

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Theodore R. Robinson,	:	
Petitioner	:	
	:	
v.	:	
	:	
State Employees' Retirement Board,	:	No. 1136 C.D. 2014
Respondent	:	Submitted: October 31, 2014

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: March 10, 2015

Theodore R. Robinson (Robinson) challenges the order of the State Employees' Retirement Board (Board) that granted the State Employees' Retirement System's (SERS) motion to dismiss Robinson's appeal with prejudice.

The Board moves to quash Robinson's petition for review and also moves for sanctions.

I. Background – Previous Decision.

Robinson commenced employment with the Office of Attorney General on January 26, 1988. At that time he became a member of SERS. On March 16, 1999, Robinson applied for disability retirement due to a work-related injury. SERS granted Robinson a temporary disability retirement benefit for a period of one year, effective April 17, 1999. SERS continued Robinson's temporary disability retirement benefit at six month and one year intervals from

2000 through 2005. By letter dated April 13, 2006, SERS notified Robinson that its medical staff determined that Robinson's disability was permanent.

By letter dated March 2, 2011, Robinson requested that SERS adjust his disability retirement benefit to include a service connected disability supplement under Section 5704(f) of the State Employees' Retirement Code (Code), 71 Pa.C.S. §5704(f).¹ By letter dated March 4, 2011, SERS informed Robinson that he qualified for a disability supplement of \$451.27 per month retroactive to February 21, 2004, that within the next two weeks he would receive \$35,541.23 for the retroactive supplemental payments from February 21, 2004,

¹ Section 5704(f) of Code, 71 Pa. C.S. §5704(f) states in relevant part: SUPPLEMENT FOR SERVICE CONNECTED DISABILITY--If a member has been found to be eligible for a disability annuity and **if the disability has been found to be a service connected disability and if the member is receiving workers' compensation payments for other than medical benefits**, such member shall receive a supplement equal to 70% of his final average salary less the sum of the annuity as determined under subsection A and any payments paid or payable on account of such disability under the act of June 2, 1915 (P.L. 736, No. 338), known as the Workers' Compensation Act, the act of June 21, 1939 (P.L. 566, No. 284) known as The Pennsylvania Occupational Disease Act, and the Social Security Act Such supplement shall continue as long as he is determined to be disabled and is receiving workers' compensation payments for other than medical benefits on account of his service connected disability in accordance with the Workers' Compensation Act or The Pennsylvania Occupational Disease Act. If the member has received a lump sum workers' compensation payment in lieu of future weekly compensation payments, the length in weeks and calculation of the service connected disability supplement shall be determined by dividing the lump sum payment by the average weekly wage as determined by the Workers' Compensation Board. (Emphasis added.)

through March 31, 2011, and that commencing with his April 2011, payment, his gross monthly annuity would be increased to \$2,113.12 per month less \$162.82 for federal withholding and \$27.67 for a court ordered deduction for a net monthly annuity payment of \$1,522.63 until his workers' compensation payments ceased² in September 2011, when his SERS gross monthly annuity would return to \$1,661.85 less deductions.

By letter dated April 4, 2011, Robinson disputed SERS' decision to terminate his service connected disability after September 2011. By letter dated May 9, 2011, Debra G. Murphy (Murphy), director of the Benefit Determination Division of SERS, informed him that a member was only eligible to receive a supplement equal to seventy percent of his final average salary if he was receiving workers' compensation benefits.

Robinson timely appealed this determination. By letter dated August 25, 2011, Murphy informed Robinson that because his partial workers' compensation disability benefits ended on August 1, 2011, he was no longer entitled to the service connected disability supplement. The Appeals Committee of SERS denied Robinson's request to continue receiving a service connected disability supplement after his workers' compensation disability benefits ceased.

² Section 306(a.2)(7) of the Workers' Compensation Act, Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §511.2(7). This section was added by the Act of June 24, 1996, P.L. 350.

Robinson appealed to the Board. Following a hearing, the hearing officer recommended that the Board deny Robinson's request to continue to receive a service connected disability supplement after the termination of his workers' compensation benefits. The hearing officer determined that, based on this Court's determination in Waters v. State Employees' Retirement Board, 955 A.2d 466 (Pa. Cmwlth. 2008), Robinson was not entitled to a service connected disability supplement once his workers' compensation disability benefits ceased.

Robinson filed exceptions to the opinion and recommendation of the hearing officer.

By order dated December 11, 2012, the Board denied Robinson's request to continue receiving a service connected disability supplement after his workers' compensation benefits terminated on August 1, 2011.

In Robinson v. State Employees' Retirement Board, (Pa. Cmwlth., No. 2321 C.D. 2012, filed August 7, 2013), (2013 Robinson), Robinson challenged the Board's determination in this Court. Robinson contended that Article 1, Section 17 of the Pennsylvania Constitution prohibits SERS' refusal to continue paying him the full service connected disability supplement promised him at the time of his 1999 disability retirement based on the Board's regulation, 4 Pa. Code §247.4(b). Also, a business practice policy inconsistent with the authority of the General Assembly under Article 2, Section 1 of the Pennsylvania Constitution was prohibited. Robinson further contended that the Board's conclusion that it was authorized to terminate his service connected disability supplement because his

five hundred weeks of partial disability workers' compensation benefits were exhausted was clearly erroneous and an error of law.

This Court held that the Board did not violate Article 1, Section 17 of the Pennsylvania Constitution and Article 2, Section 1 of the Pennsylvania Constitution.³ 2013 Robinson, slip opinion at 10-11. This Court also ruled that Robinson's contention that the Board violated Article 1, Section 17 of the Pennsylvania Constitution and impaired his contract with SERS was without merit. 2013 Robinson, Slip Opinion at 11-14. This Court ruled based on Waters and the plain language of Section 5704(f), that a member must be receiving workers' compensation disability benefits in order to be eligible for a service connected disability supplement. Because Robinson's partial disability benefits ended, he was ineligible for the service connected disability supplement. 2013 Robinson, Slip Opinion at 14-15.

II. Present Controversy.

In 2013, Robinson again requested that SERS increase his benefits effective in August 2011, to include the service connected disability supplement. By letter dated November 13, 2013, the Benefits Determination Division of SERS denied the request. By letter dated December 4, 2013, Robinson appealed the

³ Article 1, Section 17 of the Pennsylvania Constitution provides, "[n]o *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

Article 2, Section 1 of the Pennsylvania Constitution provides, "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

denial to the SERS Appeals Committee and argued that his receipt of the service connected disability supplement should not be conditioned upon whether he continued to receive workers' compensation benefits other than medical benefits. On or about February 21, 2014, the SERS Appeals Committee denied the appeal.

By letter dated March 21, 2014, Robinson appealed to the Board and argued that he was entitled to the service connected disability supplement because he continued to receive workers' compensation medical benefits.

On April 9, 2014, SERS answered and denied the material allegations. Also, on April 9, 2014, SERS moved to dismiss and alleged that this controversy had already been decided:

7. Claimant [Robinson] appealed the Retirement Board's Order to Commonwealth Court. After accepting briefs and hearing oral argument, Commonwealth Court affirmed the Retirement Board's Order and later denied his request for reargument. . . . [2013 Robinson].

8. Simultaneously with his prior appeal to the Retirement Board, Claimant [Robinson] sought the same relief he seeks in the instant matter via a Class Action Complaint in Mandamus filed in Commonwealth Court. . . .

9. Commonwealth Court sustained the Retirement Board's preliminary objections and dismissed Claimant's [Robinson] Complaint in Mandamus. . . .

10. Claimant [Robinson] thereafter filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which affirmed Commonwealth Court's dismissal. . . .

11. In addition to the above-cited cases to which Claimant [Robinson] was a party, Claimant's [Robinson] counsel has litigated the same legal issues multiple times before the Retirement Board, Commonwealth Court and the Pennsylvania Supreme Court. . . .

12. Claimant's [Robinson] appeal letter filed on March 24, 2014 involves the same relevant averments of fact and issues of law that the Retirement Board considered in denying Claimant's [Robinson] prior request to continue receiving a Service Connected Disability Supplement after his eligibility for that benefit ended.

13. Claimant's [Robinson] Appeal Letter filed on March 24, 2014 involves the same relevant averments of fact and issues of law that Commonwealth Court considered in affirming the Retirement Board's Order denying Claimant's [Robinson] prior request to continue receiving a Service Connected Disability Supplement after his eligibility for that benefit terminated and in dismissing Claimant's [Robinson] Class Action Complaint in Mandamus.

14. Claimant's [Robinson] Appeal Letter filed on March 24, 2014 involves the same relevant averments of fact and issues of law that the Pennsylvania Supreme Court considered in affirming Commonwealth Court's dismissal of Claimant's [Robinson] Class Action Complaint in Mandamus.

15. There exists no legal basis for the Retirement Board to grant Claimant [Robinson] the relief he seeks in his Appeal Letter.

16. Claimant's [Robinson] Appeal Letter filed on March 24, 2014 is legally insufficient on its face.

Motion to Dismiss of the State Employees' Retirement System, April 9, 2014, Paragraph Nos. 7-16 at 2-4.

On June 19, 2014, the Board granted SERS's motion to dismiss and determined:

[T]here is no legal authority for this Retirement Board to grant Claimant's [Robinson] request to receive a service connected disability supplement pursuant to Section 5704(f) of the Retirement Code. Additionally, as SERS correctly points out it [sic] its Motion, this issue has already been decided on several occasions by not only this Retirement Board but also by both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court.

State Employees' Retirement Board Opinion, June 19, 2014, (Opinion) at 2. The Board further determined that the issue presented was substantially identical to the issues decided by the Board and this Court in prior cases. Opinion at 3.

Robinson contends that this Court has never decided that a pre-2002 retiree under the Code must be receiving Workers' Compensation "for other than medical benefits" to receive a service connected disability supplement under 71 Pa.C.S. §5704(f) for which he is otherwise qualified, that the Board erred when it granted SERS's motion to dismiss his claim where he claimed a mandatory statutory right to receive a disability supplement, and that Article I, Section 17 of the Pennsylvania Constitution and due process prohibit the Board from dismissing his claim without discussion or consideration.⁴

⁴ This Court's review of an administrative board's final adjudication is limited to determining whether the board committed an error of law, whether constitutional rights were violated and whether necessary factual findings are supported by substantial evidence. Chuk v. State Employees' Retirement System, 885 A.2d 605, 608 n. 9 (Pa. Cmwlth. 2005). With respect to questions of law, this Court exercises plenary review. Although "as an agency charged with execution and application of the retirement statute, the Board is entitled to considerable deference in its construction of the Retirement Code and the regulations promulgated thereunder, therefore, the Board's construction may not be overturned unless it is clearly erroneous." **(Footnote continued on next page...)**

III. Merits of Robinson's Case.

Initially, Robinson contends that this case is a case of first impression and that this Court has never decided that in order to receive a service connected disability supplement a pre-2002 retiree must be receiving Workers' Compensation for other than medical benefits.

Robinson is wrong on both counts. This Court explicitly decided this exact issue when it ruled on Robinson's own case in 2013 Robinson.

Next, Robinson contends that the Board improperly failed to consider the basis of his administrative appeal and that due process required that the actual claim not be ignored to reach a desired self-serving contrary decision which the Board did.

The crux of Robinson's argument is that he continues to receive workers' compensation medical benefits and that this entitles him to receive the service connected disability supplement under the Code.

Once again, the Board and this Court have already determined that in order to be eligible for the service connected disability supplement which Robinson requests, a retiree must be receiving workers' compensation benefits

(continued...)

Gowden v. State Employees' Retirement Board, 875 A.2d 1239, 1241 n. 4 (Pa. Cmwlth. 2005), *affirmed*, 927 A.2d 201 (Pa. 2007) (quoting McCormack v. State Employees' Retirement Board, 844 A.2d 619, 622 n. 2 (Pa. Cmwlth. 2004)).

other than medical benefits. Robinson is not, so the Board correctly granted the motion to dismiss his appeal upon the motion of SERS.

Finally, Robinson contends that the Board disregarded the requirements of the Pennsylvania Constitution when it retroactively applied the 2002 amendment to Section 5704(f) and unilaterally changed the terms of his retirement contract. Robinson argues that an employee who has complied with all conditions necessary to receive a retirement supplement should not be affected adversely by subsequent legislation which changed the terms of the retirement contract without violating Article I, Section 17 of the Pennsylvania Constitution.

Again, in 2013 Robinson, this Court also ruled that Robinson's contention that the Board violated Article 1, Section 17 of the Pennsylvania Constitution and impaired his contract with SERS was without merit. While this Court acknowledged that Section 5704(f) did not explicitly state that a member must be receiving workers' compensation benefits prior to an amendment to the Retirement Code in 2002, this Court determined, as it held in Waters, that the addition of the language concerning receipt of workers' compensation benefits did not change the status of a member's eligibility for a service connected disability supplement. As a result, this Court held that Robinson's argument that there was an improper, unconstitutional impairment or unilateral modification of his contract with SERS was also without merit.

Robinson raises the same issue here. Based on this Court's earlier decision, Robinson's argument is foreclosed and without merit.⁵

IV. Motion for Sanctions.

The Board moves for sanctions against Waters and alleges that the Board and this Court have consistently held that in order to receive a service connected disability supplement pursuant to Section 5704(f) of the Retirement Code, a member must be receiving workers' compensation benefits for other than medical benefits. Robinson with Waters as his counsel twice previously attempted to seek the relief sought here. In the first case, relief was sought through a purported class action. This Court sustained the Board's preliminary objections and dismissed the petition for review with prejudice. Our Pennsylvania Supreme Court affirmed. In the second action, Robinson sought the same relief which the Board denied, and this Court affirmed. In addition, Waters represented his wife, Sylvia Waters, in three separate unsuccessful attempts to obtain a service connected disability supplement when she was not receiving workers' compensation benefits for other than medical benefits.

⁵ This Court must address the Board's motion to quash and dismiss Robinson's petition for review. The Board moves to quash on the basis that these issues have already been decided by this Court both in actions brought by Robinson and in those brought by Robinson's attorney, Paul E. Waters on behalf of Sylvia A. Waters.

While the issue of whether an individual must receive workers' compensation benefits other than medical benefits in order to obtain the service connected disability supplement contained in Section 5704(f) of the Code has been decided by this Court previously, Robinson has filed a petition for review from an adjudication of the Board. The petition for review was timely filed. This Court sees no reason to quash the petition for review and denies the motion to quash.

In Waters v. State Employees Retirement Board (Waters), (Pa. Cmwlth. No. 560 M.D. 2009, filed April 21, 2010), Waters brought a “Civil Action – Mandamus, Class Action” which this Court dismissed for legal insufficiency. The Board moved for sanctions there. This Court denied the motion and stated, “it is hereby ordered that, for so long as Waters does not receive workers’ compensation benefits, she and her counsel are to refrain from initiating in this court any further litigation seeking a service-connected disability supplement from the Board or SERS or face further sanctions.” Waters at Order page.

The Board further alleged that by letter dated August 1, 2014, it requested that Waters withdraw Robinson’s petition for review because it was legally insufficient. Waters did not do so.

Although the Board seeks sanctions under Pa.R.C.P. No. 1023.2, that section of the Pennsylvania Rules of Civil Procedure applies to actions in the common pleas court. The proper motion for costs and counsel fees under the Pennsylvania Rules of Appellate Procedure is Pa.R.A.P. 2744 which provides:

In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including

(1) a reasonable counsel fee and

(2) damages for delay at the rate of 6% per annum in addition to legal interest, if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the

amount of damages authorized by this rule. (Emphasis added.)

An appellate court may consider an appeal frivolous if the realistic chances of success are slight and the continuation of the contest is unreasonable. Waste Management v. Unemployment Compensation Board of Review, 651 A.2d 231 (Pa. Cmwlth. 1994). The award of fees and costs is subject to the court's discretion. Watkins v. Unemployment Compensation Board of Review, 689 A.2d 1019 (Pa. Cmwlth. 1997).

While this Court understands the Board's frustration with Waters, technically Waters did not violate this Court's warning in Waters because Waters and his wife did not bring this action, Waters and Robinson did. While the action here could be deemed frivolous based on this Court's prior rulings on the issue, this Court denies the motion for sanctions. This Court notes that the Board did not bring the motion under the proper section of the Pennsylvania Rules of Appellate Procedure. However, this Court admonishes Waters and/or Robinson to refrain from initiating in this court any further litigation seeking a service-connected disability supplement from the Board or SERS or face sanctions.

Accordingly, this Court affirms the Board, denies the motion to quash, and denies the motion for sanctions.

BERNARD L. MCGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Theodore R. Robinson,	:	
Petitioner	:	
	:	
v.	:	
	:	
State Employees' Retirement Board,	:	No. 1136 C.D. 2014
Respondent	:	

ORDER

AND NOW, this 10th day of March, 2015, the order of the State Employees' Retirement Board in the above-captioned matter is affirmed. The motion to quash of the State Employees' Retirement Board is denied. The motion for sanctions of the State Employees' Retirement Board is denied. This Court directs Paul E. Waters and Theodore Robinson to refrain from initiating in this court any further litigation seeking a service-connected disability supplement from the Board or the State Employees' Retirement System or face further sanctions.

BERNARD L. McGINLEY, Judge