IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-5413
Summary Calendar

STEPHEN LEMELLE,

Plaintiff-Appellant,

VERSUS

DONNA E. SHALALA,
Secretary of Health and Human Services

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(92-CV-2281)

(September 23, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Stephen Lemelle appeals the dismissal of his action for social security benefits. Finding no error, we affirm.

I.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

In 1978, Lemelle filed applications for disability-insurance benefits and supplemental-security income, alleging that he had been unable to work since January 1977 because of osteogenesis imperfecta, a congenital disorder in which the bones are unusually brittle and fragile. See THE BANTAM MEDICAL DICTIONARY 295 (1981). In a 1979 decision, an administration law judge ("ALJ") found Lemelle to be disabled. In 1980, however, an ALJ reversed the 1979 decision and denied Lemelle's applications for benefits. Later in 1980, the Appeals Council denied Lemelle's request for review of the ALJ's 1979 decision. In 1981, a federal district court granted the motion to dismiss filed by the defendant, the Secretary of Health and Human Services.

In 1983, Lemelle filed second applications for disability-insurance benefits and supplemental-security income for a period of disability beginning September 1977. An ALJ, on January 15, 1985, issued a decision denying Lemelle's applications for benefits. On May 28, 1985, the Appeals Council denied Lemelle's request for review of the ALJ's decision of January 15, 1985, making the ALJ's decision the Secretary's final decision. The Appeals Council's notice advised Lemelle and his attorney that he had sixty days to seek judicial review, but Lemelle apparently did not seek judicial review.

On May 28, 1987, Lemelle filed a third application for supplemental-security income. An ALJ determined on July 12, 1988, that Lemelle was disabled as of May 28, 1987. Although the

decision advised Lemelle that he could appeal is he was dissatisfied, he did not do so.

Four years later, in May 1991, Lemelle filed his fourth and current application for disability-insurance benefits based upon the alleged disabling condition that commenced in 1977. This claim was denied initially on July 15, 1991, and, upon reconsideration, on February 20, 1992. Lemelle then filed a request for a hearing.

On September 18, 1992, Lemelle's request for a hearing was dismissed based upon res judicata. The ALJ found no basis for reopening the decision on Lemelle's November 1983 application. Subsequently, Lemelle filed a request for a review of the ALJ's order dismissing the request for a hearing, and on October 30, 1992, Lemelle's request was denied.

In December 1992, Lemelle, proceeding in forma pauperis, filed a petition in federal district court for benefits under the Social Security Act. He specifically sought review of a dismissal by the Secretary of his claim for disability-insurance benefits. The Secretary responded by moving to dismiss the action on several grounds, including res judicata.

II.

Lemelle argues that the entire case should be reopened so he can present evidence showing that he was disabled at the time he was insured. He specifically urges reconsidering the Secretary's decision that reversed the decision of July 12, 1979.

Under the applicable regulations, a decision of the Secretary may be reopened (1) within twelve months of the date of the notice of the initial determination for any reason; (2) within four years of the date of the notice of the initial determination if good cause is found; and (3) at any time, for several reasons, including fraud or similar fault, or if an error is present on the face of the record. 20 C.F.R. § 404.988(a), (b), (c)(1), (8) (1993). Lemelle, however, did not file the current application until more than six years after the Secretary's final decision of January 15, 1985, and more than a decade after the decisions pertaining to his initial applications.

The ALJ treated Lemelle's current application as a request to reopen the case. The ALJ, however, refused to reopen Lemelle's prior claim because there was no new and material evidence warranting any revision of the final decision of January 15, 1985, and because there was no clerical error or error on the face of the evidence upon which the decision was based. The Appeals Council concluded that there was no basis for granting the request for review of the dismissal of the request for a hearing.

Section 205(g) of the Social Security Act "clearly limits judicial review to a particular type of agency action, a final decision of the Secretary made after a hearing." Califano v. Sanders, 430 U.S. 99, 108 (1977) (internal quotation marks omitted). A decision not to reopen a prior final determination, because the decision could be made without a hearing, is not reviewable by the federal courts unless the claimant challenged the

Secretary's action on constitutional grounds. Sanders, 430 U.S. at 109; Thibodeaux by Thibodeaux v. Bowen, 819 F.2d 76, 79-80 (5th Cir. 1987).

A.

Lemelle asserts that the decision is reviewable because his challenge is based upon constitutional grounds. He specifically alleges a violation of due process.

In this case, however, there has been no denial of due process. As set out above, with respect to his original applications, Lemelle pursued the full administrative review and review in federal district court. Lemelle did not appeal the district court's decision and, therefore, did not seek further judicial review. With respect to the 1983 applications and the final decision of January 15, 1985, Lemelle did not seek judicial review. He has presented no basis in law or in fact for his allegations of unconstitutionality. Lemelle, therefore, has not presented a colorable constitutional claim as required by Sanders.

B.

To the extent that Lemelle challenges the application of res judicata, that argument also lacks merit. An ALJ's dismissal of a claimant's case on res judicata grounds is unreviewable absent a "colorable constitutional claim." Brandyburg v. Sullivan, 959 F.2d 555, 561 (5th Cir. 1992).

As explained above, Lemelle's constitutional claims are not colorable. Furthermore, nothing in the record suggests that the claims should not have been dismissed based upon res judicata. The current applications for social-security benefits concern the same facts and issues addressed in Lemelle's prior applications; the Secretary has already issued final decisions on these matters; and with respect to all but the 1978 applications, Lemelle failed to seek court review. The application at issue, therefore, was properly dismissed based upon res judicata. See 20 C.F.R. § 404.957(c)(1); see also United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966) (upholding use of res judicata to administrative findings).

AFFIRMED.