

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

AMY SLONE, ETC.,)	
)	
Plaintiff,)	Case No. 2:00CV00069
)	
v.)	OPINION
)	
WILLIAM A. HALTER, ACTING COMMISSIONER OF SOCIAL SECURITY,)	By: James P. Jones
)	United States District Judge
)	
Defendant.)	

The question in this child’s social security case is whether there is sufficient proof that the deceased insured wage earner provided support commensurate with the needs of his unborn child at the time of the insured’s death. Based on the administrative record, I find that the Commissioner’s denial of the claim was not supported by substantial evidence, and reverse.

I

The plaintiff Amy Slone, on behalf of her minor son, Ryan J. Morgan, challenges the final decision of the Commissioner of Social Security (“Commissioner”)¹

¹ William A. Halter became acting Commissioner of Social Security on January 20, 2001, to succeed Kenneth S. Apfel. Pursuant to law, there is an automatic substitution of parties in this case. *See* Fed. R. Civ. P. 25(d)(1).

denying the claim for her child's insurance benefits under certain provisions of the Social Security Act ("Act"). *See* 42 U.S.C.A. § 402(d)(1) (West Supp. 2000). This court has jurisdiction under 42 U.S.C.A. § 405(g) (West Supp. 2000). The action was referred to United States Magistrate Judge Pamela Meade Sargent to conduct appropriate proceedings. *See* 28 U.S.C.A. § 636(b)(1)(B) (West 1993); Fed. R. Civ. P. 72(b). Magistrate Judge Sargent submitted her report recommending that the Commissioner's denial of benefits be affirmed and the plaintiff has filed timely written objections to the report.

I must make a de novo determination of those portions of the magistrate judge's report to which the plaintiff objects. *See* 28 U.S.C.A. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). Under the Act, I must uphold the factual findings and final decision of the Commissioner if they are supported by substantial evidence and were reached through application of the correct legal standard. *See Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). Substantial evidence is "evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966). If such evidence exists, my inquiry is terminated and the Commissioner's final decision must be affirmed. *See id.*

II

Ryan J. Morgan (“Ryan”), the minor child, was born on July 2, 1993, to Amy Sloan. At the time she became pregnant with Ryan, Sloan was dating Robert J. Morgan, a twenty-one-year-old wage earner insured under the Act. On April 9, 1993, when Sloan was approximately six months pregnant, Morgan was killed in an automobile accident.

Sloan and Morgan had not married prior to his death and were not living together. Sloan has testified that she knows that Ryan is Morgan’s child because she had not had sexual intercourse with any other man other than Morgan prior to Ryan’s birth. According to Sloan, Morgan knew the child was his and had told her that he was going to help take care of the child. Sloan testified that Morgan gave her cash while she was pregnant and bought items for the baby.

Sloan filed Ryan’s application for benefits on June 26, 1995. After a hearing before an administrative law judge (“ALJ”), the claim was denied. She thereafter filed an action for review of the denial in this court. The Commissioner moved to remand the case for a supplemental administrative hearing on the question of “whether the deceased parent’s contributions to the then unborn infant Plaintiff’s support was sufficient to entitle him to children’s insurance benefits.” By order entered June 17, 1999, the unopposed motion to remand was granted.

A supplemental hearing before the same ALJ was held on October 8, 1999. Thereafter, by decision dated November 24, 1999, the ALJ again denied the application for benefits, finding that the evidence convinced him that Morgan had made no contributions to the unborn child at the time of his death. The Social Security Administration's Appeals Council denied review, and the present action was timely filed in this court.

III

Under the Act, a minor child of a deceased individual who was insured as a wage earner may receive survivors' benefits if the child was dependent upon such individual prior to the insured person's death. *See Lawrence v. Chater*, 516 U.S. 163, 164 (1996). Until 1965, an illegitimate child of an insured wage earner had only two ways to obtain benefits—first, if the child could inherit the insured's personal property under state intestacy laws, and second, if the parents' marriage was invalid due to a legal impediment. In 1965, Congress greatly expanded the universe of children who might be eligible.² As relevant to the present case, Congress provided in the Act that

² For a history of the treatment of illegitimate children under the Act, see Kelly Wall Schemenauer, Comment, *Adams v. Weinberger and Dubinski v. Bowen: Posthumous Illegitimate Children and the Social Security Child Survivorship Provision*, 73 Iowa L. Rev. 1213, 1214-1218 (1988).

an illegitimate child qualifies for benefits if the insured decedent “is shown by evidence satisfactory to the Commissioner of Social Security to have been the . . . father of the applicant, and such insured individual was . . . contributing to the support of the applicant at the time such insured individual died.” 42 U.S.C.A. § 416(h)(3)(C)(ii) (West Supp. 2000).

The posthumous child, as in the present case, poses special problems in the interpretation of this statute. The Fourth Circuit has held that since a father’s “support” for an unborn child cannot be easily measured, such support need only be “commensurate with the needs of the unborn child at the time of the father’s death.” *Parsons v. Health & Human Servs.*, 762 F.2d 1188, 1191 (4th Cir. 1985) (quoting *Adams v. Weinberger*, 521 F.2d 656, 660 (2d Cir. 1975)). The Social Security Administration has acquiesced in this ruling for its cases within the Fourth Circuit, *see* AR 86-22(4), 1983-1991 Admin. Rulings, Soc. Sec. Rep. Serv. 908 (West) (Jul. 3, 1986), and the Commissioner agrees that the standard adopted in *Parsons* should be applied in this case.

Slone testified at both hearings that Morgan provided financial support during her pregnancy before his death. She testified that at the time of his death he had been working at a “pizza place” (R. at 159) and had given cash to her from time to time, in

no set amount. (R. at 79, 159-60.) She testified he had purchased maternity clothes for her and baby blankets, clothes and toys. (R. at 82-83, 160-61.)

Sloan's sister and cousin testified at the second hearing that they had personally witnessed the purchase of items by the deceased. (R. at 163, 166.) They both testified that Morgan gave Amy money for gas to travel to her doctor during her pregnancy when he could not take her. (R. at 163, 166.) At the first hearing, Morgan's own sister testified that he had wanted to borrow money from her for a baby bed. (R. at 93.)

The ALJ found this evidence insufficient on the following grounds: (1) that there was no documentary evidence, such as canceled checks or credit card receipts, to support the testimony; (2) that Morgan reported earnings during the period of Sloan's pregnancy before his death of only approximately seventy dollars per month; (3) that Sloan lived with her parents during her pregnancy and they provided her with room and board; (4) that since the death of Ryan's father, Sloan has had two other children by a different father and that father has not provided support to his children; and (5) that Amy Sloan made prior statements to representatives of the Social Security Administration that were inconsistent with her hearing testimony. (R. at 138.)

I find that the ALJ's determination was not supported by substantial evidence. Under the *Parsons* standard, significant contributions by the father to the posthumous child are not required. All that is necessary is that the father have provided assistance

to the mother that indirectly contributed to the well being of the unborn child. *See Whitlock v. Chater*, 959 F. Supp. 324, 330 (W.D. Va. 1997). “Such support, depending on the facts of the case, can consist of even relatively small amounts.” AR 86-22(4), 1983-1991 Admin. Rulings, Soc. Sec. Rep. Serv. at 910. Even though Sloan’s basic needs were provided by her parents and even though Ryan’s father did not have the resources to provide substantial help, the uncontradicted evidence is that he did in fact provide support for the benefit of his unborn child. Indeed, his limited financial status makes his degree of support even more noteworthy.

The fact that this support was not documented is not surprising. One would hardly expect Morgan, the young employee of a “pizza place,” to have had a checking account or credit cards. Moreover, the fact that the father of Slone’s other children has not complied with his obligation to support them does not prove that Ryan’s father was not willing to do so for his own child.

The more serious ground relied upon by the ALJ is that of the prior statements by Slone. The record contains a statement, written out by a representative of the Social Security Administration and signed by Slone on June 26, 1995, in which she states that “Robert J. Morgan gave me about \$50 per week from 08/92 - 04/93.” (R. at 41.) She also states that he “bought clothing.” (R. at 42.) In addition, the record contains a typewritten “Report of Contact” by a social security representative with Slone on

August 12, 1993, six weeks after Ryan was born. The report states: “Per Amy Slone, Robert was not living with her nor contributing to her support at his time of death.” (R. at 36.)

The ALJ reasoned that since Slone had not testified at the hearings as to any set amount of cash given to her and because she “did not explain the discrepancies in her original allegations” (R. at 138), her testimony was “simply not credible.” (*Id.*)

While I respect the role of the ALJ as fact finder, I believe that he erred in his inferences from this evidence. Slone’s sworn testimony at the two hearings was consistent, although she added more details at the second hearing, since its sole purpose was to explore the question of support. Slone was not asked at either hearing to explain the prior statements, even though in social security administrative proceedings, “[i]t is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting benefits” *Sims v. Apfel*, 120 S. Ct. 2080, 2085 (2000) (citations omitted).

Moreover, it is not clear that her earlier statements were inconsistent with her hearing testimony. Her 1995 statement acknowledged that the dollar figure was imprecise, since she stated that the amount was “about \$50 per week.” Her exact words in 1993 were not reported, although it is plain from the report that she was talking about support to her, and not for the benefit of her unborn child. The support

contributed by Morgan for the child's well being consisted of cash for Slone's doctor visits and the purchase of baby items, and not for lodging or food, which was already provided to Slone by her parents.

For these reasons, I hold that the ALJ was incorrect in denying benefits. Accordingly, I will sustain the objections to the magistrate judge's report, grant the plaintiff's motion for summary judgment, and direct the Commissioner to calculate and pay benefits.³

An appropriate final judgment will be entered.

DATED: March 13, 2001

United States District Judge

³ The ALJ also held that he was not persuaded that Ryan was in fact Morgan's child. (R. at 136.) However, the Commissioner conceded that point in his earlier request for a remand and the Commissioner makes no argument now that Ryan is not the child of the deceased.