

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JAN 30 1991

ROBERT L. HOECKER
Clerk

LEONARD F. GILMORE,
Plaintiff-Appellant,
v.
LOUIS W. SULLIVAN, M.D., Secretary of
Health and Human Services,
Defendant-Appellee.

No. 89-6309
(D.C. No. 87-2076-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before MOORE, BARRETT, Circuit Judges, and SPARR,** District Judge.

**Honorable Daniel B. Sparr, District Judge, United States District Court for the District of Colorado, sitting by designation.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except: for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Plaintiff appeals from an order of the district court affirming the Secretary's decision that plaintiff was disabled as of January 3, 1981, and awarding benefits from January, 1984.

Plaintiff filed a written application for benefits in January, 1985. That application was denied. On reconsideration, the administrative law judge (ALJ) determined that plaintiff was disabled as of 1981 and awarded benefits retroactive to January, 1984, twelve months prior to the date of plaintiff's application. See 42 U.S.C. § 402(j)(1).¹

Plaintiff requested a rehearing claiming that he had previously applied for benefits in early 1981. Plaintiff alleged that he was told at that time that he was not eligible for benefits because he did not meet the earnings requirement. Plaintiff also submitted affidavits from various family members to support his position.

The Secretary found no record of any application for benefits in his files prior to the 1985 application. Therefore, the ALJ denied plaintiff's request because no evidence supported plaintiff's allegation that he had filed a written application in 1981. The Appeals Council denied plaintiff's request for review, and the ALJ's decision became the Secretary's final decision.

"Our review of social security administration cases is usually quite limited. 'The Secretary's decision must be

¹ Section 402(j)(1) provides that an individual who would have been entitled to benefits, had he filed an application for benefits earlier, "shall be entitled to such benefit for such month if he files application therefor prior to . . . the end of the twelfth month immediately succeeding such month"

sustained if supported by substantial evidence. The reviewing court does not weigh the evidence and may not substitute its discretion for that of the agency.'" Sorenson v. Bowen, 888 F.2d 706, 710-11 (10th Cir. 1989)(quoting Cagle v. Califano, 638 F.2d 219, 220 (10th Cir. 1981)(citations omitted)). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401 (1971)(quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

Plaintiff argues that the Secretary erred in determining the date from which benefits would be paid. He argues that family members have sworn in affidavits they knew he went to apply for benefits and that he can identify the individuals he talked to when he filed his application. These statements do not meet the requirements set forth in the regulations.

A claimant "must file an application to become entitled to benefits." 20 C.F.R. § 404.603. Under § 402(j)(1), plaintiff could only be awarded benefits prior to January, 1984, if he had actually filed an earlier application. An application "refers only to an application on a form described in § 404.611." 20 C.F.R. § 404.602.

To be considered a claim for benefits, an application must generally meet all of the following conditions:

- (a) It must be on an application form as described in § 404.611.
- (b) It must be completed and filed with SSA

- (c) It must be signed by the claimant

(d) The claimant . . . must be alive at the time it is filed.

20 C.F.R. § 404.610. The Secretary found no application in his files, neither did plaintiff produce such an application. Oral representations that such a form was filed are insufficient. We further note that in his 1985 application, plaintiff stated that he had not filed any prior applications for benefits.

Construing plaintiff's complaint liberally, Haines v. Kerner, 404 U.S. 519 (1972), plaintiff may be attempting to argue that the Secretary is estopped from denying him benefits. "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." Heckler v. Community Health Servs. of Crawford County, Inc., 467 U.S. 51, 59 (1984). In order to claim estoppel, plaintiff must have relied on the government's conduct "'in such a manner as to change his position for the worse,' and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." Id., quoting Wilbur Nat'l Bank v. United States, 294 U.S. 120, 124-25 (1935)(footnotes omitted).

Here, at best, plaintiff relied on the government's representation that he was not qualified for benefits in 1981 because he did not meet the earnings requirements. Even assuming such a representation was made, this is not proof that plaintiff filed a written application.

The judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM