

No. 23-1370

IN THE
Supreme Court of the United States

DAVID DUNLAP,

Petitioner,

v.

JETBLUE AIRWAYS CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
APPELLATE DIVISION, SUPREME COURT OF NEW YORK,
THIRD JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

1. JetBlue Airways Corporation is a publicly traded corporation, incorporated in the state of Delaware, with its principal offices located in Long Island City, NY.
2. New Hampshire Insurance Company is a direct, wholly-owned (100%) subsidiary of AIG Property Casualty U.S., Inc., which is a wholly-owned (100%) subsidiary of AIG Property Casualty Inc., which is a wholly-owned (100%) subsidiary of American International Group, Inc., which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

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INTRODUCTION

This unorthodox petition for a writ of certiorari should be denied, as there is no compelling basis presented as to why this Court should entertain review. Petitioner's allegation of a Due Process violation is not supported by settled case law regarding due process in the context of state administrative proceedings. "The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982)(internal citations omitted).

Here, the petitioner has already had an opportunity to be heard. He has been afforded due process in the form of an administrative trial before a Workers' Compensation Law Judge. Following that trial, Petitioner's administrative appeal was denied by the Workers' Compensation Board. Notably, petitioner was represented by counsel throughout the proceedings. As such, Petitioner's right to counsel has not been violated.

Additionally, petitioner has not set forth any allegation of an important federal question or conflict between courts or laws that would require this Court to invoke its review power. And, finally, Petitioner raises arguments in the instant Petition that were not raised in the underlying proceedings at the New York State Supreme Court, Appellate Division, Third Department.

For these reasons, this Court should deny the Petition.

STATEMENT OF THE CASE

Petitioner, David Dunlap (hereinafter “Petitioner” or “Claimant”), is a former airline pilot and the claimant in a New York State Workers’ Compensation matter. In a C-3 form dated 10/31/2019, claimant filed a claim alleging brain damage as a result of alleged toxic fume inhalation. The workers’ compensation carrier denied the claim, and, at a pre-hearing conference held on 05/29/2020, the matter was set down for litigation. The parties presented evidence for the record, including lay testimony from Mr. Dunlap, as well as medical testimony from Dr. Lester Ploss, Dr. Paul Sovran, Dr. Richard Stripp and Dr. Daniel Gerstenblitt. (*See* Memorandum and Order, Appendix p. 4a; *See* Memorandum of Board Panel Decision, Appendix p. 12a).

In a Decision dated 07/22/2021, the administrative law judge (“ALJ”) disallowed the claim, finding that claimant’s medical evidence “fails to establish a causally related aero toxic syndrome through bleed air exposure during his employment with Jet Blue,” and finding further that the carrier’s medical consultant presented the more credible evidence regarding causation. The claimant appealed these findings by way of an Application for Board Review, and the carrier filed a Rebuttal.

Ultimately, in its November 9th, 2021 Memorandum of Board Panel decision, the Board Panel denied review of claimant’s Application due to an incomplete/defective RB-89 form. The Board Panel found that claimant’s RB-89 failed to include the IME report of Dr. Stripp in response to Item #13. Claimant appealed to the New York State Appellate Division, Third Department, and also filed an Application for Reconsideration/Full Board Review.

In a Decision dated 02/11/2022, the Full Board affirmed the 11/09/2021 Board Panel Decision. The Appellate Division Third Department affirmed the Board Panel Decision. Petitioner then filed two motions for leave to appeal to the Court of Appeals, which were denied by both the Third Department and the New York State Court of Appeals.

REASON FOR DENYING THE PETITION

POINT I: The Petition Should Be Denied on the Basis that Petitioner Has Failed to Allege a Due Process Violation, Nor Any Other Compelling Federal Question For This Court to Review

The primary legal argument raised by the petition is that Petitioner's due process rights have been violated by the New York State Workers' Compensation Board's denial of his administrative appeal. However, petitioner's argument failed to consider the well-settled law that, in a state administrative proceeding, the State is permitted to establish and enforce procedural and/or evidentiary requirements. And, as stated concisely by this Court in the very case on which petitioner relies, "the State certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

This case presents nothing more than a standard administrative denial of an administrative appeal in a workers' compensation claim based on the administrative agency's enforcement of its own procedural rules. Petitioner is attempting to claim this amounts to a violation of due process, but has cited to no other case

law that supports such a contention. Petitioner's appeal was denied based on violation of a procedural rule, but petitioner's right to be heard was not infringed. The appeal arose from an administrative trial decision that was made on the merits of the claim after development of a full record.

This is in stark contrast to the facts of the case relied by on Petitioner, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In that case arising out of the Illinois Fair Employment Practices Act, a petitioner's employment discrimination claim was dismissed by the state administrative agency because the agency itself had failed to schedule a hearing on the claim within the statutorily mandated 120-day time frame. On appeal, the court held that, because no hearing had been convened within 120 days, the agency lacked jurisdiction to hear the claim at all. Essentially, the agency's mistake deprived the petitioner of his right to bring the claim entirely. The Court held, "[T]he State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.*, 455 U.S. at 434.

Therefore, the underlying facts in *Logan v. Zimmerman* are inapposite, and do not provide support for Petitioner's allegation of a due process violation here. If anything, the *Logan* case supports the opposite conclusion – that there was no due process violation where the state agency was merely enforcing its own rules. By contrast, in *Logan* the petitioner was deprived of his ability to state a claim at all, through no fault of his own. That is not the case here, where petitioner's claim was denied after a full administrative trial on the merits, and petitioner's

administrative appeal was denied based on failure to comply with the New York Workers' Compensation Board's procedural requirements for such applications.

As the *Logan* Court succinctly stated, “[w]hat the Fourteenth Amendment does require, however, is an opportunity . . . granted at a meaningful time and in a meaningful manner, for [a] hearing appropriate to the nature of the case.” *Logan v. Zimmerman Brush Co.*, 455 U.S. at 437 (internal citations and quotations omitted). Here, the New York Workers' Compensation Board provided Petitioner with not only that *opportunity*, but that *actuality*. Thus, there is no due process violation in this case.

Petitioner also cites to *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976), in which this Court found no due process violation despite the fact that the petitioner was *not* granted an evidentiary hearing prior to termination of his Social Security Disability benefits. Petitioner here suggests that the Court should apply the *Mathews* test in this case. Assuming, *arguendo*, that the Petitioner in this matter even has a property interest in the workers' compensation benefits he was deemed ineligible for following trial, the *Mathews* test would determine how much process is due. In *Mathews*, this Court held that “something less than an evidentiary hearing is sufficient prior to adverse administrative action.” *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976) (“In view of these potential sources of temporary income, there is less reason here than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action.”).

Again, Petitioner in this case received a full administrative trial on the merits of his claim, including lay and medical testimony. Thus, here, Petitioner has received *more* process than this Court in *Mathews* ruled was necessary prior to an “adverse administrative action.” As this Court observed in *Mathews*, “This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.” *Mathews*, 424 U.S. at 333.

Further, Petitioner has invoked the jurisdiction of this Court based on 28 U.S.C. 1257(a) and Rule 13(1) of this Court. However, pursuant to 28 U.S.C. 1257(a), final decisions of State Courts may be reviewed where, as is relevant to this appeal, the validity of a state statute is being called into question “on the ground of it being repugnant to the Constitution.”

Here, beyond vague allegations of due process and right to counsel violations, Petitioner has not stated with specificity how his complaints relate to the statute cited in his Petition. On page 15 of the Petition, Petitioner cites to *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922) for the proposition that this Court may review the constitutionality of a state statute that is alleged to violate the 14th Amendment. However, it is unclear from the Petition what New York State statute is to be reviewed, or how any particular statute violates any constitutional principles in this case. Petitioner lists New York Workers’ Compensation Law Sections 23 and 23-a in his Table of Contents, but has made no link between any statute purportedly at issue, the claim of a due process and/or other constitutional violation, and Petitioner’s request for relief applicable to this specific case. Additionally, as noted,

the Petitioner's right to counsel has not been infringed, as he has been represented by counsel throughout these proceedings.

Thus, there is no compelling federal question involved here. Petitioner has failed to allege an adequate basis to invoke this Court's review.

Moreover, in arguing that the Board is discriminating against represented claimants, Petitioner's papers seemingly ignore the fact that the Board's policy of enforcing compliance and completeness with the RB-89 cover sheets applied not only to represented claimants, but also to carriers. If the Board were somehow discriminating against represented claimants by requiring strict compliance on RB-89 cover sheet issues, then the Board was also discriminating against carriers (who were subject to the same potential penalty as represented claimants). Contrary to Petitioner's argument, the Board has not engaged in arbitrary conduct when all parties have been given notice of the rules, and those rules have been applied to both represented claimants and carriers alike.

It cannot be said that the Board discriminated against both claimants and carriers at the same time by subjecting them both, equally, to the requirement that all sections of the RB-89 cover sheet be filled out completely. The fact that the legislature and the Board chose to give leniency to unrepresented claimants is well within their discretion, and does not infringe on the rights of represented parties. Regardless – no such discrimination occurred in this case, wherein the claimant was represented by counsel throughout and any question regarding the efficacy of *pro se* representation is purely hypothetical.

POINT II: The Petition Should Be Denied on the Basis that Petitioner Has Raised Arguments Not Raised Before The New York State Appellate Division, Third Department

Petitioner's constitutional arguments regarding due process and the right to counsel were not raised before the New York State Appellate Division, Third Department. Petitioner first raised these issues in his request for leave to appeal to the New York State Court of Appeals, but not prior. Petitioner's initial argument was that the Board should have retroactively applied Section 23-a to this case.

However, that argument was considered and rejected by the New York State legislature in its construction of the statute. The legislature explicitly provided that the statutory amendment "shall apply to any and all forms prescribed by the [B]oard with respect to said applications . . . subsequent to the effective date of this section." WCL § 23-a(4). As the Appellate Division's Memorandum and Order pointed out, the statute went into effect on December 22, 2021, which was after the date of claimant's relevant Application. Accordingly, the statute does not apply to this case.

In order to fashion this as a constitutional claim, Petitioner's argument shifted into the argument that the Board's actions in this case violated claimant's due process rights, and Section 23-a violates the right to counsel, or is otherwise unconstitutional. However, it is unclear what review of the statute would even accomplish in this case, since the claimant has been represented by counsel throughout these proceedings, and these constitutional questions were not raised in the underlying papers

submitted to the New York State Appellate Division, Third Department.

While *Mathews v. Eldridge* and its progeny do recognize that “it is sometimes appropriate for courts to entertain constitutional challenges to statutes or other agency-wide policies even when those challenges were not raised in administrative proceedings,” claimant still must raise these issues in the underlying appeal. See *Carr v. Saul*, 593 U.S. 83, 92 (2021). This Court observed in a footnote in *Mathews* that, “If Eldridge had exhausted the full set of available administrative review procedures, failure to have raised his constitutional claim would not bar him from asserting it later in a district court.” *Mathews v. Eldridge*, 424 U.S. at 329 n. 10. Nevertheless, in the instant matter, Petitioner did not raise these issues before the New York State Appellate Division, Third Department, where his substantive arguments were ruled upon.

While the rule is “not inflexible,” ordinarily, “this Court does not decide questions not raised or resolved in the lower Court (internal citations omitted).” *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

POINT III: The Petition Asserts As Fact Statements That Are Not Facts in the Record

Finally, of note, Petitioner’s Brief repeatedly makes reference to the size – both literal and metaphorical – of the underlying defect in his administrative application. However, other than the fact that the physical document on which the error is contained was part of the underlying record, no findings have been made in the underlying proceedings with regard to the size of the defect at issue or

the relative difficulty or ease with which one might identify it. Consistent with Supreme Court Rule 15, Respondent respectfully asserts that Petitioner cannot rely on these assertions as though they are facts. *See, e.g.*, Petition at p. 20 (“Dealing with an error so miniscule in size it took more effort to find it than to ignore it, no compelling state interest has been presented.”).

CONCLUSION

Accordingly, Mr. Dunlap’s Petition for a Writ of Certiorari fails to raise any compelling question for this Court to review. Respondent respectfully asserts that the Petition should be denied.

Respectfully submitted,
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