United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-1088 **September Term, 2019**

FILED ON: MAY 26, 2020

STEPHEN SETH,

PETITIONER

v.

UNITED STATES RAILROAD RETIREMENT BOARD,

RESPONDENT

On Petition for Review of an Order
of the Railroad Retirement Board

Before: GRIFFITH and MILLETT, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

This petition for review was considered on the record from the United States Railroad Retirement Board, as well as on the briefs and oral arguments of the parties. We have accorded the issues full consideration and determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied.

Stephen Seth filed claims with the United States Railroad Retirement Board to correct his record of covered employment under the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231 *et seq.* Specifically, he sought credit for work he performed for CSX Real Property, Inc., from May 1987 through November 1987 and January 1991 through December 1992. Seth concedes that he did not timely request that the Board correct his record of compensation "within four years after the day on which return of the compensation was required to be made," as the law generally requires. *See* 45 U.S.C. § 231h; *see also* 20 C.F.R. § 211.16(a). Rather, Seth argues that the Board erred in failing to excuse his untimeliness under either of two regulatory exceptions to that four-year limitations period. *See* 20 C.F.R. § 211.16(b)(1), (2)(ii).

Because the Board reasonably concluded, based on the arguments presented to it, that neither of those exceptions for untimely filing applied to Seth's claims, we affirm the Board's decision.

First, Seth argues that the Board erred in not applying its regulatory exception allowing

untimely claims when (i) "the earnings were erroneously reported to the Social Security Administration in the good faith belief by the employer or employee that such earnings were not covered under the Railroad Retirement Act," and (ii) "there is a final decision of the Board * * * that such employer or employee was covered under the Railroad Retirement Act during the period in which the earnings were paid[.]" 20 C.F.R. § 211.16(b)(2)(ii).

The problem for Seth is the second prong of that regulatory test: He has not identified a final decision of the Board holding either (i) that his service for CSX Real Property from May 1987 through November 1987 and January 1991 through December 1992 was covered under the Railroad Retirement Act, or (ii) that CSX Real Property was a covered employer during that time period.

Seth points to the Board's decisions on review here as the qualifying decisions. Of course, those decisions were not available to the Board when it was considering Seth's claims. More to the point, those decisions only rejected the claims at issue here as untimely and nowhere considered whether—let alone made a finding that—CSX Real Property was a covered employer or Seth was performing qualifying service during the relevant time periods. *See, e.g.*, A.R. 15 ("With respect to *claimed* service with [CSX Real Property] from May 1987 through November 1987 and January 1991 through December 1992, Mr. Seth did not make a timely request for the *claimed* service and compensation[.]") (emphasis added). The only merits decision made by the Board pertained to different time periods for which Seth had filed a timely request for correction. *See* A.R. 15 ("Mr. Seth's service with [CSX Real Property] *from January 1993 through May 1999* is creditable railroad service[.]") (emphasis added).

Seth also points to a statement in the Designated Hearing Examiner's June 2015 report that CSX Real Property "*is* not engaged in an independent trade or business from CSX Transportation because [CSX Real Property] and CSX Transportation *are* under the common control of CSX Corporation, and CSX Transportation is a covered employer under the Railroad Retirement Act[.]" A.R. 27 (emphasis added). But that statement does not amount to a finding that CSX Real Property was a covered employer in 1987 or 1992. *See* 20 C.F.R. § 211.16(b)(2)(ii) (requiring a final decision of the Board on coverage "during the period in which the earnings were paid"). Rather, the Hearing Examiner, like the Board, ruled only that Seth's service was covered under the Railroad Retirement Act "[w]ith regard to [his] *timely* claim for employee service from January 1993 through May 1999[.]" A.R. 69 (emphasis added). The Hearing Examiner rejected the claims Seth presses in this appeal as untimely. A.R. 69; *see also* A.R. 57 (Hearing Examiner noting that, "if no timely claim was presented for an individual claimant, no individualized employee service evaluation is necessary or possible, because the claimant's reports of compensation could not be corrected" given the limitations period).

Second, Seth invokes the regulatory exception allowing untimely claims "where the compensation was * * * not posted as the result of fraud on the part of the employer." 20 C.F.R. § 211.16(b)(1). Seth argues that, in finding this exception inapplicable to his claims, the Board applied an unreasonably narrow definition of the term "fraud."

The Board claims that its interpretation of the term "fraud" in its own regulation merits deference, and Seth agrees with that legal proposition, arguing only that the Board's definition is

arbitrary and capricious. *See* Board Br. 21–25; Oral Arg. Tr. 27:22–24; Seth Br. 13; Oral Arg. Tr. 16:14–17; *see generally Auer v. Robbins*, 519 U.S. 452, 461 (1997). Given that lack of adversarial disagreement, we ask here only whether the Board's definition of fraud is reasonable. *See generally Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019). Under that deferential standard of review, the definition of fraud applied by the Board in this case passes muster.

The Board defined "fraud" under its regulation to require "intentional wrongdoing on the part of the employer with the specific intent to alter the employer's obligations under the [Railroad Retirement Act]." A.R. 12. The Board also determined that "intentional wrongdoing requires a deliberate intent to deceive, and must be shown by clear and convincing evidence." A.R. 12. In fashioning this definition, the Board was guided by "the body of law interpreting" the term "fraud" in Section 6663 of the Internal Revenue Code, 26 U.S.C. § 6663. A.R. 12. The Board chose Section 6663 as its reference point because "employers under the [Railroad Retirement Act] are subject to penalties under [S]ection 6663 if any part of an underpayment of tax required to be shown on a return is due to fraud[.]" A.R. 12.

Seth counters that "nothing within the [Railroad Retirement Act] directs the Board to use" the "overly restrictive" definition of fraud in the Internal Revenue Code. Seth Br. 20; Seth Reply Br. 8. In Seth's view, fraud should only require a showing by a "preponderance of evidence standard" that the employer engaged in "constructive fraud, or 'reckless' fraud[.]" Seth Reply Br. 13; *see also* Oral Arg. Tr. 18–19.

It is true that "nothing in the Railroad Retirement Act requires the Board to" define fraud as it did. Board Br. 23. That is because fraud appears only as a regulatory basis for excusing Seth's late filing. So the only question here is whether the Board's decision to adopt that standard was reasonable. It was.

One well-settled definition of the term "fraud" requires an intentional showing of wrongdoing. *See, e.g.*, *Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019) (def. 1) (defining "fraud" as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment"). Plus another Board regulation indicates that when the Board used the term "fraud" in this regulation, it meant a deliberate intent to deceive. *See* 20 C.F.R. § 255.11(b) (defining "fault" in part by noting that, "[u]nlike fraud, fault does not require a deliberate intent to deceive"). For those reasons, the Board reasonably defined fraud in this case as requiring a deliberate intent to deceive.[1]

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[1] The definition of fraud adopted by the Board here, while reasonable, may not be the only potential meaning of the term. *See, e.g.*, *Fraud*, BLACK'S LAW DICTIONARY (11th ed. 2019) (def. 2) (defining "fraud" as "[a] reckless misrepresentation made without justified belief in its truth to induce another person to act"). In *Weyerhaeuser Co. v. United States Railroad Retirement Board*, 503 F.3d 596 (7th Cir. 2007), the Board took the position before the Seventh Circuit that fraud under 20 C.F.R. § 211.16(b)(1) required only "the knowing failure to report compensation," as opposed to "a deliberate intent to deceive," *Weyerhaeuser*, 503 F.3d at 602 & n.11 (internal quotation marks omitted); *see also Weyerhaeuser* Board Br. 11–12 & n.2. Seth, however, has not argued in this case that the Board's current definition of fraud reflects an unexplained and wholly unacknowledged departure from its prior position. So we do not address that question.

In addition to challenging the Board's definition of fraud, Seth argues that substantial evidence does not support the Board's finding that CSX Transportation and CSX Real Property's initial failure to credit his compensation was not intentionally fraudulent. Specifically, Seth argues that the record compels the conclusion that CSX Transportation and CSX Real Property committed fraud in arguing (successfully) to the Board in 1996 that CSX Real Property should not be deemed a covered employer under the Railroad Retirement Act.

We reject this argument under our "highly deferential" standard of review for substantial-evidence claims. *Rossello ex rel. Rossello v. Astrue*, 529 F.3d 1181, 1185 (D.C. Cir. 2008). The Hearing Examiner's report, which was adopted in relevant part by the Board, A.R. 13, acknowledged that, in arguing against a coverage determination in 1996, Seth's employer provided explanations of CSX Real Property's functions that conflicted with the views of its employees. But the Hearing Examiner reasonably concluded that other evidence in the record indicated that this conflict did not amount to intentional wrongdoing on the part of Seth's employer to avoid a coverage determination. For example, Seth's employer had turned over to the Board during that inquiry extensive documentation that included material unfavorable to its position. CSX Real Property also permitted the Board to contact individual employees with questionnaires regarding their work, and it kept adequate and accurate records of its operations. *See* A.R. 47–49. That constitutes substantial evidence supporting the Board's determination that the initial failure to credit Seth's work was not the result of intentional wrongdoing on the part of CSX Transportation or CSX Real Property to obtain a non-coverage determination. Where one reasonable reading of the evidence before an agency factfinder identifies "a manipulative scheme" and another does not, it is not for this court to "pick between [those] competing narratives." *Koch v. SEC*, 793 F.3d 147, 155–156 (D.C. Cir. 2015); *see also id.* at 156 ("As we have remarked many times before, an agency's conclusion may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.") (internal quotation marks omitted).

Finally, we note the Board's conclusion that, in the absence of fraud, it had no authority to excuse Seth's untimeliness as a matter of equity. *See, e.g.*, A.R. 6; *see also* Oral Arg. Tr. 21:6–12 (the Board's counsel agreeing with this interpretation of the Board's decision). That is puzzling, given that the Board's regulations explicitly permit the Board to make an untimely correction where the "failure to make a correction would be inequitable." 20 C.F.R. § 211.16(b)(2)(iv). Nonetheless, because Seth has not argued in this case that Section 211.16(b)(2)(iv)'s equitable exception to untimeliness applies, we have no occasion to consider the question.

For those reasons, we deny Seth's petition for review.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk