UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-5129

(Summary Calendar)

WILKEN JONES, JR., and other similarly situation representatives of claimants,

Plaintiff-Appellant,

versus

U.S. SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(6:92-CV-1365)

(March 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff Wilken Jones, Jr., brought suit against the Secretary of Health and Human Services ("the Secretary"), alleging that the Social Security Act deprives non-attorneys who represent

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Social Security Claimants of equal protection.[1] The Secretary moved to dismiss for lack of subject matter jurisdiction, and Jones moved for summary judgment. The district court summarily granted the Secretary's motion. Jones contends on appeal that mandamus jurisdiction is proper under 28 U.S.C. § 1361.

Section 1361 vests district courts with original jurisdiction over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." "Before mandamus is proper, three elements must generally co-exist. A plaintiff must show a clear right to the relief sought, a clear duty by the defendant to do the particular act, and that no other adequate remedy is available." *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984).

Jones has not established that he has a clear right to relief. Jones fails to allege that the Secretary ever denied him payment for his representation of a social security claimant, that he ever requested such payment, or that he has in fact represented a claimant who was determined to be entitled to past-due benefits under the Act. Thus, there is an insufficiently real and concrete dispute with respect to application of the challenged provision.

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[1] The Act provides that

> if the claimant is determined to be entitled to past-due benefits under this subchapter and the person representing the claimant is an attorney, the Secretary shall . . . certify for payment out of such past-due benefits . . . to such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of such past due benefits . . . .

42 U.S.C. § 406(a)(4)(A) (1988).

See Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 305, 99 S. Ct. 2301, 2312, 60 L. Ed. 2d 895 (1979). Moreover, it is not clear that the statutory classification, "which neither proceeds along suspect lines nor infringes fundamental constitutional rights," can not be supported by "any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Communications, Inc.*, ___ U.S. ___ 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211 (1993). Consequently, Jones has failed to establish that the Secretary has a clear duty to compensate him out of an award of past-due benefits.

For the foregoing reasons, we AFFIRM the judgment of the district court.