

Asciutto v New York City Empls. Retirement Sys.

2019 NY Slip Op 30093(U)

January 9, 2019

Supreme Court, Kings County

Docket Number: 511644/2018

Judge: Paul Wooten

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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

GEORGIA ASCIUTTO,

Petitioner,

INDEX NO. 511644/2018
SEQ. NO. 1

- against -

**NEW YORK CITY EMPLOYEES'
RETIREMENT SYSTEM and
THE BOARD OF TRUSTEES OF NYCERS,**

Respondents.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo) _____

<u>PAPERS NUMBERED</u>	
_____	<u>1</u>
_____	<u>2, 3</u>
_____	<u>4</u>

In this CPLR article 78 proceeding, Georgia Ascitutto (petitioner), widow of a member of the New York City Employees' Retirement System (NYCERS) and a World Trade Center respondent who died as a result of exposure at the World Trade Center site after the September 11, 2001 terrorist attacks, seeks an Order and Judgment: (1) enjoining NYCERS from applying a workers' compensation offset to her accidental death benefits; (2) directing NYCERS to pay petitioner \$12,517.96 she refunded to NYCERS at its request on account of the offset; and, (3) directing NYCERS to pay petitioner her full accidental death benefits without deduction for a workers' compensation offset. Respondents NYCERS and the Board of Trustees of NYCERS submit their Verified Answer and petitioner submits a reply.

BACKGROUND

Petitioner's husband was a former Executive Director of the Fire Department of New York. NYCERS approved his retirement benefits on February 15, 2005. He was also a responder at the World Trade Center after the terrorist attacks on September 11, 2001. On April 7, 2013, petitioner's husband passed away as a result of exposure at the World Trade Center site. On November 4, 2013, the New York State Workers' Compensation Board awarded death benefits to petitioner and her daughter. On July 13, 2017, the Board of Trustees of NYCERS approved petitioner's application for accidental death benefits, pursuant to the Administrative Code of the City of New York section 13-168, which provides death benefits to the survivors of World Trade Center responders who pass away, after retirement, from a qualifying World Trade Center condition.

On February 9, 2018, NYCERS notified petitioner that she had been overpaid \$12,517.96 based on the workers' compensation death benefits awarded to petitioner and her daughter in connection with the death of her husband. As a result, NYCERS reduced petitioner's monthly accidental death benefit in order to recoup the overpayment. Thereafter, petitioner refunded the overpayment amount to NYCERS and requested an explanation for the reduction. In its April 26, 2018 letter, NYCERS informed petitioner that it relied on the New York City Administrative Code sections 13-149 and 13-176 as the legal basis for the reduction of petitioner's accidental death benefit by the workers' compensation death benefits awarded to her and her daughter.

LEGAL STANDARD

"In reviewing administrative proceedings in general, courts are 'limited to considering whether a 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'" (*Chinese Staff & Workers Assn. v City of New York*, 68 NY2d 359, 363 [1986], quoting CPLR 7803[3]; see also *Matter of Lobaina*

v Human Resources Admin., Office of Child Support Enforcement, 79 AD3d 884 [1st Dept 2010]). “The proper test is whether there is a rational basis for the administrative orders. . . . Rationality is what is reviewed under . . . the arbitrary and capricious standard” (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). 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]). “Indeed, once it has been determined that an agency’s conclusion has a ‘sound basis in reason’ the judicial function is at an end and a reviewing court may not substitute its judgment for that of the agency” (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997], quoting *Matter of Pell*, 34 NY2d at 231). However, “where the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency” (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]).

RELEVANT STATUTES

Administrative Code of the City of New York § 13-168(c) provides that:

“c. Notwithstanding any other provision of this chapter or of any general, special or local law, charter, administrative code or rule or regulation to the contrary, *if a retiree who*: (1) has met the criteria of subdivision b of this section and retired on a service or disability retirement, or would have met the criteria if not already retired on an accidental disability; and (2) has not been retired for more than twenty-five years; and (3) *dies from a qualifying World Trade Center condition* as defined in section two of the retirement and social security law, as determined by the applicable head of the retirement system or applicable medical board, then unless the contrary be proven by competent evidence, such retiree shall be deemed to have died as a natural and proximate result of an accident sustained in the performance of duty and not as a result of willful negligence on his or her part. *Such retiree’s eligible beneficiary, as set forth in section 13-149 of this chapter, shall be entitled to an accidental death benefit as provided by section 13-149 of this chapter, however, for the purposes of*

determining the salary base upon which the accidental death benefit is calculated, the retiree shall be deemed to have died on the date of his or her retirement. *Upon the retiree's death, the eligible beneficiary shall make a written application to the head of the retirement system within the time for filing an application for an accidental death benefit as set forth in section 13-149 of this chapter requesting conversion of such retiree's service or disability retirement benefit to an accidental death benefit.* At the time of such conversion, the eligible beneficiary shall relinquish all rights to the prospective benefits payable under the service or disability retirement benefit, including any post-retirement death benefits, since the retiree's death. If the eligible beneficiary is not the only beneficiary receiving or entitled to receive a benefit under the service or disability retirement benefit (including, but not limited to, post-retirement death benefits or benefits paid or payable pursuant to the retiree's option selection), the accidental death benefit payments to the eligible beneficiary will be reduced by any amounts paid or payable to any other beneficiary" [emphasis added].

Administrative Code of the City of New York § 13-149(b)-(c) provides, in pertinent parts, that:

"Upon application by or on behalf of the dependents of such deceased member, such board shall grant a lump sum . . . :

1. To his or her surviving spouse, to continue until the death or remarriage of surviving spouse . . ."

Administrative Code of the City of New York § 13-176(b) provides that:

"b. If an amount which is payable throughout a period under the provisions of the workers' compensation law equals or exceeds the amounts otherwise payable during the same period *out of the moneys provided or to be provided by the city* under the provisions of this chapter *on account of the same disability of the same person*, no payment shall be made to such person under the provisions of this chapter during such period nor thereafter, until the total amount of such omitted payments, together with the regular interest which they would have accumulated, equals the amount paid under the workers' compensation law, together with the regular interest which it would have accumulated. If an amount which is payable throughout a period under the provisions of the workers' compensation law be a percentage less than one hundred per cent of the amounts otherwise payable during the same period *out of moneys provided or to be provided by the city* under the provisions of this chapter *on account of the same disability of the same person*, there shall be paid during such period as it becomes due under the provisions of this chapter, in lieu of each amount otherwise payable, the percentage thereof which is the difference between such lesser per cent and one hundred per cent" [emphasis added].

DISCUSSION

In support of her petition, petitioner avers, *inter alia*, that the express terms of Administrative Code section 13-176(b) provide for an offset of only “disability retirement” benefits based on “the same disability of the same person” that was the basis for the award of disability retirement benefits. Thus, the express terms of section 13-176(b) do not authorize such an offset of death benefits. Petitioner also argues that neither section 13-149 nor 13-168 provide for a reduction of an accidental death benefit based on a widow’s or dependent’s receipt of workers’ compensation death benefits.

Furthermore, petitioner draws a contrast between subdivisions (b) and (c), of section 13-176, whereby subdivision (b) applies to disability retirement benefits while subdivision (c) deals with both accident disability or accidental death benefits. Thus, petitioner reasons that the inclusion of an offset for disability retirement benefits in subdivisions (a) and (b) of section 13-176, without also referring to accidental death benefits and without a separate provision for a workers’ compensation offset in either section 13-149 or 13-168, establishes that the City Council did not intend that an accidental death benefit should be reduced by a workers’ compensation death benefits, in particular in cases where a retiree’s death is caused by exposure at the World Trade Center site.

However, in *Ferraiolo v O’Dwyer*, the Court of Appeals resolved the very same issue of reducing an accidental death benefit by worker’s compensation death benefit for the same accidental death (*see Ferraiolo v O’Dwyer*, 302 NY 371 [1951]). In particular, the *Ferraiolo* Court found that “a proper rule of construction that the phrase ‘out of moneys provided or to be provided by the city . . . on account of the same disability of the same person’, Administrative Code s B3-45.0 [current section 13-176(b)], was not limited to disability benefits payable to an injured employee during his lifetime, but included accidental death benefits as well, from which it followed that an offset in full of a compensation award payable by the city to a widow was

properly made against her accident death pension benefit" (*id.* at 375-76, citing *Matter of Daley v O'Dwyer*, 274 AD 938 [2d Dept 1948], *affd* 298 NY 890 [1949]). In *Matter of Daley v O'Dwyer*, the Court of Appeals held that the term "disability" in subdivision b of section B3-45.0 [current section 13-176(b)] should be construed to include "death" to prevent "receipt of a double award by a single beneficiary (*see id.* at 378 [Conway, J., dissenting]; *Matter of Daley*, 274 AD at 938-39 [holding that NYCERS properly reduced the widow's pension, awarded to her pursuant to section B3-33.0 (current section 13-149), by the amount awarded to her by the State Industrial Board pursuant to section B3-45.0(b), which is current section 13-176[b]]).

While unlike here, *Ferraiolo v O'Dwyer* involved offset of workers' compensation award only to dependents, other than the widow, the Court stated that "but, even so, there is no substantial difference in principle and no different construction is warranted" (*id.* at 376). In its earlier decision, in *Matter of Daley*, the Court of Appeals had held that section B3-45.0, current section 13-176(b), "forbids the receipt by a dependent of such a double award [under both the pension law and the workers' compensation law] on account of the death of the same person" (*see id.* at 378 [Conway, J., dissenting]; *citing Matter of Daley*, 298 NY 890).

The *Ferraiolo* Court reasoned further that "[t]he same policy is followed by the State in administering payments under the State Employees' Retirement System, offsets of compensation awards being made against pensions but not against annuity benefits, which is but an application of the established policy and prohibition against dual payment of public funds" (*id.*).

The *Ferraiolo* Court also noted that "since October 1, 1920, the effective date of the city employees' retirement system, . . . workmen's compensation awards have been deducted in full from accidental death pensions irrespective of the number of dependents surviving," which interpretation of the Code is not "necessarily binding on the court but nonetheless constitutes an element to be considered" (*id.*). Thus, the Court held that NYCERS properly deducted from the

plaintiff-widow's accidental death benefits a workers' compensation payments made on the account of her infant daughter and dependent father, as well as her, by reason of the death of her husband (*see id.* at 377). Therefore, the Court finds that NYCERS' decision to offset petitioner's accidental death benefit by the amount of the workers' compensation death benefits awarded to petitioner and her daughter, pursuant to Administrative Code section 13-176(b), by reason of the death of her husband was not arbitrary and capricious.

In light of the foregoing, the Court need not address the parties' remaining contentions.

CONCLUSION

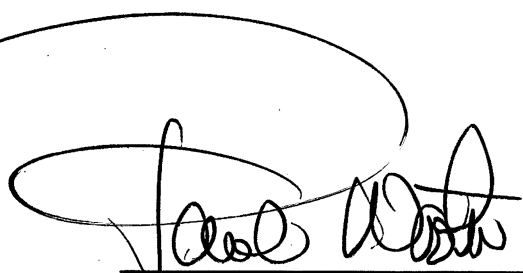
For these reasons and upon the aforementioned papers, it is,

ORDERED that the CPLR article 78 petition of petitioner Georgia Ascitutto, seeking an Order and Judgment: (1) enjoining NYCERS from applying a workers' compensation offset to her accidental death benefit; (2) directing NYCERS to pay petitioner \$12,517.96 she refunded to NYCERS at its request on account of the offset; and, (3) directing NYCERS to pay petitioner her full accidental death benefit without deduction for a workers' compensation offset, is denied in its entirety, and the herein proceeding is dismissed; and, it is further,

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

This constitutes the Decision and Order of the Court.

Dated: January 4, 2019


PAUL WOOTEN J.S.C.

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KINGS COUNTY CLERK
FILED