

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PHYLLIS W. MARTIN,

Plaintiff,

v.

CIVIL ACTION NO. 85-0080-R
Magistrate's No. 85-0017-L

OTIS R. BOWEN, Secretary of
Health and Human Services,

Defendant.

M E M O R A N D U M A N D O R D E R

Plaintiff brings this action to review the decision of the Secretary of Health and Human Services not to waive recovery of a \$7,276.40 overpayment of mother's insurance benefits made to plaintiff under Title II of the Social Security Act. The United States Magistrate to whom this matter was referred has filed his memorandum recommending that summary judgment be entered for plaintiff, absolving her of liability, and defendant has filed his objections thereto. For the reasons which follow, defendant's objections will be overruled and the magistrate's memorandum will be accepted in its entirety.

Plaintiff filed an application for wife's benefits in 1975.¹/ At the same time, she filed an application for children's benefits on behalf

¹/The facts will be only briefly summarized. A more detailed statement is contained in the magistrate's memorandum.

of her three children. Three months later, the Secretary notified her that none of the benefits she received would be hers. Rather, they were "for the use and benefit of the other family members" The evidence is that plaintiff spent all monthly allotments in accordance with the Secretary's instructions.

In 1982, the Secretary notified plaintiff, for the first time, that some of the money she had been receiving belonged to her for her own use and that she had been overpaid her share because of her excess earnings in 1978. Plaintiff protested that she had understood the payments were for her children and that the Secretary had informed her she was not receiving any benefits. In 1983, the Secretary sent plaintiff a further notice that she had been overpaid benefits for 1977-1982 because of her excess earnings during those years. Accordingly, the Secretary moved to collect the amount of the overpayment from plaintiff.

Both the Administrative Law Judge and the Appeals Council found that plaintiff was without fault in causing the overpayment. Unlike the Administrative Law Judge, however, the Appeals Council declined to find that recovery would be "against equity or good conscience," a finding necessary to obtain waiver of the overpayment. 42 U.S.C. § 404(b).

The magistrate concluded that the Secretary had misled plaintiff into believing that the payments she was receiving belonged entirely to her children and that she had no right to use them for anything other than for their "use and benefit." Based upon a de novo review of the record, it is apparent that the conclusion is inescapable.

The Administrative Law Judge, in evaluating the evidence, found:

[T]his is a clear situation of the occurrence of unusual or unavoidable circumstances the nature of which clearly shows that the individual was unaware of a violation of the deduction provisions which are applicable [T]here was no way for her to determine from checks received that benefits payable to her children, as well as reduced mother's insurance benefits, were included. (TR 87).

The Appeals Council adopted this finding.^{2/} The only "unusual or unavoidable circumstance" that appears in the record is the issuance of the August 8, 1975, award certificate informing plaintiff that she was not entitled to receive payments as a widow and that any future increase in family benefits would belong solely to her children.^{3/}

Next, the magistrate concluded that all payments received should be treated exactly as directed by the Secretary - solely for

^{2/}Unlike the Administrative Law Judge, however, the Appeals Council found that recoupment of overpayments would not be against equity and good conscience. It is the decision of the Appeals Council on this issue which is before the Court. See, e.g., *Kellough v. Heckler*, 785 F.2d 1147, 1149-1151 (4th Cir. 1986).

^{3/}The certificate stated:

. . . [Y]our benefit amount is not now payable because of your work and earnings. However, the benefits due other members of your family should be increased so that they still receive the maximum amount payable on this record. To save administrative costs, the law permits us to pay the family's increase to you. But it is for the use and benefit of the other family members and is not considered your income. (TR 59).

the use and benefit of the children. He analyzed the language of the award certificate, the manner in which plaintiff treated the payments and the failure of the Secretary to notify plaintiff at any time that the "mother's benefits" she was receiving included income to her. The magistrate reasoned that a trust resulted and that plaintiff's liability should be limited to the liability of a trustee to the settlor of a trust. He concluded that there should be no liability because plaintiff complied with the directives of the Secretary by spending the funds solely for the benefit of her children.

Defendant objects first that the Secretary's instructions that the funds were solely "for the use and benefit" of her children^{4/} were insufficient to create an express trust. Second, he objects that the Secretary has no authority to create an express trust and, third, that even if a trust existed, plaintiff remained personally liable to the Secretary for overpayments.

Defendant's objections miss the mark. The type of trust to which the magistrate made reference was not an express trust. It was an implied trust. The distinction renders meaningless most of counsel's argument:

Express trusts depend for their existence on the intent of a property owner which is directly and expressly stated. Implied trusts, on the other hand, either depend on implied or presumed intent of a property owner or are not concerned with intent at all.

^{4/}The document actually refers to the "use and benefit of the other family members." (TR 59). The record discloses the other family members are her children.

The phrase "resulting trust" has been employed generally to cover cases where the court decrees a property holder to be a trustee, either because it finds there has been an implied intent that he be such or because of a presumed or fictional intent [Footnote omitted]

G. Bogart, Law of Trusts, § 71 at 262 (5th Ed. 1973).

Here the Secretary induced a reasonable belief by the plaintiff that all "mother's benefits" she would receive were to be held in trust for her children. The certificate of award identified the type of benefits which were not to be considered hers as "mother's." (TR 59). While there may have been increases in the amounts of the benefits she received, she was never advised that any increase was attributable to her eligibility for wife's, widows, or other benefits. Both the Administrative Law Judge and the Appeals Council held that fact significant in finding that plaintiff was "without fault" in receiving overpayments. Under the circumstances, it is entirely appropriate to imply that a trust was created and that the funds plaintiff received should be treated not as hers, but as the funds of the children. Further, any overpayments were not induced by plaintiff, but by the Secretary. Under such circumstances, it would offend both equity and good conscience to require plaintiff to repay benefits from which she received no personal benefit and which were spent entirely in accordance with instructions emanating from the Secretary. Cf. Rini v. Harris, 615 F.2d 625, 627 (5th Cir. 1980)(where Secretary induces plaintiff to accept overpayment, recovery of overpayment denied).

As an alternate ground to deny recovery, the magistrate suggested that the Secretary had failed to consider the applicability

of two of his own regulations to this case. 20 C.F.R. § 404.510 provides that an individual will be considered without fault if acceptance of overpayments was due to:

(b) Reliance upon erroneous information from an official source within the Social Security Administration (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits under title II of the Act) with respect to the interpretation of a pertinent provision of the Social Security Act or regulations pertaining thereto.

20 C.F.R. § 404.512(a) provides:

When adjustment or recovery of an overpayment will be waived.

(a) Adjustment or recovery deemed "against equity and good conscience." In the situations described in §§ 404.510(a), (b), and (c), and 404.510a, adjustment or recovery will be waived since it will be deemed such adjustment or recovery is "against equity and good conscience."

Counsel argues that § 404.510(b):

Does not apply to routine award notices, such as at issue here, because it is not deemed inequitable to recover an overpayment made to a claimant incorrectly informed of entitlement; rather, the individual must show that he has relinquished a valuable right or changed his position for the worse. See 20 C.F.R. § 404.509 and the reference to a notice therein. [Emphasis added]

Assuming arguendo that § 404.510(b), and therefore § 404.512(a), does not apply to routine award notices, counsel's suggestion that the certificate of award in this case was a routine notice is a gross misstatement of the record. Both the Administrative Law Judge and the Appeals Council found that plaintiff was without fault in accepting the overpayments because of the unusual circumstances of this case - i.e., the misleading nature of the certificate of award. The certificate did

not purport to simply advise her she had been awarded benefits in a specific sum. It told her that "mother's benefits" payments and any increases in "mother's benefits" in the future belonged solely to her children and not to her.

Counsel further argues that § 404.510(b) is not applicable because the misleading information was not furnished in response to a direct inquiry from her requesting an interpretation of a regulation. Counsel cites no authority for his argument. There is nothing in the regulation requiring that the misleading information be given in response to a request. All that is required is that a claimant establish (1) reliance (2) upon erroneous information (3) from an official source and (4) with respect to the interpretation of a pertinent provision of the act or regulation.

Again, counsel's argument that the certificate of award did not contain erroneous information is rejected. The Secretary specifically found plaintiff was without fault in accepting the overpayments because of her reliance upon the information in the certificate. If the information were not erroneous, then plaintiff's reliance on it would not have entitled her to a "without fault" finding. In any event, the Secretary did not take the position that the information was correct^{5/} and, in fact, it was not. When the Secretary advised plaintiff that any future increases in payments of "mother's benefits" would belong to her children and not to her he committed himself to an erroneous

^{5/}The Secretary has not make any findings on the issue. See discussion infra, p. 8. All that has been advanced is counsel's position, not the Secretary's.

interpretation of both the Act and the regulations which he did not correct until 1982.

The Secretary had an obligation, at the very least, to consider the possible applicability of §§ 404.510(b) and 404.512(a). I have scoured the record for any discussion of either section by the Administrative Law Judge or the Appeals-Council. There is none. The Administrative Law Judge identified the regulations he considered to be applicable at the beginning of his opinion. 20 C.F.R. §§ 404.510(b) and 404.512(a) are rather conspicuously absent. The Appeals Council concentrated solely on the issues of whether plaintiff had demonstrated it would be against "equity and good conscience" under 20 C.F.R. § 404.509 to require repayment and whether such a requirement would defeat the purposes of the Act. It did not so much as mention plaintiff's argument that it was the information in the Secretary's certificate of award which caused the overpayment.

Finally, Congress has directed that recovery of overpayments should not be required where the claimant is without fault in receiving the overpayment (a fact conceded by defendant) and where the overpayment would be against equity and good conscience. The fault in this case belongs at the agency's doorstep. It is apparent that plaintiff acted reasonably in reliance on the directives and information contained in the certificate of award.^{6/} Under such circumstances, it would offend both equity and good conscience to require repayment. *Rini v. Harris*, 615 F.2d 625, 627 (5th Cir. 1980).

^{6/}The argument that plaintiff did not change her position for the worse overlooks the obvious: she gave up all right, title and interest in the funds she received.

And it is so ORDERED.

UNITED STATES DISTRICT JUDGE

Dated: _____