

FILED
United States Court of Appeals
Tenth Circuit

AUG 14 1990

ROBERT L. HOECKER
Clerk

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

REFUGIO JOE ROJAS,
Plaintiff-Appellant,
v.
SECRETARY OF HEALTH & HUMAN
SERVICES,
Defendant-Appellee.

No. 90-2075
(Dist. N.M. CV 88-337 JB)

ORDER AND JUDGMENT*

Before **ANDERSON, BALDOCK, and EBEL**, Circuit Judges.

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. Therefore, the case is ordered submitted without oral argument.

Plaintiff-appellant Refugio Joe Rojas appeals from the district court's February 7, 1990 opinion and order dismissing this action for lack of subject matter jurisdiction. No administrative hearing was held in this case, and only "final decision[s] of the Secretary [of Health and Human Services] made

* 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.

after a hearing" are subject to judicial review. 42 U.S.C. § 405(g). The Supreme Court, interpreting § 405(g) in accordance with its plain meaning, has indicated that judicial review of administrative decisions made without a hearing is generally precluded. Califano v. Sanders, 430 U.S. 99 (1977). An exception exists, however, for "colorable constitutional claims"; in such cases, "the availability of judicial review is presumed." Id. at 109.

Plaintiff argues that the following three claims provide a sufficient basis for the district court to exercise jurisdiction: (1) plaintiff "suffered from a mental impairment at the time his prior application for disability insurance benefits was denied which (arguably) prevented him from understanding and protecting his legal rights" in violation of the Due Process Clause; (2) plaintiff proceeded pro se during his prior administrative appeal; and (3) the ALJ in the prior administrative appeal applied "incorrect legal standards." Appellant's Br. at 5, 9, 11. After reviewing the briefs and record on appeal, we conclude that plaintiff has failed to state a colorable constitutional claim.

First, plaintiff has not offered sufficient evidence of mental impairment for us to conclude that the Due Process Clause was violated. In support of his argument, plaintiff refers to certain evidence contained in a vocational report upon which the ALJ relied in denying plaintiff's previous application for benefits. The evidence was that: (1) plaintiff had a verbal IQ of 75 and the equivalent of a second grade education; (2) plaintiff suffers from a learning disability; and (3) his

"'physical and/or psychological limitations' create" a "'significant'" impairment. Appellant's Br. at 5-6 (quoting R. Vol. II at 122).¹ We do not believe that such evidence is sufficient to constitute a colorable constitutional claim. Cf. Young v. Bowen, 858 F.2d 951, 953-55 (4th Cir. 1988) (colorable constitutional claim raised where "voluminous" record irrefutably indicated that claimant was incompetent; among other things, the record contained evidence that claimant "suffered from personality disorders and alcoholism for much of her adult life" and that claimant's verbal and performance IQ was 67 and her full-scale IQ was 66); Elchediak v. Heckler, 750 F.2d 892, 893-94 (11th Cir. 1985) (per curiam) (colorable constitutional claim raised where claimant had failed to pursue his previous applications for benefits beyond initial stages of review and where "[a]ll the available medical evidence confirm[ed] that he suffer[ed] from" paranoid schizophrenia); Shrader v. Harris, 631 F.2d 297, 299-303 (4th Cir. 1980) (remanding for an evidentiary hearing to determine claimant's mental capacity where claimant had introduced evidence that he was psychotic). Moreover, the report to which plaintiff makes reference contains some countervailing evidence. See R. Vol. II at 132.

¹ Plaintiff has not offered any proof of mental impairment beyond that which was part of the record in his previous application for benefits. On appeal, plaintiff argues that this case was dismissed too quickly for him to have determined whether additional evidence is available to support his claim. See Appellant's Br. at 10. However, plaintiff has had sufficient time following the district court's dismissal order to determine whether any new evidence exists.

We are also reluctant to find a due process violation in light of the fact that plaintiff was able to follow the procedures necessary to obtain an administrative hearing on his prior application for benefits (although he did not file a subsequent appeal to the Social Security Appeals Council). In addition, our review of the hearing transcript suggests that plaintiff was able to present his case adequately.

Second, although plaintiff did not have the benefit of counsel at the hearing, he has failed to demonstrate that this amounts to a colorable constitutional claim. Plaintiff was advised of his right to representation at the hearing. See R. Vol. II at 17. Moreover, as noted above, plaintiff was able to follow the administrative procedures necessary to obtain the hearing before the ALJ, and our review of the hearing transcript indicated that plaintiff was able to present his claim adequately.

Finally, plaintiff has failed to demonstrate that the ALJ's alleged failure to apply proper legal standards in the prior administrative appeal rises to the level of a constitutional violation. Therefore, for all of the above reasons, we AFFIRM the district court's February 7, 1990 order dismissing this case for lack of subject matter jurisdiction.

Entered for the Court

David M. Ebel
Circuit Judge