

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3738
Summary Calendar

DOROTHY WATSON,

Plaintiff-Appellant,

versus

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

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 92 3113 D)

March 27, 1995

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

After extended proceedings before the Secretary of HHS, appellant Watson succeeded in recovering widows' disability benefits from and after 1987. On this appeal, she asserts that she was also entitled to receive benefits for the period 1979-87. The magistrate judge who reviewed her case wrote a succinct but complete opinion rejecting this contention, and the district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

approved it. We affirm essentially for the reasons stated in the magistrate judge's report and recommendation.

The precise question on appeal is whether the Social Security Appeals Council in fact reopened Watson's earlier applications or, alternatively, determined that the ALJ improperly reopened them. The difference is crucial for our appellate review. A decision not to reopen the prior applications is not subject to judicial review unless rendered on constitutional grounds. Califano v. Sanders, 430 U.S. 99, 107-08, 97 S. Ct. 980 (1977).

Watson alleges no constitutional grounds for her contention. She urges:

Instead, this is a case where the Appeals Council expressly ruled that the additional medical evidence submitted by Mrs. Watson should be evaluated by the Administrative Law Judge to determine whether it is 'new and material' to the extent that res judicata would not apply and a decision on the merits would be required, where the Administrative Law Judge expressly reopened the prior applications . . . , and where the Appeals Council then ruled that the Administrative Law Judge had committed legal error in reopening the prior determinations, but nevertheless ruled on the merits of Mrs. Watson's claims and held that she has been disabled as defined in the Social Security Act since July 30, 1978.

(emphasis added).

Appellant's position does not, in our view, correctly characterize the decision of the Appeals Council regarding her prior applications, to the extent she suggests that the Appeals Council "ruled on the merits" of her claims. In fact, the Appeals Council concluded:

Accordingly, there is no basis for reopening the determination made in connection with the claimant's prior applications and benefits are payable based only on the application filed September 28, 1987.

The magistrate judge, however, accurately described this holding, and the Appeals Council's supporting opinion, as an unreviewable decision not to reopen. Watson's mere disagreement over the rationale used by the Appeals Council in deciding not to reopen does not permit judicial review. Compare Moon v. Bowen, 810 F.2d 472, 474 (5th Cir. 1987) (alleged abuse of agency discretion does not give rise to judicial review of reopening decision). Under these circumstances, Cieutat v. Bowen, 824 F.2d 348, 358 n.15 (5th Cir. 1987), in which reopening did occur, is not controlling.

Even if the decision of the Appeals Council could be regarded as having reopened Watson's previous applications, we agree with the magistrate judge's analysis that the Secretary did not abuse her discretion in declining to award benefits. The "new and material evidence" would have entitled Watson to benefits only if a 1991 change in the law were retroactively applied, which clearly could not be the case.

For these reasons, the judgment of the district court is **AFFIRMED.**