COMMONWEALTH OF MASSACHUSETTS

**Division of Administrative Law Appeals**

**1 Congress Street, 11th Floor**

**Boston, MA 02114**

**www.mass.gov/dala**

**Joy Cedarquist**,

Petitioner

v. Docket No. CR-15-232

**Bristol County Retirement System**,

Respondent

**Appearance for Petitioner**:

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**Appearance for Respondent**:

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**Administrative Magistrate**:

Kenneth Bresler

**SUMMARY OF DECISION**

In 1977, petitioner’s husband, a firefighter, died. She received accidental death benefits as his surviving spouse. In 1987, she remarried and, under the so-called remarriage penalty then in effect, lost her benefits. In 2000, the remarriage penalty was eliminated. In 2015, she applied for reinstatement of her benefits. The retirement system awarded her the monthly benefit amount that she had received in 1987, but without cost-of-living increases for the intervening years. She appealed. The retirement system should have awarded her accidental death benefits based on her application in 2015, not her previous benefits in 1987.

**DECISION**

 The petitioner Joy Cedarquist appeals the reinstatement by the Bristol County Retirement System (BCRS) of her surviving spouse’s accidental death benefits at the same amount that was in effect when they were terminated in 1987 but without any cost-of-living adjustment in the intervening years.

 Under 801 CMR 1.01(10)(c), the parties moved to waive a hearing and submit a written record. I accepted into evidence 16 exhibits.

 Ex. 1: Letter from BCRS to Ms. Cedarquist, May 20, 2015.

 Ex. 2: Notice of Receipt of Appeal, June 1, 2015; appeal letter, May 26, 2015.

 Ex. 3: Enrollment form for Richard C. Banna into BCRS.

 Ex. 4: Beneficiary form.

 Ex. 5: Richard C. Banna death certificate.

 Ex. 6: Retirement benefit documents.

 Ex. 7: Retirement benefit form.

 Ex. 8: Accidental death benefits form.

 Ex. 9: Letter from Division of Insurance to BCRS, Jan. 24, 1978.

 Ex. 10: Ms. Cedarquist’s marriage record; Ms. Cedarquist’s letter to BCRS, Dec. 28, 1987.

 Ex. 11: Letter from BCRS to Ms. Cedarquist, Dec. 10, 1987.

 Ex. 12: Letter from BCRS to Ms. Cedarquist, Jan. 31, 2012; PERAC Memo #34/2000.

 Ex. 13: Letter from Ms. Cedarquist to BCRS, March 30, 2015.

 Ex. 14: Calculation sheets.

 Ex. 15: PERAC Memo #8/2015.

 Ex. 16: PERAC letter to Boston Retirement System, May 26, 2015.

**Findings of Fact**

 1. Richard C. Banna was a member of the Seekonk Fire Department and of the Bristol County Retirement System (BCRS) when he died in the line of duty on December 14, 1977. (Stipulation.)

 2. Joy (Banna) Cedarquist is the widow of Richard Banna. (Stipulation.)

 3. Because of her then-husband’s death, Ms. Cedarquist received accidental death benefits under G.L. C. 32 §100. (Stipulation, Ex. 9.)

 4. Ms. Cedarquist remarried in 1987 and notified BCRS. (Stipulation, Ex. 10.)

 5. BCRS terminated Ms. Cedarquist’s accidental death benefits because of what was called the remarriage penalty. (Stipulation.)

 6. When they were terminated, Ms. Cedarquist’s accidental death benefits were $1,211.87 monthly. (Stipulation.)

 7. On March 30, 2015, Cedarquist reapplied for survivor benefits. She stated (and the wording is important):

In accordance with PERAC memo #8/2015- “Pursuant to the CARELL decision, upon proper reapplication, all boards must grant a death benefit to any deceased member’s surviving spouse who remarried prior to July 1, 2000 and had his or her death benefit terminated due to the remarriage penalty. Such death benefit shall be awarded prospectively only from the date of reapplication”.

Please accept this letter as my reapplication necessary for the Bristol County Retirement Board to process my reapplication *in accordance with PERAC Memo 8/2015*.

(Ex. 13)(emphasis added.) (This decision discusses the PERAC memorandum and *Carell* decision later.)

 8. On May 20, 2015, BCRS told Ms. Cedarquist that it had approved her request for reinstatement of accidental death benefits and had reinstated them at the same amount that was in effect when they were terminated. BCRS also told her that it had not approved for her any cost-of-living adjustment in the intervening years. (Ex. 1.)

 9. On May 26, 2015, Ms. Cedarquist timely appealed. (Ex. 2.)

**Discussion**

 Repeal of the remarriage penalty

 In 2000, various provisions in Chapter 32, known collectively as the remarriage penalty, were repealed. (Ex. 12 (PERAC memo #34/2000, Aug. 15, 2000), Ex. 15 (PERAC memo #08/2015, Feb. 23, 2015).) They were repealed by the Statutes of 2000, chapter 159, which became effective on July 1, 2000. St. 2000 c. 498.

 G.L. c. 32, § 9 governs accidental death benefits. Until July 1, 2000, it provided that such benefits were to be paid “[t]o the surviving spouse of such member so long as such spouse survives and does not remarry….” The Statutes of 2000, chapter 159 deleted the words “and does not remarry.” St. 2000 c. 159, § 87.

 G.L. c. 32, § 12 governs a retiree’s options, namely, Options A through D. Until July 1, 2000, it included a paragraph under Option D beginning with “In the event of the remarriage of such spouse.” The Statutes of 2000, chapter 159 deleted the entire paragraph. St. 2000 c. 159, § 87.

 G.L. c. 32, § 100 governs retirement benefits to the surviving spouses of various public safety officers. Until July 1, 2000, it included this sentence:

Any pension payable to a surviving spouse under this section shall be paid to the surviving spouse so long as such surviving spouse remains unmarried.

The Statutes of 2000, chapter 159 deleted the sentence. St. 2000 c. 159, § 97.

Until July 1, 2001, another sentence in §100 began with “In the event of the death or remarriage of any surviving spouse eligible to receive a pension under this section.” The Statutes of 2000, chapter 159 deleted the words “or remarriage.” St. 2000 c. 159, § 98.

Until July 1, 2001, the same sentence later referred to “the pension which said surviving spouse was receiving at the time of such surviving spouse’s death or remarriage.” The Statutes of 2000, chapter 159 deleted the second use of the words “or remarriage.” St. 2000 c. 159, § 99.

 G.L. c. 32, § 101 governs retirement benefits to widows of certain disabled retirees. Until July 1, 2001, it included these words: “for as long as she remains unremarried.” The Statutes of 2000, chapter 159 deleted those words. St. 2000 c. 159, § 100.

The effect of these amendments was “to eliminate provisions which change or eliminate benefits to spouses of deceased members who remarry.” (Ex. 12 (PERAC memo #34/2000, Aug. 15, 2000).) The amending language was straightforward. It did not indicate that the amendments were supposed to be retroactive, prospective, or self-executing.[[1]](#footnote-1)

 First PERAC memorandum

 On August 15, 2000, the Public Employees Retirement Administration Commission (PERAC) issued a memorandum on two subjects, including “Elimination of the remarriage penalty.” It stated that the statutory amendments do “not apply to any benefits which were terminated or reduced prior to July 1, 2000.” (Ex. 12 (PERAC memo #34/2000, Aug. 15, 2000).) In other words, PERAC’s first interpretation was that the amendments were prospective, not retroactive. A surviving spouse whose benefits had been ended under the remarriage penalty remained ineligible for such benefits. The legislation benefited spouses who became widowed only after July 1, 2000. The memorandum contained no other substance on the issue of prospective versus retroactive application.

 The Ward case

 Understanding the instant appeal requires a discussion of the *Carell* case, which I discuss below. Understanding the *Carell* case, in turn, requires a discussion of the *Ward* case.

 In *Priscilla Ward v. Middlesex County Retirement Board*, CR-91-222 (DALA 1992), the petitioner had been married to a police officer who died. She received widows’ benefits under G.L. c.32 § 101. When she remarried, her widows’ benefit ended. After she divorced, she applied to have her widows’ benefits reinstated. The retirement board denied her application.

 The Division of Administrative Law Appeals (DALA) decision affirming the denial was short: three pages. It had only six findings of fact, each a sentence long. Its discussion section comprised four substantive paragraphs. The reasoning in those four paragraphs was perfunctory and conclusory:

[A]ccording to the statutory language of G.L. c. 32 s. 101, her benefits must cease. *Consequently*, she is not entitled to have those benefits reinstated upon the termination of the second marriage.

and

currently G.L. c. 32 s. 101 does not provide for the reinstatement of benefits upon the termination of the remarriage.

(Emphasis added.)

 The *Carell* case

 DALA decision in *Carell*

 In *Edith I. Carell v. Boston Retirement Board*, CR-11-325 (DALA 2012), the petitioner was married to a police officer who died. She received accidental death benefits under G.L. c. 32, §§ 9 and 94. In 1978, she remarried. Her accidental death benefits were terminated. In 2003, she divorced. In 2011, she applied to have her accidental death benefits reinstated. The retirement board denied her application.

 DALA upheld the denial. Its reasoning was brief, only two substantive sentences:

[B]ecause the remarriage took place before July 1, 2000, PERAC Memorandum #34/2000, Elimination of the Remarriage Penalty has no effect. As in *Ward*, Mrs. Carell is not entitled to have those benefits reinstated upon the termination of the second marriage.

*Id.* DALA only *cited* the first PERAC memorandum; it didn’t *discuss* the memorandum. There was nothing in the first PERAC memorandum to discuss, because it had only one substantive sentence, a conclusory one, deciding that the statutory amendments were prospective.

 CRAB decision in *Carell*

 The petitioner appealed to the Contributory Retirement Appeals Board (CRAB). CRAB reversed the DALA decision, concluding

that the repeal of the remarriage penalty for accidental death benefits by chapter 159 of the Acts of 2000 applies prospectively to any person otherwise eligible for such benefits, and is not limited in its application to survivors who remarried after the effective date of the Act.

*Edith I. Carell v. Boston Retirement Board*, CR-11-325 (CRAB 2013). CRAB continued:

[W]e agree with Carell that the repeal legislation applies to her. The amendment contains no provision limiting its application to those who remarry after its effective date, and we discern no basis in the language of the amendment for so narrowing its reach.

*Id.*

 CRAB further continued:

Although other provisions of the act were made subject to specific limitations as to their application to certain persons or under certain circumstances,[5] no such limitation was applied to the repeal of the remarriage penalty.

* Thus, as of the date of Carell’s application to the BRB for reinstatement of her accidental death benefit, s. 9 simply provided that it was payable “to the surviving spouse of such member so long as such member survives . . .” G.L. c. 32, s. 9(2)(a) (in pertinent part).

*Id.* Note 5 reads:

See, e.g., St. 2000, c. 159, s. 484 (certain sections apply to retired members returning to active duty with the state police who have not yet been fully reinstated); s. 486 (limiting provision to applications filed after Feb. 1, 2000); s. 487 (certain sections apply only to taxes assessed on or after July 1, 2000); s. 488 (certain sections apply to tax years beginning Jan. 1, 2000).

*Id.* n.5. CRAB further reasoned:

[W]e cannot read into the amendment a limitation concerning the time of remarriage that the Legislature did not enact. Construction of the section must begin with its plain words, which could not be clearer: benefits are payable “to the surviving spouse of such member so long as such member survives.” Carell is undisputedly the surviving spouse of a qualifying member and as such is entitled to the accidental death benefit “so long as [she] survives.” G.L. c. 32, s. 9(2)(a).

We do not consider the application of the repeal legislation to eligible persons commencing on the legislation’s effective date to be “retroactive.” The amended law is simply applied prospectively to those who, by its terms, are entitled to benefits.

….

[T]he repeal of the remarriage penalty applies prospectively to those who would be eligible for benefits but for their having remarried. What controls is the status of the applicant under the law as of the date of the application, not his or her status as of the date of the remarriage.

*Id.*

 Superior Court decision in *Carell*

The Boston Retirement Board appealed CRAB’s decision to Superior Court. On February 7, 2014, Suffolk Superior Court upheld CRAB’s decision in *Boston Retirement Board v. Contributory Retirement Appeal Board and Edith I. Carell*, Sup. Ct. Civil No. 2013-02476-H.

The Superior Court agreed with CRAB’s reasoning, writing:

BRB’s principal argument is that CRAB erroneously applied the remarriage penalty repeal retroactively, contrary to the usual presumption against retroactive application of statutes and in the absence of any expressed legislative intent in favor of such retroactive application in this instance. The court disagrees with the fundamental premise upon which that argument is predicated, as it does not view CRAB’s interpretation of the statute, to which the court gives appropriate deference, to constitute retroactive application.

Second PERAC memorandum

 On February 23, 2015, PERAC issued its Memorandum #8, 2015. It recounted the procedure and rulings in *Carell* and ruled that all retirement boards

must grant a death benefit to any deceased member’s surviving spouse who remarried prior to July 1, 2000 and had his or her death benefit terminated due to the remarriage penalty. Such death benefit shall be awarded prospectively only, from the date of application.

Any applicable surviving spouse who claims to have reapplied for those death benefits after July 1, 2000, shall be required to prove the date and validity of such reapplication. Upon such proof, and once the amount of the death benefit owed the surviving spouse has been determined, interest on that amount should be calculated and paid as part of the death benefit from the date of reapplication.....

(Ex. 15 (PERAC Memo #8/2015, Feb. 23, 2015).)

 PERAC’s clarification of its second memorandum

 Some time before May 26, 2015, the Boston Retirement System (BRS), previously called the Boston Retirement Board, asked PERAC some questions about its second memorandum. BRS’s communication to PERAC is not in evidence, but PERAC’s response quotes several paragraphs from BRS’s communication, possibly all of the substantive ones. (Ex. 16.)

 BRS asked whether the surviving spouse of a deceased retiree was entitled to cost-of-living increases dating from the time that the spouse’s death benefits were terminated due to the remarriage penalty or from the time that the spouse reapplied for benefits. PERAC conceded, “This is a difficult question” and answered in part:

[W]e believe the Board is authorized to include the amount of “missed” COLAs in the calculation of the prospective pension payment, consistent with the *Carell* decision.

(Ex. 16.) Notice that PERAC used the word “authorized” and not “required.” BRS posed other questions and PERAC attempted to answer them or at least discussed them.

 (The significance of this clarification to this appeal is unclear. I have read it and reread it. If Ms. Cedarquist discussed its significance, I have been unable to locate a direct reference to it in her submissions. In its Memorandum of Law, BCRB discussed the clarification, but not in depth, and does not seem to give it authoritative weight.)

 Chapter 32 is not self-executing

Chapter 32 is not self-executing. Members of a retirement system must apply for benefits; retirement systems do not seek out members, retirees, and their survivors, calculate their benefits unasked, and grant the benefits. *See e.g.*, G.L. c. 32, § 5 (referring to a “written application”), § 6 (same), § 7 (same), § 12 (referring to a “written “application” and multiple references to “applies”). Even § 9, which governs accidental death benefits, refers to a retirement board’s “*receipt* of proper proof” (emphasis added); the section does not require retirement boards to investigate deaths of members and determine if their survivors are entitled to benefits.

Not only does Chapter 32 assume that prospective beneficiaries will apply for benefits, practicalities require them to do so. Retirement boards sometimes do not know where inactive members are because they have not kept the boards apprised of their moves. *E.g.*, *Brenda Desmaris v. Massachusetts Teachers’ Retirement System*, CR-13-252 (DALA 2016). Retirement boards don’t know when inactive members plan to retire until they apply for retirement benefits. *Id.*

What is on appeal

When Ms. Cedarquist reapplied for accidental death benefits, she *quoted* the second PERAC memorandum: “‘Such death benefit shall be awarded prospectively only *from the date of reapplication*.’” She stated explicitly that her reapplication was “*in accordance with PERAC Memo 8/2015*.” (Ex. 13)(emphasis added.) Ms. Cedarquist did not reapply for accidental death benefits dating back to July 1, 2000, when the remarriage penalty was eliminated. She reapplied for accidental death benefits as of the date of her application, March 30, 2015.

Yet in Petitioner’s Written Submission Under 801 CMR 1.01(10)(c), Ms. Cedarquist argues that she deserves accidental death benefits beginning on July 1, 2000. (Pet. Written Submission at 3.) What’s more, Ms. Cedarquist argues that when CRAB issued its *Carell* decision in 2013 or, alternatively, when PERAC issued Memorandum #8/2015, BCRS should have reviewed its records to insure compliance with G.L. c. 32, § 100. (Pet. Written Submission 10.) Presumably, Ms. Cedarquist means that BCRS should have reviewed its records, learned that it had terminated her accidental death benefits in 1987, located her, and reinstated her benefits.

However, these claims are not on appeal and are not before me. A petitioner cannot expand her appeal by discussing issues in her final memorandum of law that were not in her initial appeal. If a party has not applied for something, she cannot appeal not receiving it to DALA.

An administrative law case regarding pensions has three stages before the appeal arrives at DALA. 1. A member of a retirement system applies for a benefit. 2. The retirement system denies it or does not act on the application. 3. The member appeals the denial or inaction. Ms. Cedarquist skipped all three steps in arguing that she was entitled to benefits reaching back to before her application.

Even if these issues were before me, Ms. Cedarquist would not prevail. She would not prevail because Chapter 32 is not self-executing. She had to apply to have her death benefit reinstated. On a practical level, BCRB had no reason to know where Ms. Cedarquist lived or even if she was still alive.

In addition, BCRB had no duty to search her out, and Ms. Cedarquist offers no authority for her argument that BCRB had such a duty, except possibly her citation to General Laws c. 32, § 20(5)(c)(1). That statute generally requires a retirement board, “upon *discovery* of any error in any record,” to “correct such record.” (Emphasis added). The statute did not require BCRB to review its records, learn that it had terminated Ms. Cedarquist’s accidental death benefits in 1987, locate her, and reinstate her benefits. There was no error in BCRB’s records for it to discover. When Ms. Cedarquist’s benefits were terminated, they were terminated according to statute. They remained terminated at least until Ms. Cedarquist applied again for accidental death benefits. Ms. Cedarquist’s non-application between July 1, 2000 and March 30, 2015 did not constitute an error in BCRB’s records.

 Ms. Cedarquist could have, but did not, apply again for accidental death benefits on July 1, 2000. She could have, but did not, initiate legal proceedings, as Edith I. Carell did, despite the first PERAC memorandum, that ultimately led to CRAB’s controlling interpretation that surviving spouses were eligible for reinstatement of death benefits from their date of application forward.

 Ms. Cedarquist’s argument that the statutory amendments did not require her to reapply to receive reinstatement of previous benefits (Pet. Written Submission at 2, 9) is not only not on appeal, it cuts against her. If she did not need to reapply, then she should not have reapplied. Instead, she should have appealed her non-receipt of benefits without a reapplication. Under CRAB’s controlling interpretation, Ms. Cedarquist was eligible to again receive accidental death benefits on July 1, 2000. She did not appeal her non-receipt and under her theory that she did not need to reapply for benefits, her right to appeal expired approximately 18 years ago.

 Ruling

 CRAB’s reasoning in *Carell* is that the elimination of the remarriage penalty did not apply retroactively to surviving spouses whose benefits had previously been terminated. Rather, the statutory amendments created a new legislative scheme under which surviving spouses like Ms. Cedarquist were eligible for accidental death benefits going forward. CRAB wrote: “What controls is the status of the applicant under the law as of the date of the application….” *Carell*. Under CRAB’s reasoning and under the language of PERAC’s second memorandum (“Such death benefit shall be awarded prospectively only from the date of reapplication”), Ms. Cedarquist should receive accidental death benefits, but not the dollar amount that she received in 1987. Her benefit should be as if she had applied for the first time on March 30, 2015. If the dollar amount based on her application dated March 30, 2015 differs from what BCRS awarded her – her benefit amount in 1987 – BCRS will award her the former.

 What BCRS awarded to Ms. Cedarquist – her benefit amount in 1987, without any cost-of-living adjustment in the intervening years – is on appeal. However, because BCRS’s denial of cost-of-living adjustments was inextricably tied to the wrong calculation year – BCRS should have looked at 2015, not 1987, to determine her benefit – cost-of-living adjustments before 2015 do not matter. Because they do not matter, I won’t discuss the denial of cost-of-living adjustments further.

**Conclusion and Order**

 Ms. Cedarquist is entitled to accidental death benefits in the amount that a newly widowed spouse in her situation applying for such benefits on March 30, 2015 would be entitled to.

 DIVISION OF ADMINISTRATIVE LAW APPEALS

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 Kenneth Bresler

 Administrative Magistrate

Dated: June 29, 2018

1. SECTION 87. Section 9 of said chapter 32, as so appearing, is hereby amended by striking out, in line 48, the words “and does not remarry”.

SECTION 88. Option (d) of subdivision (2) of section 12 of said chapter 32, as so appearing, is hereby amended by striking out the eleventh paragraph.

SECTION 97. The first paragraph of section 100 of said chapter 32, as so appearing, is hereby amended by striking out the second sentence.

SECTION 98. Said section 100 of said chapter 32, as so appearing, is hereby further amended by striking out, in line 25, the words “or remarriage”.

SECTION 99. Said section 100 of said chapter 32, as so appearing, is hereby further amended by striking out, in lines 31 and 32, the words “or remarriage”.

SECTION 100. Section 101 of said chapter 32, as so appearing, is hereby amended by striking out, in lines 9 and 10, the words “, for as long as she remains unremarried”. [↑](#footnote-ref-1)