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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

E A C, Plaintiff v. JO ANNE B. BARNHART, Commissioner of the Social Security Administration, Defendant _____ —	))))))))))))	Civil Action No. 04CV2329LAB (LSP) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (Fed. R. Civ. P. 56(a)) Honorable Leo S. Papas Hearing Date: June 20, 2005 Hearing Time: 11:30 A.M. Courtroom: G

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STATEMENT OF THE CASE

Plaintiff E C ("Mrs. C") has received Supplemental Security Income ("SSI") benefits since 1979. In November 2000, Mrs. C received hip replacement surgery that was eventually revised due to manufacturer's defects. Mrs. C was included in a class of plaintiffs that sued the manufacturer and agreed to the terms of settlement arising from the claim. The total value of the claim was $160,000.

On November 27, 2002, Mrs. C was severely injured in an automobile accident and spent nearly three months residing, recovering and rehabilitating in a skilled nursing facility. During this time, Mrs. C was not able to receive her mail at her home. Her son would intermittently gather her mail and deliver it to her at the skilled nursing facility.

In February 2003, Mrs. C received mail at the skilled nursing facility that included a check for $90,000 as partial payment pursuant to the class action settlement. This check has been determined by the Social Security Administration ("SSA") as countable unearned income to Mrs. C for the month of February. Upon receipt of the $90,000 check, Mrs. C immediately transferred the money to her son G C. The gift was made on February 20, 2003.

Soon after making and reporting her gift, Mrs. C received notice that her SSI benefits were terminated, effective February 1, 2003, for transferring a "resource" for less than fair market value. SSA also claimed that Mrs. C had been overpaid $2,672 from December 2002 through June 2003 and began collections of the alleged overpayment by garnishing her very modest Social Security retirement benefits. Mrs. C filed a Request for Reconsideration on June 6, 2003 which was denied on June 19, 2003. The denial was based on an impermissible transfer of a "resource" for less than fair market value. Mrs. C promptly filed a Request for Hearing before Administrative Law Judge David Wurzel ("ALJ Wurzel").

The requested hearing was held on February 18, 2004. ALJ Wurzel's decision was unfavorable. He based his decision on two precepts: "first, the property transferred was technically a 'resource,' not income when it was transferred in February 2003; and second, even if the transfer was technically 'income,' rather than a 'resource,' the statutory rules regarding the transfer of property for less than fair market value apply to all property owned by a claimant,

including both 'resources' and 'income.'" Decision of ALJ Wurzel, May 21, 2004 ("ALJ Decision"), Transcript of Administrative Proceeding ("Transcript"), p. 15.

Following the unfavorable May 21, 2004 ALJ decision, Mrs. C requested timely review by the SSA Appeals Council on July 16, 2004. The Appeals Council declined to review the case on September 17, 2004 and Mrs. C responded by filing the instant action for judicial review on November 22, 2004.

ISSUE PRESENTED

The issue presented to the court is whether Mrs. C continued to meet the income and resource requirements for continued SSI benefits under section 1614(a)(3)(A) of the Social Security Act in light of receiving and gifting the $90,000 settlement award. More narrowly, the specific issue is whether the $90,000 gift was exempt from the gifting penalty provisions of the Social Security Act § 1613(c)(a)(A), 42 U.S.C. §1382B(c)(1)(A), on the ground it was "income" rather than a "resource" when she transferred it to her son in February 2003.

ARGUMENT

I. SUMMARY JUDGMENT MUST BE GRANTED IF THERE IS NO MATERIAL ISSUE AS TO ANY MATERIAL FACT AND THE MOVING PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Summary judgment must be granted if there is no material issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044 (9th Cir. 1995). Summary judgment is also proper when, "viewing the evidence in the light most favorable to the non-moving party, the movant is clearly entitled to prevail as a matter of law." Brown v. Devine, 574 F.Supp 790, 792 (N.D. Cal., 1983), (citing Radobenko v. Automated Equipment Corp., 520 F.2d 540, 543 (9th Cir. 1975); Caplan v. Roberts, 506 F.2d 1039, 1042 (9th Cir. 1974)).

In the present case, there are no issues as to any material facts. The only outstanding issues relate to the application of the established facts to Social Security law, regulations, and policies. The most salient uncontroverted facts are that Mrs. C was issued a check for $90,000 that was delivered to her in February 2003 and that on February 20, 2003, she gave the entire check to her son Gary. ALJ Decision, Transcript, p. 14. The ALJ decision misapplies these critical facts using a legal framework that constitutes an error of law, disregarding both the law and SSA's own rules and policies.

As there are no disputed facts in the present case, the only remaining questions involve Defendant's erroneous interpretation of these facts as applied to the law. Summary judgment is appropriate if Mrs. C can demonstrate that the application of the correct legal standard supports a judgment solely in her favor. McDermott Intern., Inc. v. Wilander, 498 U.S. 337, 356 (1991). As Mrs. C will show, ALJ Wurzel made critical errors of law by refusing to apply the law as written and instead substituting his own *ad hoc* legal standards.

II. THE APPROPRIATE STANDARD OF REVIEW MANDATES THAT THE ALJ'S DECISION APPLY THE CORRECT LEGAL STANDARDS.

A court providing judicial review of an ALJ decision must insure that the correct legal standards have been applied and that the ALJ's findings are supported by substantial evidence. Hart v. Sullivan, 824 F. Supp. 903, 905 (N.D. Calif., 1992); *see also* Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986). Where an error of law has been made, an ALJ's decision must be overturned. Bunnell v. Sullivan, 947 F.2d 341, 346 (9th Cir. 1991). When reviewing the administrative decision, all ALJ determinations of law are reviewed *de novo* and are not due any presumptive weight. Quarles v. Barnhart, 178 F.Supp.2d 1089, 1094 (N.D. Cal. 2001) (referring to McNatt v. Apfel, 201 F.3d 1084, 1087 (9th Cir. 2000)).

In the current case, the SSA has not applied its own correct legal standards in reviewing Mrs. C's gift. This error of law requires that the ALJ decision be overturned and Mrs. C's SSI benefits be restored.

III. MRS. C'S RECEIPT AND SUBSEQUENT GIFT OF $90,000 DO NOT AFFECT HER ELIGIBILITY FOR CONTINUED SSI BENEFITS.

A. MRS. C'S CHECK WAS INCOME IN FEBRUARY 2003.

Mrs. C's June 19, 2003 Notice of Reconsideration mistakenly refers to Mrs. C's $90,000 check as both "income" **and** a "resource." The Notice states "[i]t is determined that you did have excess income in February 2003 and we find that on February 20, 2003 you transferred a resource for less than fair market value." Notice of Reconsideration, June 19, 2003, Transcript, pp 158-159. The determination that Mrs. C's check was income in February 2003 was correct; the contradictory finding that the check was a resource was not.

Income is defined in 42 U.S.C. § 1382(a) as both earned and unearned income. Unearned income includes "prizes and awards." 42 U.S.C. § 1382(a)(2)(C); 20 C.F.R. § 416.1121(f) (2005). An award includes money "received as the result of a decision by a court." 20 C.F.R. § 416.1121(f). Money received by SSI beneficiaries pursuant to personal injury settlements are "awards" within the meaning of §1382(a)(2)(C). LeBeaux v. Sullivan, 760 F.Supp. 761 (N.D. Iowa 1991). Clearly, Mrs. C's $90,000 check was an award and thus, unearned income.

Income is counted to an SSI beneficiary in the month in which it is received, credited to one's account, or set aside for one's use. 20 C.F.R. § 416.1123 (1995). Items received in cash "during a month are evaluated first under the income counting rules and, if retained until the first moment of the following month, are subject to rules for counting resources at that time." 20 C.F.R. § 416.1207(d) (1987). Under SSA's own internal policies, money received cannot possibly be both income and a resource simultaneously. SSA Programs Operation Manual System ("POMS") SI 01120.005. ALJ Wurzel's decision affirms that awards are not a resource during the month of receipt or set aside. ALJ Decision, Transcript, p. 16.

1. Mrs. C's Check Was Received in February.

After properly identifying the $90,000 check as income, the next step in the analysis of Mrs. C's continued SSI eligibility turns to the month in which it is considered income. The check was income to her in February 2003 but ALJ Wurzel committed his first error of law by concluding that the check was Mrs. C's income in a month prior to February. This mistaken conclusion rested on two theories:

1) The $90,000 check was received for counting purposes when it was delivered to her mailbox which likely occurred before February, rendering it income *before* February and a resource *in* February; or

2) The $90,000 was "set aside for [Mrs. C's] use," when Sulzer issued the check to her, regardless of when she actually physically "received" the check, and is thus income in December 2002, the month that Sulzer issued the check, and a resource in February 2003. Id., at 15.

ALJ Wurzel's first theory relies on the notion that the check was delivered to Mrs. C's home mailbox before February 2003 but there is no evidentiary support to establish this notion as fact. The only evidence submitted regarding delivery of the check conclusively establishes that Mrs. C did not actually possess the check until February and that she had no knowledge of its delivery until that time. Letter from E A C, May 3, 2003, Transcript, p. 191; ALJ Decision, Transcript, p. 14. The SSA itself has found that the check was countable income to Mrs. C for February. Notice of Reconsideration, Transcript, p 158. Due to Mrs. C's hospitalization and incapacity, she did not have knowledge of, nor did she receive, the check until February when her son's delivery resulted in actual physical possession.

Regardless of exactly when the $90,000 check was delivered to Mrs. C's home mailbox, ALJ Wurzel's first theory remains incorrect because it claims that income is "received" for SSI counting purposes whenever it is delivered to a beneficiary's mailbox. Not only did the ALJ give no legal support for this definition of "received," he also chose to craft a definition without consulting any outside sources. Since there are no Social Security regulations that define receipt, outside sources are instructive. The Uniform Commercial Code ("U.C.C.") § 2-103(1)(c) states that "receipt of goods means taking physical possession of them," and in note 2, elucidates that "delivery with respect to documents of title . . . requires transfer of physical delivery." U.C.C. § 2-103 (2003). Although a check is not a good specifically, it is analogous to a document of title and therefore receipt necessarily includes physical delivery, emphasizing actual possession. Perhaps even more on point, the official comment to U.C.C. § 3-420 states "until delivery, the payee does not have any interest in the check." U.C.C. § 3-420, Official Comment (1) (2002).

□ 2. Mrs. C's Check Was Not "Set Aside" When it Was Issued.

ALJ Wurzel's second theory for finding that Mrs. C's $90,000 check was income in a month prior to February 2003 is based on the check being set aside for her use when it was issued, regardless of its delivery. He admits that there is no regulatory or decisional law to determine the meaning of "set aside" so he again composes and applies his own definition. ALJ Wurzel relies on U.C.C. §§ 3-102(1)(b) and 3-104 which defines a check as an unconditional order to a bank to pay a sum certain to a specific person on demand. He argues that once a check

is issued, the funds deposited to pay the check could not be accessed, except to pay the check, without breaching the issuing trustee's fiduciary duty.

ALJ Wurzel's argument that setting aside for purposes of 20 C.F.R. § 416.1123 occurs when a settlement disbursement check is issued is flawed. Satisfying "set aside" upon a check's issuance would make the receipt portion of the law irrelevant. If income is attributed as soon as a check is issued, then the question of receipt would never arise because issuance always precedes receipt. This definition of "set aside" would create further problems when a check is lost, delayed, stolen, or returned unpayable. In such a situation, although no receipt or possession has occurred, section 416.1123 would be satisfied by the mere issuance of the check. An SSI recipient would therefore be ineligible for benefits for an indefinite period for excess income (and, in the next month, excess resources) despite having no knowledge or possession of an issued check, leaving him or her without benefits and no money until the lost check is reissued, received, and cashed. Such injustice would be repeated in the case of an issued check that proved to be unpayable for insufficient funds.

A check cannot fairly be considered set aside for the recipient's use unless he or she has the ability to access the funds immediately. In a related federal court case regarding maintenance of SSI eligibility, immediate *access* to funds was held to be the key for determining when a distribution counted as income. Cowlings v. Barnhart, 75 Fed.Appx. 665, 667 (9th Cir. 2003). In the present case, Mrs. C never had anything even remotely resembling access to the funds that were allegedly "set aside" until February 2003. She was incapable of accessing the funds prior to February because she could not perform various, requisite intermediate steps between issuance and actual access. Among other steps, Mrs. C could not access the funds represented in the check until the check had been: 1) physically received, 2) endorsed, and 3) presented to her bank. In addition, banks have funds availability policies designed to limit customer access to deposited checks until sufficient time is given to verify the funds at the issuing bank. In the case of such an exceptionally valuable, non-local check, any bank would have withheld access to the funds for at least eleven business days after the check was deposited. 12 U.S.C. § 4003(b)(1); 12 C.F.R. §§

229.13(b), 229.13(h) (2004). The availability of funds is also contingent upon the presence of sufficient funds in the drawer's account at the issuing bank.

Mrs. C's situation is analogous to that in Baxter v. CIR. In Baxter, the court was forced to decide if an issued check was countable as income in the month that it was prepared even though, due to holiday and weekends, the check was unavailable until the first business day of the next month. Baxter v. C.I.R. 816 F. 2d 493, 495 (1987). In analyzing the question, the court relied on a tax regulation quite similar to 42 C.F.R. § 416.1123. The tax regulation defined income as "constructively received by a taxpayer in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given." Id. Applying this definition, the court stated that "although money has been credited to one's account or set apart for one it is not income if some barrier exists to actual possession." Id.

In Mrs. C's case, she was faced with myriad barriers to the actual possession of the funds that her $90,000 check represented. After her accident and resulting incapacity, Mrs. C was unable to gain possession of the check because she was not living at home when it was delivered and was ignorant of its disbursement. This situation created substantial physical barriers to actual possession that compounded the barriers discussed *supra* that are inherent to cashing checks.

Mrs. C's check should not have been counted as unearned income until she actually possessed the check. Mrs. C did not voluntarily ignore the check to maintain SSI eligibility; rather, because of circumstances beyond her control, she did not have knowledge of the delivery of the check and was unable to gain actual possession of it. The ALJ's ruling is legally erroneous because it counts unearned income in a month prior to actual possession and finds

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Mrs. C ineligible for SSI benefits despite the fact that circumstances beyond Mrs. C's control resulted in multiple, significant barriers to actual possession of the check in question.

B. SSI REGULATIONS DO NOT PENALIZE THE GIFTING OF INCOME.

1. SSA Law, Regulations, and Policies Expressly and Plainly Allow Continued SSI Eligibility in Light of a Gift of Income in the Month of Receipt.

There is simply no law or regulation that penalizes SSI recipients for transferring income for less than fair market value. ALJ Wurzel' decision only confirms this fact. Only the gifting of *resources* expressly affects SSI eligibility. 42 U.S.C. § 1382b(c); 20 C.F.R. § 416.1246 (1990). The law and SSA regulations charge *resource* gifts toward the overall resource limit in an effort to discourage transfers intended to establish SSI eligibility. The law is limited to gifts of "resources" and the implementing regulation is similarly limited to gifts of "**nonexcluded resources.**" Id. (emphasis added). Gifts of other items are not charged against resource limits.

Resources, for all SSI purposes, are defined as "cash or other liquid assets or any real or personal property that an individual . . . owns and could convert to cash to be used for his or her support and maintenance." 20 C.F.R. § 416.1201(a) (1994). As ALJ Wurzel noted, many items of property can meet the definition of income and resource simultaneously; however, items received in cash during a month are "evaluated first under the income counting rules and, if retained until the first moment of the following month, are subject to rules for counting resources at that time." 20 C.F.R. § 416.1207(d). Under SSI regulations, money received cannot possibly be both income and a resource simultaneously. POMS SI 01120.005.

Mrs. C's check for $90,000 was erroneously counted as a resource in the month it was received, thereby rendering the application of a period of SSI ineligibility also erroneous. As previously demonstrated, the check was actually income in February and never became a resource. All resource determinations for current SSI beneficiaries are limited to the first moment of each calendar month. POMS SI 01110.600. Because Mrs. C's check was not received until February 2003 and was gifted prior to the end of the month, her nonexcluded resources never exceeded the allowable $2000 maximum at the beginning of any calendar month.

ALJ Wurzel notably does not dispute that the plain language of the Social Security law and regulations do not allow penalties for gifts of income. Nonetheless, he makes his second critical error of law by then claiming that the term "resources," as used in 42 U.S.C. § 1382b(c)

means something other than its *express* definition and as it is used throughout the rest of the entire body of SSI law and regulations.

2. There is no Evidence that Congress Intended to Penalize the Gifting of Income by SSI Beneficiaries.

ALJ Wurzel concedes that the distinction between "resources" and "income" is pervasive throughout the Social Security Act. Nonetheless, he tramples this explicit distinction by labeling most uses of the term "resource" as "technical" and that used in section 1382b(c) as something else, presumably, "nontechnical." ALJ Decision, Transcript, p. 19. The actual SSA regulations rule out income in the definition of resources. 20 C.F.R. §§ 416.1201(a), 416.1207(d). In the case of section 1382b(c), however, ALJ Wurzel finds, exceptionally, that resources *include* income, expressly contrary to the regulations and SSA operations policy. The thrust of ALJ Wurzel's finding is that the regulations and SSA's express policies are invalid in Mrs. C's particular case.

ALJ Wurzel's support for interpreting the word "resource" in direct contradiction of its express definition comes from an analysis of some selected legislative history that preceded the adoption of the 1999 amendments to the Social Security Act. The intent of Congress is reported in House Report No. 106-182 and states:

"The logic of this provision is similar to that for trusts; namely, that a basic principal of all Federal welfare programs is that benefits are reserved for those who have limited income and resources. If individuals dispose of valuable assets at less than their fair market value - often by "selling" them to friends or relatives - in order to meet the assets test for a Federal welfare program, that individual should not be allowed to participate in the welfare program until taxpayers have been compensated from an amount equal to the difference between the amount for which the individual disposed of the asset and the fair market value of the asset. Again, similar to the case of trusts, equity issues are involved here because Medicaid law already contains a provision protecting taxpayers against applicants who dispose of assets for less than fair market value."

From this report, ALJ Wurzel concludes that Congress intended to prevent SSI beneficiaries from giving away "property" to remain eligible for SSI and that "property" includes income. The report does not refer to "property," but does often refer to assets. Assets are not defined in the Social Security Act, but its common and regulatory usage does not include income. See 20 C.F.R. § 416.1102 (2005) (income defined: does not mention assets) 20 C.F.R.

§ 416.1201 (resources defined: mentions assets). The report repeatedly uses the term "assets" as a general term, but notably, Congress exclusively used the well-defined term "resource" when formulating its actual gifting penalty.

ALJ Wurzel emphasizes that the report explicitly refers to "income and resources" when discussing the motivation for the Act. ALJ Decision, Transcript, p. 20. This explicit reference, however, does not occur within the discussion of penalizing transfers for less than fair market value; rather, it is a reference to general program eligibility. There is no reference to "income" in the cited congressional report that supports the imposition of a period of ineligibility nor in the law and regulations which actually impose such penalties.

Even if ALJ Wurzel's argument that the term "resource" should not be confined to its express definition because of possibly inconsistent legislative intent merits this Court's attention, the argument is nonetheless too uncertain to eviscerate the law. If contrary legislative intent is going to be used to override the expressed plain meaning of a statutory term, such legislative intent should be clear and unarguable. "[A] court may not rewrite a statute to conform to a presumed intent that is not expressed." People v. Statum, 28 Cal. 4th 682, 692 (2002). In the present case, the ALJ's interpretation of legislative intent is far from clearly supported by the language in the House Report he cites. The Report refers to "assets" which are not defined. The common and regulatory usage of "assets" does not include income. There is no express intent to penalize the gifting of income.

Congress established its resource gifting penalties to discourage gifts intended to establish eligibility for the SSI program. Congress knows how to statutorily impose penalty periods for gifts it chooses to discourage. There are no federal laws that permit penalizing the gifting of income. The law in this area is not ambiguous. Social Security's attempt to penalize the gifting of Mrs. C's income violates the law. Any affirmation of this unlawful practice would be tantamount to creating law without proper authority. If such unwarranted law creation is to be undertaken, the legislative intent should at least be clear. In this case, the intent to penalize gifts of income is not even existent, let alone clearly established.

C. EVEN IF MRS. C'S GIFT QUALIFIED AS A DISPOSAL OF RESOURCES FOR LESS THAN FAIR MARKET VALUE, SHE IS

NONETHELESS EXEMPT FROM A PERIOD OF INELIGIBILITY.

Even if Mrs. C's $90,000 check is properly labeled a resource in February 2003 or ALJ Wurzel's blatant contradiction of the law and regulation regarding penalty periods is excused, she nonetheless remained eligible for SSI benefits after gifting the money to her son. 42 U.S.C. § 1382b(c)(iii)(III) states that resource gifts will not cause ineligibility for SSI benefits if the gift was exclusively for a purpose other than to qualify for benefits. The regulations similarly limit the gifting penalty solely to individuals attempting to establish eligibility for SSI. 20 C.F.R. § 416.1246(a). In Mrs. C's case, she had already received SSI benefits for 24 years and thus did not need to qualify for benefits. Her qualifying period had been satisfied years before.

The law penalizing resource gifts is clearly aimed at new SSI applicants, not current beneficiaries. The explanation and reason portions of the House Report ALJ Wurzel uses to determine Congressional intent express that the law is aimed at barring SSI benefits to applicants who gift resources in an effort to meet the qualifications for benefits. There is no mention of current beneficiaries; only applicants are mentioned as the motivation for the change in law. As a longtime recipient of SSI, Mrs. C was not an applicant seeking to qualify for benefits and thus, exempt from a period of ineligibility.

III. CONCLUSION

Mrs. C received a $90,000 check in February 2003. That same month, she transferred the check to her son, Gary. The law and regulations which direct the SSI program clearly provide that the check was income to Mrs. C for February, but as it was transferred within the same month of receipt, never became a resource. Since she never held resources in excess of $2000, she is not subject to a period of ineligibility, and was not overpaid any SSI benefits. No strained readings of legislative intent or hypotheticals can undermine the plain language of the law protecting Mrs. C's gift. Mrs. C has been wrongfully deprived of her critical SSI benefits, leaving her with less than $500 a month on which to survive. Prior to making her gift, Mrs. C understood the law and depended on its meaning. Now, the SSA has found the operation of the law not to its liking and has undertaken to change it without notice or authority, leaving Mrs. C to struggle with the unjust and illegal results.

SSA's decision in this matter relies on several errors of law. The material facts are not in dispute. The law and procedural history of this case demand that summary judgment for Mrs. C be granted and that her SSI benefits be immediately reinstated.

Respectfully Submitted,

Dated: _____, 2005

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_____
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