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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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ANITA NEWMAN, on behalf of herself and-all
others similarly situated,

Plaintiff-Appellee/Cross-Appellant

LEGAL SERVICES, INC.

v.

DONNA E. SHALALA, in her official capacity-as
Secretary of Health and Human Services,

Defendant-Appellant/Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

REPLY BRIEF FOR PLAINTIFF-APPELLEE/CROSS-APPELLANT

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Nos. 9445761, 94-55887

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INTRODUCTION

The Secretary, in her Reply and Cross-Appellee Brief (hereinafter Secretary's Brief), has seriously misconstrued plaintiff's position with respect to the most basic issues on this appeal. Plaintiff, in her earlier brief (hereinafter Plaintiff's Brief), has set forth her argument that the Secretary is entitled to no deference at all in deciding the threshold issue of whether the district court was correct in determining that the Secretary was mandated by Congress to promulgate a regulation. (Plaintiff's Brief at 12-18.) Plaintiff also argues that Congress in 42 U.S.C. S 1382(c)(4) required that the regulation have some content (i.e., that it provide that the benefits of at least some people be determined on the basis of current month income). (Plaintiff's Brief at 29.) It is not inconsistent with this to concede, as plaintiff does, that if the Secretary were to promulgate a regulation she would be entitled to some discretion in determining the precise contours of the regulation. *Id* Plaintiff has never sought to have the Court dictate the content of the regulation to the Secretary. She has only sought to have the Court dictate that there be a regulation and that it not be an empty shell.

I. THE SECRETARY'S INTERPRETATION IS CONTRARY TO THE REMEDIAL PURPOSES OF THE SOCIAL SECURITY ACT.

The Secretary, for all her insistence on deference to her interpretation of the statute, seems never to have even considered why it is that Congress would have enacted 42 U.S.C. S 1382(c)(4). Nowhere does she reconcile her interpretation with

the overall purpose and design of the statute as a whole. She chooses to ignore this Court's consistent holdings that in construing provisions of the Social Security Act, the Court must have a preference for "that which we believe best advances the purposes of the SSI program." Summy v. Schweiker, 688 F.2d 1233, 1235 (9th Cir. 1982); Jones v. Shalala, 5 F.3d 447, 450 (9th Cir. 1993). That purpose is to provide aged, blind or disabled individuals with at least a subsistence level income." Paxton v. Secretary of Health and Human Services, 856 F.2d 1352, 1353 (9th Cir. 1988).

Yet the Secretary's interpretation of the statute required plaintiff Juanita Newman, and others similarly situated, to survive on considerably less than the minimum subsistence level.' When this Court was recently faced with the Secretary's interpretation of a related provision of the Social Security Act [42 U.S.C. S 1382(c)(2)(a)], which also required the calculation of an SSI grant for a two month period based on income the person no longer had, the Court did not hesitate to strike it down. Jones v. Shalala, 5 F.3d 447 (9th Cir. 1993). In doing so, the Court was persuaded in no small part of the need "[t]o be consistent with the humanitarian purpose of the Act and ensure that claimants are able to maintain a minimum subsistence levelII Id. at 451.

The Secretary makes much of her contention that an exception to retrospective monthly accounting (RMA) would "harm" many SSI recipients. (Secretary's Brief at 15-16.) Indeed, she asserts

' She received \$296 per month rather than the minimum subsistence level of \$560. (Plaintiff's Brief at 3-4.)

that for SSI recipients, such as Mrs. Newman, who have Title II income, "such a regulation would reduce the SSI benefits of an overwhelmingly higher number of persons than those whose SSI benefits would increase." Id. at 15. This argument has two fatal flaws. First plaintiff does not seek to exempt all Title II income from RMA. Plaintiff seeks an exception to RMA only where "reliable information" is "currently available" with respect to Title II income. If the Secretary restricted her analysis of increases and decrease in benefits to this much smaller group of recipients with Title II income, the results are likely to be quite different.

The most important defect in the Secretary's analysis is much more basic and goes beyond speculation as to how many people would have their grants increased or decreased. Juanita Newman and members of the plaintiff class have had their SSI grants reduced to an amount less than that "minimum income level below which the federal government thinks people should not have to live." Paxton, 856 F.2d at 1353. "When a family is living at subsistence level, the subtraction of any benefit can make a significant difference to its budget and its ability to survive." Id. at 1354.

Contrast this with the "harm" the Secretary alleges would be suffered by other SSI recipients. What is the nature of that "harm?" The "harm" is that they too would receive SSI benefits at the government established subsistence level and would no longer receive benefits in excess of that level for a two month

period.² The two types of harm are simply not comparable in terms of their impact on an individual. The loss of \$264 per month when it brings you \$264 below the subsistence level is a far more devastating blow than the failure to receive a temporary increase of \$264 per month to an amount \$264 above the subsistence level. The "harm" to be suffered by the person who receives less as the result of current month accounting is to receive the level of income that members of the plaintiff class so desperately seek in this action - i.e., the government-established subsistence level.

When the Secretary states that she "must balance the interests of those persons who will gain by a switch to current monthly accounting against those . . . who will lose money . . . because their income from other sources has just begun or increased" (Secretary's Brief at 8-9), she indicates a complete failure to grasp the nature of her responsibility in implementing this provision. Congress surely would not have intended her to reduce the income of the plaintiff class substantially below the subsistence level for two months because of her solicitude for the desire of some recipients to have income above the subsistence level for a two month period. This is not the type of balance Congress had in mind.

² These are people whose income from sources other than SSI has increased. For the most part, they continued, for a two-month period, to receive an SSI grant based on their previous lower income. After two months, the increase in other income is taken into account and the SSI grant is then reduced accordingly.

II. THE SECRETARY HAS NOT COMPLIED WITH THE RULEMAKING REQUIREMENTS OF THE STATUTE OR THE ADMINISTRATIVE PROCEDURE ACT.

The Secretary has an alternative argument. She argues, in an effort to establish new law, that when Congress states "The Secretary shall prescribe by regulation"¹¹[42 U.S.C. s 1382(c) (4) (B)], she need not go to the trouble of formal rulemaking but need only have a process "substantially equal in formality." (Secretary's-Brief at 4.) She cites no cases or statutory authority for this innovative standard.

In particular, the Secretary relies on her rulemaking to implement RMA generally, even though the preamble to these rules contained a disclaimer that "[t]he Secretary has this matter under consideration, and is not exercising this authority at this time." 50 Fed. Reg. 48563, 48565 (Nov. 26, 1985). It goes on to state: "[W]e have not yet determined the best way to implement this provision" Id at 48568. There is no discussion in this publication of reasons for or against implementation of a "reliable information" exception. The clear implication is that this is a matter for another day. This would have been a reasonable approach at the time since the Secretary had the more immediate need to implement RMA generally and the "reliable information" exception required some careful consideration of how best to exercise her discretion in applying it. Any reasonable person reading this notice would conclude that it simply does not deal with the "reliable information" exception and that it would obviously be premature to comment on it since there is not yet any proposal to comment on.

We are now told that this 1985 publication was an "interim decision" on the "reliable information" exception. (Secretary's Brief at 5 n.2.) Although interim rules are clearly not unheard of and are often appropriate where there is a need for immediate action, they are usually clearly labelled as such. The 1985 publication was never described as an interim decision until many years later when the need to develop a position became clear "in the heat--of litigation." See, e.s., Penninaton v. Didrickson, 22 F.3d 1376, 1383 (7th Cir. 1994). As late as 1990 she was still stating that she had not "engaged in any policy-setting or rulemaking" with regard to the "reliable information" exception. [Addendum to Plaintiff's Brief at 39 (Defendant's Response to Plaintiff's Second Set of Requests for Admissions).]

While the 1991 Federal Register notice relied on by the Secretary did deal explicitly, albeit superficially, with the "reliable information" exception, it provided no opportunity for comment and was developed in response to this litigation and the litigation in Gould v. Shalala, 30 F.3d 714 (6th Cir. 1994). 56 Fed. Reg. 14268 (April 8, 1991).

The Secretary's "rulemaking process" fails to meet due process standards and falls woefully short of Administrative Procedure Act requirements. 5 U.S.C. s 553.

III. THE SECRETARY'S DESCRIPTION OF TITLE II BENEFIT CEANGES ARE MISLEADING.

In an attempt to deflect the cross-appeal, the Secretary grasps at straws in her effort to show that "the end date of a mother's benefit is not nearly as mechanical as plaintiff

suggests." (Secretary's at 24.) She suggests, for example, that a dispute might arise as to the date a child turns sixteen. Surely she is not serious when she suggests that there could be a dispute on the calculation of the date on which the child turns sixteen when the birth date is known. Her contention that there could be a dispute as to the date of the child's birth is similarly without merit since the parent must prove the child's date of birth at the front end in order to establish eligibility for mother's benefits in the first place. SSA Program Operations Manual System (POMS) RS 00203.040 A.1 (copy attached as Addendum). As a result it is difficult to comprehend how there could be a bona fide dispute as to the date on which the child turns sixteen. To the extent there ever was a dispute it would have been resolved long before in order for the mother's benefits to commence.

The Secretary then goes on to say "the mother could only belatedly claim that the child is disabled, in which case the benefit does not terminate at age 16 but continues in effect." (Secretary's Brief at 24.) The Secretary's description of this relatively unusual concurrence of events is inaccurate. There is provision for continuing the mother's benefit beyond the child's sixteenth birthday if the child is disabled. 20 C.F.R. S 404.341(b)(2). However, this does not happen on the mother's mere claim of the child's disability. It happens only after the mother has filed an application with the Social Security Administration and provided supporting medical evidence and that evidence has been reviewed by a state agency responsible for making disability determinations for the Secretary and the

Secretary has determined the child to be disabled. 20 C.F.R. S 603; 20 C.F.R. SS 1501-1694. This is a lengthy process that lasts for months which means that the Secretary would know of a pending disability application for the child months in advance.³

The bizarre examples provided by the Secretary do nothing to disprove plaintiff's contention that certain (not all) changes in Title II income that occur by operation of law should be taken into account in the month in which they occur.

CONCLUSION

The statute requires the Secretary to promulgate a regulation that applies the "reliable information" exception to RMA in some circumstances, but leaves the Secretary discretion to determine which particular circumstances are appropriate on the basis of Congress's enunciated standard of "reliable information" "currently available."

The Secretary has abdicated this responsibility for twelve long years while thousands are forced to eke out an existence on a fraction of what Congress has determined to be a subsistence income. Plaintiff seeks the Court's assistance to compel the

³ In 1993 the backlog in State Disability Determination Services (DDSs) was 10.7 weeks. The backlog was expected to increase significantly in FY 95. Committee on Ways and Means, U.S. House of Representatives, 103d Cong., 2d Sess., Overview of Entitlement Programs - 1994 Green Book (Comm. Print 1994).


Secretary to promulgate a regulation that implements the
"reliable information" exception.

DATED: Los Angeles, California
February 21, 1995

Respectfully submitted,

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A D D E N D U M

Required Evidence and Findings

RS 00203,940 Summary of Evidence and Findings Required

A. Policy Principle - Initial Entitlement

Evidence	When Required	Reference
1. Name of Child	Always	cm 00307.001 RB 00203.080 (disabled child)
2. Age of deceased NEI	>only if it affects computation of PIA or insurance status	JN 00302.00s
3. Death of NH	in death claim	ZN 00304.001ff
4. Dependency of child	child 18 not deemed dependent	2s 01305.001ff
5. Disability of child	My when benefits are limited for a child 18 a wet who is under a disability which began before age 22	1 DI 11005.100 DI 11020.001-b1 11020.220
6. Relationship of child to NH	Uwaye	IN \$0306 * 001ff
7. Marital relationship of child's parents	1 Child claim benefit on stepparent's E/R, 1 & mm is child of invalid ceremonial marriage, 1 Condition in GN 00306.035 are met.	' GI 11 00306.035 ' a 00306.14S 1 GN 00306.390ff
8. Full-time school attendance	Benefit are claimed for full-time student	RS 00205.010A
9. Selection of dependent payee	. Child is under age 18 . \$mmatance in GN 00502.015 apply	m oosaa.aoo
10. Wage and SEI of NH	Rlway13	RS 00605.301 - RS 006a5.320
11. SSA-4 -BK (Application)	' Always, in life cases . In death cases unless child already entitled on same E/R when NH died NOTE; SSA-11-8X is sufficient if child	* Rs 00a03.050ff

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 1995, copies of the **REPLY BRIEF**
FOR PLAINTIFF-APPELLEE KROSS-APPELLANT were mailed by First Class

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