

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Appellate Case No.: 2015-002228

Deborah Brooks Durden, Administrative Law Judge

Case No. 14-ALJ-30-0539-CC

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APR 12 2016

SC Court of Appeals

Edward W. Miller,

Appellant,

V.

South Carolina Public Employee Benefit Authority,

South Carolina Retirement Systems,

Respondents.

REPLY BRIEF OF APPELLANT

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SC ID No.: 3978
Appellant

Other Counsel of Record:

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I. Respondent Wrongly Asserts that Appellant's Current Claim Arose in 2002

In its brief, Respondent erroneously asserts that the current claim arose in 2002 when Appellant's original application for benefits was filed with Respondent. (Resp. Br. pp. 10-11). Respondent, in so asserting, fails to acknowledge that this claim actually arose in 2014 when Appellant first learned of the Watson Case, and when Appellant, therefore, was first put on notice of Respondent's 2002 breaches of Fiduciary Duty. Appellant's 2014 discovery resulted in the initiation of this claim (R. pp. 60-62). Therefore, Respondent cannot assert that a timeliness bar arises based on Appellant's lack of knowledge of events from twelve (12) years earlier. Appellant could not have exhausted his administrative remedies in 2002 due to lack of notice. Respondent's assertion that resolving this claim is hindered because of the passage of time (from 2002 until 2016) disingenuously ignores Respondent's failure to abide by its Fiduciary Duty of Disclosure in 2002. Disclosure in 2002 would have resulted in an appeal of the part time award *at that time*, to which no timeliness bar could then have been asserted.

II. Respondent Acknowledges Genuine Disputes as to Material Facts

Respondent welcomes the application of the Summary Judgment Standard of Review, and wholly supports the ALJ's unilateral decision to apply that standard to this case. In its brief, however, Respondent acknowledges that there are material facts in dispute: 1) whether another member was similarly situated to Appellant; 2) whether Respondent knew of the other member and the differing treatment¹; and 3) whether Respondent concealed its knowledge of the unequal treatment. Respondent used two pages of its brief to argue why these stipulated facts and exhibits do not support Appellant's position. (Resp. Br. pp. 12-14). Respondent's dispute, with the facts and the reasonable inferences drawn therefrom, highlights that this case presents triable

¹ Respondent's assertion here is disingenuous as it was the party which granted the Watson award and is the confidential custodian of the records pertaining to it;

issues of fact requiring adjudication by the trier of fact. Clearly there are genuine issues as to material facts which, when viewed in a light most favorable to the non-moving party, *per* the Summary Judgment Standard of Review, require factual adjudication. That the ALJ should have required development of these facts, prior to any decision based on the drastic remedy of Summary Judgment, is an inescapable conclusion. The ALJ decided to apply the Summary Judgment standard, but failed to fairly and properly apply this Standard of Review.

III. Respondent Fails to Address its Fiduciary Duty and Breach Thereof

Nowhere in its brief does Respondent address or deny the existence of the Fiduciary Duties owed to Appellant by Respondent, *i.e.* the Duty of Disclosure of material facts and the obligation to treat similarly situated beneficiaries equally. Nowhere in its brief does Respondent deny that it breached its duties to Appellant. (Resp. Br. pp. 11-14). Respondent's failure to address and to deny these central issues constitutes an admission that these duties were owed to Appellant and that Respondent breached these duties. Respondent's silence demonstrates that Respondent cannot formulate any argument that can excuse the breaches of these duties.

Respondent raises, for the first time, at the appellate level, that there is not enough evidence in the record to support Appellant's positions. (Resp. Br. pp. 12-14). Rather than denying that it has breached its Fiduciary Duties to Appellant, Respondent's theory is that its assertion of insufficient evidence should excuse its Breach of Fiduciary Duties, and Respondent should be allowed to treat similarly situated beneficiaries unequally. Respondent's pursuit of this argument is a further implicit admission that Respondent has breached the fiduciary and common-law trustee duties it owes to the beneficiaries that it was legislatively created to serve.

IV. Respondent Erroneously Attempts to Justify the ALJ's Unnoticed Hearing and Resulting Due Process Violation

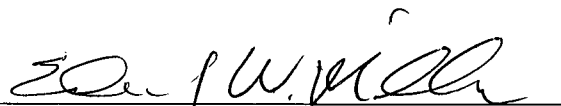
It is beyond dispute that the ALJ conducted a “telephonic hearing” with no notice to Appellant, nor notice that the “telephonic hearing” would comprise a part of the ALJ’s rulings in this case. There is no transcription or record of any kind of the “telephonic hearing” (R. p. 39). The September 28, 2015 Order of the ALJ contains alleged statements of the Appellant, purportedly made during the “telephone hearing,” among its findings of fact. Further compounding its Constitutionally incorrect treatment of the Appellant, the ALJ than used Appellant’s alleged, undocumented statements as a partial *basis* for its ruling (R. pp. 1-5). Respondent attempts to excuse this manifest Constitutional infirmity by relying on the same specious, undocumented “facts” cited by the ALJ from the unrecorded “hearing:” *i.e.* that no evidence was taken and that no arguments were advanced. (Resp. Br. pp. 15-16). A record of this hearing would remove any question about the discussions contained therein and allow for meaningful appellate review. Appellant strongly disagrees with the Respondents’ defense of the Constitutionally infirm use of an unnoticed and undocumented “hearing” as a partial basis for the ALJ’s ruling. Respondent’s brief fallaciously represents that no evidence was taken and no arguments were made at the “telephonic hearing,” despite the clear language of the September 28, 2015 Order, where the ALJ cites alleged comments of the Appellant made during the “telephonic hearing.” Respondent asserts that this Court should ignore the clear language of the ALJ’s September 28, 2015 Order so as to gloss over the ALJ’s violation of Appellant’s Constitutional Due Process rights.

CONCLUSION

For the foregoing reasons this Court should reverse the ALJs' Orders and grant Appellant's requested relief, or, in the alternative, reverse the ALJs' Orders and remand the case for proceedings to address what Appellant has been wrongfully denied to date.

Respectfully Submitted,

Dated: April 7, 2016


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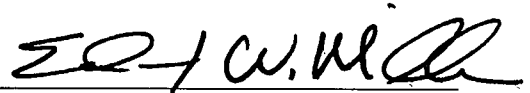
V.

South Carolina Public Employee Benefit Authority,
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Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that he/she has served the Appellant's Final Brief, Appellant's Reply Brief, and the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on April 9, 2016, addressed to their attorney of record, Justin R. Werner, Esq., Post Office Box 11960, Columbia, South Carolina 29211-1960.



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Dated: 4/9/2016