2016 IL App (1st) 152705-U

FIFTH DIVISION
August 12, 2016

No. 1-15-2705

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

SUSAN J. CURNICK, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, Defendant-Appellee.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 15-L-2705 Honorable James M. McGing, Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

Held: Plaintiff has forfeited her claims that the Illinois Social Security offset provision was unconstitutional by her failure to raise any of her constitutional claims before the Illinois Department of Employment Security Board of Review.

¶ 1 I. BACKGROUND

¶ 2 Plaintiff, Susan Curnick, worked as a sales associate for Sternaman Retail Corporation from March 5, 2005, until November 30, 2014. At the time she applied for unemployment

benefits, she was receiving social security benefits of $1,644.90 per month. The claims adjudicator for the local office of the Illinois Department of Employment Security (Department) determined that plaintiff's unemployment benefits should be reduced by $191.90 per week because she was receiving Social Security retirement pay, to which her employer had contributed part of the cost. That sum represented a reduction of one-half of the amount she was already receiving in Social Security retirement benefits. Pursuant to the Illinois Social Security Offset Rule (Offset Rule) under the Illinois Unemployment Insurance Act (Act) (820 ILCS 405/611(A)(2) (West 2014)), an individual's weekly unemployment benefits are reduced by an amount equal to one-half of his or her Social Security retirement benefits attributable to the reportable week and is required. Specifically, the offset is subtracted from the claimant's weekly benefit amount, as the claimant is receiving earnings at the same time she is collecting unemployment benefits.

¶ 3 Plaintiff appealed the claims adjudicator's decision. On February 9, 2015, plaintiff appeared before a Department of Employment Administrative Law Judge (referee) with her attorney for a telephone hearing. The employer did not participate. Plaintiff testified that she was currently receiving approximately $1400.00 per month in Social Security retirement benefits. She explained that the amount normally would be $1644.00 per month but that $200.00 per month was being deducted by the Social Security Administration as an overpayment because when she was working she had earned more than the permissible amount. An additional $147.00 per month was deducted from her social security for Medicare. Plaintiff stated that she received no other pension.

¶ 4 The referee found that Plaintiff received $1644.90 in Social Security benefits monthly. The referee also accepted Plaintiff's testimony that her benefits were being reduced an additional

$200.00 per month because she had earned wages that exceeded the amount allowed by Social Security. Further, the referee determined that Plaintiff was receiving reduced unemployment benefits based on the total amount of the social security she was receiving as of January 2015.

¶ 5 The referee found that pursuant to section 611 of the Act (820 ILCS 405/611(A)(2) (West 2014)), and section 2920.65 of the Illinois Administrative Code (56 Ill. Adm. Code 2920.70 (West 2014)), one-half of an individual's Social Security benefits constituted disqualifying income, requiring plaintiff's benefits to be reduced by one-half of her Social Security benefits.

¶ 6 Plaintiff appealed the referee's decision to the Board of Review (Board). The Board issued a final administrative decision affirming the referee. As the referee had done, the Board noted that, by the law as it existed at that time, an individual's receipt of Social Security retirement pension and disability payments based on that individual's employment is considered "50% disqualifying income." The Board and the referee both noted the federal cases which addressed this same issue and found that a state agency's reduction of a claimant's benefits by 50 percent of his social security pension payments does not violate federal law. *Peare v. McFarland*, 778 F.2d 354 (7th Cir. 1985); *Bowman v. Stumbo*, 735 F.2d 192 (6th Cir. 1984); *Rivera v. Becerra*, 714 F.2d 887 (9th Cir. 1983).[1]

¶ 7 Plaintiff appealed the Board's ruling to the circuit court of Cook County. In her complaint before the circuit court, she argued, for the first time, that the pre-2016 version of section 611, the Offset Rule, was unconstitutional because it discriminated against retirees on the basis of age and therefore violated her right to equal protection under the United States and Illinois constitutions. The Department responded that Illinois has a legitimate interest to avoid forcing employers to be responsible for both unemployment insurance and pension benefits arising from

[1] Section 611 of the Act was amended in 1989 to include Social Security benefits rendering *Vaught v. Dept. of Labor*, 152 Ill. App. 3d 340 (1987) invalid. Section 611 was again amended in January 2016 to remove social Security retirement benefits as disqualifying income. This amendment applied prospectively only.

the same period of employment. After a hearing, the circuit court issued a written order denying plaintiff's complaint for administrative review, and affirmed the Board's decision.

¶ 8 II. ANALYSIS

¶ 9 On appeal, plaintiff has presented three issues for review, but we find the first issue presented to be dispositive and decline to address the remaining issues. The dispositive issue is whether plaintiff forfeited her argument that the Offset Rule (820 ILCS 405/611(A)(2)(West 2014)) was unconstitutional by failing to raise the argument in the proceedings before the referee and again before the Board.

¶ 10 There is no disagreement among the parties regarding the facts and the question presented is fairly straightforward. Plaintiff, appellant, contends that the pre-2016 version of the social security offset provision discriminated against retirees on the basis of age and therefore violated her right to equal protection under the United States and Illinois constitutions. She also contends that the circuit court erred by not granting her an evidentiary hearing because she raised a constitutional issue in her complaint. Plaintiff did not raise any arguments regarding the constitutionality of the statute before the referee or the Board. Instead, she raised her constitutional arguments for the first time in the circuit court.

¶ 11 In an administrative proceeding, our review is limited to the propriety of the Board's decision, and not that of the circuit court. *Odie v. Department of Employment Security*, 377 Ill. App. 3d 710, 713 (2007). It is well settled that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time on administrative review. *Cinkus v. Village of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 212 (2008); *Hurst v. Dep't of Emp't Sec.*, 393 Ill. App. 3d 323, 328 (2009). "The rule of procedural default in judicial proceedings applies to administrative determinations, so as to

preclude judicial review of issues that were not raised in administrative proceedings." *Cinkus*, 228 Ill. 2d at 212-13. Our review of the record reveals that plaintiff did not raise these constitutional claims at any time during the proceedings before the claims adjuster, the referee, nor the Board. The first time plaintiff raised these arguments was during the administrative review proceeding in the circuit court.

¶ 12 The rule of procedural default is based on the demands of orderly procedure and the justice of holding a party to the results of his or her conduct before the agency, where to do otherwise would surprise the opponent and deprive the opponent of an opportunity to contest an issue in the tribunal that is supposed to decide it. *Cinkus*, 228 Ill. 2d at 213. In general, issues or defenses not placed before the administrative agency will not be considered for the first time on administrative review. *Hurst*, 393 Ill. App. 3d at 328; see also *Lehmann v. Dep't of Children & Family Services*, 342 Ill. App. 3d 1069, 1078 (2003) ("Failure to raise an issue before an administrative body—even a question of constitutional due process rights—waives the issue for review") (citing *S.W. v. Dep't of Children & Family Services*, 276 Ill. App. 3d 672, 679 (1990)). A party's argument that a statute is invalid can be waived by act or omission. *Celotex Corp. v. Pollution Control Bd.*, 94 Ill. 2d 107, 120 (1983). While the Board in this case lacked the authority to invalidate a statute on constitutional grounds, a constitutional challenge must be made before the administrative tribunal, because administrative review is confined to the proof offered before the Board. *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 278 (1998). If the issue that plaintiff would like reviewed was never presented to the administrative agency, there is no basis for this court to review the claims. *Cinkus*, 228 Ill. 2d at 212-13.

¶ 13 III. CONCLUSION

¶ 14 Accordingly, we find that plaintiff has forfeited her claims that the Offset Rule as it existed at the time of her hearing was unconstitutional, and we affirm the judgment of the Board.

¶ 15 Affirmed.