

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2456
Summary Calendar

CLARENCE BURSE,

Plaintiff-Appellant,

VERSUS

LOUIS W. SULLIVAN, M.D.,
Secretary of Health & Human Services, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 85 4360)

December 4, 1992

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

The plaintiff, Clarence Burse, appeals the denial of his motion to reinstate his complaint. Concluding that the district court exceeded its permissible discretion, we reverse.

I.

Burse filed a complaint in July 1985 seeking judicial review

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

of the decision of the Secretary of Health and Human Services denying him disability benefits. Burse's application to proceed in forma pauperis (IFP) was granted. The Secretary filed a motion for summary judgment, arguing that his decision was supported by substantial evidence in the record. The district court denied the motion, finding that plaintiff possessed new and material medical evidence that might have affected the outcome of the administrative decision. Specifically stating that it was not intimating an opinion on whether Burse ultimately could establish a disability, the court remanded to the Secretary in February 1987 for consideration of the new evidence.

Burse subsequently filed a pleading in March 1990 entitled "Plaintiff's Objections To The Secretary's Final Order Denying Disability Benefits," in which he stated that following a supplemental hearing, the Secretary again had denied his application for disability benefits in February 1990. Burse requested the court to award him benefits or remand to the Secretary for further findings. Burse also filed a motion to reinstate his case in March 1990, requesting the court to review his objections to the Secretary's decision.

The district court denied the motion to reinstate on May 7, 1992. The district judge, who was not the judge that had remanded the case, stated that the case had been dismissed at the time that it was remanded for further administrative action. The record does not reflect, however, that the case in fact had been dismissed.

The district court also observed that Burse had attempted to

relitigate the matter in two other civil actions in the district (Civ. Ac. Nos. H-89-3954 and H-92-715) and that in the latter case, he was barred from filing any "further civil rights suits" IFP until he paid a sanction of \$25. The court also denied Burse's request to rule on the pleadings.

II.

Burse argues that, because his case was remanded pursuant to sentence six of 42 U.S.C. § 405(g), he has a statutory right under sentence seven of that provision to have his case reinstated. The Secretary concedes that the case was remanded pursuant to the sixth sentence of section 405(g) and contends that the district court retained jurisdiction over the case during the remand proceedings. The Secretary also claims that the motion to reinstate was unnecessary because the case was automatically re-activated when the Secretary filed the supplemental administrative findings in the record and that the plaintiff is entitled to further review of the additional findings.

There are two kinds of remands provided for in 42 U.S.C. § 405(g): remands pursuant to the fourth sentence of the statute and remands pursuant to the sixth sentence of the statute. Melkonyan v. Sullivan, 111 S. Ct. 2157, 2163 (1991). "The fourth sentence of § 405(g) authorizes a court to enter a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing." Id. (internal quotations omitted). In remanding under sentence six,

however, the court "does not rule in any way as to the correctness of the administrative determination. Rather, the court remands because new evidence has come to light that was not available to the claimant at the time of the administrative proceeding and that evidence might have changed the outcome of the prior proceeding." Id. (citation omitted). The remand order in this case plainly falls within the scope of sentence six, as the district court stated that it was not intimating an opinion as to the plaintiff's disability status and that it was remanding for consideration of new and material evidence.

In sentence four cases, the decision affirming, modifying or reversing the administrative decision is the "final judgment" that triggers the filing periods for appeal and making an application for attorney fees. Id. at 2165. Sentence six states in part that "the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision" Sentence seven of the act provides, "Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision."

A final judgment cannot be entered in a case involving a sentence six remand until after the post-remand administrative proceedings have been completed and the district court has reviewed any additional or modified findings of fact and the decision of the

Secretary. Id. at 2165. The court then enters final judgment, and the time for filing a notice of appeal commences. Id.; Luna v. United States Dep't of Health & Human Servs., 948 F.2d 169, 172 (5th Cir. 1991).

The district court denied the plaintiff's motion to reinstate based upon the fact that plaintiff had attempted to "relitigate" the matter in suits filed in 1989 and 1992. "[A] district court may dismiss an IFP proceeding for frivolousness or maliciousness at any time, before or after service of process, and . . . is vested with especially broad discretion in determining whether such a dismissal is warranted." Bailey v. Johnson, 846 F.2d 1019, 1021 (5th Cir. 1988) (citation and internal quotations omitted). "[R]epetitious litigation of virtually identical causes of action is subject to dismissal under 28 U.S.C. § 1915(d) as malicious." Id. (citations omitted). A dismissal pursuant to section 1915(d) is reviewed for an abuse of discretion. Id.

Although a district court's power to dismiss an IFP suit is broad, the district court abused its discretion in denying plaintiff's motion to reinstate, as the court was not divested of jurisdiction in the case as a result of remanding the matter to the Secretary. See Sullivan v. Finkelstein, 496 U.S. 617, 627 (1990) (post-remand review is contemplated following a sentence six remand); Frizzell v. Sullivan, 937 F.2d 254, 257 (5th Cir. 1991) (a sentence four remand, as opposed to a sentence six remand, results in a final judgment that terminates the civil action and divests the court of jurisdiction). Burse is entitled by statute to a

review of the Secretary's post-remand findings and to the entry of a final judgment in the case. If the later suits filed by Burse were duplicative of this action, it was appropriate to sanction him for filing those proceedings, but he is entitled to obtain a final judgment in this initial case and to exercise his right to appeal if the district court affirms the Secretary's decision.

REVERSED and REMANDED.