

Matter of Rosenberg v D'Alessandro

2014 NY Slip Op 31001(U)

April 17, 2014

Supreme Court, New York County

Docket Number: 103880/12

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

In the Matter of the Application of
HERBERT M. ROSENBERG,
Petitioner,

INDEX NO. 103880/12

MOTION SEQ. NO. 001

For a Judgement Pursuant to the Provisions of
Article 78 of the New York Civil Practice
Law and Rules,

-against-

**DIANE D'ALESSANDRO, as Executive Director of
the New York City Employees Retirement System
and THE BOARD OF TRUSTEES OF THE NEW
YORK CITY EMPLOYEES RETIREMENT SYSTEM,**
Respondents.

FILED

APR 18 2014

COUNTY CLERK'S OFFICE
NEW YORK

The following papers were read on this motion by petitioner for an order and judgment pursuant to Article 78 of the Civil Practice Law and Rules.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

In this Article 78 proceeding, Herbert M. Rosenberg (petitioner), a former New York City Transit Authority (NYCTA) Police officer, brings this Article 78 proceeding for an Order and Judgment: (1) nullifying and vacating a June 1, 2012 determination by The Board of Trustees of the New York City Employees Retirement System (NYCERS) to reduce his monthly Accidental Disability Retirement (ADR) pension allowance payment from \$2,741.30 to \$685.05 to reimburse respondents for ADR pension overpayment in the sum of \$145,120.62; (2) reinstating the petitioner's ADR pension payment to the sum of \$2,741.30 per month; and (3) reimbursing the petitioner for all suspended and/or reduced payments of his monthly pension

allowance and payment to date. Respondents are in opposition to the herein proceeding.

BACKGROUND

Petitioner, who is currently 71 years old, became a duly appointed police officer for the NYCTA on June 21, 1961. During the course of his employment with the NYCTA, petitioner suffered multiple on the job injuries and one in particular on September 16, 1982. According to the NYCTA Report of Accident to Employee, plaintiff suffered an injury "across lower back-down right leg" (Verified Answer, exhibit 3). Specifically in this Report it is noted that petitioner stated "that while coming from District 33 on the 'A' train re: return from mail run, the train jerked forward at Jay street causing other passengers to fall into him. Aided grabbed a pole to protect himself and a small child from being crushed in the process. Upon doing this, aided experienced a sharp pain in lower back" (*id.*). Moreover, in a Workmen's Compensation Board (WCB) C-48 Report filled out on September 17, 1982, petitioner stated that on September 16, 1982 "while riding on train delivering mail, train lurched causing injuries to lower back, when passenger fell on me" (Verified Answer, exhibit 3).

On June 29, 1983, petitioner filled out an application requesting an accidental disability retirement (ADR) pension based upon in the line of duty incidents, including but not limited to, ones that occurred on June 3, 1979, September 11, 1981, November 9, 1981, and September 16, 1982 (*see* Verified Answer, exhibit 7).

On February 2, 1984, a NYCERS Medical Board examined petitioner and found him disabled from performing his duties as a police officer with the NYCTA as a result of his injuries on November 9, 1981, which resulted in carpal tunnel syndrome of the right wrist, and September 1, 1982, which resulted in impact injury to his low back (*see* Medical Board Report, Verified Petition, exhibit 1; Verified Answer, exhibit 8). In describing the September 1, 1982 incident, the Medical Board wrote "while on limited duty, delivering mail for the Transit Authority,

[petitioner] sustained injury to his back. This occurred, he said when the train came to a sudden halt while approaching a station...the train was relatively crowded. Mr. Rosenberg was standing. Nearby was a young child. As the train came to a halt, Mr. Rosenberg sensing that the child might be crushed by the passengers inserted himself between the child and the midway passenger post. In the course of doing this his back was against the pole. At this instance, passengers were thrown in his direction and pushed him very hard against the pole. He felt pain in his lower back and has persisted since that time" (*id.*).

In a letter dated March 5, 1984, petitioner was advised of his retirement date and that it was petitioner's responsibility to supply NYCERS with any and all Notices of Decision which show the amount of compensation payments which he has received or will receive in the future (Verified Answer, exhibit 14). Additionally, petitioner was informed that "The Law provides that any amount payable, not merely paid, under the Worker's Compensation Law, be offset against an Accidental Disability Retirement allowance" (*id.*). Petitioner was approved for ADR on April 13, 1984, which became effective upon his retirement on April 28, 1984. On August 3, 1984, NYCERS sent petitioner a retirement allowance election, which also indicated that "your accident disability allowance will be reduced by any award which may be made to you under the Worker's Compensation Act" (Verified Answer, exhibit 10). In a report dated September 17, 1984, NYCERS Chief Actuary, Jonathan Schwartz, indicated that petitioner had been receiving \$105.00 per week from May 8, 1981 to June 1, 1982 from the WCB, but that the cases were closed. As a result, he concluded that "Since the Worker's Compensation payments were completed before the effective retirement date, the above allowance is payable [to petitioner] without modification" (Petitioner's exhibit 3; Verified Answer, exhibit 17). Thus, petitioner was awarded an ADR monthly allowance in the sum of \$2,741.30.

In 1988, four years after the ADR pension's effective date and petitioner's receipt of the ADR monthly pension allowance, petitioner also received a retroactive WCB award of 2.4

weeks of intermittent lost time for the period of September 17, 1982 to October 20, 1983 at the rate of \$215.00 per week, a retroactive award of \$105.00 per week for the period of April 28, 1984 to November 7, 1988, and as of November 7, 1988, continuing payments for the remainder of his life at \$105.00 per week.

In 2011, NYCERS implemented new procedures to audit worker's compensation benefits for members receiving ADR pensions based upon a recommendation from the New York City Department of Investigation. It was at that time that NYCERS became aware that petitioner was receiving both WC payments and his ADR pension, without any offset, since April 28, 1984. In letters dated August 24, 2011 and October 25, 2011, petitioner was asked to fill out and send to NYCERS Form # 354 which required him to report the most recent WC award he received, if any, and the period covered for that award (Verified Answer, exhibits 19, 20). Specifically, these letters indicated that NYCERS was required to periodically verify the WC amounts received by petitioner to determine the disability benefits to which he was entitled because of a statutory requirement that retirement allowances be offset by WC payments. Moreover, the letters stated that failure to fill out and return Form # 354 would result in a suspension of petitioner's pension (*see id.*). Petitioner failed to respond to these inquiries, and as a result, on or about February 1, 2012 his pension was suspended pending NYCERS' receipt of the requested form. Petitioner was mailed an additional letter on March 23, 2012 (*see* Verified Answer, exhibit 21). On April 26, 2012, petitioner filled out and returned said form "under duress and protest" and indicated that he had received WC payments for the period 4/9/12 through 4/23/12 (Verified Answer, exhibit 22).

In a letter from the Pension Payroll Unit of NYCERS, dated May 15, 2012, petitioner was informed that based on recent information received from the New York City WCB, effective with the May 2012 payroll, petitioner's monthly ADR allowance would be reduced prospectively from \$2,741.30 to \$2,285.05 based on weekly WC payment of \$105.00 he was receiving (*see*

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Verified Petition, exhibit 4; Verified Answer, exhibit 24). Additionally, the letter stated "You will be notified in the near future as far as repayment of Worker's Compensation payments you have previously received" (*id.*). Subsequently, petitioner received a letter from the Pension Payroll Unit of NYCERS, dated June 1, 2012, which informed him that based upon recent information from the New York City WCB, effective with the June 2012 payroll, petitioner's monthly ADR allowance would be reduced from \$2,741.30 to \$685.05 due to an overpayment of \$145,120.62, which encompasses payment of \$105.00 weekly from the WCB from April 28, 1984 until May 31, 2012. Additionally, the letter informed petitioner that NYCERS would maintain this reduction to offset the amount paid by WC through the year 2020 (*see* Verified Petition, exhibit 5; Verified Answer, exhibit 25).

On September 27, 2012, the petitioner commenced the herein Article 78 proceeding seeking vacatur of NYCERS determination to offset petitioner's ADR pension by a sum equal to WCB's payments received and its reduction of his ADR monthly allowance from \$2,741.30 to \$685.05 to reflect the \$145,120.6 overpayment. Moreover, he seeks reinstatement of his ADR pension in the sum \$2,741.30 per month, and reimbursement for all suspended and/or reduced payments of his monthly pension allowance and payment to date.

In support of his application, petitioner asserts, *inter alia*, that he received WC benefits for an injury that occurred on September 16, 1982 and an ADR pension for injuries that occurred on November 9, 1981 and September 1, 1982 and as such, these are not the "same disability of the same person" as referred to in the New York City Administrative Code (Admin Code) § 13-176. Thus, he proffers he is entitled to his full ADR pension allowance and receipt of WC without any offset. Additionally, he contends that respondents' attempt to revisit a 1984 determination of the Medical and WC Boards by stating that there is a typographical error as to the relevant dates of injuries is speculation and not supported by the facts. Moreover, he claims that he was not given prior notice of the reduction other than the May 15, 2012 letter, nor

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was he given an opportunity to contest the determination.

NYCERS filed a Verified Answer and in opposition to the petition, asserts that consistent with Admin Code § 13-176, petitioner can only receive the pension allowance to which he is entitled and that it must be offset by any WC benefits. Moreover they proffer, that they are statutorily required, pursuant to Admin Code § 13-182, to correct any errors in computing benefits entitlements, which is simply what they are doing here. Furthermore, though they are correcting an error that occurred over 20 years ago, NYCERS argues that estoppel and laches are inapplicable in this case. Respondents assert that petitioner's claim that he was not given prior notice of the offset is false as evidenced by the record which shows NYCERS provided him with notice on no less than four occasions. They also assert that petitioner's claim that he was awarded an ADR pension for a back injury from 9/1/82 and a WC award related to a 9/16/82 incident is misplaced, as any reference to a 9/1/82 incident in the Medical Board's Report is a typographical error since the description of the incident in the Medical Report almost mirrors the NYCTA incident report filled out for an injury on 9/16/82. Finally, it is NYCHA's contention that this proceeding is time-barred because petitioner was notified of NYCERS' determination to offset his pension on March 15, 2012, and thus he had until September 15, 2012 to timely commence the proceeding. However, petitioner brought this action on September 27, 2012, which is beyond the four-month statute of limitations. NYCERS maintains that the June 1, 2012 letter detailing the overpayment schedule does not extend the statute of limitations.

STANDARD

The standard of review in this Article 78 proceeding is whether NYCERS' determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; see also *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the

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Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; see also *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assoc. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn. v Glasser*, 30 NY2d 269, 278 [1972]; see also *Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

DISCUSSION

"A proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR 217[1]; see *Matter of Rocco v Kelly*, 20 AD3d 364, 365 [1st Dept 2005]). "An administrative determination becomes 'final and binding' when the petitioner seeking review has been aggrieved by it" (*Matter of Rocco*, 20 AD3d at 365, quoting *Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000]). The Court finds that contrary to NYCERS' contention, petitioner's application is not time-barred. The June 1, 2012 notification letter which addressed the complete reduction of petitioner's ADR monthly pension from \$2,741.30 to \$685.05 as an offset for WC payments from April 28, 1984 to the present is the operative notice for Article 78 purposes. Although the letter received by petitioner on May 15, 2012 notified him of a reduction of his ADR monthly allowance prospectively and effective for the May 2012 payroll due to information received from the WCB, a decision by which petitioner is aggrieved, it is unclear on

its face whether this is a final and binding decision given that it states “[y]ou will be notified in the near future as far as repayment of Worker’s Compensation payments you have previously received.” Thus, petitioner’s Article 78 proceeding brought on September 27, 2012, which is within four months from June 2012, is timely and shall be considered on its merits (*see Matter of Rocco*, 20 AD3d at 365 [“if an agency has created ambiguity or uncertainty as to whether a final and binding decision has been issued, the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court”] [internal quotation marks omitted]).

In reviewing the record, the Court finds that petitioner’s Article 78 petition is denied in all respects. NYCERS’ decision to seek reimbursement of the overpayment of pension funds to the petitioner is neither arbitrary nor capricious, an abuse of discretion, or made in violation of a lawful procedure or affected by an error of law. In fact, NYCERS is under a statutory obligation to offset any pension payments by any WC payments received, and is required to correct any errors in computing entitlement to benefits upon the discovery of such error (*see NYC Admin Code* §§ 13-176, 13-182). Despite petitioner’s claims to the contrary, NYCERS is entitled to correct an error even after 28 years, especially given the fact that it only discovered such error after petitioner filled out form # 354 when NYCERS suspended his pension for failing to disclose if he received any WC payments. Moreover, petitioner was on notice as early as 1983 when he applied for ADR that any payments would be subject to a WC offset (*see Verified Answer*, exhibits 7, 10, 14, 18).

Furthermore, Petitioner’s claim that he received his ADR pension for a different injury for which he has been awarded WC benefits is completely belied by the record. It is clear from the documentary evidence submitted to the Court that any reference by the Medical Board in their February 2, 1984 Report to a lower back injury sustained by the petitioner on September 1, 1982, which he claims is partially the basis for his ADR pension, is merely a typographical error

and should have read September 16, 1982. Respondents correctly point out that the description by the Medical Board of the September 1, 1982 injury is almost identical to petitioner's own description in a NYCTA Report of Accident to Employee and a WCB C-48 Report, filled out on September 17, 1982, of an on the job injury that occurred September 16, 1982, for which he claims he is receiving WC. As such, petitioner's defense that the ADR pension and the WCB payments are for separate injuries totally belies the facts and evidence before the Court and is disingenuous. Finally, the Court has considered petitioner's remaining arguments and finds them unavailing.

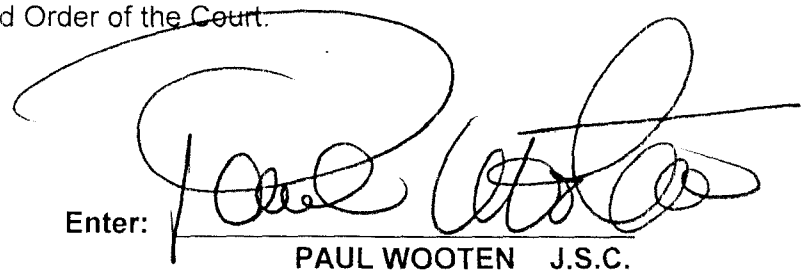
CONCLUSION

For these reasons and upon the foregoing papers, it is,

ORDERED that petitioner's Article 78 petition is denied in all respects, without costs or disbursements to the respondents; it is further,

ORDERED that respondents shall serve a copy of this order, with Notice of Entry, upon petitioner and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Enter: 
 PAUL WOOTEN J.S.C.

Dated: 4-17-14

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: : DO NOT POST REFERENCE

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