UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELAINE CLARK, RAYMOND GIANGRASSO, TONY GONZALES, JOHNNY L. HEATHERMAN and MONELL WHITE, individually on behalf of themselves and on behalf of all those similarly situated,	:	06 Civ. 15521 (SHS)
Plaintiffs,	:	
-against-	:	OPINION & ORDER
MICHAEL J. ASTRUE, Commissioner of the Social Security Administration, in his official capacity, and the SOCIAL SECURITY ADMINSTRATION, [1]	:	:
Defendants.	:	

SIDNEY H. STEIN, U.S. District Judge.

I. Introduction

Plaintiffs Elaine Clark and Johnny L. Heatherman bring this action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), as well as 28 U.S.C. § 1361, challenging the Social Security Administration's ("SSA") interpretation of the statutes that provide for suspending or denying Social Security payments to individuals who have violated a condition of probation or parole. Specifically, plaintiffs contend that the SSA violates 42 U.S.C. §§ 1382(e)(4)(A)(ii) and 402(x)(1)(A)(v) – as well as the accompanying regulations found at 20 C.F.R. § 416.1339(b) – by suspending benefits based on the mere existence of outstanding warrants for violations of probation or parole, as opposed to waiting to suspend benefits until after a final determination

[1] Michael J. Astrue, who became Commissioner of the Social Security Administration on February 12, 2007, is substituted as a defendant pursuant to Fed. R. Civ. P. 25(d)(1). In addition, because the only proper party to an action involving social security claims is the Commissioner of the SSA, see 42 U.S.C. § 405(g); Keesing v. Apfel, 124 F. Supp. 2d 134, 135 (N.D.N.Y. 2000), the Social Security Administration is dismissed as a defendant.

that a condition of probation or parole has in fact been violated. Plaintiffs seek to represent a putative class of similarly situated individuals,[2] and they have moved for a temporary restraining order and a preliminary injunction essentially requiring the immediate reinstatement of benefits and a declaration that the SSA policy violates the applicable statutes.

Plaintiffs commenced this action by filing the complaint and moving by order to show cause for a temporary restraining order, preliminary injunction, and expedited discovery. The Court subsequently denied plaintiffs' request for a temporary restraining order and held oral argument on plaintiffs' motion for a preliminary injunction. Defendants have answered the complaint and have both opposed the motion for preliminary injunction and cross-moved for summary judgment.[3] As explained below, because plaintiffs have not shown a likelihood of success on the merits, their motion for a preliminary injunction is denied.

II. Background

A. The SSA's Policies and Procedures for Terminating Benefits for Violations of Probation or Parole.

The SSA's Office of the Inspector General obtains information on outstanding warrants from the National Crime Information Center ("NCIC") of the Federal Bureau of Investigation ("FBI") as well as from the United States Marshals Service. (Declaration of Michael J. McGill dated Jan. 31, 2007 ("McGill Decl."), ¶¶ 4-5; Declaration of Gareth Dence dated Feb. 1, 2007 ("Dence Decl."), ¶ 3.) The SSA also obtains warrant information from a variety of state and local law enforcement agencies. (McGill Decl. ¶ 4; Dence Decl. ¶ 3.)

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[2] As of this date, plaintiffs have not moved for certification of a class.

[3] Because the briefing on defendants' motion for summary judgment has not yet been completed, that motion is not ripe for determination, although defendants' affidavits in support of its cross-motion for summary judgment are also part of its opposition to plaintiffs' motion for a preliminary injunction.

The NCIC has developed uniform offense codes which most law enforcement agencies use when providing warrant information. (McGill Decl. ¶ 7.) NCIC offense code "5011" designates an individual as a parole violator and offense code "5012" designates an individual as a probation violator. (Id.) The SSA uses these uniform offense codes and other available information to identify warrants that have been issued by a court or other tribunal expressly for a probation or parole violation. (McGill Decl. ¶ 7, Ex. B; Dence Decl. ¶ 3.) The SSA does not suspend benefits for a probation or parole violation based upon a general arrest warrant that lacks a finding that a specified beneficiary is violating the conditions of his or her probation or parole. (Dence Decl. ¶ 3.) The SSA interprets the statutory scheme and implementing regulations to require that a warrant be issued expressly due to a probation or parole violation before it will suspend benefits. (Declaration of Brian Cronin dated Feb. 1, 2007, ¶ 9.)

B. The Named Plaintiffs.

1. *Elaine Clark*

Elaine Clark began receiving Social Security Disability Insurance ("SSDI") benefits in 1996, after being diagnosed with end stage renal disease. (Declaration of Elaine Clark dated Jan. 2, 2007 ("Clark Decl.") ¶ 4.) She has since received a kidney transplant and is also being treated for diabetes mellitus, joint disorders of the lower extremities, hypertension, hyperlipidemia, depression, esophagitis reflux, osteoporosis and anemia. (Id. ¶ 3.) She takes numerous medications and requires a wheelchair for mobility. (Id.) Clark is enrolled in the Total Aging in Place Program, a managed long-term care plan, and resides in its facility in Amherst, New York. (Id. ¶ 1.) The medical share of the cost of her participation in that program is funded by Medicaid. (Id.) The remainder of her monthly SSDI benefits check paid her rent at the facility. (Id.)

Ms. Clark has also been on California state probation since 1999. (Declaration of Bertha Richardson dated Jan. 31, 2007 ("Richardson Decl."), Ex. M at US001773.) On November 21, 2002, the Superior Court of the State of California held a hearing and considered evidence that Clark had violated the conditions of her probation by failing to: (i) maintain contact with the Probation Department; (ii) pay court ordered restitution; and (iii) complete 300 hours of community service. (Id., Ex. M at US001773-76.) That same day, based on the hearing, the Superior Court determined that she "failed to comply with terms of probation," and issued a bench warrant for Clark. (Id., Ex. M at US001779-80.)

Clark first learned that her SSDI benefits were going to be suspended when she received a letter from the SSA, dated December 11, 2005, informing her that an arrest warrant had been issued. (Clark Decl. ¶ 7.) Six weeks later, on January 19, 2006, the SSA informed Ms. Clark that her benefits were suspended immediately and that the benefits should have been suspended effective January 2005, but since payments had continued, she had been overpaid $9,235. (Id. ¶ 10.) Nearly one year after filing a timely Request for Reconsideration (id. ¶ 11), Ms. Clark received a letter from SSA dated December 24, 2006 affirming the initial determination and denying her Request for Reconsideration. (Id. ¶ 12.)

Because she has not received her SSDI benefits for more than one year, Clark has been unable to pay her rent and has been threatened with eviction from the facility. (Id. ¶ 3.) She currently owes the facility $6,687.16. (Id. ¶ 19.) The facility has given her a referral to a homeless shelter where she fears that someone with her medical conditions would not be able to survive. (Id. ¶ 3.) Since losing her benefits, she has been hospitalized twice after fracturing her pelvis. (Id. ¶ 19.)

2. *Johnny Heatherman*

In February 1987, Johnny L. Heatherman pleaded guilty to aggravated assault and vandalism in an Ohio state court and was sentenced to probation for two years. (Richardson Decl. at ¶ 4, Ex. N at US001781, 001783-85, 001790.) In September 1987, the Ohio Probation Department concluded that Heatherman had refused to abide by the terms of his probation. (Id., Ex. N at US001790.) Accordingly, the Cuyahoga County Court subsequently issued an arrest warrant for Heatherman based upon that finding. (Id., Ex. N at US001781-83, 001790, 001888-90.)

Almost thirteen years later, in February 2000, Heatherman applied to SSA for disability benefits. (Declaration of Dennis Mass dated Feb. 1, 2007 ("Mass Decl."), at ¶ 17, Ex. R at US001141.) Although SSA initially determined that Heatherman was not disabled, the agency eventually approved his application in November 2001, making benefit payments retroactive to March 1999. (Id., Ex R at US001137-41; Declaration of Johnny L. Heatherman dated Jan. 3, 2007 ("Heatherman Decl.") ¶ 4.) Heatherman suffers from bipolar disorder and Reflex Sympathetic Dystrophy, which require several medications to control. (Heatherman Decl. ¶ 4.)

Following the approval of Heatherman's benefit payments, Ohio State law enforcement authorities notified SSA about Heatherman's outstanding warrant, including the offense code "5012" indicating a violation of probation. (Mass Decl. ¶ 18; Dence Decl. ¶ 19, Ex. I.) Upon receiving this information, SSA confirmed that Heatherman's identity matched a recipient of SSA benefits, verified the warrant, and concluded that an appropriate finding of a probation violation existed sufficient to initiate the process of suspending his benefits. (Id. ¶ 19.) Consequently, SSA sent advance notice of the proposed suspension to Heatherman in September 2005 and again in December 2005. (Id., Ex R. at US001095-1102.) Heatherman's disability benefits were suspended either in January or February 2006. (Id. ¶ 20, Ex. R. at US001099-

1108; Heatherman Decl. ¶ 7.) Heatherman subsequently filed a Request for Reconsideration, which according to defendants, was denied. (Mass Decl. ¶ 21, Ex. R at US001112-13, 001161-70; Heatherman Decl. ¶¶ 11-12.)

According to Heatherman, the impact of the suspension on him has been "devastating." (Heatherman Decl. ¶ 3.) Not only has he been unable to contribute to the financial support of his wife and three children, but also he and his wife have filed for bankruptcy. (Id.)

3. *Raymond Giangrasso and Monell White*

Because plaintiffs Raymond Giangrsso and Monell White are currently receiving social security benefits, plaintiffs have withdrawn their request for a temporary restraining order in regard to these plaintiffs. (Plts.' Reply Mem. of Law dated Feb. 14, 2007, at n.2.)

4. Tony Gonzales

It appears at this stage of the litigation that plaintiff Tony Gonzales was suspended not because of violation of probation or parole, but rather because he was a fugitive felon. (Dence Dec. at ¶ 22; Ex. L.) Discovery will be permitted on that issue as the litigation proceeds.

III. Discussion

A. Subject Matter Jurisdiction and Exhaustion of Remedies

The SSA asserts that because 42 U.S.C. §§ 405(g) and (h) require SSA beneficiaries to exhaust available administrative remedies as a prerequisite to suing in federal court, this Court lacks jurisdiction over this dispute. See Pavano v. Shalala, 95 F.3d 147, 150 (2d Cir. 1996) ("[A] federal court may review a Medicare determination such as this only where a claimant has obtained a final agency decision."); Mathews v. Chater, 891 F. Supp. 186, 188 (S.D.N.Y. 1995) ("It is well settled that under 42 U.S.C. §§ 405(g) and (h), judicial review of Social Security benefit determinations is limited to 'final' decisions of the Commissioner made after a

hearing, that available administrative procedures must be exhausted and that a final decision is a prerequisite for subject matter jurisdiction in the District Court."), aff'd, 101 F.3d 681 (2d Cir. 1996).

In response, plaintiffs contend that this Court should waive the exhaustion requirement. The U.S. Court of Appeals for the Second Circuit has outlined the criteria a court should employ when deciding whether to waive the exhaustion requirement. As Judge Joseph M. McLaughlin wrote for a panel of the Second Circuit, "[h]oary ritual" requires a recitation of those criteria as follows: "(1) whether the claim is collateral to a demand for benefits; (2) whether exhaustion would be futile; and (3) whether the plaintiffs would suffer irreparable harm if required to exhaust their administrative remedies before obtaining relief." Abbey v. Sullivan, 978 F.2d 37, 44 (2d Cir. 1992). Here, the Court finds it appropriate to waive the requirement that plaintiffs exhaust their administrative remedies prior to bringing this litigation on the grounds that it would be futile for plaintiffs to challenge the Secretary's interpretation of the statute in administrative hearings. As Judge McLaughlin wrote in Abbey, "[T]he policy of permitting an agency to correct its own errors is chimerical when the challenge is to regulations promulgated and consistently enforced by the agency, and which the agency has either no power, or no inclination, to correct." Id. at 45; see also, Ellis v. Blum, 643 F.2d 68, 78 (2d Cir. 1981) ("[I]t would be foolish to expect the [predecessor to the SSA Commissioner] in an adjudicatory administrative proceeding to take steps to remedy what plaintiff alleges to be a full-blown policy" of the defendants.). Given that the SSA takes the position in this action that its interpretation of the statute is correct, there is no reason to believe that the agency would reinstate plaintiffs' benefits through the administrative process. This Court waives the exhaustion requirement because of the

futility of requiring plaintiffs to exhaust their administrative remedies. Accordingly, this Court has subject matter jurisdiction over this dispute.

B. Preliminary Injunction Standard

A party seeking a preliminary injunction must demonstrate "'(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor.'" MyWebGrocer, LLC v. Hometown Info, Inc., 375 F.3d 190, 192 (2d Cir. 2004) (quoting Merkos L'inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F.3d 94, 96 (2d Cir.2002)). However, "where a moving party challenges government action taken in the public interest pursuant to a statutory or regulatory scheme" – as is the case here – "the moving party cannot resort to the 'fair ground for litigation' standard, but is required to demonstrate irreparable harm and a likelihood of success on the merits." Jolly v. Coughlin, 76 F.3d 468, 473 (2d Cir. 1996) (citations and internal quotation marks omitted); Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 424 (2d Cir. 2004) (In situations where a plaintiff seeks a preliminary injunction against "government action taken in furtherance of a regulatory or statutory scheme, which is presumed to be in the public interest" the "plaintiff must meet a 'more rigorous likelihood-of-success standard.'") (internal citation omitted.) Thus, in order to obtain a preliminary injunction, plaintiffs must demonstrate both irreparable harm and a likelihood of success on the merits.

C. Likelihood of Success on the Merits.

Plaintiffs contend that the SSA's practice of suspending benefits based solely on a warrant for a violation of probation or parole violates 42 U.S.C. §§ 1382(e)(4)(A)(ii) and

402(x)(1)(A)(v), as well as the accompanying regulations found at 20 C.F.R. § 416.1339(b). The relevant portion of the statute provides as follows:

> No person shall be considered an eligible individual or eligible spouse for purposes of this subchapter with respect to any month if during such month the person is . . . (ii) violating a condition of probation or parole imposed under Federal or State law.

24 U.S.C. § 1382(e)(4)(A)(ii).

> Notwithstanding any other provision of this subchapter, no monthly benefits shall be paid under this section or under section 423 of this Title to any individual for any month ending with or during or beginning with or during a period of more than 30 days throughout all of which such individual . . . (v) is violating a condition of probation or parole imposed under Federal or State law.

42 U.S.C. §§ 402(x)(1)(A)(v). In addition, the implementing regulations provide that the suspension of benefits become effective:

> The month in which a warrant or order for the individual's arrest or apprehension, an order requiring the individual's appearance before a court or other appropriate tribunal (e.g., a parole board), or similar order is issued by a court or other duly authorized tribunal on the basis of an appropriate finding that the individual . . . [i]s violating, or has violated, a condition of his or her probation or parole . . . .

20 C.F.R. § 416.1339(b). Based on this language – and in particular relying on the word "is" – plaintiffs contend that a plain reading of the statute requires a finding by "a court or other appropriate tribunal" that a recipient "is violating a condition of his or her probation or parole." Plaintiffs assert that the SSA may not suspend benefits simply because an arrest warrant has been issued because such a warrant merely represents a conclusion that there is probable, or reasonable, cause to believe the benefit recipient has violated probation or parole. An arrest warrant, plaintiffs urge, is not a finding that the recipient "is violating" probation or parole.

However, statutory interpretation must be "guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy." John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 94-95, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993) (internal citation and quotation marks omitted). Here, plaintiffs' proposed statutory construction is unpersuasive in light of express statutory language reflecting that Congress contemplated and intended for the SSA to suspend benefits based on a warrant alone. Specifically, the "good cause" provision of the statute provides that:

> [T]he Commissioner shall, for good cause shown, pay the individual benefits that have been withheld or would otherwise be withheld . . . if the Commissioner determines that . . . a court of competent jurisdiction has found the individual not guilty of the criminal offense, dismissed the charges relating to the criminal offense, vacated the warrant for arrest of the individual for the criminal offense, or issued any similar exonerating order . . . .

42 U.S.C. § 402(x)(1)(B)(iii) (emphasis added). See also, 42 U.S.C. § 1382(e)(4)(B) (same). Clearly, if Congress gave the Commissioner the authority to re-institute benefits after a warrant has been vacated, then *a priori* Congress intended that the agency was authorized by statute to suspend benefits based on such a warrant. To find otherwise would render meaningless the "good cause" provision of the statute. As the U.S. Supreme Court has recognized, "legislative enactments should not be construed to render their provisions mere surplusage." Dunn v. Cftc, 519 U.S. 465, 472, 117 S. Ct. 913, 137 L. Ed. 2d 93 (1997) (citations omitted).

Plaintiffs seek succor in the recent decision of the Second Circuit in Fowlkes v. Adamec, 432 F.3d 90 (2d Cir. 2005). In that case, the Second Circuit interpreted 43 U.S.C. § 1382(e)(4)(A)(i), which is immediately prior in the U.S. Code to the provision at issue here, 43 U.S.C. § 1382(e)(4)(A)(ii). Fowlkes, 432 F.3d at 96. Indeed, 42 U.S.C. § 1382(e)(4)(A)(i) utilizes language parallel to 42 U.S.C. §§ 1382(e)(4)(A)(ii) in that it provides for suspension of

benefits for an individual who "is . . . fleeing" whereas the statutory provision at issue in this action does the same for an individual who "is . . . violating a condition of probation or parole."

In Fowlkes, the SSA had suspended the claimant's benefits based on a warrant that indicated only that the claimant had been indicted for larceny – a felony – and was silent as to whether the issuing jurisdiction had found that the claimant was a fleeing felon. Fowlkes, 432 F.3d at 92, 97-98. The Second Circuit held that "[t]he Commissioner's current interpretation is not a permissible construction of either the statute or the regulation because it contemplates suspension of benefits without any finding of 'flight' by the agency, a court, or other tribunal." Id. at 97. The Court ruled that "benefits may be suspended only as of the date of a warrant or order issued by a court or other authorized tribunal on the basis of a finding that an individual has fled or was fleeing from justice." Id. In other words, the Second Circuit found impermissible the Commissioner's interpretation because the SSA was suspending benefits pursuant to 42 U.S.C. § 1382(e)(4)(A)(i) based on warrants that contained no finding that there was probable cause to believe the person "is . . . fleeing," as was required by Section 1382(e)(4)(A)(i).

In the present case, to the contrary, the SSA has shown that that it suspends benefits pursuant to 42 U.S.C. §§ 1382(e)(4)(A)(ii) based only on warrants that specifically address violations of probation or parole, as opposed to general arrest warrants. (McGill Decl. ¶ 7, Ex. B; Dence Decl. ¶ 3.) The SSA has developed a system with the NCIC by which it relies only on warrants that possess the uniform codes "5011" and "5012," which, as noted above, designate, respectively, an individual as a parole or probation violator. (McGill Decl. ¶ 7.)

Indeed, the SSA suspended the benefits of both Clark and Heatherman only after state courts had issued warrants specifically addressed to violations of probation. With respect to

plaintiff Clark, the Superior Court of the State of California held a hearing and considered evidence that Clark had violated the conditions of her probation by failing to: (i) maintain contact with the Probation Department; (ii) pay court ordered restitution; and (iii) complete 300 hours of community service. (Richardson Decl., Ex. M at US001773-76.) That same day, based on the hearing, the Superior Court determined that she "failed to comply with terms of probation," and issued a bench warrant for Clark. (Id., Ex. M at US001779-80.) With respect to Heatherman, the Ohio Probation Department concluded that Heatherman had refused to abide by the terms of his probation (Id., Ex. N at US001790), and consequently, the state court issued an arrest warrant for Heatherman based upon that finding. (Id., Ex. N at US001781-83, 001790, 001888-90.) Heatherman's warrant was reported to the SSA with the specific offense code "5012," indicating a violation of probation. (Mass Decl. ¶ 18; Dence Decl. ¶ 19, Ex. I.) Therefore, the SSA practice that plaintiffs challenge in the present action is patently distinguishable from that invalidated by the Second Circuit in Fowlkes.

In addition, the Fowlkes ruling recognizes that warrants can constitute an appropriate finding of a violation under the statutory scheme relevant here. The Second Circuit ruled that "benefits may be suspended only as of the date of a warrant or order issued by a court or other authorized tribunal on the basis of a finding that an individual has fled or was fleeing from justice." Fowlkes, 432 F.3d at 97 (emphasis added). Applying this logic to the present case, benefits may be suspended only as of the date of a warrant or order issued by a court or other authorized tribunal on the basis of a finding that an individual has violated a condition of probation or parole.

An agency's interpretation of its own statute and regulation "must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Thomas Jefferson

Univ. v. Shalala, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) (quoting Udall v. Tallman, 380 U.S. 1, 16-17, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965) (internal quotation marks omitted)). If "the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (footnotes omitted).

Here, the relevant statutory language shows that Congress expressly contemplated that the agency was authorized to terminate benefits upon receiving an arrest warrant, and therefore the Commissioner's interpretation is not plainly erroneous. Indeed, the Commissioner's interpretation of its governing statute and regulations is clearly supported by, and consistent with, the statute and decisional law.

Accordingly, plaintiffs have failed to demonstrate a likelihood of success on the merits of their action.[4]

IV. Conclusion

As set forth above, plaintiffs have not demonstrated a likelihood of success on the merits and plaintiffs' motion for a preliminary injunction is therefore denied.

Dated: New York, New York
March 8, 2007

SO ORDERED:

Sidney H. Stein, U.S.D.J.

[4] Because the Court has concluded that plaintiffs have not demonstrated a likelihood of success on the merits, it does not address whether or not irreparable harm exists on the facts of this case.