

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DON DOYLE,

Plaintiff,

OPINION AND ORDER

v.

00-C-643-C

JO ANNE P. BARNHART,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

This is an action for judicial review of an adverse decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). Plaintiff Don Doyle, who is proceeding *pro se*, appeals the Commissioner's determination that he was overpaid \$6,152 in supplemental security income from March 1996 through March 1997 because he owned countable resources during that time period that rendered him ineligible for supplemental security income.

Having reviewed the administrative record and plaintiff's submissions, I conclude that defendant's decision must be affirmed. Substantial evidence in the record supports her determination that plaintiff did not intend to return to his residence as of March 1996 and therefore, his residence counted as a resource from that date until plaintiff traded properties with his mother in March 1997. As will be explained more fully below, plaintiff's concerns

about waiver and overpayment are not properly before the court because plaintiff has not exhausted his administrative remedies with respect to those issues.

From the administrative record and plaintiff's submissions, I find the following facts.

FACTS

Plaintiff began receiving supplemental security income in 1990 after defendant found him disabled because of arthritis of the spine with spurs. Although plaintiff owned a home, he qualified for supplemental security income because defendant does not count a claimant's homestead when determining financial eligibility. 42 U.S.C. § 1382b(a); 20 C.F.R. §§ 416.1210, 416.1212. However, "[i]f an individual . . . moves out of his . . . home without the intent to return, the home becomes a countable resource because it is no longer the individual's principal place of residence." 20 C.F.R. § 416.1212(c). On September 29, 1993, plaintiff told a local social security agency claims representative that he was moving temporarily out of his home located at 1148 Highway East in Adams, Wisconsin because of water problems. Plaintiff said he was going to stay at his mother's house at 251 East Sherman in Adams, Wisconsin. In that same report, plaintiff indicated that he had borrowed \$2,000 from his mother for roof repairs at his residence.

On January 8, 1997, plaintiff completed a Statement for Determining Continuing Eligibility for Supplemental Security Income Payments. In the form, he indicated that he rented the place where he lived from his mother and paid her rent in the amount of \$275 a month. Shortly thereafter, the agency terminated his benefits because it deemed his

Highway East residence a countable resource under the social security regulations that rendered him ineligible for supplemental security income.

On February 25, 1997, plaintiff submitted a Request for Reconsideration of the initial determination terminating his benefits. At that time, he spoke to Paul Demers, an agency representative, and told him that he wanted to trade properties with his mother. On March 14, 1997, plaintiff's reconsideration request was denied. On March 19, 1997, plaintiff's mother transferred her property at 251 East Sherman, worth \$22,200, to plaintiff in exchange for his property at 1148 Highway East, worth \$33,500. A quit claim deed recording the transaction of the property at 251 East Sherman was filed with the register's office on March 21, 1997. On that same date, plaintiff filed a request for a hearing before an administrative law judge.

A hearing was held on January 12, 1998. On March 27, 1998, the administrative law judge issued a decision, finding that plaintiff was ineligible for SSI benefits from 1994 until 1997 because he had had excess resources during that time period. The administrative law judge determined that plaintiff had moved out of his homestead in 1994 with no intent to return; thus, the property was a resource to him that could not be excluded from his countable assets from 1994 until he transferred the property to his mother in 1997. On May 6, 1998, plaintiff filed a request for review of the administrative law judge's decision. On June 23, 2000, the Appeals Council concluded that there was no basis for granting review. Some time after the administrative hearing, the Social Security administration notified plaintiff that he had been overpaid \$18,523.76 in supplemental security income

between January 1994 and January 1997, and \$1,438.00 from November 1996 to March 1997.¹

On October 27, 2000, plaintiff filed a complaint in this court appealing the agency's decision. The court remanded the case to the agency for further administrative action pursuant to sentence six of § 405(g) because the agency was unable to locate plaintiff's file or the cassette from the administrative hearing.

On November 13, 2001, plaintiff was notified that a new administrative hearing was going to be held on December 4, 2001. The notice indicated that the issue to be decided was whether plaintiff was "correctly assessed an overpayment in the amount of 1,438.00 because of unreported excess resources for the period 11-96 to 3-97." Plaintiff appeared at the hearing with a nonattorney representative. Plaintiff contended that the dates and amount of overpayment set forth on the Notice of Hearing form were incorrect, and that the real issue was whether he had been overpaid \$18,523.76 from January 1994 to January 1997.²

At the hearing, plaintiff testified that he had gone to his local Social Security office in early 1996 and informed a representative that he wanted to trade properties with his mother and asked how he could go about trading properties without risking his SSI eligibility. According to plaintiff, an agency employee told him that he could not trade

¹Copies of the notices of overpayments are not in the file.

²The record is unclear regarding why the agency determined that plaintiff had been overpaid \$1,438 from November 1996 to March 1997. It is also unclear whether plaintiff ever brought a separate challenge to the \$1,438 overpayment.

properties because his records were not available. Plaintiff testified that he was told his records had been sent to a different location where a hearing on an overpayment issue was going to be held. Plaintiff testified that the agency employee informed him that he would need to wait until his file was produced before he could trade properties.

In a letter submitted to the administrative law judge after the hearing, plaintiff conceded that he did not intend to return to his Highway East residence as of early 1996. Also, plaintiff argued that the agency should waive any overpayment incurred between the date plaintiff ceased intending to return home and the date he switched properties because of the agency's alleged failure to give plaintiff proper advice when he asked about switching the properties. However, plaintiff acknowledged that he had not filed a formal request for waiver.

On January 25, 2002, the administrative law judge issued a decision, finding that plaintiff had moved from his home in December 1993 with no intent to return. He then found an overpayment from November 1996 to March 1997 in the amount of \$1,438. The administrative law judge did not address plaintiff's position regarding the overpayment dates and amount at issue or his waiver request.

Plaintiff filed a request for review by the Appeals Council. On August 10, 2002, the Appeals Council vacated the administrative law judge's January 25, 2002 decision. From its independent review of the evidence in the record, the Appeals Council concluded that plaintiff did not intend to return home as of March 1996 and therefore he was not eligible for SSI from that date through March 1997. The Appeals Council noted that in a letter

dated February 24, 1997, plaintiff had told the agency that he had tried to obtain help from the local Social Security office with respect to his desire to trade properties with his mother. According to plaintiff's letter, this meeting occurred at least four to six months before he was to appear at an administrative hearing on an unrelated matter. The Appeals Council found that the administrative hearing on the unrelated matter was on September 16, 1996, placing the date on which plaintiff had discussed trading properties at March or May 1996. The Appeals Council also noted that plaintiff's representative had submitted a list of questions and answers from plaintiff on which plaintiff indicated that he and his mother had begun discussing the property trade approximately one year before they actually traded in March 1997. From this evidence, the Appeals Council found that as of March 1996, plaintiff had changed his intention of returning to his Highway East residence to live, making the home a countable resource that precluded his eligibility for supplemental security income until he traded properties with his mother in March 1997. From Social Security records, the Appeals Council found that plaintiff received monthly payments of \$470 for March 1996 to December 1996 and \$484 for January 1997 to March 1997, resulting in an overpayment of \$6,152. The Appeals Council declined to address plaintiff's request for waiver, finding that the issue was not properly before it. It instructed plaintiff to contact his local Social Security office for assistance on that matter.

From documents plaintiff has attached to his reply brief, it appears that some time before August 10, 2002, plaintiff asked his local Social Security office to waive recovery of the overpayment. The local office denied his request for waiver, but told plaintiff he could

meet with an agency representative at a specified date and time to discuss the matter further. Plaintiff did not appear at the scheduled conference. As a result, the agency found there was no basis for changing its decision to deny his request for waiver. In a letter to plaintiff dated August 27, 2002, the agency indicated that plaintiff had an overpayment balance remaining in the amount of \$16,390.15. In the letter, the agency informed plaintiff that he had 60 days from the date of the letter in which to appeal the waiver decision by filing a Request for Reconsideration form. The record does not show whether plaintiff filed a Request for Reconsideration.

OPINION

42 U.S.C. § 405(g) provides for judicial review of “final decisions” of the Commissioner of Social Security. The review authorized by the statute is limited: the commissioner’s findings as to any fact are conclusive so long as they are supported by “substantial evidence.” See Stevenson v. Chater, 105 F.3d 1151, 1153 (7th Cir. 1997); Brewer v. Chater, 103 F.3d 1384, 1390 (7th Cir. 1997). “Substantial evidence is more than a mere scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Stevenson, 105 F.3d at 1153 (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), as quoted in Richardson v. Perales, 402 U.S. 389, 401 (1971)) (other citations omitted). A standard this low could allow for different supportable conclusions in a given claimant's case. That being so, this court cannot in its review reconsider facts, reweigh the evidence, decide questions of credibility or otherwise substitute

its own judgment for that of the commissioner regarding what the outcome should be. See Brewer, 103 F.3d at 1390 (citations omitted); Kapusta v. Sullivan, 900 F.2d 94, 96 (7th Cir. 1990).

In this case, the Appeals Council's decision of August 10, 2002, is defendant's final decision. The issue is whether substantial evidence supports the Appeals Council's conclusion that plaintiff's home was a countable resource from March 1996, when plaintiff decided to trade properties with his mother, and March 1997, when the trade actually occurred.

The Appeals Council's decision is supported by substantial evidence. In concluding that plaintiff had no longer intended to live at his Highway East residence as of March 1996, the Appeals Council relied on statements plaintiff had made in documents he and his representative had submitted in connection with his claim. Plaintiff does not point to any significant contrary evidence in the record and I have found none in my independent review of the record. With the exception of one letter to the Appeals Council in which plaintiff stated that his intent changed in "late 1996," all of plaintiff's submissions indicate that he decided to trade properties with his mother in early 1996.

Indeed, plaintiff's submissions to this court indicate that he is not challenging the Appeals Council's determination with respect to its finding that he did not intend to return to his residence as of March 1996. Rather, plaintiff contends that he should not have to pay the government back for the social security benefits it paid to him between March 1996 and March 1997 because the overpayment was defendant's fault. Plaintiff alleges that he

notified his local Social Security agency in March 1996 that he wanted to trade properties with his mother at that time but an agency representative told him he would have to wait until his file was returned from a different location. According to plaintiff, he traded properties as soon as he could after his file was returned to the local office.

Defendant argues that plaintiff's request for waiver of the overpayment is not properly before this court because plaintiff failed to exhaust his administrative remedies on that issue. I agree. Under 42 U.S.C. § 405(g), a plaintiff must receive a "final decision" from the commissioner before seeking judicial review of his claim. In order to obtain a final decision, a claimant must file a claim and then exhaust his administrative remedies by proceeding through the three stages of the administrative process: reconsideration by the agency, hearing before an administrative law judge and appeal to the Appeals Council. Johnson v. Sullivan, 922 F.2d 346, 348, 352 (7th Cir. 1990).

The evidence before the court shows that plaintiff has not exhausted his administrative remedies with respect to his waiver request. Although plaintiff argued in support of waiver at the administrative hearing and before the Appeals Council, at that time plaintiff had apparently not yet sought an initial determination on his waiver request from his local Social Security office. See 20 C.F.R. § 416.1402(c) (providing that initial determinations include "[w]hether an overpayment of benefits must be repaid"). Plaintiff's submissions show that he did file such a request with his local Social Security office some time after the administrative hearing. However, the record indicates that plaintiff has not exhausted his administrative remedies with respect to his waiver request by completing the

three stages (reconsideration, administrative hearing and Appeals Council review) of the administrative review process.

Although the court may waive the exhaustion requirement, such action is appropriate only where (1) the plaintiff's suit involves a collateral attack rather than one on the merits; and (2) the plaintiff's interest in prompt judicial review is so compelling that deference to the agency's determination is inappropriate. Johnson, 922 F.2d at 352-353 (citations omitted). Neither of these circumstances is present in this case. If this court were to decide whether plaintiff should have to pay back the government the \$6,152 that he was overpaid, it would be determining the merits of plaintiff's waiver request. Furthermore, the court should refrain from ruling on plaintiff's waiver claim without first giving the agency the opportunity to develop the relevant facts and order any relief it deems appropriate.

Plaintiff may have forfeited his right to challenge the agency's initial determination denying his waiver request if he failed to file a Request for Reconsideration by October 26, 2002. If he did, he might still be able to seek reconsideration of the waiver determination if he demonstrates to the agency that he had good cause for missing the deadline to request review. See 20 C.F.R. §§ 416.1409(b); 416.1411. Although determining whether plaintiff had good cause is a decision for defendant to make, I note that plaintiff asserts in his reply brief that he was told by an employee from his local Social Security office that he was unlikely to succeed on his waiver claim because two judges had already found against him. If this assertion is true, it might satisfy the good cause requirement. See 20 C.F.R. § 416.1411(a)(2) (misleading actions by agency may constitute good cause). In the event

plaintiff did not file a timely Request for Reconsideration, he would be well advised to contact his local Social Security office to seek an extension of his deadline for making such a request.

Finally, in his submissions to this court, plaintiff indicates that he is confused by conflicting information that he has received from the Social Security agency regarding the amount of his overpayment. Plaintiff points out that the Appeals Council's order of August 10, 2002, finds that he was overpaid \$6,152, but notices from his local Social Security office on August 27 and November 6, 2002 show that his overpayment balance exceeds \$16,000. Plaintiff also questions what happened to the amounts that already may have been withheld from his SSI benefits to repay the \$1,438 overpayment that was found by the administrative law judge in January 2002.

With respect to plaintiff's first question, it appears that the local Social Security office's records are still showing that plaintiff was overpaid \$18,000 (less amounts that have been withheld from plaintiff's checks) from January 1994 to January 1997 and have not yet been modified to reflect the Appeals Council's finding that plaintiff was overpaid only \$6,152 because of excess resources from March 1996 to March 1997. As for plaintiff's concern about the \$1,438, defendant asserts in her brief that any amounts withheld from plaintiff's SSI benefits to pay that amount should be used to offset plaintiff's overpayment of \$6,152. Thus, from my review of the record and defendant's statement, I conclude that the total amount that plaintiff was overpaid as a result of leaving his homestead without

intending to return to it was \$6,152. Defendant is directed to take whatever steps are necessary to reconcile plaintiff's Social Security record forthwith.

ORDER

IT IS ORDERED that the decision of the defendant Commissioner finding that plaintiff was overpaid \$6,152 in supplemental security income from March 1996 through March 1997 because he owned countable resources during that time period that rendered him ineligible for supplemental security income is AFFIRMED.

Dated this 13th day of December, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge