UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30266

(Summary Calendar)

BOLIVAR MOBLEY,

Plaintiff-Appellant,

versus

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

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-92-3605-N)

(March 7, 1995)

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

PER CURIAM:[*]

Disability claimant Bolivar Mobley appeals from the district court's final judgment dismissing his suit with prejudice and its subsequent denial of his "Motion for Reconsideration/New Trial." We dismiss for lack of jurisdiction Mobley's untimely appeal from the court's final judgment, and we affirm the court's denial of his postjudgment motion.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Bolivar Mobley applied for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. § 423 (1988), and for supplemental security income benefits based on disability under Title XVI of the Social Security Act, 42 U.S.C. § 1381a (1988). He claimed that he had become disabled because of a heart condition, diabetes, a stroke, and poor eyesight. The Secretary of Health and Human Services ("the Secretary") denied his claim, and Mobley requested a hearing before an administrative law judge ("ALJ"). After a hearing, at which Mobley appeared with counsel and testified, the ALJ denied Mobley's claim, finding that he was not "disabled" as that term is defined in the Social Security Act. When the Appeals Council of the Social Security Administration's Office of Hearings and Appeals denied Mobley's request for review, the ALJ's decision became the final decision of the Secretary.

Mobley then filed a complaint in district court seeking judicial review of the Secretary's decision. *See* 42 U.S.C. § 405(g) (1988). The court referred Mobley's suit to a United States magistrate judge. After filing an answer, the Secretary moved for summary judgment, contending that its decision was supported by substantial evidence. In response, Mobley filed a "Motion for Remand in Lieu of Motion for Summary Judgment."

In his motion for remand, Mobley contended that the ALJ and Mobley's counsel at the time of the administrative hearing had failed to include in the administrative record certain "newly obtained" evidence, including medical reports from examinations

conducted after the ALJ hearing. Mobley specifically referred to two examinations: one after the ALJ hearing but before the ALJ's decision, and another shortly after the ALJ's decision. Mobley did not include reports from these examinations with his motion, although the examinations were conducted almost two years before the date of Mobley's motion and over a year before Mobley's complaint.[1] Mobley also did not respond to the Secretary's motion for summary judgment.

The magistrate judge determined that the Secretary's decision was supported by substantial evidence and recommended that the court grant the Secretary's motion for summary judgment. The magistrate judge also found that Mobley had not made the necessary showing to warrant a remand to the Secretary under 42 U.S.C. § 405(g) (1988).[2] With respect to the "new evidence" Mobley described in his motion for remand, the magistrate judge found that the evidence would not be material to the period for which disability benefits had been denied. As a result, the magistrate judge recommended that the court deny Mobley's motion for remand.

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[1] In a memorandum supporting Mobley's motion for remand, Mobley's counsel stated: "Counsel for Plaintiff has been unable, due to circumstances beyond his control, to obtain the records of the recent hospitalizations and other treatment records of Plaintiff re his first stroke and re visits to his treating physicians, but will do so immediately and supplement this memorandum with these records." Mobley's counsel never supplemented the memorandum, however, and the magistrate issued his finding without their benefit. On appeal, Mobley's counsel contends that he did not submit the reports before the Magistrate issued his finding because the Magistrate's law clerk lulled him into a "false sense of security" by representing that the Magistrate had a backlog of Social Security cases.

[2] Section 405(g) provides that the court "may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g).

Mobley filed objections to the magistrate judge's finding and recommendation, to which he attached copies of the medical reports described in his motion for remand. He also attached numerous other medical reports, some of which were dated as late as eighteen months after the ALJ's decision denying his claim. The district court, after adopting the magistrate judge's finding and recommendation as its opinion, granted the Secretary's motion for summary judgment and denied Mobley's motion for remand.[3] The court then entered judgment in favor of the Secretary and against Mobley, dismissing Mobley's complaint with prejudice on January 28, 1994.

On February 14, 1994, Mobley filed and served a "Motion for Reconsideration/New Trial of Judgment Approving Report and Recommendation of U.S. Magistrate Judge Herein." In his motion, Mobley reiterated the "new evidence" argument contained in his objections to the magistrate judge's finding and recommendation.

On March 3, 1994, the court denied Mobley's motion, noting that it was not filed within ten days from entry of judgment as required by Rule 59(b) of the Federal Rules of Civil Procedure, which governs motions for new trial. The court also rejected Mobley's motion on the merits, explaining that it remained "convinced that the Magistrate Judge's Report and Recommendation was correct."

On April 29, 1994, Mobley filed a notice of appeal, in which he stated an intention to appeal from the district court's

[3] The court erroneously referred to Mobley's motion as a motion for summary judgment.

dismissal of his claims and denial of his postjudgment motion. On appeal, Mobley contends that the district court should have remanded his case to the Secretary to consider evidence developed after the administrative hearing but before the ALJ's decision.[4]

II

Mobley appeals from two adverse decisions: the district court's final judgment dismissing his complaint with prejudice, and the court's order denying his motion for "reconsideration/new trial." However, Mobley has timely appealed from only the latter of the two judgments. According to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, a notice of appeal from a final judgment to which an agency or officer of the United States is a party must be filed within sixty days after entry of judgment. The district court entered final judgment dismissing Mobley's suit with prejudice on January 28, 1994, but Mobley did not file his notice of appeal until April 29, 1994. Consequently, Mobley's appeal from the court's final judgment dismissing his suit is untimely, and we lack jurisdiction over it.[5]

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[4] Mobley also attempts to "reserve" the claims he made in the district court: "In an effort not to burden the Court unnecessarily, Plaintiff-Appellant would simply reserve all of the claims aserted [sic] with the cited authorities given in support thereof in his original brief in support of his Motion for Remand which brief is included in the record excerpts . . . ." We do not address the merits of these claims because issues not argued in an appellant's brief on appeal are considered waived. *See United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1099 (5th Cir. 1991) (holding that appellant forfeited an issue listed in his statement of the issues by not discussing it in his brief), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2369, 124 L. Ed. 2d 275 (1993).

[5] Had Mobley served his motion for "new trial/reconsideration" within ten days after the court's final judgment dismissing his suit with prejudice, his appeal from that final judgment would have been timely. Under Rule 4(a)(4)(E) and (F), the 60-day period would have started to run only after the court denied his motion. *See* Fed. R. App. P. 4(a)(4)(E) & (F) (allowing that if party makes either (1) motion for relief from judgment under Rule 60 that is served within

We do, however, have jurisdiction over Mobley's appeal from the district court's denial of his "Motion for Reconsideration/New Trial of Judgment Approving Report and Recommendation of U.S. Magistrate Judge Herein." The court denied Mobley's motion on March 3, 1994, and Mobley filed his notice of appeal on April 29, 1994, within sixty days of the court's order.

It is unclear whether Mobley intended his motion to be a motion for new trial under Rule 59(a), a motion to alter or amend the court's judgment under Rule 59(e), or a motion for relief from the court's judgment under Rule 60(b) of the Federal Rules of Civil Procedure.[6] Under our rule in *Harcon Barge*,[7] we construe it as a motion for relief from judgment under Rule 60(b) because it was untimely under Rule 59. Rules 59(b) and (d) provide that motions

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10 days after entry of judgment or (2) timely motion for new trial under Rule 59, then time for appeal runs from entry of order denying motion); *see also* Fed. R. Civ. P. 59(b) (requiring motion for new trial to be served within 10 days after entry of judgment). Because Mobley's motion was served 11 days after the court entered final judgment, it did not enlarge the period for filing a timely appeal of the underlying judgment. *See First Nationwide Bank v. Summer House Joint Venture*, 902 F.2d 1197, 1200 (5th Cir. 1990) (holding that motion for new trial not served within 10 days after judgment did not enlarge time for appeal).

[6] Mobley's motion is partially denominated a "motion for reconsideration," but the "Federal Rules do not recognize a `motion for reconsideration' *in haec verba*." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990). In *Lavespere*, we explained that:

> [A] motion so denominated, provided that it challenges the prior judgment on the merits, will be treated as either a motion "to alter or amend" under Rule 59(e) or a motion for "relief from judgment" under Rule 60(b). Under which Rule the motion falls turns on the time at which the motion is served. If the motion is served within ten days of the rendition of judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b).

Id. (footnotes omitted).

[7] *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir.) (en banc), *cert. denied*, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986).

for new trial and motions to alter or amend a judgment shall be served not later than ten days after entry of judgment. The certificate of service attached to Mobley's motion indicates that Mobley's counsel served the motion on February 14, 1994, eleven days after the court entered its final judgment dismissing Mobley's suit.[8] Consequently, it was not timely under Rule 59, and we will consider it a motion for relief from judgment under Rule 60(b). *See Harcon Barge Co.*, 784 F.2d at 667 (holding that motion to alter or amend judgment served more than ten days after entry of judgment is governed by Rule 60(b)); *see also First Nationwide Bank*, 902 F.2d at 1200 (holding that motion for new trial not served within ten days of judgment is considered Rule 60(b) motion (citing *Harcon Barge*, 784 F.2d at 667)).

We will reverse a district court's denial of a Rule 60(b) motion only if it abused its discretion. *First Nationwide Bank*, 902 F.2d at 1200-01. We apply this deferential standard "to ensure that 60(b) motions do not undermine the requirement of a timely appeal." *Id.* "[T]o overturn the district court's denial of [a] Rule 60(b) motion, it is not enough that a grant of the motion might have been permissible or warranted; rather, the decision to deny the motion must have been sufficiently unwarranted as to amount to an abuse of discretion." *Fackelman v. Bell*, 564 F.2d 734, 736 (5th Cir. 1977), *quoted in Lancaster v. Presley*, 35 F.3d 229, 231 (5th Cir. 1994), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Jan. 9, 1995) (No. 94-7881).

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[8] *See* Fed. R. Civ. P. 6(a) (describing rules for computation of time).

Rule 60(b) provides that a court may:

> relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Mobley did not specify the subsection of Rule 60(b) on which he relied to support his motion for "new trial/reconsideration."[9] He simply repeated his central objection to the magistrate judge's finding and recommendation (i.e., that it did not adequately consider his newly obtained evidence) and reasserted his argument in support of remand: "[C]onsequently, this case presents a classic example of a claim which, under the cogent law and jurisprudence cited to this Honorable Court in the Memorandum heretofore presented to the Court by counsel for Plaintiff, should be remanded to the Secretary . . . ." In other words, Mobley claimed relief from the district court's judgment denying his motion for remand because the judgment was legally erroneous. We therefore interpret Mobley's argument in his Rule 60(b) motion as a claim of legal mistake under Rule 60(b)(1). *See Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 694-96 (5th Cir.) (treating Rule 60(b) movant's claim that a judgment was legally

[9] Mobley's motion contains no citations to the Federal Rules of Civil Procedure or any other legal authority.

erroneous as a claim of legal "mistake" under Rule 60(b)(1)), *cert. denied*, 464 U.S. 826, 104 S. Ct. 98, 78 L. Ed. 2d 103 (1983); *see also McMillan v. Mbank Fort Worth, N.A.*, 4 F.3d 362, 367 (5th Cir. 1993) (explaining, in dicta, that claims of legal error or mistake "are subsumed under subsection (1)" of Rule 60(b)).

A motion for relief under Rule 60(b)(1) is "not a substitute for the ordinary method of redressing judicial error))appeal." *Alvestad v. Monsanto Co.*, 671 F.2d 908, 912 (5th Cir.), *cert. denied*, 459 U.S. 1070, 103 S. Ct. 489, 74 L. Ed. 2d 632 (1982). "The movant must show `unusual or unique circumstances justifying such relief,' and she may not use Rule 60(b) as `an avenue for challeng[ing] . . . mistakes of law that should ordinarily be raised by timely appeal.'" *Aucoin v. K-Mart Apparel Fashion Corp.*, 943 F.2d 6, 8 (5th Cir. 1991) (quoting *Pryor v. United States Postal Service*, 769 F.2d 281, 286 (5th Cir. 1985)). A party requesting relief under Rule 60(b) must therefore claim more than that the district court made an erroneous legal ruling. *Chick Kam Choo*, 699 F.2d at 695.[10]

In *Chick Kam Choo*, we acknowledged that the district court's rulings "present[ed] issues that arguably could have been decided otherwise on appeal," but we affirmed the district court's denial of the plaintiffs' Rule 60(b) motion because the rulings "[did] not present rulings so obviously incorrect as to constitute a fundamentally misconceived ruling such as, for instance, one that

[10] *See generally* 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2858 (1973).

overlooks controlling statute or case law." *Id.* In this case, Mobley cited no such controlling authority in support of his Rule 60(b) motion, and he has similarly not cited to any such authority on appeal. At best, Mobley's arguments support the conclusion that the court *could* have reversed its earlier judgment and remanded Mobley's claim to the Secretary. We therefore hold that the district court did not abuse its discretion when it denied Mobley's Rule 60(b) motion. *See Fackelman*, 564 F.2d at 736.

III

For the foregoing reasons, we **DISMISS** Mobley's appeal from the district court's final judgment and **AFFIRM** the district court's order denying Mobley's postjudgment motion.