

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sylvia A. Waters, :
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 Petitioner :
 :
 :
 v. : No. 560 M.D. 2009
 : Submitted: January 29, 2010
 :
 State Employees Retirement Board, :
 :
 Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: April 21, 2010

Sylvia A. Waters has filed a petition for review (Petition) styled as a “civil action-mandamus class action complaint” in this court’s original jurisdiction. The State Employees Retirement Board (SERB) has filed a preliminary objection to the Petition based on a lack of subject matter jurisdiction and a motion for sanctions against Petitioner and her counsel,¹ alleging abuse of process,² both of which are currently before us for disposition.

¹ Throughout these proceedings, Waters has been represented by her husband, Paul E. Waters, Esq.

² Pa. R.C.P. No. 1023.1(c)(1)-(3) provides that the signature of an attorney serves to certify that a pleading has not been presented for any improper purpose, that the claims, defenses and other legal contentions therein are warranted by existing law or by a non-frivolous argument for modification of existing law, and that the factual allegations have evidentiary support. Pa. R.C.P. No. 1023.4(a)(2)(i) provides for a sanction for violation of Rule No. 1023.1, including “the striking of the offensive litigation document. . . .”

This is the third time that Waters is before this court; therefore, some background is necessary to an understanding of the issue we now confront. Waters sustained a work-related injury in 1985 while employed by the Pennsylvania Department of Health, and she received workers' compensation benefits pursuant to the Workers' Compensation Act.³ As a state employee unable to work, Waters also was granted a disability annuity under section 5308(c) of the State Employees Retirement Code (Retirement Code), 71 Pa. C.S. §5308(c). Under section 5704(f) of the Retirement Code, 71 Pa. C.S. §5704(f), an employee whose disability is work-related receives a supplement as necessary to ensure that his or her disability annuity equals 70% of his or her final average salary.⁴ However, the State Employees

³ Act of June 2, 1915, P.L. 736, *as amended*, 77 P.S. §§1—1041.4; 2501—2708.

⁴ Section 5704(f) of the Retirement Code provides:

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) [relating to disability annuity amount] 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 (49 Stat. 620, 42 U.S.C. §301 et seq.). 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

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Retirement System (SERS) did not pay Waters the section 5704(f) supplement because the combination of her disability annuity and workers' compensation benefits already exceeded 70% of her final salary. In 2006, after Waters' workers' compensation benefits ended, Waters' counsel requested the section 5704(f) supplement; however, SERS denied the request, explaining that Waters did not qualify for the section 5704(f) supplement once her workers' compensation benefits were discontinued.

Waters appealed and, in *Waters v. State Employees' Retirement Board (Waters I)*, 955 A.2d 466 (Pa. Cmwlth. 2008), this court affirmed SERB's decision that Waters was not entitled to the section 5704(f) supplement even though her work-related disability continued. We determined that, based on the longstanding interpretation of section 5704(f) and 4 Pa. Code §247.4(b),⁵ the exhaustion of Waters'

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dividing the lump sum payment by the average weekly wage as determined by the Workers' Compensation Board.

71 Pa. C.S. §5704(f).

⁵ 4 Pa. Code §247.4(b) provides:

Eligibility for a service connected disability benefit shall be determined exclusively under the provisions of the Pennsylvania Workmen's Compensation Act ... and the Pennsylvania Occupational Disease Act ... and other compensation statutes applicable to special classes of Commonwealth employees. A service-connected disability, shall total 70% of the final average salary, and includes within that annuity the benefit amounts awarded by the Social Security Administration and the agency or agencies having jurisdiction over the determination of the applicable State benefits. The benefit shall continue as long as the member is entitled to receive the State

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workers' compensation benefits made her ineligible for the supplement. Waters did not appeal from this determination.

Thereafter, Waters filed a complaint in our original jurisdiction, which we treated as a petition for review, and which was styled as a "Complaint in Mandamus-Class Action." In this petition, Waters again sought to supplement her disability annuity pursuant to section 5704(f) of the Retirement Code. SERB filed preliminary objections and a motion to dismiss on grounds that this court lacked subject matter jurisdiction because the issue had already been decided. After oral argument, this court sustained SERB's preliminary objections and dismissed the petition. Waters' counsel requested reconsideration, expressing confusion as to why the order was entered. The request for reconsideration was granted; however, on October 6, 2009, we once again sustained SERB's preliminary objections and dismissed the action based on a lack of subject matter jurisdiction. *See Waters v. State Employees Retirement Board* (323 M.D. 2009, Order dated October 6, 2009) (*Waters II*). Waters did not appeal from this order.

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compensation benefits. The service-connected disability shall be discontinued if the State compensation authorities determine that the service-connected disability has ceased. In that event, a member shall be eligible for normal disability benefits, as provided in section 5704(a) of the code (relating to disability annuities) if the Board determines that the member remains disabled. The service-connected disability benefit shall be payable as of the effective date of the application for disability benefits filed with the Board, irrespective of the date the State compensation award was made.

Waters filed her most recent Petition on October 29, 2009, alleging that, pursuant to section 5704(f) of the Retirement Code and 4 Pa. Code §247.4(b), SERB is required to pay a disability supplement to retirees whose disability is service-connected and has not been determined by workers' compensation authorities to have ceased.⁶ Waters seeks relief in mandamus, judgment under the Declaratory Judgments Act, 42 Pa. C.S. §§7531—7541, costs and “bad faith exemplary damages.” (Petition at 7.)

As before, SERB filed a preliminary objection, asserting that the Petition should be dismissed due to lack of subject matter jurisdiction because this court, on two earlier occasions, rejected Waters' claim that she is entitled to the section 5704(f) supplement, and Waters did not appeal from these adverse decisions. SERB also requests that we sanction Waters and her counsel by ordering counsel to withdraw this claim and by admonishing both of them to refrain from further attempts to obtain a service-connected disability supplement from SERS.

Waters counters the preliminary objection, contending that this Petition presents a different issue.⁷ In response to SERB's motion for sanctions, Waters'

⁶ Waters further alleges that SERB has neglected to increase the amount of the supplements that class members are currently receiving in order to comply with the 70% mandatory minimum supplement required by statute and, due to this violation of law, class members have been underpaid the statutory amount mandated by section 5704(f) of the Retirement Code. Waters further asserts that SERB has construed the applicable regulation in a manner inconsistent with Article II, §1 of the Pennsylvania Constitution but does not elaborate further.

⁷ Specifically, Waters alleges: “The prior adjudication, affirmed by this Court, did not decide whether, as claimed in this case, a service connected disability retiree who is receiving a supplement, under 5704(f) by statute, must receive not less than 70% [Final Average Salary] even if paid fully by SERB.” (Waters' brief at 3.)

counsel claims he still is confused why this court decided it had no subject matter jurisdiction in *Waters II*. We agree with SERB.

Despite her claims to the contrary, we recognize that, now, as before, Waters seeks a determination that she is entitled to the section 5704(f) supplement.⁸ As we have already noted, this issue was fully resolved in *Waters I*, and the finality was confirmed in *Waters II*.⁹ Thus, even accepting as true all well-pled, material allegations in the Petition, we are satisfied that Waters cannot obtain the relief she seeks.¹⁰ Waters seeks review in our original jurisdiction of what is, and was, an

⁸ In this regard, Waters

prays for a judgment against Defendant SERB commanding it to calculate the past amounts due and automatically adjust the disability benefit payments of each service connected disability retiree less any amount paid or payable by Workers' Compensation, so that they shall receive not less than 70% of final average salary for so long as it has not been determined by Workers' Compensation authorities that disability has ceased.

(Petition at 5, 6.)

⁹ Waters further cites *Gowden v. State Employees' Retirement Board*, 875 A.2d 1239 (Pa. Cmwlth. 2005), *affirmed*, 592 Pa. 612, 927 A.2d 201 (2007), for the proposition that SERB, in a decision reversed by this court, improperly denied the full 70% service-connected disability supplement to William R. Gowden. As we explained in *Waters I*, however, *Gowden* is distinguishable because the employee in that case, unlike Waters, was receiving workers' compensation benefits.

¹⁰ In ruling on preliminary objections, this court must accept as true all well-pled, material allegations in the Petition, as well as all inferences reasonably deducible therefrom. *Wagaman v. Attorney General of Pennsylvania*, 872 A.2d 244 (Pa. Cmwlth. 2005). However, we need not accept as true either conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. *Id.* For preliminary objections to be sustained, it must **(Footnote continued on next page...)**

appellate matter, now finally resolved by an order denying her that requested relief.¹¹
This she cannot do.

Accordingly, we sustain SERB's preliminary objection and dismiss Waters' Petition with prejudice. We also grant SERB's motion for sanctions as a result of counsel for Waters' violation of Pa. R.C.P. No. 1023.1(c) in continuing to file nonmeritorious claims.

ROCHELLE S. FRIEDMAN, Senior Judge

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appear certain that the law will not permit recovery, and any doubt should be resolved by refusing to sustain the preliminary objections. *Id.*

¹¹ In *Pennsylvania Department of Aging v. Lindberg*, 503 Pa. 423, 469 A.2d 1012 (1983), our Supreme Court specifically held that matters our legislature has placed within Commonwealth Court's appellate jurisdiction are excluded from its original jurisdiction.

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State Employees Retirement Board,	:	
	:	
Respondent	:	

ORDER

AND NOW, this 21st day of April, 2010, upon consideration of Sylvia A. Waters' petition for review and the State Employees Retirement Board's (SERB) preliminary objection and motion to dismiss, it is hereby ordered that SERB's preliminary objection is sustained and Waters' petition is dismissed with prejudice. Also, upon consideration of SERB's motion for sanctions, 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 SERB or the State Employees Retirement System, or face further sanctions.

ROCHELLE S. FRIEDMAN, Senior Judge