

entire pharmaceutical industry.¹⁴⁸ Although the FDA's primary responsibility is the protection of the consumer,¹⁴⁹ the September regulations questioned in *Pharmaceutical Manufacturers Association* would deprive not only the drug industry, but the public as well, of the statutory right to comment and object to the substance of the regulations. The FDA was required to remove ineffective drugs from the market by the 1962 amendments; if notice and opportunity for comment had been provided before the promulgation of the September regulations, unnecessary litigation might have been avoided and the designated drugs removed from the market much sooner. When litigation occurs, testing by the NAS-NRC often ceases, and the regulations are placed in abeyance pending the outcome of litigation. Fair procedure in such cases can encourage cooperation between the drug industry and the FDA, resulting in less reluctance on the part of the drug manufacturers to comply with subsequent drug regulations. Rule-making proceedings are not merely confrontations between the FDA and the manufacturers but are proceedings in which all interests should be considered,¹⁵⁰ such as the interest of consumers in not paying substantially higher prices for drugs to cover the companies' added expenses for what may be unnecessary testing. Sections 4(b) and 4(c) of the APA were enacted to ensure public participation in the rule-making process, for broader participation enables agencies to educate themselves before establishing procedures and rules which will have a substantial impact on the public and on the industries regulated.¹⁵¹ A denial of notice and the opportunity to comment may facilitate the enforcement of agency policy in the short-run, but it is the rule of law and the public interest which eventually will suffer when procedural safeguards are circumscribed.

IV. ADJUDICATION

The Evolving Right To Counsel In Social Security Hearings

In the past year a small, but perhaps important, change has

148. The obvious effect of *Pharmaceutical Manufacturers Association* can be observed in the republishing of the September regulations in February, 1970, in full compliance with the APA.

149. See *United States v. Two Bags*, 147 F.2d 123, 127 (6th Cir. 1945), which gives as the purpose of the Federal Food, Drug and Cosmetic Act the protection of the ultimate consumer.

150. 21 U.S.C. § 371(e)(3) (1964).

151. See *Texaco, Inc. v. FPC*, 412 F.2d 740 (3d Cir. 1969).

developed in the judicial attitude toward the right to counsel in Social Security benefit hearings. The recently decided cases¹ in most of the courts of appeal have continued to hold that lack of counsel at the examiner's hearing cannot be "good cause" for remand to the Secretary of HEW under section 205(g) of the Social Security Act.² However, the Sixth Circuit seems to be taking a somewhat different attitude. In the case of *Webb v. Finch*³ the court remanded to the Secretary an appeal from a denial of benefits solely because of an allegation that additional evidence could have been adduced at an examiner's hearing but for the absence of counsel.

It is generally conceded that there is currently no constitutional or statutory right to assigned counsel in Social Security hearings.⁴ An argument that the fifth amendment's due process clause mandates assigned counsel encounters several hurdles, one of which is concerned with whether Social Security benefits are a right or a privilege. Although the theory that anyone has a vested right to receive Social Security benefits has been explicitly repudiated,⁵ the distinction has been rendered less important by the stance recently taken by the Supreme Court. In *Goldberg v. Kelly*⁶ the Court held that the due process clause mandated certain procedural safeguards before welfare benefits could be terminated regardless of whether the receipt of payments was considered a right or a privilege. The Court in *Goldberg* viewed the welfare benefits at issue⁷ as "a matter of statutory entitlement for persons qualified to receive them"⁸ implying that payments due under a welfare scheme, such as Social Security, are "more like 'property' than a 'gratuity.'"⁹ While *Goldberg* eroded the right-privilege distinction in the welfare area, the Court explicitly

1. E.g., *Granger v. Finch*, 425 F.2d 206 (7th Cir.), cert. denied sub nom., *Granger v. Richardson*, 400 U.S. 824 (1970); *Cross v. Finch*, 427 F.2d 406 (5th Cir. 1970); *Easley v. Finch*, 431 F.2d 1351 (4th Cir. 1970); *Domozik v. Cohen*, 413 F.2d 5 (3d Cir. 1969).

2. "The court . . . may, at any time, on good cause shown, order additional evidence to be taken before the Secretary . . ." 42 U.S.C. § 405(g) (1964).

3. 431 F.2d 1179 (6th Cir. 1970).

4. See, e.g., *Vega v. Secretary*, 1A CCH UNEMPL. INS. REP. ¶ 16,042 (D.P.R. 1970); *McGaughy v. Gardner*, 264 F. Supp. 820 (E.D. La. 1967).

5. *Fleming v. Nestor*, 363 U.S. 603 (1960).

6. 397 U.S. 254, 262 (1970).

7. Aid to Families with Dependent Children as established by the Social Security Act of 1935, 42 U.S.C. §§ 601-10 (1964), and administered by the state of New York. See N.Y. SOC. WELFARE LAW §§ 343-62 (1966).

8. 397 U.S. at 262.

9. *Id.* at n.8. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issue*, 74 YALE L.J. 1245, 1255 (1965).

limited its holding to the issue of whether due process required an informal hearing prior to a welfare benefit termination¹⁰ and refused to require that counsel be provided at these hearings.¹¹ However, the opinion contains dicta which might well serve as an impetus for the argument that due process requirements demand counsel in the Social Security area. In discussing the character of welfare hearings the Court stated that “[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.”¹² In referring to the right of the claimant to retain counsel, the Court acknowledged: “Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient.”¹³ Obviously, those applicants without the funds, intelligence, or strength of personality to present their cases effectively are going to be substantially prejudiced, especially when one considers that most of the claims are prosecuted by persons claiming disabilities or by elderly persons substantially unable to bear the burden of collecting and presenting evidence. However, no lower federal courts have undertaken to provide counsel for Social Security litigants, either before the agency or on appeal,¹⁴ in the absence of express direction by the Supreme Court.¹⁵

Social Security appeals are reviewed pursuant to section 205 of the Social Security Act¹⁶ under a relatively simple procedure. When an application for benefits is denied and reconsideration also results in denial, the applicant may demand a hearing before an examiner,¹⁷ who then makes a decision which may be reviewed by an Appeals Council¹⁸ which makes a final decision on behalf of the Secretary of

10. 397 U.S. at 267.

11. *Id.* at 270.

12. *Id.* at 268-69.

13. *Id.* at 270-71.

14. *See* McGaughy v. Gardner, 264 F. Supp. 820 (E.D. La. 1967) (demand for assigned counsel refused).

15. The Supreme Court has denied certiorari in a case where the lack of counsel was asserted as error. Granger v. Finch, 425 F.2d 206 (7th Cir. 1970). *See also* Paul v. Celebrezze, 337 F.2d 352 (9th Cir. 1964), *cert. denied*, 381 U.S. 906 (1965).

16. The applicability of the APA to Social Security hearings has been the subject of considerable litigation. However, the APA provides no greater right to counsel than does the Social Security Act, 5 U.S.C. § 555(b) (Supp. V, 1970). *See* Cohen v. Perales, 412 F.2d 44, *rehearing denied*, 416 F.2d 1250 (5th Cir. 1969), *cert. granted sub nom.* Richardson v. Perales, 400 U.S. 811 (1970); Project, *Federal Administrative Law Developments—1969, 1970* DUKE L.J. 67, 146-56.

17. 20 C.F.R. §§ 404.917, 404.919-20 (1970).

18. *Id.* § 404.945.

HEW. After exhausting this process, a claimant may appeal to a United States district court.¹⁹ The court is given power under the statute to remand a case to the Secretary where "good cause" is shown for the receipt of additional evidence.²⁰ Many litigants have attempted to assert that lack of counsel before the hearing examiner is sufficient cause for remand. Generally, they have been unsuccessful, especially where no special prejudice can be demonstrated;²¹ however, the list of cases where lack of counsel at the administrative level has been cause for remand is growing.²²

While the movement is perhaps strongest at the district court level, the Sixth Circuit's decision in *Webb v. Finch*²³ is demonstrative of a court's reluctance to affirm a denial of benefits where the applicant has been unable to present his case effectively below. Although the court acknowledged that there were ample grounds to affirm a judgment denying benefits, it noted that the applicant had a limited education and only the help of a non-lawyer friend in presenting his case. In argument, Webb's attorney alleged that additional evidence of disability existed that had not been presented at the hearing. Relying on this possibility of additional evidence and the lack of counsel at the hearing, the court of appeals remanded the case to the Secretary. Given heavy weight in the decision was the fact that the applicant represented himself "with obvious ineffectiveness [and was] . . . hampered by lack of education."²⁴

The dissent in *Webb* essentially restated the law as it is generally conceived in the other courts of appeal. It distinguished the earlier Sixth Circuit case of *Arms v. Gardner*,²⁵ wherein a Social Security applicant who was actually represented by an attorney was given a remand because

19. 42 U.S.C. § 405(g) (1964).

20. *Id.* See note 2 *supra*.

21. *E.g.*, *Cross v. Finch*, 427 F.2d 406 (5th Cir. 1970); *Granger v. Finch*, 425 F.2d 206 (7th Cir. 1970); *Steimer v. Gardner*, 395 F.2d 197 (9th Cir. 1968); *Ussi v. Folsom*, 254 F.2d 842 (2d Cir. 1958); *Kennedy v. Finch*, F. Supp. (E.D. Pa. 1970); *Vega v. Secretary*, 1A CCH UNEMPL. INS. REP. ¶ 16,042 (D.P.R. 1970); *Pimental v. Secretary*, 297 F. Supp. 212 (D. Mass. 1969); *McGaughy v. Gardner*, 264 F. Supp. 820 (E.D. La. 1967); *Meola v. Ribicoff*, 207 F. Supp. 658 (S.D.N.Y. 1962) (remanded on other grounds); *Butler v. Folsom*, 167 F. Supp. 684 (W.D. Ark. 1958); *Wray v. Folsom*, 166 F. Supp. 390 (W.D. Ark. 1958) (remanded on other grounds).

22. *E.g.*, *Webb v. Finch*, 431 F.2d 1179 (6th Cir. 1970); *Arms v. Gardner*, 353 F.2d 197 (6th Cir. 1965); *Crowder v. Gardner*, 249 F. Supp. 678 (D.S.C. 1966); *Ihnen v. Celebrezze*, 223 F. Supp. 157 (D.S.D. 1963); *Hall v. Celebrezze*, 217 F. Supp. 905 (M.D.N.C. 1963).

23. 431 F.2d 1179 (6th Cir. 1970).

24. *Id.* at 1180.

25. 353 F.2d 197 (6th Cir. 1965).

the attorney took no part in the examination of witnesses, offered no testimony in appellee's behalf and gave the appellee no apparent legal assistance in the preparation of his case, admitting on the record that he knew very little about Social Security laws.²⁶

The dissent relied on the fact that Webb's lay advisor was experienced in giving advice to Social Security claimants. The citation of a number of cases, however, reveals that the dissent simply denied that there is any particular right to have one's case skillfully presented.²⁷ Judge McCree concluded that "[l]ack of counsel at a hearing is not sufficient grounds for remand in the absence of a showing of clear prejudice or unfairness."²⁸

An examination of the particular situations of the claimants in *Webb* and *Arms* as compared to those in cases where remands have been denied²⁹ reveals that the unsuccessful claimants are usually illiterate, or nearly so, and presumably have little capacity to understand the nature of legal procedures. While the courts which have denied remand purport to leave open the case where a claimant is clearly prejudiced by lack of counsel, one suspects that it will be difficult to demonstrate such prejudice to these courts. The Sixth Circuit decision in *Arms* should be compared with the Ninth Circuit decision in *Steimer v. Gardner*.³⁰ In *Arms* the court concluded:

A careful review of the record however discloses that the claimant did not have the proper representation to which he was *entitled* at the hearing before the examiner. As stated above, his attorney failed and was admittedly unable to give him the legal assistance he *should have had* to present his evidence and to cross-examine the witnesses produced.³¹

In *Steimer* the applicant argued that not only was she unable to effectively present her case but that she was misled by the Social Security literature into believing that she did not need counsel. The court decided that the notice of hearing form was not misleading and that it contained all the information necessary to establish the disability claim.³²

In an effort to lessen the impact of the lack of counsel on the unsophisticated claimant for Social Security, some courts have

26. *Id.* at 199.

27. 431 F.2d at 1180.

28. *Id.*

29. See *Cross v. Finch*, 427 F.2d 406 (5th Cir. 1970); *Vega v. Secretary*, 1A CCH UN-EMPL. INS. REP. ¶ 16,042 (D.P.R. 1970).

30. 395 F.2d 197 (9th Cir. 1968).

31. 353 F.2d at 199 (emphasis added).

32. 395 F.2d at 198-99.

developed a doctrine that the examiner must step in and assist the unrepresented claimant in the presentation of his case, at least to the extent of making sure that all available witnesses are called and that the claimant understands the nature of the proof required.³³ This duty may, however, interfere with the performance of the examiner's main function—impartial resolution of the dispute.³⁴ However, the Social Security regulations do state that the hearing examiner "shall inquire fully" into the issues raised in the hearing.³⁵ Perhaps if this duty of full inquiry were effectively rendered the meritorious applicant would have little difficulty in establishing eligibility for benefits. At present, however, the Social Security applicant must depend on the good will of employees willing to give advice and on the written explanatory materials available for his case.

In considering allegations that lack of counsel at a prior hearing prejudiced a claimant's case, some courts have distinguished the applicant who files a second benefit application after his earlier claim has been decided adversely and the claimant who appeals from an original denial of benefits. In the former instance courts have universally applied the doctrine of res judicata and denied the second application in accordance with the finality provisions of the Social Security regulations.³⁶ Some claimants have attempted to persuade the courts to disregard the original application on the ground that, absent counsel, their case was ineffectively presented at the administrative hearing or was not properly appealed. In *Easley v. Finch*³⁷ the Fourth Circuit rejected such a claim. In *Easley* the claimant had filed four applications for benefits³⁸—three without the

33. See *Stewart v. Cohen*, 309 F. Supp. 949 (E.D.N.Y. 1970).

34. See 20 C.F.R. § 404.922 (1970).

35. *Id.* § 404.927.

36. *Id.* § 404.937(b). See, e.g., *Domozik v. Cohen*, 413 F.2d 5 (3d Cir. 1969); *Rushing v. Finch*, 310 F. Supp. 848 (W.D. La. 1970).

37. 431 F.2d 1351 (4th Cir. 1970).

38. An application was first filed in October 1960 claiming disability as of December 1959 due to asthma. *Easley* did not ask for reconsideration, the first step in Social Security review, and the original denial became final. See 20 C.F.R. § 404.909-17 (1970). The second application reasserted the asthma claim and also alleged disability due to arm weakness. This time *Easley* sought reconsideration after denial but was again rebuffed. At the hearing the examiner concluded that *Easley* was not entitled to benefits. The third application was also denied at the reconsideration stage. The request for hearing was denied because no new evidence was offered and the Appeals Council, the final administrative review body, denied relief. See generally 1 CCH UNEMPL. INS. REP. ¶ 12,655-91 (1970) (general explanation of Social Security appeal procedure); Note, *Administrative Procedure and the Social Security Disability Program*, 2 IND. LEGAL F. 295 (1969).

assistance of counsel. On Easley's fourth attempt he was represented by counsel who took the case through the entire administrative process, trying unsuccessfully to convince the agency to reopen the case. Easley finally took his case to court where the district court judge held that administrative res judicata did not apply since Easley had been without counsel at the first hearing and because he never had judicial review of his claim.³⁹ The district court went on to find Easley disabled, but the Fourth Circuit reversed, holding that lack of counsel was "insufficient basis for disregarding the principle of repose."⁴⁰

The Fourth Circuit's reversal in *Easley* is probably correct on the alternate ground that the claimant was not in fact disabled.⁴¹ However, the contention that Easley's claim was barred by res judicata is unwarranted, primarily because there is no justification for limiting the statutory standard of "good cause" to the restricted meaning implied by the regulations. Social Security regulations provide for the dismissal of a claim on the ground of res judicata if a previous application containing the same material has been determined adversely to the claimant,⁴² but the Secretary is empowered to reopen an application up to four years from its denial when "good cause"⁴³ is shown. Good cause is defined in the regulations as existing when "new and material evidence is furnished,"⁴⁴ a clerical error is found,⁴⁵ or an error appears on the face of the record.⁴⁶ Good cause as used in the regulations would thus not seem to include an allegation that lack of counsel had made an effective presentation of the claimant's case impossible, but rather the situation where new evidence is discovered after the record is closed. By contrast, section 205(g) of the Social Security Act⁴⁷ authorizes a remand to the Secretary for the taking of additional evidence for good cause. Seemingly there is no reason why any less good cause would have existed to deny Easley a remand of his application than existed in *Webb*,⁴⁸ where the court found that good cause to remand under the

39. The district court's opinion is unreported.

40. 431 F.2d at 1353.

41. *Id.* at 1354.

42. 20 C.F.R. § 404.937(a) (1970).

43. *Id.* § 404.957(b).

44. *Id.* § 404.958(a). This provision seems oriented to evidence produced by the government.

45. *Id.* § 404.958(b).

46. *Id.* § 404.958(c). See *Grose v. Cohen*, 406 F.2d 823 (4th Cir. 1969).

47. 42 U.S.C. § 405(g) (1964).

48. See notes 23-24 *supra* and accompanying text.

statute could include a lack of counsel which contributed to an ineffective presentation of the case. However, the *Easley* court viewed the use of the doctrine of res judicata from the regulations as serving the broader purpose of confining review of Social Security claims strictly to the scheme set forth in the Act and implemented by the regulations. Still, protection of the applicant's right to an effective presentation of his case is a value which also deserves consideration. The *Easley* decision seems to be rooted in the philosophical view that Social Security Administration proceedings are fundamentally fair, even without counsel at the administrative stages.⁴⁹ Yet the district court's view may be more in accord with the scope of section 205(g),⁵⁰ which apparently makes remand largely a discretionary tool, free from the rigid procedural restraints that *Easley* imposes.

It would be unwise to contend that all Social Security applicants should have counsel appointed for them at an early stage, due to the tremendous volume of the applications that are processed each year.⁵¹ Many applicants need do no more than fill out a simple form in order to obtain benefits, and the Social Security Administration has been lenient in allowing benefits.⁵² In fact, some 83 percent of all claims are allowed initially or on reconsideration.⁵³ Even in the disability area, into which most of the contested applications fall, more than half of the claims are successful in the pre-hearing stages.⁵⁴ Yet the applicant who comes to a hearing without counsel faces serious difficulties. The burden of establishing the claim falls upon him,⁵⁵ although he may be unable to understand the nature of the proof required. The more

49. A hearing on an application for benefits is not an adversary proceeding. The applicant is confronted with no adversary in the usual sense of that term. The Social Security Administration provides an applicant with assistance to prove his claim. Here, the Administration provided a comprehensive medical examination. There is no reason to suspect any influence which would compromise its objectivity. Although only about five percent of all applicants are represented by counsel at the initial and reconsideration stages, the majority of claims are allowed. This hardly suggests the existence of widespread unfairness to applicants unrepresented by counsel

431 F.2d at 1353 (citations omitted).

50. 42 U.S.C. § 405(g) (1964).

51. In fiscal 1968 disability claims numbered 515,938. The total number of all claims was almost four million. 431 F.2d at 1353 n.9.

52. *But see* L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 407-09 (3d ed. 1968).

53. 431 F.2d at 1353 n.9.

54. Disability claims granted in the two pre-hearing stages numbered 343,628 (67 percent of those filed) in fiscal 1968. *Id.*

55. *See, e.g.,* Franklin v. Secretary, 393 F.2d 640 (2d Cir. 1968).

meritorious his disability claim, the less likely he will be able to do those things necessary to prosecute his case effectively. His inability to work will often prevent him from hiring counsel, and that same difficulty will make his search for witnesses and other evidence a very difficult task. However, the courts may be able to avoid a rigorous rule requiring counsel if they are careful, as was the Sixth Circuit in *Webb*, not to deny routinely a request for a remand for the taking of additional evidence. A claimant, finally desperate enough to secure representation, should not be denied a proper hearing where he was initially beset by age, disability, lack of education, or lack of intelligence. Additionally, the examiner's duty of fair inquiry into the issues before him might be broadly construed to demand that the relative complexity of the issues before him be examined with a view toward discerning whether counsel is necessary in a given case. At least the claimant could then be encouraged to seek help from the private bar or an appropriate legal aid agency if the examiner so recommended.

Right to Hearing in License Renewal Proceeding when Allegation is the Subject of Concurrent Rule-making Proceeding

In *Hale v. FCC*⁵⁶ the Court of Appeals for the District of Columbia Circuit held that section 309(e) of the Communications Act⁵⁷ does not require the FCC to grant a hearing in a license renewal proceeding to petitioners whose allegations of the licensee's violations of the "fairness doctrine" and of excess concentration of media ownership were not supported by the required specific factual instances of harm to the public. Private citizens challenging the proposed renewal of the license of KSL-AM radio station, held by the Church of Jesus Christ of Latter Day Saints (Mormon Church) through KSL, Inc., alleged that the licensee had violated the FCC's "fairness doctrine"⁵⁸ and that the church's extensive holdings of other communications media in the area gave it a concentration of power

56. 425 F.2d 556 (D.C. Cir. 1970).

57. 47 U.S.C. § 309(e) (1964). Section 309(e) reads in relevant part:

If, in the case of any application to which subsection (a) of this section applies [to authorize renewal of licenses], a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding [that the public interest would be served], it shall formally designate the application for hearing

58. FCC, *Application of the Fairness Doctrine in the Handling of Controversial Issues of Public Information*, 29 Fed. Reg. 10415 (1964).