

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3744
Summary Calendar

MELVIN POWELL,

Plaintiff-Appellant,

versus

DONNA SHALALA, Secretary,
Department of Health & Human
Services,

Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Louisiana
(CA-93-0329-F)

(November 18, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM:¹

This appeal concerns the question of whether the district court erred in dismissing the appellant's appeal from a decision of the Social Security Administration (SSA) which had dismissed an application for disability benefits. The question turns on whether

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

or not the SSA reopened applicant's application. Because the evidence before us supports the conclusion of the SSA that the case was not reopened, we affirm the district court.

Facts and Procedural History

Melvin Powell filed an application for social security disability benefits on June 26, 1986, based on an alleged disabling back condition that occurred on October 9, 1982. The SSA denied Powell's request for benefits initially and upon reconsideration. Powell filed a request for an administrative hearing; a hearing was conducted and the administrative law judge ("ALJ") again denied Powell's request for benefits on August 5, 1987. Although Powell suffers from severe chronic lumbar strain, status post lumbar laminectomy, the ALJ determined that Powell was not disabled because of his residual functional capacity to perform a full range of light work.

Powell filed a second application for disability benefits on December 21, 1989. All of the administrative decisions pertaining to the processing of this application are not included in the record, but the ALJ's decision indicates that the application was denied initially and upon reconsideration. Upon Powell's request for a hearing, the ALJ dismissed the application on November 27, 1992; the ALJ ruled that although Powell had submitted additional medical evidence which had not been considered previously by the ALJ who ruled on the first application, the "new" evidence was merely cumulative to that evidence considered by the original ALJ. The ALJ further ruled that because the "new" evidence was not material and because there had been no error, the administration's

final decision of June 26, 1986, could not be reopened based on res judicata. On December 29, 1992, the Appeals Council denied Powell's request for a review of the ALJ's dismissal of his application.

Grounded on the assertions that the ALJ did not consider Powell's new and material evidence in compliance with 20 C.F.R. 404.987, et seq., and that he had demonstrated that the ALJ had erred, Powell filed a complaint in federal district court for a review of the dismissal of his claim for benefits. The Secretary filed a motion to dismiss Powell's complaint. It argued that, because the dismissal was based on res judicata, the district court lacked jurisdiction because the Secretary had not issued a final decision subject to review.

The magistrate judge to whom the case had been referred construed the Secretary's motion as a motion for summary judgment, concluding that the Secretary had not reopened Powell's claim for benefits by making a threshold inquiry into whether the new medical evidence added to the prior decision. Accordingly, the magistrate judge recommended that the Secretary's motion to dismiss be granted and the complaint dismissed without prejudice.

Over Powell's objections to the report, the district court adopted the report and recommendation and granted the Secretary's motion to dismiss without prejudice, affirming the Secretary's decision not to reopen Powell's case.

Argument and Analysis

Powell argues that the district court erroneously concluded

that it was without jurisdiction to review the case because he argues that the Secretary actually reopened the case and issued a new opinion denying his claim for benefits.

In Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L. Ed. 2d 192 (1977), the Supreme Court held that 41 U.S.C. § 405(g) does not authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits. 430 U.S. at 107-08. The Court also held that the federal courts did have jurisdiction to review challenges to the Secretary's decision not to reopen on constitutional grounds. Id. at 108-09.

Powell has not alleged a constitutional ground for reopening his case. He merely asserts that there was new medical evidence that supported his claim of disability. He also argues that jurisdiction exists because the case was actually reopened and a new opinion was issued that again denied his claim for benefits. Because Powell has not made a constitutional claim for reopening the case, only that the case was reopened based on the submission of new medical evidence, jurisdiction in the district court did not exist unless the case was actually reopened by the administration. Califano, 430 U.S. at 108.

To support his claim that his case was reopened, Powell asserts that the Secretary reconsidered his prior application and issued a new medical opinion regarding his entitlement to disability. He argues that the district court erred by concluding that his case had not been reopened and that it was barred by res

judicata. Relying on a letter from the administration dated March 16, 1992, (Exhibit M), that advised Powell's attorney to come in for purposes of updating his medical records for a new determination at Powell's request, Powell argues that the district court erred by concluding that this was not an expressed reopening of the file.

Sections 404.987-404-996 govern the reopening of a determination or decision regarding disability benefits. Cieutat v. Bowen, 824 F.2d 348, 353 n.5 (5th Cir. 1987). The regulations allow disability cases to be reopened for four years with good cause. Id. Good cause exists if new and material evidence is furnished by the claimant, a clerical error was made, or the evidence considered in making the determination shows on its fact that an error was made. Id. at 354, 357. A reopening based on new evidence that is material occurs when there is a possibility that the new evidence would have changed the outcome of the Secretary's determination had it been before him. Id. at 358. Here, that standard was not met because the ALJ concluded that the new evidence was not material or that it would have contributed to another result.

Moreover, the district court correctly concluded that the Secretary had not reopened Powell's case by making a threshold inquiry into whether Powell's additional medical evidence was material to his claim of disability or merely cumulative. A threshold inquiry does not amount to a reopening of a claim for social security benefits. Triplett v. Heckler, 767 F.2d 210, 213

(5th Cir. 1985), cert. denied, 474 U.S. 1104 (1986). In Triplett, the Court noted that the claimant must establish more than the Secretary's acknowledged receipt of additional evidence and a finding that that evidence is wanting. Id. Having failed to make that showing, the district court correctly ruled that the claim had not been reopened because Mr. Powell had merely presented additional evidence of his medical treatment and that evidence was merely cumulative to that already considered by the original ALJ.

The same medical impairment was considered in Powell's second application for benefits, an alleged disabling back condition, and the evidence was found not to be more persuasive. The actual medical reports are not included in the record; a listing of the additional evidence presented by Powell exists, however, in the explanation of the administrative determination that substantiates the conclusion reached by the second ALJ. The district court's finding that the application had not been reopened by the review of the additional medical evidence is correct and a review is barred.

The district court's order of dismissal is AFFIRMED.