

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3019

Summary Calendar

SHIRLEY H. CREAMER,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA-91-306-B-M2)

(September 23, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

This appeal raises one issue: whether substantial evidence supports the Secretary of Health and Human Services' determination that Shirley Creamer was partly at fault in causing or accepting overpayment of disability insurance benefits. After reviewing the administrative record, the district court found the

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Secretary's determination to be supported by substantial evidence. We agree and therefore affirm the district court's decision dismissing Creamer's petition for judicial review.

I.

In January 1972, Creamer filed an application with the Social Security Administration (SSA) for disability insurance benefits. She alleged that she had become unable to work in 1969 because of an eye impairment. The SSA agreed that Creamer was unable to work, but determined that she only became disabled in July 1971. Creamer thus began receiving disability benefits.

Creamer obtained a receptionist job in August 1975, but she did not advise the agency that she was working. In mid-1976, the SSA learned that Creamer was working through a letter from a state vocational rehabilitation agency and commenced proceedings to determine her status. The SSA classified Creamer's one-year employment as a trial work period and terminated her disability status as of July 1976. However, the agency did not seek reimbursement of the benefits received during the trial work period.

In August 1976, Creamer quit working and soon thereafter began attending classes at Louisiana State University. Creamer filed a new application for disability benefits on September 13, 1976. She alleged in this second application for benefits that she had become unable to work as of August 15, 1976--again because of her eye disability. The SSA found her disabled, and

she began receiving benefits once again. Thus, despite the fact that her disability status was to terminate as of July 1976 there was little, if any, interruption in Creamer's receipt of benefits in 1976.

Creamer attended Louisiana State University for one year and obtained a job at the college in 1980. The SSA did not discover that Creamer was working until 1986. In March of 1987, the SSA notified Creamer that she was required to reimburse it for benefits that she had received in the amount of \$31,998.10. According to the SSA, because she had been capable of performing work since October 1979, the last payment she was entitled to receive was the one in December 1979.

Pursuant to 42 U.S.C. § 404(b), Creamer thereafter filed a request with the SSA for a waiver of recovery of the overpayment. This request was initially denied by the SSA, and Creamer requested a hearing from an administrative law judge (ALJ).

Following a hearing, the ALJ found: (1) that Creamer was overpaid benefits totaling \$25,326.80; (2) that Creamer was not without fault in causing or accepting the overpayment; and (3) that recovery of the disability benefits should not be waived by the Secretary. The Appeals Council refused Creamer's request for review, and the waiver was accordingly denied.

Creamer then proceeded to federal court, where she sought judicial review of the Secretary's denial of her request for a waiver of recovery of overpayment of disability insurance benefits. She specifically alleged that the Secretary's decision

with respect to her fault was not supported by substantial evidence. The matter was referred to a magistrate and, thereafter, both Creamer and the defendant Secretary filed cross-motions for summary judgment. The magistrate judge issued a report, recommending the denial of Creamer's motion and the granting of the Secretary's motion for summary judgment. After a de novo review of the record, the district court adopted the magistrate judge's recommendation and dismissed Creamer's petition for judicial review. This appeal followed.

II.

The standards for determining when the Secretary will waive recovery of overpayment are well-settled. "Waiver of recovery of overpayment is granted only where an individual is 'without fault' in causing the overpayment and where recovery of the overpayment would defeat the purpose of the Act or be against equity or good conscience." Bray v. Bowen, 854 F.2d 685, 687 (5th Cir. 1988) (citing 42 U.S.C. § 404(b)). The burden of proof is on the claimant to show that she is without fault. Id. The claimant is not without fault if the overpayment resulted from: a) an incorrect statement made by the claimant which she knew or should have known to be incorrect; b) the claimant's failure to furnish information that the claimant knew or should have known to be material; c) acceptance of a payment that the claimant knew or should have known was incorrect. Id. (citing 20 C.F.R. § 404.507). "In determining fault, the Secretary will consider

other relevant factors such as the claimant's age, intelligence, education, and physical and mental condition." Austin v. Shalala, 994 F.2d 1170, 1174 (5th Cir. 1993).

"Judicial review of a final decision of the Secretary . . . is limited to determining whether the decision was supported by substantial evidence and whether any errors of law were made." Bray, 854 F.2d at 686-87. "Substantial evidence is evidence that a reasonable mind would accept as adequate to support the decision." Austin, 994 F.2d at 1174 (citation omitted). We cannot reweigh the evidence in the record, re-try the issue of Creamer's fault, or substitute our judgment for the Secretary's. See Harrell v. Bowen, 862 F.2d 471, 475 (5th Cir. 1988).

III.

On appeal, Creamer makes numerous arguments about the deficiencies in the ALJ and the Secretary's findings. For purposes of this appeal, however, all of her arguments essentially relate to her one, overarching complaint: that the Secretary's determination that she was not without fault is not supported by substantial evidence. We disagree.

Admittedly, there is evidence in the record suggesting that Creamer, who has a severe visual impairment, did not actually know of her duty to notify the SSA in the event she started working. Creamer testified that when she originally applied for disability benefits in 1971, the SSA employees gave her general information only and did not read the forms to her. The ALJ

found this testimony to be credible. She also denied that she was told that she would not be eligible for benefits if she worked. Creamer further testified that she relied on her children to read to her any information received from the agency, and the only information that she recalled receiving from the SSA was a card that addressed the circumstances pertaining to individuals over age 65.

However, there is also substantial evidence suggesting that Creamer did know--or at least should have known--of her duty to notify the SSA of any work she performed. Most important in this regard is the SSA's decision to terminate her benefits in 1976 based on her 1975-76 work activity. Creamer clearly knew that her benefits were terminated, because she reapplied for those benefits in September 1976. This termination, in our view, put Creamer on notice that her work activity would affect her right to receive benefits. Also relevant to the knowledge issue is Creamer's testimony that from time to time she received flyers or statements from the SSA that were read to her by her children or another relative. This testimony, when coupled with evidence that the SSA routinely sent notices to beneficiaries advising them of their duty to report any event that could affect their benefits, would support an inference that such notices were, at least occasionally, read to Creamer. Finally, we find persuasive the ALJ's conclusion that Creamer was intelligent and mature enough--despite her visual impairment--to have recognized that working would affect her entitlement to benefits.

The ALJ made thorough and specific credibility determinations, which were affirmed by the Secretary, concerning the information that Creamer knew or should have known. These findings are supported by substantial evidence in the record, including the evidence that documentation is customarily sent to disability benefits recipients advising them of their reporting obligations and the evidence that Creamer was aware that her benefits were terminated in 1976 as a result of her work activity. Creamer's arguments otherwise must fail.

IV.

There is substantial evidence in the record to support the Secretary's determination that Creamer was not without fault in causing or accepting the overpayment of benefits. The judgment of the district court dismissing Creamer's petition for judicial review is, therefore, AFFIRMED.