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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NORTHEASTERN DIVISION

FILE 1017216  
U.S. DIS. MID.  
SEP 19 1995 (116pp.)

JONATHAN T. BENNIS, by )  
MARILYN KNOWLES, next friend, )  
Plaintiff, )

) No. 2:94-0070  
) Judge Mo~rcon- --

BY   
DEPUTY CLERK

DONNA E. SHALALA )  
Department of Health and Human )  
Services )  
Defendant )

REPORT AND RECOMMENDATION

I. INTRODUCTION

Plaintiff, Jonathan T. Bennis, by next. friend Marilyn S. Knowles, filed this civil action for judicial review of the denial of his application for benefits under Title XVI of the Social Security Act (hereinafter "the Act"), 42 U.S.C. §51381 through 1383c, by the Secretary of the Department of Health and Human Services (hereinafter "the Secretary"). (Docket Entry No. 4). On February 4, 1982, Marilyn Knowles, Bennis' mother, applied for Social Security benefits on his behalf. (Transcript, "cr." p. 41). Based upon his multiple impairments, Bennis' disability application was approved, and Bennis was awarded Title XVI benefits from the date of his 1982 application. (tr. 30, 32).

During a periodic review of Bennis' disability status and benefits that were based in part, on Knowles' income, an error was discovered in the calculation of Bennis' benefits. On February 3, 1992, Knowles was informed

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that for ten (10) years, Bennis' Supplemental Security Income ("SSI") benefits had been miscalculated, resulting in an underpayment. (cr. 33, 60). Bennis' benefits record, however, was corrected only for the previous two years, i.e., back to February, 1990. (cr. 60). On March 17, 1992, Knowles requested reconsideration of this decision seeking baymen? of the entire ten year period. (cr. 42). In a Notice of Reconsideration dated April 3, 1992, Knowles was informed that the law permitted the Social Security Administration ("SAA") to correct the record for only the two years immediately preceding a decision. (tr. 46-47).

Knowles requested and received a hearing before an Administrative Law Judge ("ALJ"). (cr. 26). The ALJ adopted the SSA view that each periodic determination was subject to a request for review and concluded that the administrative decisions issued prior to February 2, 1990, were final and binding except that upon a showing of good cause, Bennis could seek relief for the two years only prior to the discovery of the error. Bennis demonstrated good cause and the ALJ ruled that he was entitled to retroactive SSI benefit underpayments, but only for any month prior to February, 1990. (cr. 12-19). The Appeals Council concluded that there was nco basis for granting Knowles' request for review. (Cr. 3).

The ALJ made the following specific findings about Bennis' request for reconsideration:

1. [Bennis'] SSI benefits have been underpaid since 1982.
2. The underpayment of [Bennis'] SSI benefits was the result of error or mistake by the Social Security Administration; the determination incorrectly calculating the amount of [Bennis"] SSI benefit was an

initial determination issued in or around February 1982. 20 C.F.R. 416.1402

3. [Bennis] did not request reconsideration of any initial determination or otherwise seek to reopen and revise any initial determination issued in this matter prior to an or about February 3, 1992.
4. The evidence that was considered in making the determination clearly shows on its face that an error was made. 20 C.F.R. 416.1489(a)(3)
5. The determination(s) of the amount of [Bennis'] benefits is/are not subject to reopening for cause for more than 2 years prior to the request for reopening, February 3, 1982. 20 C.F.R. 416.1488(c)
6. The evidence fails to establish that the determination in question was the result of fraud or similar fault. 20 C.F.R. 416.1488
- 7.I The initial determination issued in 1982 and all determinations issued thereafter through and including February 2, 1990 are binding upon [Bennis] and are not subject to reopening. 20 C.F.R. 416.1405; 20 C.F.R. 416.1488
8. Recovery by claimant of any underpayment of benefits occurring prior to February 1990 is barred by operation of 20 C.F.R. 416.1405 and 416.1488.

(cr. 18).

This civil action was filed timely and the District Court possesses jurisdiction under Section 405(g) of the Act. Both parties have moved for summary judgment. If the ALJ applied the correct legal standard, then the Secretary's decision is conclusive under Section 405(a).

## II. REVIEW OF THE RECORD

At the time of the hearing before the ALJ, Bennis was twelve years old. (cr. 28, 41). Marilyn Knowles is Bennis' mother, (tr. 28). Bennis was approved for Social Security Income in February, 1982. (tr. 32). At that time, neither Bennis nor Knowles was represented by counsel. (cr. 33). Bennis

has multiple impairments. Bennis is a quadriplegic, has cerebral palsy, and spasticity; and is retarded. Id. Ms. Knowles who has phlebitis as well as other medical problems, is also on Social Security disability. (tr. 34). Knowles earns no income other than her disability benefits. (cr. 35).

Knowles testified that Bennis' status was reviewed by the Social Security Administration on a yearly basis after he was approved for benefits. Id. In February, 1992, Bennis' status was reviewed by the SSA, and a clerk at the SSA discovered that Bennis had been underpaid by approximately one hundred dollars (\$100.00) a month for the previous ten years. Id. Knowles, however, received a check for two years' worth of underpayments. Id. An SSA clerk informed Knowles that the recoupment of the underpayments was limited to two years. (tr. 33-34).

Knowles testified that she was unfamiliar with the formula that SSA used to determine the amount of Bennis' benefits in 1982. (cr. 33-34). Knowles simply relied on SSA to determine the proper amount, thinking that "you just have to take what they send you." (cr. 36). Knowles also testified that Bennis suffered many health problems over the previous ten years, including undergoing three surgical procedures. (cr. 37). Knowles reported that she is often preoccupied with her illness and that of her son. (tr. 37).

### III. CONCLUSIONS OF LAW

Judicial review of the Secretary's decision is limited to the written record made in the administrative hearing process. The determination of disability under the Act is an administrative decision, and the only question before the Court is whether the decision of the Secretary is supported by substantial

evidence. Substantial evidence means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It is more than a scintilla and less than a preponderance. Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); Le Master v. Weinbertzer, 533 F.2d 337 (6th Cir. 1976).

The scope of judicial review is limited to determining whether the findings of fact made by the Secretary are supported by substantial evidence and deciding whether the Secretary employed the proper legal standard in reaching those findings. Gibson v. Secretary of Health, Education and Welfare, 678 F.2d 653 (6th Cir. 1982). A reviewing court does not substitute its finding of fact for those of the Secretary, if substantial evidence supports the Secretary's findings and inferences. Garner v. Heckler, 745 F.2d 383, 387 (6th Cir. 1984).

The Court must accept the ALJ's explicit findings and determination unless the record, as a whole, is without substantial evidence to support the ALJ's determination. Houston v. Secretary of Health and Human Services, 736 F.2d 365, 366 (6th Cir. 1984); Heohner v. Marhews, 574 F.2d 359 (6th Cir. 1978). If the ALJ fails to consider the record as a whole, then the Secretary's conclusion is undermined. Hurst v. Secretary of Health and Human Services, 753 F.2d 517, 519 (6th Cir. 1985). as well as by the application of erroneous legal standards to the facts, Blankenshin v. Bowen, 874 F.2d 1116, 1120-21 (6th Cir. 1989).

The issue here is whether the ALJ applied the correct legal standard when he relied on 20 C.F.R. 45 416.1405 and 416.1488 to limit Bennis' recovery of

underpayment of SSI benefits to two years.

First, the ALJ noted that each periodic determination of Bennis' benefits, as authorized by 20 C.F.R. 0 416.204(b), is an "initial determination" that is "binding unless [Bennis] request[s] a reconsideration within the stated time period, or we revise the initial determination." 20 C.F.R. 416.1405. Thus, the ALJ decided that Bennis' right of recovery of the underpayment is limited by the following time provisions in 20 C.F.R. 0 416.1488 that governst h e periodic reconsideration, revision and reopening of favorable disability determination:

A determination, revised determination, decision, or revised decision may be reopened --

(a) Within 12 months of the date of the notice of the initial determination, for any reason;

(b) Within two years of the date of the notice of the initial determination if we find good cause, as defined in 8 416.1489. to reooen the case. or

(c) At any time if it was obtained by fraud or similar fault. In determining whether a determination or decision was obtained by fraud or similar fault, we will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which you may have had at the time.

(emphasis added).

"Good cause" within the meaning of § 416.1488(b) is defined at 20 C.F.R. § 416.1489 as follows:

(a) We will find that there is good cause to reopen a determination or decision if --

(1) New and material evidence is furnished;

(2) A clerical error was made; 0-r

(3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made.

(b) We will not find good cause to reopen your case if the only reason for reopening is a change of legal interpretation or administrative ruling upon which the determination or decision was made.

In reaching his conclusion, the ALJ adopted the SSA position on Bennis' request.

The Administration apparently considered each annual review of benefits to produce an initial determination which was subject to reopening for cause within 2 years, since it allowed recovery of the underpayment for the two years immediately preceding the discovery of the underpayment in 1992. . . . Under this view, had there been only one initial determination made in 1982, and none intervening since, when the error was discovered in 1992, no determination would have been within the 2 year reach of reopening for cause. Consistent with the foregoing, the Administration position is that since Bennis did not timely request reconsideration of the first, or until 1992, any subsequent initial determinations of benefits, those determinations have become "binding" unless "revised" pursuant to 20 CFR 416.1405; see also, 20 CFR 416.1487(a). Accordingly, the only regulatory mechanism to reopen and "revise" those of the determinations lying beyond the two year reach of reopening for cause is the regulation at 20 CFR 416.1489(c), permitting reopening "at any time if it (the determination) was obtained by fraud or similar fault."

(cr. 13-14) (emphasis added).

Citing Social Security Ruling 85-23, the ALJ explained further that Section 1489(c) is directed at claimants who fraudulently obtain benefits, thus, that section is clearly inapplicable here. (cr. 14). The ALJ also cites Social Security Rulings on Title II provisions that are analogous to Sections 416.1488 and 416.1489. (cr. 15). Collectively, these rulings are that retroactive benefit

payments are precluded when the determination sought to be revised is beyond the time limits found in the “for good cause” reopening provisions. Id. See S.S.R. Nos. 66-30, 75-20, 61-60, and 63-2.

Knowles argues that the ALJ’s conclusion is erroneous because, in essence, there are separate regulations regarding underpayments and these regulations do not impose any time limits upon recovery of underpayments. The underpayment regulations also do not refer to the time provisions in the regulations governing the reopening of determinations... Knowles further argues that, if the two-year limit under 8 416.1488(b) is applicable, this time limitation should be either equitably or statutorily tolled.

There are distinct rules for consideration of underpayment of benefits within the Act, 20 C.F.R. 416.535,. 416.536, 416.538 and 416.542. As Knowles correctly notes, these provisions do not contain any express time limitations. There is also a separate regulation, 20 C.F.R. § 416.1411(a)(9), that defines those circumstances in which a claimant who missed a deadline to seek review of a decision, may be excused and that section also does not contain a time limitation. There is, however, a good cause requirement. 20 C.F.R. Q 416.1411(a)(4) and (9) provide in pertinent part, that:

(a) In determining whether you have shown that you have good cause for missing a deadline to request review we consider --

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Whether you had any physical, mental, educational, or, linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request for review.

\* \* \*

(9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph (a)(4) of this section, which show that you could not have known of the need to file timely, or which prevented you from filing timely.

Id.

Knowles also cites the Program Operations Manual System (POMS). that reflects the following general rule on enforcement of time limitations under the Act's regulations.

It has always been the SSA policy that failure to meet the time limits for requesting review is not automatic grounds for dismissing the appeal and that proper consideration be given to a claimant who presents evidence that he/she lacked the mental capacity to appeal the prior determination.

Under Q E03101.300, requests for review of underpayment of SSI benefits can be considered beyond a two year period for appeals that are contrary to the ALJ's conclusion on the interpretation of Q 416.1488. POMS 8 E03101.300 D.3. states: 'I . . . Good cause may extend well beyond the 60-day time limit [for appeals], even more than 2 years (SSI) or 4 years (OASDI)."' POMS 5 E03101.300 F. also provides:

If the rules on reopening cannot be applied or if the claimant chooses to request an appeal rather than request reopening, the [Field Office] adjudicator will decide if good cause for extending the time to appeal exists . . .

Any doubts about good cause are to be resolved in favor of the claimant. POMS E03101.300.G. The Secretary cites POMS 04070.001 that governs the opening and revision of erroneous decisions. This POMS distinguishes between

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'For applications under Title II, there is also a four year time period to request a reopening of a decision upon a finding of good cause. 20 C.F.R. 8 404.988(b) provides that "determination, revised discrimination decision or revised decision may be reopened . . . (b) within four years of the date of the notice of the initial determination, if is found good cause, as defined in 8 404.989, to reopen the case . . . 'I

an “initial determination” and a “revised” determination in that the latter is where “either the end result on a finding with respect to a factor of eligibility of a prior determination has been changed.” 04070.001.B.2. A “periodic redetermination of eligibility” is an initial determination. 0407.001.B.2. A change in the amount of payment is a “revision.” 04070.001.B.5.

In addition to these regulations and their time limitations, courts have imposed due process requirements, i.e., the “fundamental doctrines of fairness and equity, ” upon the Secretary’s interpretation of these time limitations regulations. Culbertson v. Secretary of HHS, 859 F.2d 319, 324-25 (4th Cir. 1988).<sup>\*</sup> In Culbertson, the claimant who had a mental impairment, applied for Title II #benefits in 1976 and was denied. Her parent did not appeal the decision on her child’s 1976 application. *Id.* at 320-21. The claimant’s second application also was denied and there was not a request for further review. *Id.* at 321. The third application was filed in 1980 with the assistance of counsel. *Id.* The expert proof showed that the claimant was clearly disabled since the date of her 1976 application. *Id.* The ALJ found disability and granted relief dating back to 1976.

The Appeals Council reversed and limited the award to four (4) years as in the Title II time regulations. *Id.* at n. 1. On remand, the ALJ found that the claimant’s impairment precluded her seeking review of the denial of the 1976 application and again granted relief. On the second administrative appeal, the Appeals Council again limited the benefits to the 1977 application, *Id.*

After the filing of a civil action and a judicial remand due to an

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<sup>a</sup>Culbertson is cited in Q E03 101.300 A. 2. of the POMS.

incomplete administrative record, the ALJ held a third hearing and concluded that the Appeals Council's decision violated the Fourth Circuit's rule barring application of the res judicata principle to administrative decisions on disability under the Act. The Appeals Council reversed, citing its administrative finality doctrine that the Council distinguished from the res judicata doctrine. Id. at 322.

In the second judicial action in Culbertson, the Magistrate Judge agreed with the ALJ and concluded that the Secretary's failure to consider the claimant's 1976 application constituted "a denial of due process." &I. The District Court, however, found that because the claimant's father was not impaired, and could have filed an appeal of the denial of the 1976 application, the request for review of the claimant's 1976 application was time barred due to the lack of good cause for failure to comply with time limits. Id.

The Fourth Circuit Court of Appeals, citing an unquestionable determination of disability since the 1976 application, ordered the Secretary to grant relief on the 1976 application. First, as to the showing of good cause, the Court looked to the child's mental impairment, not the parent's ability, acts or omission in seeking further administrative review. Q. at 324. Thus, the parent's omission to appeal the 1976 denial did not preclude the claimant's claim for benefits on her 1976 application. Here, since 1982, Jonathan Bennis clearly was disabled, being retarded and clearly suffering from serious, multiple and continuing physical disabilities. In such circumstances, the Magistrate Judge concludes that Bennis has demonstrated good cause so as to invoke § 416.141 1(a)(4) and (9) for why he did not contest the Secretary's

1982 decision nor any subsequent periodic determination on his behalf.

Given Bennis' mental and multiple physical disabilities within the meaning of the Act, the Magistrate Judge concludes that to refuse to consider Bennis' request to reconsider the 1982 decision offends due process within the meaning of Culbertson. The Magistrate Judge notes that facts here of multiple applications by a mentally and physically impaired claimant and failure to appeal are strikingly similar to Culbertson. Moreover, the Secretary recognizes and enforces the Culbertson rule in the Fourth Circuit for claimants that includes children and others with mental impairments and other serious limitations. The applicable POMS provides in pertinent part, as follows

Processing a Request for Review of a Denied Claim, Consideration of Reopening and/or Good Cause for Missing the Deadline to Request Review, Mental Incapacity to Pursue the Appeal

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2. Fourth Circuit  
--Special Rules

The Fourth Circuit Court of Appeals, by its decisions in Culbertson v. Secretary of HHS and Young v. Bowen, requires SSA to reopen a prior determination if SSA determines that the claimant lacked the mental capacity to request appeal of the prior determination, regardless of how long ago the prior determination was made. SSA's current regulations contain time limits for reopening in such circumstances. Thus, outside the Fourth Circuit, SSA must apply the time limits in the reopening regulations in such circumstances.

POMS E03 101.300.A.2.

A POMS was found by the Court of Appeals to be persuasive indications of the Secretary's interpretation of the Act's regulations. Drombetta v. Secretary of Health and Human Services, 845 F.2d 607, 609 (6th Cir. 1987). POMS predecessor, however, was found not to have any legally binding effect. Schweiker v. Hanson, 450 U.S. 785, 789, 101 S.Ct. 1468, 1471, 67 L.Ed.2d 685 (1981). ("I . . . the claims manual is not a regulation. It has no legal force and it does not bind the SSA.") (Emphasis added). Yet, following the subsequent ruling in Drombetta, and the Secretary's partial adoption of Culbertson, the Magistrate Judge deems the POMS persuasive on Bennis' contention.

In sum, the Magistrate Judge recommends that the Court adopt the Culbertson rule and apply that rule to these facts. The Secretary, by virtue of regulations, possesses broad discretion on whether to reconsider a prior determination under the Act. Califano v. Sanders, 430 U.S. 99, 108, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). This discretion, however, is subject to constitutional limitations and fundamental fairness under the Due Process Clause of the Fifth Amendment. Shrader v. Harris, 631 F.2d 297, 301 (4th Cir. 1980).

The Supreme Court in Thomas Jefferson University v. Shalala, - U.S. - 9 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994). remarked that

We must give substantial deference to an agency's interpretation of its own regulations. Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." In other words we must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the

Secretary's intent at the time of the regulation's promulgation."

Id. at 2386-87.

As to the interpretation of these regulations, the Court stated that "[t]he Secretary of Health and Human Services' interpretation of that agency's regulations should be upheld if it is not arbitrary and capricious, 845 F.2d at 609. Accord, Bedford County General Hospital v. Heckler, 757 F.2d 87, 89 (6th Cir. 1985).

Here, the Magistrate Judge has adopted the agency's regulation as interpreted by the Court and applied by the SSA in the Fourth Circuit. The Agency's general rule is to consider whether the claimant "lacked the mental capacity to appeal the prior determination." POMS 8 EO 3101.300. In 1982, Bennis was a disabled and retarded child with various physical disabilities that are also to be considered. 20 C.F.R. 416.141 1(a)(4) and (9). Under POMS 8 EO 3101.300 D.3, "[g]ood cause may well extend . . . more than 2 years (SSI) . . . I'

In sum, in the Magistrate Judge's view, the ALJ applied the wrong regulations to the facts at issue here and thereby, applied an erroneous legal standard in reaching his decision. With this conclusion, the Magistrate Judge deems it unnecessary to address Knowles' argument that the two-year time period in the reopening regulations should be equitably tolled under Bowen v. City of New York. Applying the Fourth Circuit's rule in Culbertson, the Magistrate Judge concludes that Bennis should receive the benefits erroneously underpaid since her February 4, 1982 application.

## IV. RECOMMENDATIONS

For the reasons stated above, the Magistrate Judge recommends that the Secretary's motion for summary judgment be denied and the plaintiff's motion for summary judgment be granted. Under Rule 72(bj) of the Federal Rules of Civil Procedure, any party has ten (10) days from receipt of this Report and Recommendation in which to file any written objections to this Recommendation, with the District Court. Any party opposing said objections shall have ten (10) days from receipt of any objections filed to this Report in which to file any responses to said objections. Failure to file specific objections within ten (10) days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. Thomas v. u, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985), reh'g denied, 474 U.S. 1111 (1986).

Entered this #,4 day of October, 1995.

  
WILLIAM J. HAYNES, JR.  
United States Magistrate Judge