

March 8, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Charles R. Fulbruge III
Clerk

No. 05-40654
Summary Calendar

WANDA EVANS,

Plaintiff-Appellant,

versus

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division
USDC No. 6:04-CV-509

Before DAVIS, JOLLY and OWEN, Circuit Judges.

PER CURIAM:*

Wanda Evans appeals the dismissal of her suit for social security benefits. The district court dismissed her appeal for failure to exhaust administrative remedies. The record before the district court, which has since been supplemented on appeal, did not include Ms. Evans' prior petition for Appeals Council review or her prior appeal to the United States District Court for the Eastern District of Texas. The Commissioner concedes

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

that based on the supplemented record, that dismissal of Evans' complaint for lack of exhaustion was improper.

However, the supplemented record also reveals that Evans has already received judicial review of the May 19, 1994 decision of the ALJ that is being appealed in this case. All elements for application of *res judicata* to her present suit have been satisfied. The prior decision was between the same parties, judgment was rendered by a court of competent jurisdiction, the judgment was final and on the merits and the plaintiff raises the same cause of action. Russell v. SunAmerica Securities, Inc., 962 F.2d 1169, 1172 (5th Cir. 1992). We are free to decide this case on the basis of *res judicata* despite the fact that this defense was not raised before the district court because all of the relevant facts are contained in the record and are uncontroverted. Id. See also Wooten v. Pumpkin Air, Inc., 869 F.2d 848, 850 n.1 (5th Cir. 1989) ("When the judgment of the district court is correct, it may be affirmed on appeal for reasons other than those asserted or relied on below.") citing Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 n. 3 (5th Cir.1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987).

AFFIRMED.