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United States District Court,
N.D. New York.

Felipe Oteze FOWLKES, Plaintiff,
v.
John ADAMEC, Counselor; and Paul Thomas, District Manager, Defendants.

No. 9:02–CV–00468. | March 31, 2003.

Attorneys and Law Firms

Felipe Oteze Fowlkes, Albany County Correctional Facility, Albany, New York, Plaintiff pro se.

Hon. Glenn T. Suddaby, United States Attorney for the Northern District of New York, Syracuse, New York, for Defendants.

William H. Pease, Assistant United States Attorney, of counsel.

Opinion

DECISION & ORDER

MCAVOY, J.

I. INTRODUCTION

***1** This *pro se* action brought pursuant to 42 U.S.C. § 1983 was referred by this Court to the Hon. David R. Homer, United States Magistrate Judge, for a Report–Recommendation pursuant to 28 U.S.C. § 636(b) and Rule 72.3(c) of the Local Rules of the Northern District of New York. Essentially, plaintiff has sued two employees of the Social Security Administration (SSA) asserting that his Fifth Amendment due process rights were violated when he was determined to be ineligible for social security benefits on the grounds that he was a "fleeing felon."[1] The facts of the cases are set forth with sufficient particularity in Magistrate Judge Homer's Report–Recommendation and Order ("Report–Recommendation") dated March 5, 2003 and, unless indicated otherwise, are adopted by the Court. As set forth in the Report–Recommendation, Magistrate Judge Homer concluded that plaintiff was afforded all of the process he was due and that the essence of the complaint is that plaintiff disagrees with the determination of the Social Security Administration in its interpretation of the "fleeing felon" standard. Consequently, Magistrate Judge Homer recommended that the Court grant defendants' motion to dismiss the Section 1983 claims, covert the action into an appeal of an adverse Social Security decision, and reverse and remand the decision of the Commissioner of Social Security. *Id.*

The plaintiff has filed objections to the Report–Recommendation, asserting that the magistrate judge misconstrued the facts (claiming he received notice of his "fleeing felon" designation from the SSA on April 1, 2000, not March 16, 2000 as the magistrate judge indicated); that the magistrate judge failed to recognize plaintiff's "initial right" to challenge his fleeing felon status in the criminal arena; that the Commissioner "did not apply [the correct] legal standard" regarding fleeing felons; that because the plaintiff surrendered himself upon learning of the Virginia warrant, there was never any intent on his behalf to avoid prosecution in Virginia and therefore the SSA's determination was faulty; and finally, that the magistrate judge's recommendation to recalculate plaintiff's SSI benefits between September 1999 to March 2000 affords him no relief because he actually received benefits during this time period.

When objections to a magistrate judge's Report–Recommendation are lodged, the Court reviews the record *de novo. See* 28 U.S.C. § 636(b)(1). After such a review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge]." *Id.* The Court may also receive further evidence or recommit the matter to

the magistrate judge with instructions. *Id.*

Having considered the record *de novo,* the Court accepts and adopts the recommendations of the Report–Recommendation in part as discussed more fully below.

II. DISCUSSION

A. Rule 12(b)(6) Standard

The Court adopts the Rule 12(b)(6) standard as set forth at pages 3–4 of the Report–Recommendation. *See* Rep.-Rec., dkt. # 69.

B. Plaintiff's Claim

***2** Construing plaintiff's *pro se* allegations liberally, he attempts to state a Fifth Amendment due process claim pursuant to *Bivens v. Six UnKonwn Federal Narcotics Agents,* 403 U.S. 388 (1970). While *Bivens* can create a remedy for violations of constitutional rights by federal officials, including the right not to be deprived of liberty or property without due process of law, *see, e.g., Davis v. Passman,* 442 U.S. 228 (1979), *Bivens* also noted that the courts should decline to create a remedy for constitutional violations where there is an "explicit congressional declaration" that injured parties should be "remitted to another remedy, equally effective in the view of Congress." *Bivens,* 403 U.S. at 397.

Congress has created a very limited scheme for judicial review of disability claims under Title II of the Social Security Act, 42 U.S.C. §§ 401–33. *See Rivera v. Apfel,* 2001 WL 699065, at *2 (S.D.N.Y. June 21, 2001). 42 U.S.C. Section 405(h) explicitly precludes any action to recover on a disability claim brought under certain statutes, such as 28 U.S.C. §§ 1331, 1346. Section 405(g) governs judicial review of an individual's claim for Social Security benefits.

Even assuming that the plaintiff's claim was actionable under *Bivens,* he has not stated a claim for the deprivation of due process. The fundamental requirements of due process are notice and the opportunity to be heard "at a meaningful time in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319 (1976). Plaintiff has not cited to any deprivation of any of the recognized elements of a due process claim. As set forth by the magistrate judge, plaintiff was afforded all the process he was due. His complaint is simply that he disagrees with the administrative interpretation and application of the "fleeing felon" rule. His action is, as Magistrate Judge Homer correctly concluded, a request for judicial review of the Commissioner's determination. Indeed, the same arguments that plaintiff raises now he raised in the administrative hearing. *See* Rep.-Rec., at p. 9.

Plaintiff fails to appreciate the distinction between the administrative agency's application of rules which implicate criminal statutes, and the criminal statutes themselves. Further, Plaintiff fails to recognize that the administrative agency is granted deference in applying its rules. Simply because he disagrees with the administrative determination or even its procedure (*i.e.,* assuming that he had to answer in the administrative forum upon issuance of the warrant before he had an opportunity to contest its legality in the criminal arena), this does not mean that he was deprived of an element of due process. Rather, these arguments go to the merits of his SSA claim.

While the magistrate judge's recommendation to convert the action and remand it back to the Commissioner for further determination may not provide plaintiff with what he wants, it is the only avenue available. Because he clearly does not want that relief, the Court will adopt the magistrate judge's determination inasmuch as it recommends the dismissal of his civil rights action because it fails it state a claim upon which relief can be granted.

III. CONCLUSION

***3** For the reasons stated in Magistrate Judge Homer's March 5, 2003 Report–Recommendation and as set forth above, defendants' motion the dismiss the action is GRANTED. The action is dismissed and the Clerk of the Court shall close the file.

IT IS SO ORDERED

REPORT–RECOMMENDATION AND ORDER[1]

Plaintiff pro se Felipe Oteze Fowlkes ("Fowlkes") commenced this action pursuant to 42 U.S.C. § 1983 alleging that defendants, two employees of the Social Security Administration, violated his due process rights when they improperly suspended his Social Security benefits upon a determination that he was a fleeing felon.[2] Compl. (Docket No. 1) at ¶ 7. Fowlkes seeks injunctive relief as well as compensatory and punitive damages. Presently pending is defendants' motion to dismiss. Docket No. 14. Fowlkes opposes the motion. Docket No. 16. For the reasons which follow, it is recommended that defendants' motion to dismiss be granted but that Fowlkes' civil rights complaint be converted into an appeal of an adverse Social Security decision and the decision of the Commissioner of Social Security (Commissioner) suspending Fowlkes' benefits be reversed and remanded.

I. Motion to Dismiss

A. Background

The facts as set forth in the complaint are assumed to be true for purposes of this motion. *See* Section II(A) *infra.*

In February 1997, Fowlkes was granted Social Security benefits. Compl. at ¶ 6(1). On March 16, 2000, defendant John Adamec suspended Fowlkes' benefits as of September 1, 1999 because Fowlkes had two outstanding felony warrants from Virginia. *Id.* at ¶ 6(1)-(3). On March 31, 2000, Fowlkes requested reconsideration of Adamec's decision. *Id.* at ¶ 6(2). On April 3, 2000, defendant Paul Thomas affirmed Adamec's decision. *Id.* at ¶ 6(2). On May 24, 2000, Fowlkes filed an appeal notice. *Id.* at ¶ 6(3). On May 30, 2000, Fowlkes requested a hearing before an administrative law judge (ALJ). *Id.* at ¶ 6(3).

On November 29, 2000, ALJ Joseph F. Gibbons held a hearing. Compl. at ¶ 6(3). Fowlkes presented evidence showing that there was no executive order for an extradition warrant as a fugitive felon from Virginia. *Id.* at ¶ 6(3). Fowlkes presented a verified letter from an attorney in Virginia stating that the felony charge had been dismissed and was not certified for indictment. *Id.* at ¶ 6(3). Fowlkes also submitted his New York state criminal history record and a certification from the classification and records officer at the jail indicating that there were no outstanding extradition warrants. *Id.* at ¶ 6(3). On March 20, 2001, the ALJ denied Fowlkes' appeal. *Id.* at ¶ 6(3). This action followed.

B. Motion to Dismiss Standard

Fed.R.Civ.P. 12(b)(6) authorizes dismissal of a complaint that states no actionable claim. When considering a motion to dismiss, "a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." *Sheppard v. Beerman,* 18 F.3d 147, 150 (2d Cir.1994). Dismissal is only warranted if it appears beyond a reasonable doubt that the non-moving party can prove no set of facts in support of his or her claim which would be entitled to relief. *See Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984). In evaluating whether these requirements are met, complaints prepared pro se are held to less stringent standards than formal pleadings drafted by lawyers. *See Estelle v. Gamble,* 429 U.S. 97, 106 (1976); *Haines v. Kerner,* 404 U.S. 519, 520 (1972).

***4** When a motion to dismiss is brought prior to an answer and discovery, a court is loath to grant the motion. *Lugo v. Senkowski,* 114 F.Supp.2d 111, 113 (N.D.N.Y.2000) (Kahn, J.) (citing *Ward v. Johnson Controls, Inc.,* 693 F.2d 19, 22 (2d Cir.1982)). This is true even if "the plaintiff is unlikely to prevail unless the defendant can demonstrate that plaintiff is unable to prove facts which would entitle him to relief. *Id.* "This caution against dismissal applies with even greater force where the complaint is pro se, or where the plaintiff complains of a civil rights violation." ' *Id.* (quoting *Eastman v. Sundram,* 947 F.2d 1011, 1015 (2d Cir.1991)).

C. Due Process

Fowlkes contends that his due process rights were violated when his Social Security benefits were denied without providing him an opportunity to challenge the lawfulness of the statute. Fowlkes further contends that he was denied due process when his benefits were suspended without requiring an extradition warrant followed by an extradition proceeding. Defendants contend that Fowlkes had notice and an opportunity to be heard and, thus, there was no due process violation.

In order to establish a cause of action for a violation of procedural due process, a plaintiff must prove that the questioned conduct deprived the plaintiff of life, liberty or property without notice and an opportunity to be heard. *Giano v. Selsky,* 238 F.3d 223, 225 (2d Cir.2001). Here, Fowlkes alleges that he was deprived of a property interest, his Social Security benefits. However, Fowlkes also alleges that he was provided an administrative appeal process that included a hearing where he was able to present evidence contradicting the government's allegation that he was a fleeing felon. Thus, Fowlkes has failed to allege a violation of his due process rights. It is recommended that defendants' motion to dismiss on this ground be granted.

II. 42 U.S.C. § 405(g)[3]

Fairly construed, however, Fowlkes' complaint is more properly considered under the Social Security Act (SSA), 42 U.S.C. § 405(g), under which a plaintiff may seek direct review of a decision by the Commissioner denying benefits. The defendants filed the administrative record (Docket No. 13) and addressed Fowlkes' complaint under the SSA. Thus, it is appropriate to convert his complaint from a civil rights complaint to an appeal of an adverse Social Security decision. Fowlkes moves to have his disability benefits reinstated. The Commissioner moves for a judgment on the pleadings. Docket No. 14. For the following reasons, it is recommended that the Commissioner's decision be reversed.

A. Procedural History

On December 14, 1994, Fowlkes filed an application for supplemental security benefits and disability insurance benefits pursuant to the SSA but withdrew his application on March 9, 1995. T. 18–19, 20.[4] Fowlkes reapplied on October 30, 1995. T. 21–22. That application was denied after the initial determination (T. 33–36) and following reconsideration. T. 47–50. Fowlkes then requested a hearing before an ALJ. T. 51–52. On August 5, 1996, based on the record and without a hearing, the ALJ determined that Fowlkes was disabled due to delusions. T. 217–25.

***5** On March 16, 2000, Fowlkes was found to be a fleeing felon and was notified that his benefits were suspended effective September 1999. T. 235–38. The suspension was upheld on reconsideration. T. 252–54. Fowlkes requested a hearing which was held before ALJ Gibbons on November 29, 2000. T. 384–404. On March 20, 2001, ALJ Gibbons held that Fowlkes was a fleeing felon and his benefits were properly suspended. T. 10–16. On April 1, 2002, Fowlkes commenced this action. On April 4, 2002, the Appeals Council denied Fowlkes' request for review, thus making the ALJ's findings the final decision of the Commissioner. T. 5–7.

B. Contentions

Fowlkes contends that the ALJ erred when he determined that he was a fleeing felon and thus not entitled to SSI benefits. The Commissioner contends that there was substantial evidence to support the determination that Fowlkes was a fleeing felon.

D. Standard of Review

An individual is not entitled to receive disability benefits during the first month after a warrant is issued because he or she is:

> 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 under the laws of the place from which the person flees....

42 U.S.C. § 1382(e)(4)(A) (1996).

An individual is a fleeing felon when an arrest warrant is issued because "the individual [i]s fleeing, or has fled, to avoid prosecution...." 20 C.F.R. § 416.1339. The Social Security Program Operations Manual Systems (POMS) states that an individual is not entitled to disability benefits beginning in "[t]he month in which a warrant ... is issued which finds that the individual is fleeing (or fled) to avoid prosecution...." Defs. Mem. of Law (Docket No. 14) at Attach. B; POMS SI § 00501.050(A)(2) (2001). Although POMS is not law, it is entitled to substantial deference. *Bubnis v. Apfel,* 150 F.3d 177, 182 (2d Cir.1998). To verify that an individual is a fleeing felon, the Commissioner may rely on a court order or decision or a copy of an arrest warrant or order. POMS SI § 00501.050(B).

E. Scope of Review

In reviewing a final decision of the Commissioner, a court must determine whether the correct legal standards were applied and whether substantial evidence supports the decision. *Machadio v. Apfel,* 276 F.3d 103, 108 (2d Cir.2002). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ' *Shaw v. Chater,* 221 F.3d 126, 131 (2d Cir.2000) (citations omitted). It must be "more than a mere scintilla" of evidence scattered throughout the administrative record. *Richardson v. Perales,* 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)); *Curry v. Apfel,* 209 F.3d 117, 122 (2d Cir.2000).

In addition, an ALJ must set forth the crucial factors justifying his findings with sufficient specificity to allow a court to determine whether substantial evidence supports the decision. *Ferraris v. Heckler,* 728 F.2d 582, 587 (2d Cir.1984). The court, however, cannot substitute its interpretation of the administrative record for that of the Commissioner if the record contains substantial support for the ALJ's decision. *Yancey v. Apfel,* 145 F.3d 106, 111 (2d Cir.1998). If the Commissioner's finding is supported by substantial evidence, it is conclusive. *Bush v. Shalala,* 94 F.3d 40, 45 (2d Cir.1996).

F. Substantial Evidence

***6** Defendants contend that there was substantial evidence in the administrative record showing that Fowlkes was a fleeing felon and, thus, the Commissioner's decision should be affirmed. Fowlkes contends that he was not a fleeing felon and presented substantial evidence which the Commissioner failed to consider.

On September 1, 1999, a felony arrest warrant was issued for Fowlkes in Nottoway County, Virginia. T. 159. On September 7, 1999, a Nottoway County circuit court grand jury indicted Fowlkes for committing felony larceny on June 24, 1995. T. 161. On November 2, 1999, Fowlkes was again indicted in Nottoway County circuit court for the felony of willfully making a false material statement or entry on a Virginia voter registration application on October 2, 1995. T. 160. On March 16, 2000, Fowlkes, then residing in New York, was found by the Social Security Administration to be a fleeing felon and was notified that his benefits were suspended effective September 1999. T. 235–38.

On March 31, 2000, the Commissioner's employee verified that Fowlkes had an outstanding felony warrant in Virginia. T. 170. The Virginia sheriff stated that Fowlkes would be arrested if he entered Virginia. T. 170. The same day, the Schenectady, New York Police Department confirmed with Virginia that there were two outstanding indictments against Fowlkes. T. 171–72. On April 3, 2000, the decision to suspend Fowlkes' disability benefits was affirmed. T. 252–54.

On April 25, 2000, Fowlkes received a letter stating that a petit larceny charge had not been certified in Nottoway county circuit court due to a finding of no probable cause on August 10, 1999. T. 266. In May 2000, Fowlkes gave the Commissioner his New York criminal record, which did not mention any non-New York charges. T. 267–76. On November 29, 2000 at his hearing before the ALJ, Fowlkes disputed that he was a fleeing felon. T. 388–93. Fowlkes contended that he was not a fleeing felon unless the Virginia authorities obtained an extradition warrant. T. 390–91, 403. On February 6, 2001, the deputy clerk of the Nottoway County circuit court stated that there were two outstanding felony warrants against Fowlkes

and provided certified copies of the grand jury's felony indictments. T. 330–32. On April 4, 2001, the Appeals Council affirmed the ALJ's decision. T. 5–6.

An individual's disability benefits will be suspended if he or she flees to avoid criminal prosecution for a felony crime. 20 C.F.R. § 416.1339. A person is fleeing when "he hides or absents himself with the intent to frustrate prosecution." *United States v. Rivera–Ventura,* 72 F.3d 277, 280 (2d Cir.1995). Intent is inferred when a person refuses to surrender himself after learning of the charges. *United States v. Forty–Five Thousand Nine Hundred Forty Dollars ($45,940) in U.S. Currency,* 739 F.2d 792, 796 (2d Cir.1984). "This is true whether the defendant leaves the jurisdiction intending to avoid prosecution, or, having learned of charges while legally outside the jurisdiction, 'constructively flees' by deciding not to return." *Id.*

***7** There is no evidence in the administrative record that Fowlkes appeared on the Virginia charges or had notice of the charges and then fled the jurisdiction in an attempt to avoid his prosecution. Rather the evidence shows that Fowlkes' first notice of the warrants was by the Commissioner on or about March 16, 2000. T. 235, 387–88. Thus, there is substantial evidence that warrants were issued for Fowlkes. To establish Fowlkes' status as a "fleeing" felon, however, the record must demonstrate his intent to avoid answering the charges. Where, as here, the evidence of that intent consists of his failing to return to Virginia after receiving notice of the charges, no basis exists to find that Fowlkes was "fleeing" until March 16, 2000 when he was mailed the notice of suspension. Thus, no evidence supports the ALJ's finding that Fowlkes was a fleeing felon prior to March 2000. The decision of the Commissioner should be reversed as to the effective date of the suspension and remanded for a recalculation of benefits, if any, to which Fowlkes is entitled for the period from September 1999, when the suspension of benefits was made effective, to March 2000, the earliest month for which there exists substantial evidence that Fowlkes was a fleeing felon.[5]

IV. Conclusion

For the reasons stated above it is hereby:

RECOMMENDED that:

1. Defendants' motion to dismiss (Docket No. 14) be GRANTED as to defendants Adamec and Thomas;

2. Fowlkes' complaint be converted into an appeal pursuant to 42 U.S.C. § 405(g) of the suspension of his Social Security benefits;

3. The Commissioner of Social Security be substituted as a party defendant; and

4. The decision of the Commissioner suspending Fowlkes' Social Security benefits effective September 1999 be REVERSED and REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for a recalculation of the benefits, if any, to which Fowlkes is entitled for the period from September 1999 to March 2000; and

IT IS ORDERED that the Clerk of the Court serve a copy of this Report–Recommendation and Order, by regular mail, upon parties to this action.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may lodge written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW. *Roldan v. Racette,* 984 F.2d 85, 89 (2d Cir.1993); *Small v. Sec'y of Health and Human Servs.* 892 F.2d 15 (2d Cir.1989); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

Footnotes

[1] By Order of this Court dated April 15, 2002, the Court *sua sponte* dismissed the case against defendant "Joseph F. Gibbons, Administrative Law Judge" under the doctrine of quasi-judicial immunity. *See* April 15, 2002 Order, dkt. # 4.

[1] This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

[2] As Fowlkes is suing federal employees, his civil rights complaint is properly considered under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics,* 403 U.S. 388 (1971). Although the defendants argue that Fowlkes cannot maintain a claim under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et.seq.,* it is clear from reading the complaint that the only colorable civil rights claim here is for a violation of Fowlkes' Fifth Amendment right to due process.

[3] As Fowlkes is properly challenging the suspension of his Social Security benefits, the Commissioner of Social Security is the proper party and is substituted as the only defendant. 42 U.S.C. § 405(g) (h); 42 U.S.C. § 1383(c)(3).

[4] "T." followed by a number refers to the administrative transcript filed by the Commissioner. Docket No. 13.

[5] A reviewing court has authority to reverse with or without remand. 42 U.S.C. §§ 405(g), 1383(c)(3) (1999). Remand is appropriate where there are gaps in the record or further development of the evidence is needed. *Curry v. Apfel,* 209 F.3d 117, 124 (2d Cir.2000). Reversal is appropriate, however, where there is "persuasive proof" in the record. *Id.; see also Parker v. Harris,* 626 F.2d 225, 235 (2d Cir.1980). The record here as to Fowlkes' notice of the warrants is clear, but the amount of benefits, if any, to which Fowlkes is entitled for the period from September 1999 to March 2000 is not. Therefore, reversal with remand for a recalculation of benefits appears appropriate.