UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3598
Summary Calendar

JAMES T. STEWART,

Plaintiff-Appellant,

VERSUS

LOUIS W. SULLIVAN, M.D.,
Secretary, Department of Health and Human Service,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
CA 89 330 B M2

May 3, 1993

Before KING, DAVIS and WIENER, Circuit Judges.

DAVIS, Circuit Judge:[1]

Stewart appeals the district court's determination that it no longer had jurisdiction over his Social Security claim following the court's remand of the action to the Secretary. We affirm.

At the fifth step of the sequential disability analysis, the Secretary of Health and Human Services determined that James T. Stewart retained the residual functional capacity to perform

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[1]Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

gainful activity in the national economy other than his previous work. Stewart sought judicial review of the denial of disability and supplemental security income (SSI) benefits in the district court. After Stewart filed a motion for summary judgment, the Secretary filed a motion to remand on the ground that the administrative law judge (ALJ) had incorrectly relied on the Dictionary of Occupational Titles rather than a vocational expert to satisfy the burden of showing that jobs existed in the national economy that Stewart could perform. The district court ordered the remand, and Stewart did not object.

Following proceedings by the ALJ on remand, the Secretary filed a post-remand motion in the district court for leave to file a supplemental administrative record of the proceedings on remand and a request for a scheduling order for further proceedings. The district court **sua sponte** raised the question whether it had jurisdiction to conduct further proceedings and ordered the parties to brief the issue in light of the Supreme Court's decision in **Melkonyan v. Sullivan**, __ U.S. __, 115 L.Ed.2d 78, 111 S. Ct. 2157 (1991). The Secretary responded by seeking leave to withdraw its post-remand motion. The plaintiff opposed the Secretary's request to withdraw and sought to challenge the adverse administrative decision on remand in the district court in this action rather than in a new civil action.

The magistrate judge determined that the remand order had been issued under the fourth sentence of 42 U.S.C. § 405(g); therefore, the district court's jurisdiction over the action came to an end

with its remand order. The magistrate judge recommended that the district court grant the Secretary's motion to withdraw. Stewart filed objections to the magistrate judge's report, arguing that **Melkonyan** should not be applied retroactively. After an independent review, the district court granted the Secretary's motion to withdraw its post-remand motions. The district court denied leave to appeal **in forma pauperis** (IFP), and this Court granted IFP. Stewart filed a second civil action in the district court, and the action has been stayed pending disposition of this appeal.

II.

A.

In **Melkonyan**, the Supreme Court

> distinguished between two types of remand orders in social security disability cases under 42 U.S.C. § 405(g). So-called "fourth sentence" remand orders, i.e., those made pursuant to the fourth sentence of section 405(g), are those that involve entry of "`a judgment affirming, modifying, or reversing the decision of the Secretary. . . .'" A "sixth sentence" remand, on the other hand, is one that is precipitated by new evidence that could change the outcome of the prior proceeding.

Bertrand v. Sullivan, 976 F.2d 977, 979 (5th Cir. 1992) (citations omitted). **Melkonyan** holds that fourth sentence and sixth sentence remands are the only kinds permitted under the statute. **Id**. A sentence four remand order is a final judgment; a sentence six remand is not final until the Secretary returns to court after the post-remand proceedings. **See Melkonyan**, 111 S.Ct. at 2165.

Stewart argues that the Supreme Court cases, including **Melkonyan v. Sullivan**, that developed the law in this area were

decided after August 25, 1991, the date of the order of remand in his case. He contends that, if the factors of **Chevron Oil Co. v. Huson**, 404 U.S. 97, 106-07, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), are applied, the Court will conclude that **Melkonyan** should not be applied retroactively. He urges the Court to apply the pre-**Melkonyan** rule that an order of remand did not constitute a final judgment subject to appeal.

The Secretary argues that retroactivity is not an issue because this Court has already applied the principles of **Melkonyan** retroactively in **Frizzell v. Sullivan**, 937 F.2d 254, 256-58 (5th Cir. 1991), and in **Luna v. United States Department of Health and Human Services**, 948 F.2d 169 (5th Cir. 1991).

Prior to **Melkonyan** in **Frizzell**, this Court held that, under **Sullivan v. Finkelstein**, 496 U.S. 617, 110 S.Ct. 2658, 110 L.Ed.2d 563 (1990), the district court had properly divested itself of jurisdiction by remanding to the Secretary. Marjorie Frizzell's case was remanded to the district court on September 24, 1986, and a second time on July 11, 1988. **Frizzell**, 937 F.2d at 255. After a third ALJ hearing, Frizzell sought to return to the district court. **Id**. The district court denied reinstatement on July 17, 1990. Although it is unclear when the third remand occurred, presumably it was prior to the decision in **Finkelstein** on June 18, 1990. This Court applied **Finkelstein** retroactively.

In **Luna**, the district court remanded to the Secretary on April 18, 1991, for entry of reasons by the ALJ but retained jurisdiction. **Luna**, 948 F.2d at 171. On July 17, 1991, the ALJ

found that Luna was disabled and entitled to benefits. **Id**. The district court entered a final judgment on October 1, 1991. **Id**. This Court determined that the remand was a fourth-sentence remand and relied on **Melkonyan** for the proposition that the judgment became final on April 18, 1991, the date of the remand order. **Id**. at 171-72. **Melkonyan** was decided on June 10, 1991, after the remand order was entered. Therefore, this Court characterized the remand order as a final judgment by applying **Melkonyan** retroactively.[2]

Consistent with these cases, we also apply **Melkonyan** retroactively.

B.

Alternatively, Stewart argues that his case should fall into a "subcategory" of cases in which the district court retains jurisdiction over fourth-sentence remands. This argument was explicitly rejected in **Luna**. **See Luna**, 948 F.2d at 172-73 (rejecting the holdings of **Damato v. Sullivan**, 945 F.2d 982 (7th Cir. 1991), and **Welter v. Sullivan**, 941 F.2d 674, (8th Cir. 1991)).

In this case, unlike **Luna**, the district court **sua sponte**

[2] The circuits differ concerning the application of **Melkonyan**. For example, in an unpublished opinion, the Fourth Circuit declined to apply **Finkelstein** and **Melkonyan** and held that the remand orders in that case were interlocutory, nonappealable orders. **See Sargent v. Sullivan**, 941 F.2d 1207 (4th Cir. 1991). Also, **Hafner v. Sullivan**, 972 F.2d 249, 252 (8th Cir. 1992), distinguished between a remand order that anticipated the award of benefits (a final judgment for EAJA purposes) and one that required additional administrative proceedings (not a final judgment and the district court retains jurisdiction). The court reasoned that **Melkonyan** did not "mandate a rigid rule as to when a sentence four remand order is a `final judgment' for EAJA purposes. . . ." **Id.**

raised the question whether the remand order had divested it of jurisdiction under **Melkonyan**. Applying **Melkonyan**, the district court correctly concluded that the remand was a fourth-sentence remand and, thus, a final judgment. **See Bertrand**, 976 F.2d at 978-79 (remand for a determination, through the use of a vocational expert, whether there were jobs in the national economy for which Bertrand was qualified was a fourth-sentence remand). We find no error.

C.

Stewart asserts that the parties viewed the remand order as interlocutory; therefore, he failed to timely file a new civil action. He contends that the doctrine of equitable tolling should be applied to allow his case to proceed. Although the Secretary does not dispute the timeliness of Stewart's second civil action and agrees that Stewart should be allowed to proceed, Stewart seeks this Court's protection in guaranteeing that the Secretary does not change its position.

Stewart does not explicitly state that he has filed a second civil action, but he does not dispute the Secretary's assertion that he has and that the action has been stayed pending the outcome of this appeal. Notwithstanding, the issue is not properly before this Court because the timeliness of Stewart's new civil action was not presented to the district court and is not relevant to this appeal. **See United States v. Garcia-Pillado**, 898 F.2d 36, 39 (5th Cir. 1990).

D.

Stewart contends that the ALJ erred in failing to obtain a consultative orthopedic evaluation. This issue was not raised in the district court and will not be addressed for the first time on appeal. **See Garcia-Pillado**, 898 F.2d at 39.

AFFIRMED.