted] appeal. [redacted] appeal involves the waiver of [redacted] survivor benefit in a terminated plan and is governed by Title IV of ERISA and PBGC regulations. While the Board cannot grant the relief requested in the appeal, [redacted] J&65%SA with Pop-up benefit is a nonforfeitable benefit to which he is entitled under section 4022(a) because he had met the conditions for entitlement under the Plan before the Plan terminated.

VIII. Summary of [redacted] PBGC-payable benefit

A. [redacted] no longer has a net overpayment of benefits to be recouped

The Plan terminated on July 31, 2009, with insufficient assets to fund all benefits. When PBGC becomes statutory trustee of a terminated plan, PBGC continues to pay retirees the same benefit they were receiving from the plan’s administrator until PBGC can collect plan records, audit plan data, and determine guaranteed benefit amounts.

⁴¹ 943 F. Supp. 2d 130, 137 (D. D.C. 2013), *aff’d* 773 F.3d 883, 886 (D.C. Cir. 2015).

⁴² See *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); see also *Anderson v. Marshall*, 856 F. Supp. 604, 607 (D. Kan. 1994) (court held that, after the participant retired, the election of the QJSA “became irrevocable and could not be changed through waiver by the designated beneficiary.”).

If net benefits paid to a pension plan participant in a PBGC-trusted plan exceed the total amount to which the participant is entitled under Title IV of ERISA, PBGC will recoup the net overpayment by reducing the participant's future PBGC benefit payments.⁴³ In general, PBGC uses a pension plan's termination date as the starting date for determining the amount of a participant's net overpayment.⁴⁴

PBGC records indicate that [redacted] commenced receiving \$2,910.08 per month on his ARD of September 1, [redacted]. After the Plan terminated on July 31, 2009, PBGC (through its temporary paying agent, Fidelity Investments) took over benefit payments effective August 1, 2009. PBGC continued to pay him through February 1, 2010, the same amount (\$2,910.08 per month) that the Plan's administrator paid him. PBGC records further indicate that PBGC estimated the effect of ERISA's legal limits on [redacted] benefit under the Plan and reduced his benefit amount to \$1,524.23 per month starting March 1, 2010, to avoid the possibility of large overpayments.

As noted above, PBGC determined that [redacted] is entitled to \$1,631.19 per month before August 1, [redacted]. Because he received \$2,910.08 per month from August 1, 2009, through February 1, 2010, he received benefit overpayments for seven months. [redacted] also received benefit underpayments on and after March 1, 2010. Because PBGC has continued to pay less than his monthly benefit entitlement of \$1,631.19, the net overpayment of \$181.51, referenced in the determination letter, has been repaid and, as of May 1, 2018, there is a net underpayment of \$1,636.81.

In the table below, we show how we calculated [redacted] net underpayment of \$1,636.81, as of May 1, 2018:

Table —Net Benefit Underpayment Calculation

<i>Dates Paid</i>	<i>Actual Monthly Amount Paid</i>	<i>PBGC-Payable Monthly Benefit (Correct Entitlement)</i>	<i>Monthly Overpayment</i>	<i>Monthly Underpayment</i>	<i>Months Paid</i>	<i>Total (Net Underpayment)</i>
8/01/2009 – 2/01/2010	\$2,910.08	\$1,631.19	\$1,278.89	N/A	7	(\$8,952.23)
3/01/2010 – 05/01/2018	\$1,524.23	\$1,631.19	N/A	\$106.96	99	\$10,589.04
						\$1,636.81

PBGC will pay [redacted] a backpayment of \$1,636.81, plus interest. He will receive his correct benefit entitlement of \$1,631.19 beginning on June 1, 2018.

⁴³ 29 CFR § 4022.81(a).

⁴⁴ 29 CFR § 4022.81(c).

B. may be entitled to Top-up payments from GM

PBGC's website includes a webpage containing "Frequently Asked Questions" about GM's top-up benefits.⁴⁵ The following response addresses how GM will address PBGC overpayments after the Plan's termination date of July 31, 2009:

PBGC's payment of the Delphi plan benefit to a participant or beneficiary is separate from GM's contractual obligation to pay a top-up benefit to that person. In other words, PBGC's benefit-payment relationship is with the participant, not GM. By law, PBGC cannot recoup overpayments from someone other than the participant.

Note: Any plan benefits paid after July 31, 2009, the date the plan terminated – whether the payment came from Fidelity or directly from PBGC – are considered when determining any overpayment or underpayment amount.

The webpage further explains, however, that GM is generally expected to make up the amount that PBGC recoups from participants:

In the majority of instances, the recoupment is attributable to amounts that PBGC was paying above what we are legally able to pay. Where GM determines that these amounts should have been paid by them, as part of the top-up benefit, they will 'make-up' the amount of your benefit that is reduced by the recoupment.

(See Enclosure 5.)

Although no longer has a net benefit overpayment to be recouped from his future benefit payments, PBGC's overpayments to him from August 1, 2009, through February 1, 2010, reduce his net underpayment and hence the amount of his PBGC backpayment. In addition, PBGC is not guaranteeing the increased benefit that could have realized by canceling the survivor benefit election before Plan termination with written, notarized waiver. GM must determine the amount of any top-up or other benefits due to . Please contact the GM Benefits Center at 1-800-489-4646.


IX. Decision

For the reasons explained above, the Appeals Board found no basis for changing PBGC's determination of September 27, 2016. Therefore, we are denying appeal. This is the agency's final decision on this matter and he may, if he wishes, seek review of this decision in an appropriate United States District Court.

⁴⁵ See www.pbgc.gov/wr/large/delphi/delphifaqhourly-overundergm.html (Delphi Hourly Pension Plan: PBGC Over- and Underpayments and GM's Top-Up Benefits). A copy of this webpage is provided at Enclosure 5.

If you have questions, please call PBGC's Customer Contact Center at 1-800-400-7242.

Sincerely,



James L. Eggeman
Chair, Appeals Board

Enclosures (5):

1. Pension Election Confirmation Statement (5 pages)
2. Revised Benefit Determination Statement dated March 30, 2018 (7 pages)
3. Excerpt of the Delphi Hourly-Rate Employees Pension Plan (10 pages)
4. Delphi Hourly Plan Summary Plan Description (6 pages)
5. PBGC website page on GM's Top-Up payments (4 pages)

cc w/ enclosures:

cc w/o enclosures: