

United States Court of Appeals
For the First Circuit

No. 83-1013

ROBERTO CARRASQUILLO,
Plaintiff, Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Gilberto Gierbolini, U.S. District Judge]

Before

Campbell, Chief Judge,

Coffin and Breyer, Circuit Judges.

Rafael Carreras Valle on brief for appellant.
Daniel F. Lopez Romo, United States Attorney, with whom
Annette H. Blum, Regional Attorney, and Jennifer S. Eng, Assistant
Regional Attorney, Department of Health and Human Services, on
brief for appellee.

December 15, 1983

PER CURIAM. On February 13, 1980, Roberto Carrasquillo, applied for social security disability benefits, claiming that he was mentally disabled. His claim was denied initially on the ground that he was not disabled. On reconsideration it was denied on the sole ground that he was not insured because he did not meet the earnings requirement. He then requested a hearing before an Administrative Law Judge (ALJ). Later he waived the hearing, and on November 24, 1980 the ALJ determined on the basis of the medical reports submitted that the claimant was disabled, that he met the earnings requirement, and that he was entitled to benefits as of the date he became disabled, October 26, 1979. On August 5, 1981, the Appeals Council sent notice to the claimant that his case was being reopened because it appeared that he did not meet the earnings requirements given in 42 U.S.C. § 416(i)(3)(B) and § 423(c)(1)(B). The Appeals Council granted the claimant's request for additional time to submit new evidence. (There are no indications in the record that such new evidence was submitted.) On January 20, 1982, the Appeals Council issued its decision denying benefits on the ground that the earnings requirement had not been satisfied. This decision became the final decision of the Secretary of Health and Human Services. The district court affirmed that decision and the claimant appeals. Because the Appeals Council did not state sufficient grounds for reopening, and because we cannot determine from the record that there were sufficient grounds for reopening, we remand for further proceedings.

The ALJ's decision does not contain any discussion of the evidence pertaining to the earnings requirement. However, a form signed by the ALJ states, "I find that the disability earnings requirements are met." A form containing the earnings records reveals that the claimant had fifteen quarters of coverage¹ for a thirty-five quarter period beginning with his twenty-first birthday and ending in the quarter when his disability began, and seventeen quarters of coverage for a forty quarter period ending when his disability began. Under 42 U.S.C. § 423(c),² the claimant

1. Quarters of coverage are explained in 20 C.F.R. § 404.140 et. seq.

2. 42 U.S.C. § 423(c) provides in relevant part,

(c) For purposes of this section--

(1) An individual shall be insured for disability insurance benefits in any month if--

(A) he would have been a fully insured individual (as defined in section 414 of this title) had he attained age 62 and filed application for benefits under section 402(a) of this title on the first day of such month, and

(B)(i) if he had not less than twenty quarters of coverage during the forty-quarter period which ends with the quarter in which such month occurred, or

(ii) if such months ends before the quarter in which he attains (or would attain) age 31, not less than one-half (and not less than 6) of the quarters during the period ending with the quarter in which such month occurred and beginning after he attained the age of 21 were quarters of coverage, or (if the number of quarters in such period is less than 12) not less than 6 of the quarters in the 12-quarter period ending with such quarter were quarters of coverage

Also see the similar provisions of 42 U.S.C. § 416(i)(3).

needed seventeen quarters of coverage for the thirty-five quarter period,³ or twenty quarters of coverage for the forty quarter period. Thus the earnings record did not show that the claimant had the number of quarters of coverage required to meet the earnings requirement. When the Appeals Council reopened over eight months after the ALJ's decision, it noted that the earnings record showed no quarters of coverage credited for 1973 and 1974, and one quarter credited for the third quarter of 1977, in addition to quarters of coverage credited for other years which are not at issue here. When it reopened, the Appeals Council refused to credit the claimant with any quarters of coverage for 1973 and 1974 and deleted the quarter of coverage for 1977.

The Appeals Council reopened apparently because of the discrepancy between the ALJ's decision and the earnings record. However, the Secretary's regulations determine when reopening may occur. We are uncertain that there were proper grounds contained in the regulations for reopening here. We question whether the regulations cited by the Appeals Council are applicable, and even if they are applicable, they do not appear to provide adequate grounds for reopening in this instance.

The Appeals Council stated that it was reopening "under the authority of [20 C.F.R.] section 404.988(b)." That regulation states, "A determination, revised determination, decision, or revised decision may be reopened ... (b) [w]ithin four years of the

3. Under 20 C.F.R. § 404.130(c)(3)(i), if the number of quarters in the period from the claimant's birthday until his disability is an odd number, that number is reduced by one. Thus the claimant here can meet the "one-half" requirement of 42 U.S.C. § 423(c)(1)(B)(ii) with seventeen quarters of coverage.

date of the notice of the initial determination if we find good cause, as defined in § 404.989, to reopen the case." Section 404.989(a) lists three grounds for finding "good cause": "(1) New and material evidence is furnished; (2) A clerical error in the computation or recomputation of benefits was made; or (3) The evidence that was considered in making the determination or decision clearly shows on its face that an error was made."

We doubt that § 404.989 applies, however, for the reason that a different regulation, § 404.990, specifically governs the type of reopening here at issue, namely, a reopening for "revision of an earnings record." Section 404.990 states,

A determination or a decision on a revision of an earnings record may be reopened only within the time period and under the conditions provided in [42 U.S.C. § 405(c)(4) or (5)] section 205(c)(4) or (5) of the Act, or within 60 days after the date you receive notice of the determination or decision, whichever is later.

Here, since the reopening occurred after the expiration of the time limitation of three years, three months, and fifteen days following the year in question, 42 U.S.C. § 405(c)(5) would apply. Ten grounds are stated in § 405(c)(5) under which the "Secretary may change or delete any entry with respect to wages or self-employment income in his records" These grounds differ from the "good cause" grounds stated in 20 C.F.R. § 404.989(a). If, as the Secretary argues, § 404.988(b) and § 404.989(a) permit the Appeals Council to reopen to revise the earnings record, then many of the narrower grounds stated in § 405(c)(5) are superfluous. Thus, it seems that

§ 404.990 is meant to supplant the more general reopening provision, § 404.988; otherwise much of it would be meaningless. For this reason too, the particular provision of § 405(c)(5)(A) would not appear to permit the incorporation of any of the grounds stated in § 404.988(b). See Lasch v. Richardson, 457 F.2d 435, 437-439 (7th Cir.), cert. denied, 409 U.S. 889 (1972).⁴

Whether 20 C.F.R. § 404.990 applies here depends on whether the Appeals Council made a "revision of the earnings record." Clearly the Appeals Council revised the earnings record upon reopening when it deleted from the earnings record a quarter of coverage for the third quarter of 1977. It is not immediately apparent that it revised the earnings record for any of the eight quarters in 1973 and 1974 when it refused to credit the claimant with any quarters of coverage for those years. Still, we think that the Appeals Council effectively revised the earnings record for 1973 and 1974, because the ALJ's finding, stating that the claimant met the earnings requirement, by implication credited the claimant with some quarters of coverage for 1973 and 1974.

At the time the ALJ made her decision the earnings record showed no quarters of coverage for 1973 and 1974. The claimant's file contained conflicting evidence of the claimant's earnings in those years. A representative of the claimant's employer, Pastelillos Rico, Inc.

4. 42 U.S.C. § 405(c)(5)(A) permits the Secretary to revise an earnings record "(A) if an application for monthly benefits or for a lump-sum death payment was filed within the time limitation following such year; except that no such change, deletion, or inclusion may be made pursuant to this subparagraph after a final decision upon the application for monthly benefits or lump-sum death payment." The Secretary here argues that a reopening under 20 C.F.R. § 404.955, 404.987 and 404.988 removes a prior final decision, thus permitting reopening on grounds contained in § 404.988(b) to revise the earnings record under § 405(c)(5)(A).

completed and signed a form dated March 11, 1980, which shows that the claimant had no earnings in 1973 and 1974. Another representative of the same employer, an owner whom the Appeals Council identified in its decision as the claimant's father, completed and signed a form dated October 1, 1980, which shows that the claimant earned \$240 in each quarter of 1973 and 1974. The claimant signed a statement dated June 6, 1980, which states that he did not work during the years at issue, 1973, 1974 and 1977. It follows from the ALJ's finding stating that the claimant met the earnings requirement that she resolved the conflicting evidence in the claimant's favor and credited the claimant with enough quarters of coverage in 1973 and 1974 to enable him to meet the earnings requirement. This means that she credited the claimant with at least two quarters of coverage for those two years. Thus her finding implies that she had, in effect, revised the earnings record to reflect additional quarters of coverage credited for 1973 and 1974.⁵ As far as we can determine, that this revision was not actually recorded on the earnings record may indicate nothing more than a clerical error. When the Appeals Council reopened and did not give the claimant any quarters of coverage for 1973 and 1974, it in effect revised the earnings record by deleting those quarters of coverage for 1973 and 1974 credited by the ALJ. Thus, it would seem that 20 C.F.R. § 404.990 which governs such revisions in the earnings record applies both to the Appeals Council's deletion of the 1977 quarter of coverage which had been credited on the earnings record before the ALJ made her decision, and to its refusal to give the claimant credit for any quarters of coverage in 1973 and 1974.

5. Such revision would be permitted under 42 U.S.C. § 405(c)(5)(H).

The only plausible ground under 20 C.F.R. § 404.990 and 42 U.S.C. § 405(c)(5) we can find for reopening to revise the earnings record is under § 405(c)(5)(C) "to correct errors apparent on the face of such records."⁶ The exact meaning of this provision as applied here is not apparent on its face. For guidance in interpreting it we turn to 20 C.F.R. § 404.822(e)(2) pertaining to the correction of earnings records, after the expiration of the time limit of three years, three months, and fifteen days, for an "[e]rror apparent on face of records." That provision states, "We may correct an earnings record to correct errors, such as mechanical or clerical errors, which can be identified and corrected without going beyond any of the pertinent SSA records" (emphasis added).⁷ Without going

6. Section 405(c)(5)(G) is not applicable. See Craig v. Finch, 416 F.2d 721, 724 (5th Cir. 1969), cert. denied, 397 U.S. 953 (1970). The Appeals Council did not allege, and the Secretary here does not assert, that there was an error "as a result of fraud." See 42 U.S.C. § 405(c)(5)(E).

7. We do not assume that 20 C.F.R. § 404.822(e) directly applies to reopening a decision on a revision of an earnings record, but we find it useful as a guide for interpreting the phrase, "errors apparent on the face," and similar phrases as they appear in the Secretary's regulations and in 42 U.S.C. § 405(c)(5)(C). (See the discussion below of 20 C.F.R. § 404.822[e][1].) Cases construing the reopening provisions of 20 C.F.R. § 404.989(a)(3) and related earlier regulations--see 20 C.F.R. § 404.958(c) and § 404.957(c)(3)(1980)--which permit reopening when the evidence "clearly shows on its face that an error was made," have indicated or held that these provisions do not permit reopening to reexamine conflicting evidence. See Green v. Weinberger, 500 F.2d 203, 206 (5th Cir. 1974). Also see Munsinger v. Schweiker, 709 F.2d 1212, 1215 (8th Cir. 1983); Hunt v. Weinberger, 527 F.2d 544, 548 (6th Cir. 1975); Ortego v. Weinberger, 516 F.2d 1005, 1017 (5th Cir. 1975); Lauritzen v. Weinberger, 514 F.2d 561, 563 (8th Cir. 1975); Grose v. Cohen, 406 F.2d 823, 825-826 (4th Cir. 1969).

beyond the records, we can see that there is a conflict between the list of the quarters of coverage credited on the earnings record and the ALJ's finding that the claimant met the earnings requirement. We do not know, however, how to correct whatever error may have occurred without going beyond the records. In making her finding, the ALJ had to resolve conflicting evidence pertaining to the claimant's earnings in 1973, 1974 and 1977. Her resolution of that conflict was not unreasonable on the face. Although the claimant signed a statement saying that he did not work in those years, the ALJ had to consider his credibility in view of her finding that he was mentally disabled at the time he signed the statement. Her resolution of that conflict in the evidence cannot be altered under 42 U.S.C. § 405(c)(5)(C).

Of course, it may be that the conflict between the earnings record and the ALJ's finding was only a clerical error. If so, such an error could be corrected by changing the earnings record to give such credit as determined by the ALJ. But we cannot say that the face of the records indicates that the ALJ was simply mistaken in making her finding that the earnings requirement had been met or that she had actually not given the claimant any credit for quarters of coverage in 1973 and 1974. Thus, § 405(c)(5)(C) did not give the Appeals Council a ground for correcting the records adversely to the claimant.

Even if 20 C.F.R. § 404.988(b) were to apply here to reopening, we see no clear ground under that provision for the Appeals Council

to effectively delete the quarters of coverage impliedly credited by the ALJ for 1973 and 1974. The Secretary argues that the Appeals Council could reopen under 20 C.F.R. § 404.988(b) because "good cause" had been found under § 404.989(a)(1) consisting of new and material evidence. Assuming, arguendo, that § 404.988(b) applies, there was no new evidence (i.e., submitted after the ALJ's decision) in the claimant's file pertaining to the claimant's earnings in 1973 and 1974. The only new evidence pertained to the claimant's earnings in 1977. Thus, even if § 404.988(b) is applicable, there would have been grounds under § 404.989(a)(1) to reopen only the decision pertaining to the one quarter of coverage credited for 1977.

The only other arguably applicable ground under the "good cause" provisions of § 404.989(a) is § 404.989(a)(3): "The evidence that was considered in making the determination or decision clearly shows on its face that an error was made." The result under this provision would be the same as the "errors apparent on the face" provision of 42 U.S.C. § 405(c)(5)(A), considered above.

Although the Secretary does not argue here that the Appeals Council had grounds for reopening under 20 C.F.R. § 404.822(e)(1), we will also consider this provision because the Appeals Council mentioned this regulation in its decision. It provides in part, "We may correct an earnings record if the correction is made as the result of an investigation started before, but completed after the time limit ends." The time limit of three years, three months, and fifteen days for the year 1977 expired on April 15, 1980. The

claimant applied for benefits in February of 1980, and some information pertaining to his 1977 earnings appears in the file with dates as early as March, 1980. Assuming without deciding that there was an "investigation" begun prior to April 15, 1980, we do not believe that this provision permitted any corrections after the ALJ's decision. After that final decision, the regulations pertaining to reopening apply. The reopening provisions of 20 C.F.R. § 404.990 explicitly makes applicable not 20 C.F.R. § 404.822 but 42 U.S.C. § 405(c)(4) or (5). The provisions of 20 C.F.R. § 404.822(e)(1) do not appear in 42 U.S.C. § 405(c)(4) or (5). (Nor do they appear in 20 C.F.R. § 404.987.-989.) Additionally, even if 20 C.F.R. § 404.822(e)(1) could be construed to apply, it would apply only to corrections for the year 1977 and not to corrections for 1973 and 1974. For 1973 and 1974 the time limit expired long before there was any indication in the records of any investigation.

We conclude that there were no grounds apparent from the record for reopening the claim to delete any quarters of coverage impliedly credited by the ALJ for 1973 and 1974 and for reversing the ALJ's finding that the claimant met the disability earnings requirement. Under 20 C.F.R. § 404.990, there appear to be no grounds for revising the earnings record in this case for any of the three years, 1973, 1974 and 1977.

Despite our conclusions, we do not order a reversal of the Secretary's decision because the reopening issues were not fully briefed or fully argued before us. And, in such technical matters the Secretary's views about her own regulations should be taken into

account. Therefore we shall remand this case to the district court with instructions to remand to the Secretary so that the Secretary can determine whether there are other, proper grounds for reopening, if any such grounds exist.

If the Secretary determines there were proper grounds for reopening, we have additional concerns about the treatment of this case. We note that the Appeals Council's notice of reopening of August 5, 1981, stated that it appeared that the claimant did not meet only the "under-age-31" earnings requirement, stated in 42 U.S.C. § 423(c)(1)(B)(ii). The plain language of § 423(c)(1)(B) clearly indicates that a person under 31 years old may be insured if he meets either the "under-age-31" requirement or the "20 of 40" requirement of § 423(c)(1)(B)(i). See also 20 C.F.R. § 404.130. The claimant should be properly and correctly notified of the applicable statutory and regulatory provisions if reopening occurs.

We are also concerned that the Appeals Council's only stated ground for not crediting the claimant with quarters of coverage for 1973 and 1974, and for deleting the quarter of coverage for 1977, was that the claimant had signed statements saying that he did not work during those periods. We are concerned about the soundness of giving the claimant's statement such weight. The claimant had been found to be mentally disabled during the time when he signed the statements, and the Appeals Council made no findings pertaining to the mentally disabled claimant's ability in 1980 and 1981 to accurately and truthfully report his employment in 1973, 1974 and 1977.

We vacate and remand to the district court with instructions to remand to the Secretary for further proceedings not inconsistent with this opinion.