1989 WL 91865
United States District Court, N.D. Illinois, Eastern Division.

William JONES, et al., Plaintiff,
v.
Louis W. SULLIVAN, M.D., Defendant.

No. 87 C 7419. | Aug. 8, 1989.

Opinion

MEMORANDUM OPINION AND ORDER

CONLON, District Judge.

***1** Plaintiffs are applicants, and their dependents and survivors, who were or will be denied original social security numbers ("SSNs"), new SSNs or duplicate cards without notice or the opportunity to contest the denial, and who have not obtained original SSNs, new SSNs or duplicate cards as of July 21, 1988, the date this class action was certified. They filed this case against the Secretary of Health and Human Services challenging the Secretary's process of denying SSN applications allegedly without affording notice, hearings, written final decisions explaining the denials of SSNs, or an opportunity to appeal the denial. Federal jurisdiction is invoked under 28 U.S.C. § 1361, 42 U.S.C. § 405(g) and the due process clause of the Fifth Amendment of the United States Constitution. The parties have filed cross-motions for summary judgment.

BACKGROUND

The Social Security Act ("the Act") provides for the assignment of SSNs to maintain accurate wage earning records in the administration of various social security programs. *See* 42 U.S.C. § 405(c)(2–5). The Act directs the Secretary to establish and maintain records of wages and to assign social security account numbers to all eligible workers. 42 U.S.C. § 405(c)(2)(B)(i). The Secretary may also issue replacement SSN cards and new SSNs to correct account earnings that are scrambled with the wage information of another worker. The Act empowers the Secretary to make rules and regulations and to establish procedures necessary to the administration of benefits. 42 U.S.C. § 405(a), (c)(2)(A)–(D).

Plaintiffs challenge the manner in which the Secretary denies or refuses to grant applications for initial SSNs, replacement SSN cards and different SSNs to correct scrambled account earnings. They maintain the Secretary fails to provide written notice of the reasons for denials, hearings to contest denials, or final written administrative decisions necessary for judicial review. They claim that this policy violates the Act, 42 U.S.C. § 405, and the due process clause of the Fifth Amendment to the United States Constitution.

The SSN Policy

The Act authorizes the Secretary to require SSN applicants to produce

such evidence as may be necessary to establish the age, citizenship, or alien status, and true identity of such applicants, and to determine which (if any) social security number has previously been assigned to such individual.

42 U.S.C. § 405(c)(2)(B)(ii). The regulations require applicants to complete a SSN application form and to furnish evidence of age, citizenship or alien status, identity, and previously assigned SSNs. 20 C.F.R. § 422.103, 422.107. Applicants under 18 may mail the application and evidence or appear in person at any Social Security Administration ("SSA") office. Applicants 18 years old and older must appear for an in-person interview. Secretary's statement of material facts ¶¶ 2, 3.

At the SSA office, a field office employee reviews the application and evidence. There appears to be no consistent or uniform procedure for review. The review may be conducted by service representatives, claim representatives, operation supervisors, assistant branch managers, branch managers, assistant district office managers, and district office managers. Plaintiffs' statement of material facts at ¶ 17. Field office management may extend review authority to other employees. Secretary's response at ¶ 17. A complete application supported by acceptable evidence is certified for processing by an employee authorized to conduct the mandatory in-person interview. An SSN is not assigned or a duplicate or corrected card issued unless all evidence requirements are met. 20 C.F.R. § 422.107(a).

***2** Refusals to issue SSNs are not expressly subject to administrative or judicial review. *See* 20 C.F.R. § 404.902. When an application cannot be processed, the local SSA office returns the application and identification information to the applicant. The Secretary contends that applicants are verbally advised of the additional evidence necessary to process their applications. *See* Declaration of Jack Gallagher ¶ 12. An applicant may request an explanation either at the time of the interview or in writing. The SSA may use forms to request additional

evidence to process the application. *See* Secretary's response at ¶ 18. The forms used do not state that an applicant is entitled to formal administrative or judicial review. *See* Gallagher Decl. at ¶ 2. The written notices merely advise an applicant that he or she may reapply. Secretary's response to plaintiffs' statement of material facts ¶ 24. The applicant may submit additional documentation and resubmit his or her application and evidence at any time. Secretary's statement of material facts at ¶ 4. The Secretary does not keep records of the number of denied SSN applications. Secretary's response to plaintiffs' first set of interrogatories at 5.

Plaintiffs contend that the Secretary's system affords them no procedural protections. Unless the applicant requests written notice of the reason a SSN application cannot be processed, the applicant is not advised that he or she may reapply. Unsuccessful applicants therefore are not given the opportunity to appeal or present evidence before an impartial adjudicator. Because they are not given a final decision, applicants cannot seek judicial review. Under the present system, plaintiffs maintain they have nowhere to go when they are denied SSNs.

DISCUSSION

A party is entitled to summary judgment where the pleadings, depositions, answers to interrogatories and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.,* 447 U.S. 242, 248 (1985).

Standing

The Secretary contends that plaintiffs have failed to satisfy constitutional standing requirements. The Secretary points to several discrepancies or omissions in the evidence submitted by plaintiffs in support of their applications to suggest they were rightfully denied SSNs, new SSNs, or duplicate cards. Rule 56(f) Declaration of Felicia L. Chambers. Plaintiffs cannot challenge the validity of eligibility standards for benefits, the Secretary argues, when they are ineligible for benefits. The Secretary requests that the complaint be dismissed or that he be permitted to conduct additional discovery to resolve the discrepancies.

Plaintiffs do not challenge the Secretary's eligibility standards. Whether or not each plaintiff was entitled to an SSN, a new SSN, or duplicate card, each was entitled to procedural rights under the Act and under the Constitution. Due process attaches to a claim of entitlement, not to the successful demonstration of entitlement. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 412 (1982); *Jones v. Bowen,* 692 F.Supp. 887, 891 (N.D.Ill.1988).

***3** Although some applicants may have received an explanation why their applications could not be processed (see Secretary's memo. at 19), notice is not routinely provided. There is no requirement that an applicant be given a written explanation. Plaintiffs' statement of material facts at ¶ 19. Applicants are not given the opportunity to contest the non-issuance of a SSN, new SSN or duplicate card. *Id.* at ¶ 20. Because plaintiffs cannot contest these determinations before the SSA, and they have no opportunity for judicial review, they have standing to challenge the Secretary's procedure.

Standing of Class Representatives

Representatives William Jones and Jeanette Poe were dismissed as plaintiffs on July 21, 1988 because they received SSN's prior to the filing of the complaint and prior to the certification date. *See* Memorandum Opinion and Order, July 21, 1988, at 2 n. 2, 10–11. Gloria Coe was dismissed on October 3, 1988 because she obtained a duplicate social security card prior to certification of the class on July 21, 1988. *See* Memorandum Opinion and Order, October 3, 1988, at 1. The Secretary claims that German Poe also must be dismissed from this case because he obtained a new SSN in September 1987. Secretary's memo. at 20 n. 14.

Because the judicial power of Article III courts extends only to live cases and controversies, a named plaintiff generally must have a justiciable claim at the time the complaint is filed and at the time the class action is certified by the district court. *See Sosna v. Iowa,* 419 U.S. 393, 402 (1974); *Davis v. Ball Memorial Hospital Ass'n, Inc.,* 753 F.2d 1410, 1420 (7th Cir.1985). In cases where a continuing controversy may become moot as to the named plaintiffs before the class is certified—and the issue thereby would evade review—certification may be deemed to relate back to the filing of the complaint. *Sosna v. Iowa,* 419 U.S. at 402 n. 11.

Plaintiffs contend their claim will continually evade review if declared moot merely because a particular plaintiff has received an SSN. They argue that the date of class certification should not control mootness, and that class certification should relate back to the date the complaint was filed.

The Secretary has moved to dismiss four class representatives on the ground that their alleged injury was cured prior to the date the class was certified. The sequential dismissal of three plaintiffs to date suggests

that this case may evade review if certification of this class does not relate back to the filing of the complaint.

This case was filed on August 24, 1987. German Poe obtained a new SSN in September 1987. Poe's Inter. Answer No. 2. Because German Poe was properly included in the class at the time the complaint was filed, he may remain a class representative. Gloria Coe, previously dismissed because she obtained a duplicate card in October 1987, is reinstated as a class representative. William Jones and Jeanette Poe were correctly dismissed because their SSN's were issued prior to the filing of the complaint.

***4** The Secretary also contests Francisco Noe's standing as a class representative. On June 28, 1989, plaintiffs were granted leave to file a corrected statement of material facts and an amended affidavit with supplemental answers of Francisco Noe. The Secretary argues that the factual matters addressed in these filings bear directly on the issue of standing. Specifically, Noe has made conflicting factual representations under oath throughout this litigation concerning when and where he was born, when he applied for a social security number and when he received an SSN card.

Plaintiffs' counsel maintains it was necessary to alter Noe's sworn statements because Noe speaks only Spanish and it is difficult to communicate with him, he has no telephone, he is easily confused and has difficulty remembering when he came to the United States and when he first received an SSN. Plaintiffs' motion to file amended factual submissions ¶¶ 3, 4.

The basic inconsistencies in Noe's sworn statements raise serious doubt concerning his identity. Moreover, the purported reasons for the inconsistencies establish that Noe is incapable of adequately and vigorously protecting the interests of the entire class. *See* Fed.R.Civ.P. 23(a)(4). He cannot serve as a class representative. It is unnecessary to determine at this time whether Noe is in fact a member of the class.

Francisco Noe is dismissed as a representative plaintiff. The Secretary's request that German Poe be dismissed is denied. That portion of the October 3, 1988 order dismissing Gloria Coe is vacated. Gloria Coe is reinstated as a representative plaintiff.

Procedural Claims

Plaintiffs contend there is no genuine issue of fact that the Secretary fails to provide formalized administrative review procedures for determinations not to issue SSNs. They argue that the court must determine only whether an SSN applicant is entitled to notice of the reasons for denial of an SSN, a hearing to contest denial and a written decision after the hearing. Plaintiffs maintain that the Secretary's lack of formalized administrative review procedures violates both the Social Security Act, 42 U.S.C. § 405(c) and (g), and the due process clause of the Constitution.

42 U.S.C. § 405(c) empowers the Secretary to establish and maintain wage records, to take affirmative measures to assure that SSNs are appropriately assigned, and to require applicants to produce evidence of identification. It further provides:

Decisions of the Secretary under this subsection shall be reviewable by commencing a civil action in the United States district court as provided in subsection (g) of this section.

42 U.S.C. § 405(c)(8). Subsection (g) provides for judicial review of "any final decision of the Secretary made after a hearing...." 42 U.S.C. § 405(g).

Decisions to assign, or not to assign, SSNs are made under 42 U.S.C. § 405(c)(2). Because they are "[d]ecisions of the Secretary under [405(c)]," the statute provides that they are reviewable in district court. 42 U.S.C. § 405(c)(8). Subsection (c)(8) of Section 405 does not differentiate the Secretary's decisions made under that subsection. Therefore, the Secretary's decision not to issue a SSN, new SSN, or duplicate card is subject to judicial review under the statute.

***5** The Secretary does not address the application of 42 U.S.C. § 405(c)(8) to SSN decisions. Instead, the Secretary claims that the denial or non-issuance of an SSN is not subject to judicial review under 42 U.S.C. § 405(g) because it is not a "final decision of the Secretary made after a hearing...." Secretary's response to plaintiffs' second set of interrogatories at 7, 11, 15.

The term "final decision" is not defined in the Act or the regulations. However, the regulations distinguish between "initial determinations" and other actions. Initial determinations are subject to administrative review by the Secretary, an administrative law judge, and the Appeals Council. 20 C.F.R. § 404.902, .907–.914, .929–.961, .967–.981. The decision of the Appeals Council, or the ALJ's decision if the request for review by the Appeals Council is denied, constitutes the final decision of the Secretary and may be reviewed in a federal district court. 20 C.F.R. § 404.981.

Actions not deemed initial determinations are subject only to reconsideration by the SSA. 20 C.F.R. § 404.903. They are not subject to formal administrative or judicial review. *See* 20 C.F.R. § 404.902–.903. Examples of both initial determinations and other actions are set forth in the regulations. *Id.* The decision not to issue or to deny an application for an SSN, new SSN, or duplicate card is not

included in either list.

Although refusals to process SSN applications are not characterized as final decisions of the Secretary, or initial determinations expressly subject to judicial review, in reality they are administratively final. An unsuccessful applicant cannot have a determination reviewed. The applicant may resubmit the application and evidence of identification to another field office employee in hope of obtaining a different result based upon impliedly inconsistent practices and subjective standards among SSA employees. *See* Secretary's memo. at 2. Because unsuccessful applicants have gone as far as they can go within the SSA, the decision not to process or to deny an application must be deemed a final decision within the meaning of the Act. *See Atty. Registration & Disciplinary Commission v. Schweiker,* 715 F.2d 282, 288–89 (7th Cir.1983).

If a determination not to process a SSN application constituted an initial determination, applicants would be required to go through the remaining administrative review steps before they could obtain a final decision of the Secretary within the meaning of 42 U.S.C. § 405(g) and proceed in court. However, the Secretary maintains that the decision not to process a SSN application is administratively final. If the applicant asked for a hearing or attempted to have the decision reviewed within the SSA, the applicant would be turned down. Under similar factual circumstances, the Seventh Circuit has ruled that administrative action is a final decision within the meaning of 42 U.S.C. § 405(g), and that the informal hearing that preceded the action was all that the statute required for judicial review. *See Atty. Registration & Disciplinary Com'n v. Schweiker,* 715 F.2d at 288–89.

***6** The Secretary maintains that a review procedure is unnecessary because errors in processing an application may be corrected by merely presenting the same application and supporting evidence to another SSA employee and perhaps obtaining a different result. Secretary's memo. at 2–3. The Secretary's argument reinforces the fundamental arbitrariness of his present procedures. Moreover, rejected applicants are not formally advised they may seek endless "second opinions" from other SSA employees. Only those applicants who request written notice of the denial of their application are routinely advised that they may reapply. *See* Secretary's response to plaintiffs' statement of material facts ¶ 24.

Section 405(c)(8) obligates the Secretary minimally to articulate in writing reasons for the denial or non-issuance of SSNs, new SSNs, or duplicate cards. Since the reasons for these decisions generally fall into a limited number of reoccurring categories, a form checklist of routine reasons with a space for insertion of atypical reasons may serve as adequate notice, along with written advice that an applicant may either resubmit the application and supporting evidence for reconsideration, or seek judicial review under Section 405(g).

The Secretary argues that the value of the additional procedures sought is outweighed by the cost of providing the procedures. *See* Secretary's memo. at 2–3. The Secretary claims that implementation of formal administrative review rights for unsuccessful SSN applications would cost $5,378,100 annually for the Chicago region. *See* Declaration of Jack Gallagher ¶ 5. This figure is based on actual data from the SSA's administrative cost accounting system on the cost of administrative review of far more complex social security benefits decisions. *Id.* Approximately eighty-seven percent of the purported cost, or $4,692,900, represents the estimated cost for reconsiderations by the SSA, hearings conducted by an administrative law judge, and consideration by the Appeals Council. *Id.* at ¶ 6. These costly, formalized administrative review procedures are not appropriate or required for adverse SSN decisions by 42 U.S.C. § 405(c) or (g), the regulations, or this opinion.

Plaintiffs maintain that the statutory claim affords them all the relief they seek and that it is unnecessary for the court to decide the due process claim. Plaintiffs' response to the Secretary's motion at 4 n. 3. This comports with the sound judicial policy of avoiding unnecessary decision of constitutional issues. *See Mills v. Rogers,* 457 U.S. 291, 305 (1981); *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 294 (1982). The court need not reach plaintiffs' due process claim.

CONCLUSION

Francisco Noe is dismissed as a representative plaintiff. The portion of the October 3, 1988 order dismissing Gloria Coe as a representative plaintiff is vacated; Gloria Coe is reinstated as a class representative. The Secretary's request that German Poe be dismissed is denied.

***7** The Secretary's motion for summary judgment is denied. Plaintiffs' motion for summary judgment is granted. Judgment is entered in favor of plaintiffs and against the Secretary. The Secretary's failure to provide written reasons for adverse SSN decisions and notice of the right to appeal his decisions violates 42 U.S.C. § 405(c) and (g).

Parallel Citations

Unempl.Ins.Rep. (CCH) P 14913A