

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 22, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2580

Cir. Ct. No. 2003CV848

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAMES W. PARLOW,

PETITIONER-APPELLANT,

V.

WISCONSIN RETIREMENT BOARD,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County:
C. WILLIAM FOUST, Judge. *Affirmed.*

Before Lundsten, P.J., Dykman and Vergeront, JJ.

¶1 PER CURIAM. James Parlow appeals an order affirming a decision by the Wisconsin Retirement Board. We conclude that the issue Parlow argues on appeal was not raised before the board, and therefore decline to address it. We affirm.

¶2 The facts and procedural history of this case are lengthy and familiar to the parties. In short, the current portion of the case arises from Parlow’s appeal of a decision by the Department of Employee Trust Funds to offset a worker’s compensation payment against Parlow’s duty disability benefit. The case proceeded to a hearing before a hearing examiner, whose proposed decision was accepted by the board, with modifications. Parlow then sought certiorari review in circuit court, and the court affirmed the board’s decision.

¶3 On appeal, Parlow argues that the department’s offset decision was in error because the worker’s compensation payment that was offset against the duty disability benefit is properly allocable to periods of time before that payment was actually received by Parlow, and before the start of the duty disability benefits. The circuit court declined to address that issue because it concluded that the issue had not been raised before the board. In his opening brief on appeal, Parlow fails to explain how the circuit court’s decision was in error, or even to inform us what the court’s analysis and conclusion were on this point. In response, the board argues that the issue was not raised before the board and should not be decided for the first time on certiorari review. In reply, Parlow cites three parts of the record as demonstrating that the issue was raised.

¶4 First, Parlow claims that the issue was raised in his initial appeal letters. Regardless of whether that is true, those letters were superseded by later developments in the administrative process that we discuss below.

¶5 Parlow next relies on the “pre-hearing conference memorandum” prepared by the hearing examiner after that conference. In that memo, the examiner expressly identified three issues for the appeal, none of which includes the allocation issue. However, Parlow relies on part of a sentence earlier in the

memo that describes what occurred at the conference. Parlow asserts that in this sentence the examiner describes Parlow as having represented that the issue was that “his Worker’s Compensation benefit was received before he qualified for duty disability benefits and should not have been offset.” This argument fails for two reasons. First, stating that the worker’s compensation payment was “received” at a certain time does not raise an issue about whether that payment should be allocated to some earlier time before it was received. Second, Parlow takes the memo fragment out of its context, which we set forth in the margin.¹ In context, it is clear that the hearing examiner was not describing an allocation issue.

¶6 Finally, Parlow relies on a statement by his attorney at the start of the hearing. At that time, the examiner intended to read the three issues from the memo and then confirm the parties’ continued belief that these were the issues. Counsel for the department pointed out that in the parties’ factual stipulation for the hearing they had stated their agreement that the three issues in the pre-hearing memo were the issues for the appeal. The examiner decided to skip reading the issues, but when Parlow’s attorney next had an opportunity to speak, he sought to “check one thing” and said that “it is our understanding that the — the reason for the appeal here and what these issues are designed to get at is the manner in which the workers’ compensation benefit — benefit was offset.” The examiner responded, “[t]hank you,” but there was no further discussion of that comment. Parlow asserts that this statement by his attorney was sufficient to preserve the allocation issue. However, whatever counsel’s intent may have been in making

¹ The full text of the sentence was: “At the pre-hearing conference, Mr. Parlow appeared to assert that his duty disability benefit qualifying date (or effective date) should be the date his benefits were approved by the Board, and therefore that his Worker’s Compensation benefit was received before he qualified for duty disability benefits and should not have been offset.”

this statement, it is far too vague to be read as raising the issue. There is no possibility that the examiner or the board could have discerned from that statement the argument Parlow now makes on appeal.

¶7 More important than the portions of the record that Parlow cites are the portions that he does *not* cite. Although the case was briefed extensively by Parlow during the administrative process, with two briefs to the hearing examiner and one “objections to proposed decision” to the board, Parlow does not cite any of those briefs as demonstrating that the allocation issue was raised. We have reviewed those briefs, and we are satisfied that the issue was not raised.

¶8 Parlow does not dispute the board’s argument that an issue not raised before the board should not be considered on certiorari review. Accordingly, we conclude that the issue argued on appeal is not properly before us.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

