

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

March 26, 2010

No. 09-60609
Summary Calendar

Charles R. Fulbruge III
Clerk

JAMES L. SMITH,

Petitioner

v.

UNITED STATES RAILROAD RETIREMENT BOARD,

Respondent

Petition for Review from an Order of the
United States Railroad Retirement Board
No. A-XXX-XX-5595

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

Petitioner James L. Smith, appearing *pro se* and *in forma pauperis*, appeals the decision of Respondent Railroad Retirement Board (“Retirement Board”) in which the Retirement Board rejected Petitioner’s contention that his annual Cost of Living Adjustment (COLA), which was applied to his monthly Railroad Retirement Annuity under the Railroad Retirement Act, was incorrectly calculated.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

No. 09-60609

I. Background

Petitioner was formerly employed by the Railroad Commission as a switchman and has received a monthly Railroad Retirement Annuity since at least 1985. In December 2008, Petitioner's annuity was adjusted according to the annual Cost of Living Adjustment authorized by 45 U.S.C. § 231b *et seq.* Shortly thereafter, Petitioner sent a letter to the Railroad Retirement Commission arguing that his COLA was incorrectly calculated and requesting a reconsideration of the calculation. In a letter dated February 24, 2009, a Reconsideration Specialist found that Petitioner's Tier I and Tier II annuity payments under the Railroad Retirement Act were correctly adjusted by applying the 2009 COLA of 5.8% to Tier I and 1.9% to Tier II. Petitioner appealed this decision to the Bureau of Hearings and Appeals. The hearings officer affirmed the findings of the Reconsideration Specialist. Petitioner filed a reconsideration appeal with a three member panel of the Retirement Board, again asserting that his COLA was incorrectly calculated. In a written decision dated June 29, 2009, the Retirement Board denied Petitioner's appeal. Petitioner timely appealed to this Court.

II. Analysis

A. *Standard of Review*

This Court will not set aside the Retirement Board's decision if its factual findings are supported by substantial evidence and its decision is not based on an error of law. *Kurka v. U.S. Railroad Retirement Board*, 615 F.2d 246, 249–50 (5th Cir. 1980). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971).

B. *Analysis*

No. 09-60609

Petitioner appeals the Retirement Board's determination that his 2009 COLA was properly calculated. Retirement annuity consists of two tiers, Tier I and Tier II. The Tier I amount is "equal to the amount . . . of the old-age insurance benefit or disability insurance benefit to which such individual would have been entitled under the Social Security Act." 45 U.S.C. § 231b(a)(1). The Tier II amount is based on a statutory schedule based on "years of service" and "average monthly compensation." 45 U.S.C. § 231b(b)(1). In the years that social security benefits are adjusted for changes in the cost of living, Tier I of the annuity is adjusted accordingly. 45 U.S.C. § 231b(a)(1). Tier II of the annuity is increased by 32.5% of the COLA percentage applied to Tier I of the annuity. 45 U.S.C. § 231b(g)(1).

In 2008, Petitioner's Tier I and Tier II monthly annuity payments totaled \$1,404.30. The Tier I of that amount increased by 5.8% for the 2009 year, and, as a result, the Tier II amount increased by 1.9%. This increased Petitioner's 2009 monthly annuity payments to \$1,486.75, an overall increase of \$82.45 from 2008. The Retirement Board found that this was the proper COLA for Petitioner.

Petitioner argues that his COLA should have increased by a total of \$92.00, not \$82.45, and that the Agency owes him the monthly difference of \$9.55. Petitioner bases this contention on a United Transportation Union (UTU) Alumni Newsletter published in November 2008 which details the COLA percentages for the 2009 year and states that "the average regular Railroad Retirement employee annuity will increase \$92 a month to \$2,101" Petitioner misconstrues the definition of "average." Although each retiree's Tier I COLA percentage rate is the same, the actual dollar amount that each receives depends on the individual retiree's annuity amount. No evidence exists that Petitioner's 2009 COLA was incorrectly calculated.

No. 09-60609

III. Conclusion

For the foregoing reasons, the Retirement Board's decision is AFFIRMED.