

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>NELSON FRANCIS,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>Docket No. 97-110-B</i>
)	
<i>KENNETH S. APFEL,</i>)	
<i>Commissioner of Social Security,¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION²

This is the second time this application for Social Security Disability (“SSD”) benefits finds its way to this court. On remand, the Commissioner determined the plaintiff to be disabled by alcoholism beginning June 30, 1989. Despite this finding, the Commissioner concluded that the plaintiff is barred by Section 105 of the Senior Citizens Right to Work Act of 1996, which became effective on March 29, 1996, from receiving SSD benefits. This ruling also affects the plaintiff’s

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Commissioner of Social Security Kenneth S. Apfel is substituted as the defendant in this matter.

² This action is properly brought under 42 U.S.C. § 405(g). The Commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on November 7, 1997 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

ability to claim benefits for an alleged disability due to back pain. Inasmuch as the plaintiff filed his application for benefits in January 1994, he contends that in rendering his decision the Commissioner erred as a matter of law. I recommend that the court affirm the decision of the Commissioner.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since June 30, 1989, Finding 2, Record p. 186; that the evidence established that the plaintiff suffered from alcoholism, a severe impairment that meets the requirements of section 12.09 of Appendix 1 to Subpart P, 20 C.F.R. § 404, Findings 3-4, Record p. 186; and that the plaintiff had been under a disability since June 30, 1989, Finding 5, Record p. 186. The administrative law judge nonetheless found that section 105 of Public Law 104-121 prohibits the award of benefits because alcoholism was material to the determination of disability. Record p. 186. The Appeals Council declined to review the decision, *id.* at 166-67, making it the final decision of the Commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

Ordinarily, the standard of review of the Commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). However, the question presented here is purely one of law: whether section 105 of Public Law 104-121 may be applied to this claim to bar any receipt of benefits, when the claim was initially filed more than two years before the effective date of the statute and the Commissioner's initial decision denying benefits, which was overturned by the instant decision after a remand by this court, was reached on December 19, 1994, Record p. 20, some fifteen months before the effective date of the statute.

This court remanded the case because the administrative law judge had not made an informed judgment about the limiting effect of alcoholism on the ability of the plaintiff to perform basic work activities. *Id.* at 280. This court on that first appeal also upheld the administrative law judge's finding that the plaintiff's spinal condition, which he contends causes back pain that is a sufficiently severe impairment to establish disability at the present time, was not a severe impairment before the plaintiff's insured status expired on December 31, 1992. *Id.* at 185, 279-80. The plaintiff contends that his back impairment was severe as of June 1994, *id.* at 178, and that the extension of his insured status by operation of 20 C.F.R. §§ 404.131 and 404.132 that would have occurred had his disability by virtue of alcoholism been properly established at the time of the administrative law judge's first decision would make him eligible now for disability benefits for the back impairment. The administrative law judge's second decision makes no formal findings relative to the back impairment, but does state that "the claimant's back disorder became severe in June 1994 based on evidence in the file." *Id.* at 184.

After the amendment effective March 29, 1996, 42 U.S.C. § 423(d)(2)(C) provides:

An individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled.

Here, the administrative law judge specifically found that alcoholism is a factor material to the finding of disability. Finding 6, Record p.186. The legislation enacting this amendment provides as follows:

The amendments . . . shall apply to any individual who applies for, or whose claim is finally adjudicated by the Commissioner of Social Security with respect to, benefits under title II of the Social Security Act based on disability on or after the date of the enactment of this Act, and, in the case

of any individual who has applied for, and whose claim has been finally adjudicated by the Commissioner with respect to, such benefits before such date of enactment, such amendments shall apply only with respect to such benefits for months beginning on or after January 1, 1997.

Pub. L. 104-121 § 105(a)(5)(A), 110 Stat. at 853; 42 U.S.C. § 405 note (1996). The application of this language to specific cases has resulted in differences among the district and circuit courts whose decisions have been reported since the effective date of the amendment.

The plaintiff relies on *Teitelbaum v. Chater*, 949 F. Supp. 1206 (E. D. Pa. 1996), and *Santos v. Chater*, 942 F. Supp. 57 (D. Mass. 1996), to support his argument that the amendment does not bar an award of benefits, at least until the effective date of the amendment, because he would have received benefits if the correct decision had been made on his application by the administrative law judge in the decision issued December 19, 1994, well before the effective date of the amendment. Since the decision in *Teitelbaum*, the Third Circuit has addressed this issue in *Torres v. Chater*, 1997 WL 576351 (3d Cir. Sept. 18, 1997), a reported case with factual circumstances indistinguishable from those present here.

My own research has revealed two additional reported cases in which federal district courts have held that an applicant whose claim was pending, at any stage of the proceedings, on March 29, 1996 could not receive benefits if alcoholism or drug addiction was a material factor in the applicant's disability: *Connor v. Chater*, 947 F. Supp. 56, 62 (N.D.N.Y. 1996), and *Sousa v. Chater*, 945 F. Supp. 1312, 1328-30 (E. D. Cal. 1996). Two other district courts held that the date of the final decision for purposes of the amendment was the date of the Appeals Council decision, and that a remand by the courts after that date overturning a denial meant that benefits for disability related to alcoholism would be available at least for a period ending on the effective date of the amendment:

Willis v. Chater, 939 F. Supp. 1236, 1244 n.13 (W. D. Va. 1996), and *Miller v. Callahan*, 964 F. Supp. 939, 948-49 (D. Md. 1997). In *Perkins v. Chater*, 107 F.3d 1290 (7th Cir. 1997), the Seventh Circuit stated in *dicta* that an applicant denied benefits by a final decision of the Appeals Council before the effective date of the amendment could receive benefits as a result of a remand occurring after the effective date. *Id.* at 1293. See also *Newton v. Chater*, 92 F.3d 688, 695 n.3 (8th Cir. 1996) (referring to, but not construing, language of amendment).

The Third Circuit's decision in *Torres* appears to be the only circuit court decision directly on point. In that case, the plaintiff was denied benefits in 1994. 1997 WL 576351 at *1. The district court remanded the case to the Commissioner on March 21, 1996 "for further determination as to the nature and extent of the plaintiff's alcohol problem, his ability to control his condition and his employability." *Id.* On May 16, 1996 the Commissioner filed a motion to vacate the remand order, based on the amendment to section 423(d)(2). *Id.* The district court denied the motion, and the Commissioner appealed the denial.

While noting that the claimant who has yet to be awarded benefits is entitled to procedural due process, but that such an entitlement does not limit the power of Congress to make changes in eligibility for certain entitlements, *id.* at *4, the Third Circuit held that "it is the date of adjudication, and not the time when disability exists, that triggers the application of the effective date" of the amendment, *id.* at *7. A claim subject to further hearing by the Commissioner, the court held, has not been "finally adjudicated," and therefore the plaintiff's claim is barred by the statutory amendment. *Id.* While such a result may seem initially unfair to the claimant whose benefits were erroneously denied before the effective date of the amendment, the Third Circuit effectively demonstrated that a different interpretation would render the "final adjudication" language of the

governing statute superfluous, in violation of a basic tenet of statutory construction. *Id.* at *6. On balance, I find this reasoning persuasive. As a result, the issue of the plaintiff's spinal condition will not be reached.

Accordingly, I recommend that the Commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of November, 1997.

David M. Cohen
United States Magistrate Judge