IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2522
Summary Calendar

JANE WALEY,
for FOREST WALEY, JR.,

Plaintiff-Appellant,

VERSUS

DONNA SHALALA,
Secretary, Department of Health and Human Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
CA H 91 1723

April 21, 1993

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Jane Waley appeals the district court's dismissal of her complaint seeking to reopen proceedings for social security benefits pursuant to 20 C.F.R. § 404.987. Finding no error, we affirm.

---

[*] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

The Social Security Administration (SSA) denied the application for Forest M. Waley, Jr. (Forest), for social security disability benefits on July 6, 1970. Forest's mother, Era L. Waley (Era), applied in 1975 for child survivor disability benefits for him. Her claim was denied on initial review and on reconsideration. Era was represented by counsel when her claim was denied on reconsideration in 1977.

Forest applied again for child survivor disability benefits in 1988. An administrative law judge (ALJ) found that Forest had been disabled by a mental impairment since 1964 and awarded benefits.

Forest, represented by counsel, then applied for reopening of his 1970 application for benefits. The Appeals Council denied the application.

Jane Waley (Waley), Forest's sister, filed a complaint in the district court seeking judicial review of the Appeals Council's denial of Forest's application to reopen his 1970 application, naming as defendant the then-secretary of the Department of Health and Human Services (HHS). The district court eventually granted the Secretary's motion to dismiss Waley's complaint.

II.

Waley first contends that HHS should have reopened Forest's 1970 application pursuant to Social Security Ruling 91-5p, 56 Fed. Reg. 40,360. Federal courts lack jurisdiction to review HHS denials of applications to reopen social security applications

unless the applicant challenges the denial on constitutional grounds. Califano v. Sanders, 430 U.S. 99, 107-09 (1977). The district court therefore properly dismissed Waley's non-constitutional contention.

Waley also contends that HHS violated his right to due process by failing to apply SSR 91-5p to find good cause for reopening his 1970 application while applying it to reopen other applications. Waley's constitutional contention is unavailing.

HHS regulations provide that an applicant dissatisfied with agency determinations may request that his application be reopened. 20 C.F.R. § 404.987 (1991). The regulations allow such requests within twelve months for any reason; within four years on a showing of "good cause"; and at any time in a number of situations not relevant to Waley's case. 20 C.F.R. §§ 404.988-404.989 (1991). According to SSR 91-5p,

> It has always been SSA policy that failure to meet the time limits for requesting review is not automatic grounds for dismissing the appeal and that proper consideration will be given to a claimant who presents evidence that mental incapacity may have prevented him or her from understanding the review process.
>
> When a claimant presents evidence that mental incapacity prevented him or her from timely requesting review of an adverse determination, decision, dismissal, or review by a Federal district court, and the claimant had no one legally responsible for prosecuting the claim (e.g., a parent of a claimant who is a minor, legal guardian, attorney, or other legal representative) at the time of the prior administrative action, SSA will determine whether or not good cause exists for extending the time to request review.

The Appeals Council found that Era's representation by counsel in 1977 cured any defect resulting from Forest's lack of represen-

tation in 1970 and denied Waley's application for reopening on that ground. The Appeals Council's determination amounts to a finding that Era's representation by counsel in 1977 meant that Forest's mental incapacity in 1970 was not good cause for reopening his case in 1991.

The Appeals Council's denial of Waley's application for reopening Forest's 1970 application does not violate the Due Process Clause. Counsel should have known in 1977 about the procedures for review and reopening of cases. Counsel could have moved for reopening in 1977. See 20 C.F.R. § 404.957 (1976). Cf. Thibodeaux v. Bowen, 819 F.2d 76, 80-81 (5th Cir. 1987) (claim preclusion applied to a social security case). In any event, the only basis for a due process violation that Waley briefs is HHS's alleged failure to follow SSR 91-5p. Sanders shows that failure to follow HHS's policies, standing alone, is insufficient to confer subject-matter jurisdiction on federal courts over HHS decisions not to reopen social security applications. Waley has failed to brief any other possible due process contentions on appeal and therefore has abandoned any such contentions.

AFFIRMED.