IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce H. Moyer, M.S.Ed.,	:	
Petitioner	:	
v.	:	No. 396 C.D. 2011
Department of Public Welfare,	:	Submitted: August 12, 2011
Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: December 7, 2011**

Bruce H. Moyer, M.S.Ed. (Petitioner) petitions for review of the Order of the Department of Public Welfare (the Department), Bureau of Hearings and Appeals (BHA), that adopted, in its entirety, the recommended decision of the Administrative Law Judge (ALJ) denying Petitioner's appeal to reinstate benefits pursuant to the Act of December 8, 1959, P.L. 1718, as amended, 61 P.S. §§ 951-952 (Act 534).[1] The Department determined Petitioner to be ineligible for

[1] Section 1 of Act 534 provides, in pertinent part:

> Any employe of a . . . State mental hospital or Youth Development Center under the Department of Public Welfare, who is injured during the course of his employment by an act of any inmate or any person confined in such institution or

(Continued…)

reinstatement of benefits because he was retired and, therefore, not an active employee.

Procedural History

Initially, we note that the procedural history in this matter involves two adjudications by the ALJ, which, ultimately, were adopted by the BHA. The first adjudication occurred on October 29, 2009 (2009 ALJ Decision). The 2009 ALJ Decision recommended that the case be dismissed as an untimely filed request for the reinstatement of Act 534 benefits and, on November 17, 2009, the BHA ordered that the 2009 ALJ Decision be adopted in its entirety. However, on January 13, 2011, upon Petitioner's Application for Reconsideration, the Acting Secretary of the Department (Acting Secretary) set aside the November 17, 2009

> by any person who has been committed to such institution by any court of the Commonwealth of Pennsylvania or by any provision of the "Mental Health Act" . . ., shall be paid, by the Commonwealth of Pennsylvania, his full salary, until the disability arising therefrom no longer prevents his return as an employe of such department, board or institution at a salary equal to that earned by him at the time of his injury.
>
> All medical and hospital expenses incurred in connection with any such injury shall be paid by the Commonwealth of Pennsylvania until the disability arising from such injury no longer prevents his return as an employe of such department, board or institution at a salary equal to that earned by him at the time of his injury.
>
> During the time salary for such disability shall be paid by the Commonwealth of Pennsylvania any work[ers'] compensation received or collected for such period shall be turned over to the Commonwealth and paid into the General Fund, and if such payment shall not be so made, the amount so due the Commonwealth shall be deducted from any salary then or thereafter becoming due and owing. . . .

61 P.S. § 951.

BHA Order, concluding that the appeal was timely filed and remanded the matter to the BHA. The Acting Secretary directed the BHA to reopen the hearing record to accept additional evidence and testimony, as needed, as to whether or not the Department's refusal to reinstate Petitioner's Act 534 benefits was proper, and directed the BHA to issue a new adjudication on the merits of the case. (Acting Secretary's Order, January 13, 2011, R.R. at 442a.) On January 19, 2011, the ALJ determined that the hearing record did not need to be reopened and issued a new adjudication, with new findings of fact, a new discussion, and a recommendation that Petitioner's appeal be denied (2011 ALJ Decision). (2011 ALJ Decision, R.R. at 445a-49a.) On February 9, 2011, the BHA adopted the ALJ's recommendation in its entirety. (BHA Order, February 9, 2011, R.R. at 444a.) Petitioner filed an Application for Reconsideration with the Acting Secretary on February 22, 2011. (Application for Reconsideration, C.R. at Item 5.) On March 14, 2011, the Acting Secretary denied Petitioner's Application for Reconsideration. (Acting Secretary's Order, March 14, 2011, C.R. Item 6, R.R. at 450a.)

Factual History

These facts are taken from the 2011 ALJ Decision. On May 1, 1998, Petitioner was employed as a licensed psychologist by the Department at the Selinsgrove Center and was injured by a patient. (2011 ALJ Decision Findings of Fact (FOF) ¶ 1.) "From December 10, 1998 through March 19, 2001, [Petitioner] intermittently took leave from work using Act 534 benefits based upon the May 1, 1998 incident." (FOF ¶ 2.) Since 1995, the State Employees' Retirement System, (SERS), has retired Commonwealth employees from active service rather than the employees' respective agencies. (FOF ¶ 3.) "On March 19, 2001, [Petitioner]

filed a disability retirement application, participated in retirement counseling, and submitted his disability retirement application to SERS to set a disability retirement date."[2] (FOF ¶ 4.) On March 22, 2001, Petitioner left active employment with the Department and "became eligible for pension benefits." (FOF ¶ 5.) On March 29, 2001, the Department notified Petitioner "that he was removed from its active employee complement as of March 22, 2001 and [] SERS began his disability retirement effective March 23, 2001." (FOF ¶ 6.) "On May 23, 2008, [Petitioner] filed a request for reinstatement of his Act 534 benefits as an active employee." (FOF ¶ 7.) The ALJ held an administrative hearing on April 8, 2009. Petitioner testified on his own behalf, (Hr'g Tr. at 129-215, R.R. at 176a-262a), and the Department presented the testimony of Karen Wallize, Retirement Counselor for SERS, (Counselor), (Hr'g Tr. at 11-100, R.R. at 58a-147a), and Nanette Burney-Mitchell, Employment Benefits Coordinator for the Department (Benefits Coordinator), (Hr'g Tr. at 101-23, R.R. at 148a-70a).

Petitioner testified that he did not resign, terminate his position, that he was not retired and despite getting retirement benefits, he "think[s] it's been in error." (Hr'g Tr. at 135, 141, R.R. at 182a, 188a.) He testified that he "didn't cash the checks for a number of years" and that he should still be receiving Act 534 benefits because he was not retired. (Hr'g Tr. at 135, R.R. at 182a.) He also stated that he lost many of the retirement pension checks and that he asked the Treasury to reissue the checks to him because they were lost or misplaced and outdated. (Hr'g

[2] In addition to the Application for Disability Retirement Allowance, (Hr'g Tr. Ex. C-2, R.R. at 349a), Petitioner also signed and dated SERS Form-281 (Departmental Notification), Retiree Enrollment Form, and the Disability Retirement Counseling Checklist, (Hr'g Tr. Ex. C-2, R.R. at 345a-48a).

Tr. at 215, R.R. at 262a.) Petitioner explained that he submitted an application for disability retirement with SERS, but thought he had sixty days during which he could rescind it while he was waiting for a workers' compensation judge (WCJ) to make a decision in his case. (Hr'g Tr. at 141, 156, R.R. at 188a, 203a.) Petitioner further testified that once he received the WCJ's order, he had it faxed to the person he was told was in charge of Act 534, and believed that the WCJ's order would correct everything. (Hr'g Tr. at 158, R.R. at 205a.)

Counselor testified that she was employed by SERS as a retirement counselor and that she retired employees of the Commonwealth of Pennsylvania for disability or other retirement. (Hr'g Tr. at 12-13, R.R. at 59a-60a.) Counselor testified that a disability retirement could be temporary or permanent, depending upon the doctors' decisions, and that a temporary disability retirement must be approved each year, but a permanent disability retirement requires no additional approvals. (Hr'g Tr. at 15-16, R.R. at 62a-63a.) Counselor noted that the Department does not retire its employees, SERS does. (Hr'g Tr. at 17, R.R. at 64a.) She explained that her role is to counsel Commonwealth employees about the retirement options available to them. (Hr'g Tr. at 18, R.R. at 65a.) Counselor added that SERS had various tools for employees to learn about their options in addition to counseling, such as the SERS website, pamphlets, member handbook, and annual statements. (Hr'g Tr. at 19-20, R.R. at 66a-67a.)

Counselor further testified that when Petitioner applied for disability retirement in March of 2001, Counselor asked Petitioner whether he was on Act 534 benefits, and he told her that he was not, but "that he was seeking Act 534

benefits." (Hr'g Tr. at 36-37, 39, R.R. at 83a-84a, 86a.) Counselor explained to Petitioner that "[i]f he applied for a disability retirement, he could not get Act 534 benefits." (Hr'g Tr. at 39, R.R. at 86a.) Counselor agreed that there was nothing about Petitioner that led her to believe he did not hear or comprehend what she told him, that he seemed aware of her questions, and he appeared competent to sign his documents. (Hr'g Tr. at 39-40, R.R. at 86a-87a.) She then testified that Petitioner signed the retirement disability application and the other forms required by SERS, including the letter of notification, (Departmental Notification), and the retirement employee health enrollment form. (Hr'g Tr. at 39-40, R.R. at 86a-87a.) Counselor explained that the words "to be determined" on the Departmental Notification form refer to the date that is inserted once an applicant has been approved for disability retirement, typically the last day of work. (Hr'g Tr. at 41, R.R. at 88a.) She explained that, in Petitioner's case, his disability retirement was approved to receive a retirement pension as of March 23, 2001. (Hr'g Tr. at 83-84, R.R. at 130a-31a.) Counselor noted that she knew that Petitioner received SERS benefits because he was listed on the SERS annuitant screen, she identified 1099R tax forms for the years 2001 through 2008, and explained that they reflected the pension received by Petitioner from the SERS fund for those years. (Hr'g Tr. at 44, 49-50, R.R. at 91a, 96a-97a.)

The Department's Benefits Coordinator testified that she approved Act 534 benefits for the injuries that occur to the Department's employees, in addition to other benefits. (Hr'g Tr. at 101-02, R.R. at 148a-49a.) She stated that, in May of 2008, she became aware Petitioner had requested Act 534 benefits from the date of his injury into the future. (Hr'g Tr. at 104, R.R. at 151a.) She testified that she

had reviewed Petitioner's file and that he had been on Act 534 benefits, but was not in 2008, noting that Petitioner was retired. (Hr'g Tr. at 105, R.R. at 152a.) Benefits Coordinator explained that her "concerns were that [Petitioner's] injury was in 1998" and that "in 2001 he took a disability retirement" and, therefore, "he was not eligible for Act 534 benefits because he was no longer an employee." (Hr'g Tr. at 108, R.R. at 155a.) She recounted that, before Petitioner left his employment, "he was on sick leave without pay under the [Family Medical Leave Act]" . . . , then that was overturned [when a WCJ] found in his favor and granted him [w]orkers' [c]omp[ensation]" and "his Act 534 benefits were given back to him." (Hr'g Tr. at 112, R.R. at 159a.) Benefits Coordinator added that she did not think that Petitioner should have been reinstated to the Act 534 benefits at that point or that the workers' compensation and Act 534 cases should have been together in any way. (Hr'g Tr. at 112, R.R. at 159a.) In response to whether reinstatement of Act 534 ever occurs when a person is no longer an employee, she said, "No. You have to be an employee to be entitled to that benefit." (Hr'g Tr. at 117, R.R. at 164a.)

After the hearing, on June 3, 2008, the Department refused to reinstate Petitioner as an active employee and denied his request to reinstate Act 534 benefits because Petitioner was retired. (FOF ¶ 8.) On June 28, 2008, Petitioner filed an appeal of the Department's June 3, 2008 decision, (FOF ¶ 9), whereupon the ALJ recommended denial of the Petitioner's appeal for reinstatement of Act 534 benefits. (2011 ALJ Decision, R.R. at 446a-49a.) The ALJ reasoned that: Petitioner is a retired employee; the hearing record demonstrates that the employment relationship between the Department and Petitioner ended when

petitioner elected to retire; and SERS has not returned Petitioner to active employee status with the Department. (2011 ALJ Decision at 4, R.R. at 449a.) The ALJ further noted that people who have been retired for more than two weeks must challenge their retirement status with SERS, citing Welsh v. State Employees' Retirement Board, 808 A.2d 261 (Pa. Cmwlth. 2002), Crouse v. State Employees' Retirement System, 729 A.2d 1268 (Pa. Cmwlth. 1999), Bittenbender v. State Employees' Retirement Board, 622 A.2d 403 (Pa. Cmwlth. 1992), and Section 249.7(d) of SERS' regulations, 4 Pa. Code § 249.7(d).[3] The ALJ noted that Act 534 benefits may only be issued to active employees and, because Petitioner was retired, the Department could not comply with Petitioner's request to reinstate his Act 534 benefits. (2011 ALJ Decision at 4, R.R. at 449a.) On February 9, 2011, the BHA issued an Order that adopted the ALJ's Recommendation in its entirety. (BHA Order, February 9, 2011, R.R. at 444a.) Petitioner now petitions this Court for review of that Order.[4]

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[3] Section 249.7(d) of SERS' regulations provides, in relevant part:

> (d) *Effect of election to receive a benefit.* A member who terminates State service, who is eligible to elect to withdraw his total accumulated deductions, or vest his retirement rights, or receive an immediate annuity, shall, by exercising the election, be deemed to have made an irrevocable choice which may not be changed unless the change was made prior to the effective date of termination of service.

4 Pa. Code § 249.7(d).

[4] This Court's scope of review is to determine whether the appellant's constitutional rights were violated, an error of law was committed, or a necessary finding of fact is not supported by substantial evidence. An adjudication by the Department must be sustained if it is in accordance with the law and supported by substantial evidence. Mihok v. Department of Public Welfare, 580 A.2d 905, 907 (Pa. Cmwlth. 1990).

Petitioner first argues that he is an active employee because he neither left active employment nor voluntarily terminated his active employment with the Department. Petitioner maintains that the BHA erred when it adopted the ALJ's recommendation that Petitioner elected to retire, was retired, and further erred in concluding that Petitioner, as a retired employee, was no longer entitled to Act 534 benefits as a matter of law. Petitioner specifically contends that substantial evidence does not support the ALJ's finding that "[o]n March 22, 2001, [Petitioner] left DPW active employment and became eligible for pension benefits." (FOF ¶ 5.)

Petitioner's argument that he did not retire voluntarily, despite his submission of a disability retirement application to SERS, is based upon his contention that *he* had sixty days during which to determine a disability retirement date, but, instead, *SERS* unilaterally selected his retirement date. (Hr'g Tr. at 156-59, R.R. at 203a-06a.) Petitioner's argument is based on the manner in which he completed the Departmental Notification, one of the forms Petitioner completed in applying for disability retirement with SERS. (Hr'g Tr. Ex. C-2 at 1, R.R. at 345a.) The Departmental Notification provides that Petitioner "authorize[s] SERS to provide [] notification to my agency" of disability retirement. (Hr'g Tr. Ex. C-3 at 1, R.R. at 345a.) On March 19, 2001, Petitioner signed the Departmental Notification, which also stated that he completed his disability retirement paperwork with 12.0782 years of credited state service. Additionally, on the Departmental Notification, Petitioner checked boxes labeled "to be determined" for both his "termination date" and "effective date of disability retirement." (Hr'g Tr. Ex. C-3, R.R. at 345a.) During the April 8, 2009 hearing, Petitioner agreed

with the ALJ's summary that, "[w]hat you're saying is basically that in 2001, you filled out the application in March with the expectation that you can change your mind" and that "within 60 days, you then had to do something else actively to retire." (Hr'g Tr. at 158-59, R.R. at 205a-06a.) Petitioner testified that he received a decision of the WCJ[5] on April 27, 2001, less than sixty days after submitting his retirement application with SERS and that he faxed the WCJ's order to the person "in charge at the time of Act 534."[6] (Hr'g Tr. at 157, R.R. at 204a.) Petitioner further testified that he did not believe he needed to rescind the retirement application because the "Judge's Order . . . corrects everything" and "they pay the things that are missed or dates that were cancelled that should have been covered and all that." (Hr'g Tr. at 158, R.R. at 205a.) Petitioner further explained that he thought if he did not do anything with his retirement application in the next 60

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[5] WCJ Kenneth P. Walsh issued a Decision and Order dated April 27, 2001, resolving numerous pending workers' compensation petitions arising out of Petitioner's May 1, 1998 workplace injury. (Hr'g Tr. Ex. A-2, C.R.) The Decision found, in part, that: Petitioner carried his burden of proving that his inability to work after March 20, 2000, was due to his work injury; because Petitioner was successful, the Department must pay Petitioner's litigation costs; and the Department did not carry its burden in its Termination Petition or in its Suspension Petition because it did not produce credible, competent evidence that Petitioner could perform his regular job as a psychologist or the modified-duty job that Petitioner performed after April 19, 1999. (Conclusion of Law (COL) ¶¶ 5, 10, 12, 13.) Petitioner's physician's testimony was found credible that Petitioner was not capable of returning to his job after March 20, 2000. (COL ¶ 13.) The Order, among other things, granted Petitioner's Reinstatement Petition and ordered the Department to pay Petitioner ongoing workers' compensation total disability benefits following March 20, 2000, pending further Order or Agreement. In response to the Department's Petition to Terminate Petitioner's compensation benefits, filed on September 8, 2006, and the subsequent Answer and Petitions filed in response thereto, WCJ Karl Baldys issued a Decision dated November 7, 2006 granting Supersedeas. (Hr'g Tr. Ex. A-3, C.R.)

[6] Benefits Coordinator testified that she "approve[s] the . . . Act 534 benefits for injuries that occur due to the act of the patient or resident." (Hr'g Tr. at 101-2, R.R. at 148-49a.)

days, "the [WCJ]'s Order would just kick in . . . putting me back on Act 534." (Hr'g Tr. at 159, R.R. at 206a.)

When a finding of fact is contested in an appeal of an administrative decision, in this case Finding of Fact 5 regarding Petitioner's date of retirement, our scope of review is limited to determining whether the finding is supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704.[7] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Mihok v. Department of Public Welfare (Mihok II), 670 A.2d 227, 230 n. 2 (Pa. Cmwlth. 1996). The beneficiary bears the burden of establishing the facts he asserts. Wingert v. State Employes' Retirement Board, 589 A.2d 269, 271 (Pa. Cmwlth. 1991). "Questions of resolving conflicts in the evidence, witness credibility, and evidentiary weight are properly within the exclusive discretion of the [fact finder] and are subject to only limited review by this court." Beardsley v. State Employes' Retirement Board, 691 A.2d 1016, 1018 (Pa. Cmwlth. 1997). In determining the facts, "the ALJ is

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[7] Section 704 provides:

> The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa.C.S. § 706 (relating to disposition of appeals).

2 Pa. C.S. § 704.

free to accept or reject the testimony of any witness . . . in whole or in part, and determinations regarding credibility and weight of the evidence are within the province of the ALJ." DePaolo v. Department of Public Welfare, 865 A.2d 299, 305 (Pa. Cmwlth. 2005). "Where . . . a review of the record reveals that the finding[is] supported by substantial evidence, this [C]ourt may not disturb [that] finding[]. Id.

Our review of the record reveals that Petitioner filed a disability retirement application with SERS that he signed and dated, March 19, 2001. (Hr'g Tr. Ex. C-2, R.R. at 366a-68a.) This application included a certification, signed by Petitioner that he had "read and understood all the preceding provisions," and had "full knowledge that [his] selection of a disability retirement plan (Option) is final and binding." (Hr'g Tr. Ex. C-2 at 2, R.R. at 349a.) Counselor testified that she met with Petitioner on March 19, 2001, and that she asked Petitioner whether he was on Act 534 benefits and, when he told her that he was seeking Act 534 benefits, she told him "if he applied for a disability retirement, he could not get Act 534 benefits." (Hr'g Tr. at 38-39, R.R. at 85a-86a.) Counselor then affirmed that Petitioner seemed to understand what she told him, seemed to hear her, that nothing about his demeanor led her to believe he couldn't comprehend her, that he conversed with her in a meaningful way, and nothing led her to believe that he was not competent to sign the application. (Hr'g Tr. at 39-40, R.R. at 86a-87a.) Counselor further testified that Petitioner signed the disability application. (Hr'g Tr. at 40, R.R. at 87a.) Counselor confirmed that Part D of the SERS disability retirement application states, "having read and understood the provisions, [I] have

full knowledge that my selection of disability retirement plan options[8] is final by me." (Hr'g Tr. at 32, R.R. at 79a; Hr'g Tr. Ex. C-2 at 2, R.R. at 349a.) Counselor next explained that in addition to the disability retirement application itself, there is a separate letter that SERS uses to notify the agency from which an employee is retiring.[9] (Hr'g Tr. at 40, R.R. at 87a.) Counselor explained that, "[o]nce you are approved for your disability retirement, we type[] in that date." (Hr'g Tr. at 74, R.R. at 121a.) Counselor stated that she explained to Petitioner that "a date would be given to him once he [was] approved for the disability retirement." (Hr'g Tr. at 82, R.R. at 129a.) Counselor noted that the Department "would have reported [Petitioner's] date of retirement to us as March 22, 2001 and we marked it on the medical form to start [his] medical benefits effective March 23, 2001." (Hr'g Tr. at 86-87, R.R. at 133a-34a.) Counselor added that Petitioner signed "everything that we would require for him to sign" in order to submit a disability application. (Hr'g Tr. at 40, R.R. at 87a.) She noted that Petitioner's last day of work was March 22, 2001 and that he began receiving a pension on March 23, 2001. (Hr'g Tr. at 84, R.R. at 131a.)

In addition to Counselor's testimony, the evidence includes a letter from the Department to Petitioner stating that SERS notified the Department that "you

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[8] Petitioner's SERS Application for Disability Retirement, Part B, shows that Petitioner signed the election for the Maximum retirement option, Option 1, on March 19, 2001. (Hr'g Tr. Ex. C-2 at 2, R.R. at 349a.)

[9] This is the Departmental Notification and it included the following: "My termination date will be_____ (or) □ to be determined"; and "My effective date of disability retirement will be _____ (or) □ to be determined." (Hr'g Tr. Ex. C-2, R.R. at 345a.) In this case, Petitioner checked the boxes "to be determined." (Hr'g Tr. Ex. C-2, R.R. at 345a.)

applied for Disability Retirement to be effective upon approval by SERS" and "we have removed you from the complement of Selinsgrove Center effective close of business March 22, 2001." (Letter from the Department to Petitioner (March 29, 2001) at 1, Hr'g Tr. Ex. C-14, R.R. at 428a.) In addition, a letter from SERS to Petitioner, dated March 30, 2001, provides that "Your application for disability retirement has been reviewed by our medical staff, and they have granted you a temporary disability annuity for a period of one year." (Letter from SERS to Petitioner (March 30, 2001) at 1, Hr'g Tr. Ex. C-4, R.R. at 372a.) This letter further provides that this was a temporary disability, and Petitioner would be required to furnish further medical evidence the following year in order to have the disability continued. A subsequent letter from SERS to Petitioner notes that Petitioner's first disability payment would be mailed within two weeks, "represent[ing] the annuity payment for the period from 03-23-2001 to 11-30-2001." (Letter from SERS to Petitioner (November 9, 2001) at 1, Hr'g Tr. Ex. C-5, R.R. at 374a.) A March 18, 2002 letter from SERS to Petitioner states "[t]his is to inform you that the medical documentation submitted for the continuation of your temporary disability benefits has been reviewed by our medical staff, and they have continued your disability benefits for one year." (Letter from SERS to Petitioner (March 18, 2002) at 1, Hr'g Tr. Ex. C-6, R.R. at 378a.) SERS provided a similar letter to Petitioner dated April 3, 2003. (Letter from SERS to Petitioner (April 3, 2003) at 1, Hr'g Tr. Ex. C-7, R.R. at 380a.) In 2004, SERS sent a letter to Petitioner stating that the SERS medical staff reviewed the most recent medical documentation submitted and determined that Petitioner's disability benefit was permanent. (Letter from SERS to Petitioner (April 3, 2004) at 1, Hr'g Tr. Ex. C-8, R.R. at 382a.) The evidence also contains Internal Revenue Service form 1099

listing the pension income paid to Petitioner for the years 2001-2008 by SERS, (Hr'g Tr. Ex. C-10, R.R. at 419a-26a), in addition to a list of SERS pension checks Petitioner requested SERS to replace, (Hr'g Tr. Ex. C-15, R.R. at 385a-86a). Petitioner testified that he requested replacement of these checks because his lawyer told him to cash them, they were outdated. (Hr'g Tr. at 215, R.R. at 262a.) The Commonwealth's State Treasury requested SERS to replace the checks, and they were replaced. (Hr'g Tr. Ex. C-15, R.R. at 383a-88a.)

Upon review of this record, we consider Petitioner's argument that he did not retire or select his specific retirement date to be misplaced. Petitioner misapprehends the role of the Departmental Notification, which is not the retirement application itself, but merely an authorization by which SERS notifies an employee's agency of his or her retirement as of a certain date for the purpose of coordinating employee benefits, such as disability, life insurance, leave payments, and final pay transactions. (Hr'g Tr. Ex. C-3 at 1, R.R. at 345a.) Petitioner's own actions, including several years of acquiescence and annual submission of the medical documentation necessary to continue receiving a disability retirement pension, do not comport with his present argument that he did not take a disability retirement. Petitioner accepted SERS pension annuity checks and even requested the replacement of certain checks when he misplaced them. Petitioner additionally permitted the annual submission of his medical documentation to verify his continuing temporary disability from 2001 to 2004, when his disability was declared permanent by SERS' physicians. Petitioner accepted his disability retirement that he initiated on March 19, 2001 and received as of March 23, 2001. We conclude that there is substantial evidence to support

the ALJ's finding that "[o]n March 22, 2001, [Petitioner] left DPW active employment and became eligible for pension benefits." (FOF ¶ 5.)

Petitioner next argues that Act 534 benefits should be reinstated because he was not afforded due process. Petitioner, relying upon Roman v. Department of Corrections, 808 A.2d 304 (Pa. Cmwlth. 2002), maintains that the Department must demonstrate that Petitioner was able to return to work because his disability ceased before terminating his Act 534 benefits. Petitioner also argues that Squire v. Department of Public Welfare, 696 A.2d 255 (Pa. Cmwlth. 1997), prohibits the termination of Act 534 benefits unless there is a hearing and a decision favorable to the agency; but, where the agency unilaterally terminates Act 534 benefits without a hearing, due process is denied. Next, citing Mihok II, Petitioner contends that the remedy for such a denial of due process is his entitlement to benefits through the date of the hearing.

We first note that Roman does not support the conclusion for which Petitioner cites that case. In Roman, we held that a claimant who was dismissed as a result of cocaine possession was no longer an employee. Not being an employee, this Court concluded that claimant had no property rights in her Act 632[10] benefits

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[10] Act of December 8, 1959, P.L. 1718, as amended, 61 P.S. § 951, commonly known as Act 632.

> Act 632/534 benefits are virtually identical to those benefits afforded by the "Heart and Lung Act", Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§ 637-638. . . . Thus, prior cases involving benefits under Act 632, Act 534 and the Heart and Lung Act are all relevant.

Roman, 808 A.2d at 305 n.1.

and was no longer entitled to notice and a hearing regarding the termination of such benefits. Roman, 808 A.2d at 310. In Roman, we consulted Camaione v. Borough of Latrobe, 523 Pa. 363, 567 A.2d 638 (1989), a case involving Heart and Lung Act[11] benefits. In Camaione, our Supreme Court noted that "the benefits of full compensation granted by the Act can be terminated through *voluntary* retirement." Id. at 367, 567 A.2d at 640 (emphasis added).

In the case now before us, there is substantial evidence to support the ALJ's determination that "[o]n March 22, 2001, [Petitioner] left DPW active employment," (FOF ¶ 5), and became eligible for his disability retirement benefits on March 23, 2001. (FOF ¶ 6.) Here, Petitioner, of his own accord, filed for and accepted a disability retirement from SERS. Thus, Petitioner's voluntary retirement resulted in a forfeiture of any claims under Act 534. See Camaione, 523 Pa. at 367, 567 A.2d at 640. Petitioner's voluntary retirement is different from an event beyond an employee's control, such as being furloughed due to a hospital closing, as occurred in McWreath v. Department of Public Welfare, 26 A.3d 1251, 1253 (Pa. Cmwlth. 2011). In McWreath, this Court stated:

> Under the plain language of Section 1 of Act 534, an employee is entitled to Act 534 benefits as long as work-related "disability" prevents the employee's return as the Department's employee at the pre-injury salary. . . . When Section 1 of Act 534 is so construed, the disabled employee's eligibility for Act 534 benefits is not affected by any event beyond the disabled employee's control, such as a furlough due to closing of a facility.

[11] Act of June 28, 1935, P.L. 477, as amended, 53 P.S. §§ 637-38.

McWreath, 26 A.3d at 1259. In McWreath we concluded that a furlough due to closing of a facility is an event beyond an employee's control that cannot affect eligibility for benefits under Act 534. We explained that

> [o]ur interpretation is consistent with the remedial nature and purpose of Act 534 granting full salary during the period of work-related disability. The Tuggle [v. Commonwealth Department of Public Welfare, 575 A.2d 664, 666 (Pa. Cmwlth. 1990)] and DeJohn [v. Department of Public Welfare, 657 A.2d 1017, 1019-20 (Pa. Cmwlth. 1995)] holdings[12] requiring the employee's continued employment for benefit eligibility should be limited to the specific facts in [those] case[s].

McWreath, 26 A.3d at 1259-60. This Court construed Section 1 to mean that an employee is no longer entitled to Act 534 benefits "when the employee has forfeited an employment status by his . . . own action, such as resignation, *retirement* or removal for misconduct as in Tuggle, or when a temporary position is terminated as in DeJohn." McWreath, 26 A.3d at 1260 (emphasis added). In this case, we conclude that Petitioner forfeited his employment status by his own actions.

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[12] In Tuggle, this court reasoned that the clear language of Section 1 of Act 534 "makes clear that entitlement to benefits is contingent upon returning as an employee once the employee's injuries cease to exist." Tuggle, 575 A.2d at 666. In that case, a state hospital employee was held not entitled to benefits after he was terminated for misconduct that occurred prior to his injury by a patient. Id. In DeJohn, this Court held that a temporary employee, who was not a "regular employee" under Section 3(i) of the Civil Service Act, Act of August 5, 1941, P.L. 752, as amended, 71 P.S. § 741.3(i), but who was injured in the course of his temporary employment, was not entitled to Act 534 benefits where he did not seek a determination to challenge the just cause for his separation. DeJohn, 657 A.2d at 1019-20.

Petitioner also is mistaken that Squire offers support for his arguments. In Squire, the claimant was injured by a psychiatric patient and remained out of work for approximately three years after the date of injury, receiving Act 534 benefits during this period of disability. Squire, 696 A.2d at 256. The Department sent a letter to the claimant ordering her to return to work on a certain date and informing her that her Act 534 benefits would terminate as of thirty days from the date of the letter. Id. The claimant received a second letter scheduling a pre-disciplinary conference so that she could respond to why she failed to return to work. Id. at 257. Thirty days after the date of the second letter, the Department terminated the claimant's Act 534 benefits. Id. The claimant's appeal was dismissed as untimely. Id. Based upon these facts, Petitioner contends that Squire requires that the Department hold a hearing before it can terminate Act 534 benefits. However, this contention misapplies Squire. In that case, it was the *employer* that unilaterally terminated an employee's Act 534 benefits by unilaterally changing the employee's disability status. We concluded, in Squire, that such unilateral actions by the employer require a hearing before a disability status can be changed. Id. at 259. In the present case, it was not the Department's unilateral termination of Petitioner's Act 534 benefits that changed Petitioner's disability status, it was *Petitioner's retirement of his own accord* that changed his disability status and, therefore, rendered him no longer eligible for Act 534 benefits. We disagree that a hearing is required when the Petitioner, himself, has initiated the change in his status to become a retired employee, thus becoming ineligible for Act 534 benefits. Petitioner, not the Department, set in motion his retirement with SERS. Consequently, Petitioner himself filed an application to change his employment status from active to retired, and the Department neither changed Petitioner's

disability status nor *unilaterally* terminated his Act 534 benefits. Therefore, the Department was not required to provide a hearing under the facts of this case.

Petitioner additionally contends that Mihok II entitles him to benefits through the date of his hearing as a remedy for his alleged denial of due process. (Petitioner's Br. at 14.) Mihok II involved a claimant who had returned to work after recovery from a foot injury, but failed to return after her attempt to restrain a patient caused her foot to be re-injured. The claimant was placed on leave without pay and her Act 534 benefits were terminated without a hearing. This Court affirmed the Department's conclusion that there was substantial evidence that claimant's Act 534 benefits should not be reinstated based upon elements and burdens of proof regarding medical evidence necessary for a reinstatement hearing. Mihok II, 670 A.2d at 231-32. Because those issues are not relevant to the case at bar, Mihok II is inapposite here.[13]

Accordingly, the Department's Order is affirmed.

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RENÉE COHN JUBELIRER, Judge

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[13] We note that Mihok v. Department of Public Welfare, 580 A.2d 905 (Pa. Cmwlth. 1990) (Mihok I) appears to be the case Petitioner intended to cite instead of Mihok II. In Mihok I, this Court concluded that claimant's Act 534 benefits were to be restored from the date of termination to the date of the Department's order after her hearing because she was not afforded a due process hearing prior to the termination of her Act 534 benefits. Id. at 909. The claimant simply remained on indefinite leave. She did not retire or otherwise forfeit her employment status. Id. at 906. Mihok I is factually distinguishable from the case now before us where Petitioner retired, thereby forfeiting his active employment status of his own accord.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Bruce H. Moyer, M.S.Ed.,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 396 C.D. 2011
	:	
Department of Public Welfare,	:	
	:	
Respondent	:	

ORDER

NOW, December 7, 2011, the Order of the Department of Public Welfare in the above-captioned matter is hereby **AFFIRMED**.

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RENÉE COHN JUBELIRER, Judge