

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT G. BLAKELY,

Plaintiff,

Case No. 2:02-cv-208

v.

Honorable David W. McKeague

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

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ORDER

In accordance with the Court's memorandum opinion filed this date,

IT IS HEREBY ORDERED that the magistrate judge's report and recommendation is **DISAPPROVED**; and

IT IS FURTHER ORDERED that the final decision of the Commissioner of Social Security, terminating plaintiff Robert G. Blakely's application for supplemental security income, is **REMANDED** with instructions to reinstate benefits as of January 2000.

Dated: March 8, 2004

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

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COMMISSIONER OF SOCIAL
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Defendant.

MEMORANDUM OPINION DISAPPROVING REPORT AND RECOMMENDATION

This is an action seeking judicial review of a final decision of the Appeals Council terminating plaintiff's supplemental security income (SSI). A report and recommendation was issued in this action recommending that the Appeal Council's decision, finding plaintiff ineligible for SSI benefits beginning January of 2000, be affirmed. Plaintiff has filed objections to the report and recommendation.

In accordance with 28 U.S.C. §636(b)(1), the Court has performed *de novo* review of those portions of the report and recommendation to which an objection has been made. Upon thorough review of the record, the Court finds plaintiff's objections to be well-taken. Accordingly, the Court disapproves of the recommendation to affirm the Commissioner's decision. The case is remanded to the Commissioner with instructions to reinstate claimant's benefits effective as of January 2000, the date of suspension.

The facts of this case are not in dispute. On February 4, 1996, plaintiff was involved in a fistfight in Carbon County, Montana. Though the fight was investigated by the police, no arrest was

made at that time. At the suggestion of police officers and fearing a threat to himself and his family, plaintiff moved with his two disabled children, to another municipality in Montana, about one hundred miles away, during the first week of March 1996. Subsequently, On March 12, 1996, an arrest warrant was issued for the plaintiff on a charge of aggravated assault, arising out of the fistfight incident. Plaintiff had no knowledge of this warrant and he lived openly at his new residence in Montana for about six months. After six months, he moved back to his home state of Michigan because of job and family considerations.

While living in Michigan, plaintiff finally learned of the existence of the warrant in 1999 as a result of a traffic violation and Montana also became aware of his whereabouts. However, Montana refused to extradite him, even with the assistance of the state of Michigan, because the warrant provided for extradition from surrounding states only. According to plaintiff, due to ill health and economic hardship, he could not afford to return to Montana but had volunteered to return if Montana will pay for his costs of travel or send a car to pick him up.

The Social Security Administration suspended plaintiff's SSI benefits and determined there had been an overpayment based on plaintiff's status as a fleeing felon. An administrative law judge subsequently held a hearing, requested by plaintiff, on April 25, 2002. The ALJ found that plaintiff was not a fleeing felon, reinstated plaintiff's eligibility for SSI benefits, and reversed the outstanding overpayment. The Appeals Council, on its own motion, reviewed the hearing decision and determined that plaintiff was fleeing to avoid prosecution for a felony within the meaning of the Social Security Act and, as such, was ineligible for SSI benefits beginning January 1, 2000.

Plaintiff then filed an action in this Court seeking reversal of the decision of the Commissioner. After considering the arguments, the magistrate judge concluded in the report and

recommendation that the Commissioner's determination that plaintiff was a fleeing felon within the meaning of the statute was reasonable and should be affirmed. Plaintiff filed objections to the report and recommendation, arguing that the decision was based on an unreasonable interpretation of the Social Security Act. Further, plaintiff argued that there was insufficient evidence to support the determination that claimant was a fleeing felon.

The issue in this case presents a novel question challenging a denial of SSI benefits grounded on alleged fleeing-felon status. The provision pursuant to which claimant was denied benefits, enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, provides in relevant part:

(4) No person shall be considered an eligible individual...with respect to any month if during

such month the person is—

(A) fleeing to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which the person flees, for a crime, or an attempt to commit a crime, which is a felony...

42 U.S.C. §1382(e)(4). Final rules were issued implementing this change. *See* 20 C.F.R. §§ 416.202 and 416.1339. Section 416.202 provides that an individual is eligible for SSI benefits if he is not “fleeing to avoid prosecution for a crime...which is a felony under the laws of the place from which you flee.” Under 20 CFR § 416.1339, an individual is ineligible for SSI benefits for any month during which he is “fleeing to avoid prosecution for a crime...which is a felony under the laws of the place from which the individual flees.”

The Appeals Council determined that neither the law nor the regulation provided specific criteria for the phrase “fleeing to avoid prosecution.” The Appeals Council concluded that it was

the appropriate tribunal to determine whether the plaintiff was fleeing. Because plaintiff failed to return to Montana to face charges and the warrant remained outstanding, the Council determined that plaintiff was avoiding prosecution for a felony within the meaning of the statute.

Though the Appeals Council failed to sufficiently support its reasoning, it does appear to interpret the fleeing-felon provision as requiring at least some intent to flee from prosecution. As the Appeals Council stated in the decision, “the evidence in this case is sufficient to support a finding that the claimant’s intent is to flee from prosecution and that the Commissioner of the Social Security Administration is empowered to so conclude.” More importantly for the Court’s determination that the Appeals Council construed the statute to require a finding of intent was the Appeals Council’s determination that plaintiff became a fleeing felon only after he became aware of the outstanding arrest warrant, rather than when the warrant was issued, three years earlier.

Therefore, the Court assumes for purposes of this decision that fleeing to avoid prosecution in 42 U.S.C. §1382(e)(4) was construed by the Appeals Council to necessitate a finding of flight with intent to avoid arrest or prosecution. In reviewing the decision, therefore, the Court does not focus on whether the Commissioner of Social Security lacks the competence or authority to determine whether plaintiff is a fleeing felon or whether the statute could be construed so as not to require any intent to avoid prosecution. Instead, the Court focuses solely on the question of whether the Appeals Council’s determination that plaintiff intended to avoid prosecution was supported by substantial evidence.

The standard of review of the Commissioner’s decision is whether the determination made is supported by substantial evidence and whether the Commissioner employed the proper legal standards in reaching the conclusion. *Brainard v. Sec’y of Health and Human Servs.*, 889 F.2d 679,

681 (6th Cir. 1989). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Heston v. Comm'r of Soc. Sec.*, 245 F.3d 528, 534 (6th Cir. 2001).

After a thorough review of the record, the Court is persuaded that the Council's decision finding plaintiff to be a fleeing felon is unsupported by substantial evidence.

Plaintiff contends that the mere existence of an arrest warrant, even coupled with plaintiff's knowledge of that warrant, is insufficient to show flight to avoid prosecution, when plaintiff is financially and physically unable to travel to Montana and Montana refuses to extradite him, even though he has volunteered to return. In other words, plaintiff argues that while one has a duty not to flee or conceal oneself, one does not have the affirmative duty to return, especially when one is unable to do so.

The Appeals Council found sufficient evidence to support plaintiff's intent to flee from prosecution based on the fact that plaintiff was aware of the existence of the warrant and did not voluntarily return to Montana to face charges. In its decision, the Council cited *United States v. Greever*, 134 F.3d 777 (6th Cir. 1998) for the notion that the intent to avoid prosecution could be inferred from the fact that defendant in that case knew he was wanted and failed to submit to an arrest. However, the Appeals Council omitted important facts upon which the Sixth Circuit relied in affirming the district court's decision that defendant had concealed himself with the intent to avoid prosecution.

In *Greever*, the Sixth Circuit was interpreting 18 U.S.C. §3282 which states "no statute of limitations shall extend to any person fleeing from justice." The Sixth Circuit concluded that the case law supported the conclusion that fleeing from justice required an intent to avoid arrest or

prosecution. *Greever*, 134 F.3d at 780. See also *Conger v. Barnhart*, 2003 U.S. Dist. Lexis 22521 *22-24 (D.Me. December 15, 2003)(noting that substantial evidence supports the administrative law judge's determination that plaintiff was a fleeing felon when plaintiff was issued a criminal complaint and released on personal recognizance but did not appear on the assigned date to answer charges against him and plaintiff subsequently left the state fully aware of the pendency of unresolved criminal charges against him).

In holding that the defendant in *Greever* had in fact been intending to avoid prosecution, the court relied on the following findings made by the district court: (1)the defendant had concealed himself; (2)the government had searched for him to no avail; (3)the defendant had lied to officers about his identity at a bar; (4)the defendant had stated that he had not renewed his driver's license or held a job for fear that the agents would be able to find him; (5)the defendant had admitted to officers that he had been playing a game of cat and mouse with them. *Greever*, 134 F.3d at 780.

Unlike the defendant in *Greever*, claimant did not leave Montana aware of the arrest warrant nor did he attempt to conceal himself in any manner. There is no evidence in this case that the government searched for claimant but was unable to locate him. Instead, claimant moved out of town, as suggested by the local authorities. He remained in the state of Montana for six months without any knowledge of an arrest warrant. And even after he did have knowledge of an outstanding arrest warrant, claimant made it clear that he would return but requested help in doing so. Under these circumstances, there is simply not enough evidence, as there was in *Greever* or in *Conger*, to support the conclusion that claimant was fleeing to avoid prosecution.

While the Court recognizes that there likely exists no meaningful distinction between one who leaves a state in an effort to avoid prosecution and one who leaves a state, unaware of any

charges outstanding but later becomes aware of such charges and is nonetheless unwilling to return, the facts of this case do not suggest that claimant has declined to return because he is unwilling. This Court does find that a meaningful distinction exists between one who has left but declines to return and one who has left a state, without any knowledge of outstanding charges, volunteers to return but is physically and financially unable to do so without the government's help. Thus, while opposition to extradition or even the situation in which an individual is not faced with the same level of hardship as plaintiff faces here and such individual is able but unwilling to return to the state in which there is an outstanding charge may support a finding of fleeing to avoid prosecution, this Court does not find that based on these facts, substantial evidence supports the Appeals Council's determination that claimant was fleeing with the intent to avoid prosecution.

Additionally, the state of Montana's failure and unwillingness to extradite claimant though he has volunteered to return lends support to this Court's determination that the Appeals Council's decision is unsupported by substantial evidence, particularly when it was police in the state of Montana who initially suggested that claimant depart. In analogous situations involving extradition of an individual from a foreign country to face charges, the government must demonstrate due diligence in seeking that individual's return. *See United States v. Diacolios*, 837 F.2d 79, 84 (2nd Cir. 1988)(holding that while the speedy trial clause does not prevent the government from adhering to its general policy not to seek extradition outside the extradition treaty with a foreign country, if the defendant did express a willingness to surrender himself to appropriate authorities, the government would be under an obligation to provide transportation to the United States at the government's expense if defendant's financial circumstances so warrant).

While this Court does not suggest that in order to warrant a finding of fleeing to avoid

prosecution, the Commissioner must determine that the government has pursued the claimant or that the state must always provide extradition, the facts of this case simply do not provide adequate support for the Commissioner's determination. Due to plaintiff's inability to drive for longer than 15 minutes without a break, as his uncontradicted testimony showed, coupled with plaintiff's financial circumstances, this Court does not find that claimant's inability to return to Montana results in a supportable determination that he is a fleeing felon.

Accordingly, the Commissioner's decision is reversed and the case is remanded to the Commissioner with instructions to reinstate the benefits. A judgment order consistent with this opinion shall issue forthwith.

Date: March 8, 2004

/s/ David W. McKeague
DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE

