

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

ROBERT WELCH,)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO.: 3:12-CV-654-CAN
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of the Social Security)	
Administration, ¹)	
)	
Defendant.)	

OPINION AND ORDER

On October 25, 2012, Plaintiff Robert Welch (“Welch”) filed his complaint in this Court seeking reversal of the Commissioner’s final decision denying him child’s disability benefits under Title II of the Social Security Act. Alternatively, Welch seeks remand pursuant to either sentence four or sentence six of 42 U.S.C. § 405(g) for further consideration of his application for child’s disability benefits. On April 8, 2013, Welch filed his Motion for Summary Judgment or Remand to the Commissioner. On August 9, 2013, Defendant Commissioner of Social Security (“Commissioner”) filed a response, asking the Court to affirm the decision of the Appeals Council. On September 6, 2013, Welch filed a reply brief. This Court may enter a ruling in this matter based on the parties’ consent, 28 U.S.C. § 636(c), and 42 U.S.C. § 405(g). For the reasons discussed below, the Court **AFFIRMS** the Commissioner’s final decision.

I. RELEVANT BACKGROUND

¹ Welch filed his complaint against the Commissioner of Social Security sued as Michael J. Astrue. On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of the Social Security Administration. Pursuant to Fed. R. Civ. P. 25(d), Carolyn W. Colvin, in her official capacity only, is substituted as the defendant in this action.

On April 11, 2008, Welch filed his first application for Title II Child's Disability Benefits pursuant to 42 U.S.C. § 402(d) based on the earning record of his father, John Welch ("John"), after he retired in 2008. Welch's first application was denied on April 11, 2008, and Welch did not seek reconsideration. Welch then filed his second application for child's disability benefits on September 3, 2008. His second application was denied initially on September 16, 2008, and subsequently upon reconsideration on November 28, 2008. A hearing was held before an ALJ on August 11, 2010, at which Welch, his attorney, a member of the attorney's staff, and his father appeared.

On January 20, 2011, the ALJ issued a decision denying Welch's second application for child's disability benefits. The ALJ found that Welch was not disabled for purposes of Child's Disability Benefits because Welch did not have a disability that began before he attained age 22, as required under the Social Security Act. The ALJ reasoned that Welch's employment after age 22, which constituted substantial gainful activity, precluded such a finding.

On September 7, 2012, however, the Appeals Council affirmed the ALJ's denial of child disability benefits to Welch, but with a slightly different rationale. The Appeals Council found that Welch's ability to perform substantial gainful activity in 1999 and 2000 precluded a finding that he was under a disability that began before Welch attained age 22 and continued through his father John's retirement. In other words, the Appeals Council's conclusion was based on its finding that Welch did not have a continuous disability that began before he attained age 22, as defined in Section 223(d)(1)(A) of the Social Security Act. The Appeals Council's decision is the final decision of the Commissioner for purposes of judicial review under 42 U.S.C. § 405(g).

White v. Sullivan, 965 F.2d 133, 136 (7th Cir. 1992); *Bauzo v. Bowen*, 803 F.2d 917, 921 (7th Cir. 1986); 20 C.F.R. § 404.981.

II. FACTUAL BACKGROUND

Welch was born with cerebral palsy on October 3, 1969, and is wheelchair-bound. Welch's father retired on March 20, 2008, at which time Welch became eligible to apply for child's disability benefits.

Prior to 2008, the Commissioner had twice adjudicated Welch to be legally disabled. First, the Commissioner awarded Welch Title XVI Supplemental Security Income ("SSI") benefits after finding him legally disabled for purposes of SSI as of December 1, 1987, at the age of 18. Second, the Commissioner awarded Welch Title II Social Security Disability Insurance Benefits ("DIB") after finding him legally disabled for purposes of DIB as of January 1, 1995, at the age of 25. Welch qualified for DIB based on his own part-time work record. Notably, Welch's January 1995 disability onset date for DIB was established because Welch had engaged in employment constituting substantial gainful activity in 1993–1994. Nevertheless, Welch was not engaged in substantial gainful activity and earned nothing for 8 of the 15 years between 1992 and 2007.

He did, however, work part-time again in 1999 and 2000. Through his employment in 1999 and 2000, Welch earned income above the presumptive threshold for substantial gainful activity. As a result of Welch's substantial gainful activity, the Commissioner suspended Welch's disability insurance benefits from January 2000 until May 2000 as required under Title II. Welch's benefits were automatically reinstated in May 2000 after he was terminated from his

job for being too slow and was no longer earning income above the threshold level for substantial gainful activity.

Welch continues to receive SSI and DIB today. Yet, Welch's substantial gainful activity in 1999–2000 derailed his application for child's disability benefits. Welch now seeks judicial review of the Commissioner's denial of child's disability benefits arguing that he was under a continuous disability from before he attained the age of 22 until the date of his child's disability benefits application making him eligible to receive child's disability benefits.

III. ANALYSIS

A. Standard of Review

The Social Security Act authorizes judicial review of the final decision of the Commissioner and mandates that the Commissioner's factual findings must be accepted as conclusive if supported by substantial evidence. 42 U.S.C. § 405(g); *White v. Sullivan*, 965 F.2d 133, 136 (7th Cir. 1992). Where the Appeals Council makes a decision on the ALJ's findings, the Appeals Council gives the final decision of the Commissioner. *Id.*; *Moothart v. Bowen*, 934 F.2d 114, 116 (7th Cir. 1991); *see also* 20 C.F.R. § 404.981. Thus, a court reviewing the findings in the final decision will reverse only if the findings are not supported by substantial evidence or if an erroneous legal standard was applied. *Briscoe v. Barnhart*, 425 F.3d 345, 351 (7th Cir. 2005).

When reviewing the final decision, a court considers the entire administrative record but does not reconsider facts, re-weigh the evidence, resolve conflicts in evidence, decide questions of credibility, or substitute its judgment for that of the Commissioner. *Boiles v. Barnhart*, 395 F.3d 421, 425 (7th Cir. 2005); *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000); *Butera v.*

Apfel, 173 F.3d 1049, 1055 (7th Cir. 1999). Thus, when reviewing a final decision by the Commissioner finding that the claimant was not disabled within the meaning of the Social Security Act, the court must determine whether the Commissioner used the correct legal standards and supported the decision with substantial evidence—not whether the claimant is, in fact, disabled. *Roddy v. Astrue*, 705 F.3d 631, 636 (7th Cir. 2013) (citing *O'Connor-Spinner v. Astrue*, 627 F.3d 614, 618 (7th Cir. 2010); *Prochaska v. Barnhart*, 454 F.3d 731, 734-35 (7th Cir. 2006); *Barnett v. Barnhart*, 381 F.3d 664, 668 (7th Cir. 2004)). However, “if the Commissioner commits an error of law,” the Court may reverse the decision “without regard to the volume of evidence in support of the factual findings.” *White v. Apfel*, 167 F.3d 369, 373 (7th Cir. 1999) (citing *Binion v. Chater*, 108 F.3d 780, 782 (7th Cir. 1997)).

B. Standard for Determining Eligibility for Child’s Disability Benefits

Pursuant to 42 U.S.C. § 402(d), every child of an individual entitled to old-age benefits or disability insurance benefits is eligible to apply for child’s disability benefits. To receive child’s disability benefits, a disabled claimant must show that he

(A) has filed application for child’s insurance benefits,

(B) at the time such application was filed was unmarried and . . . is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon [the individual entitled to old-age or disability insurance benefits] at the time such application was filed

42 U.S.C. § 402(d)(1)(A)–(C). Assuming the claimant meets the application, marital status, and dependency requirements, child’s disability benefits will only be awarded if the claimant establishes that (1) he was disabled on his twenty-second birthday, and (2) that the disability continued through the date of his application for benefits. *See Kidida v. Dir., Office of Workers’*

Comp. Programs, 769 F.2d 165, 167 (3d Cir. 1985); *Anderson v. Heckler*, 726 F.2d 455, 456 (8th Cir. 1984); *Parish v. Califano*, 642 F.2d 188, 189 (6th Cir. 1981); *Reading v. Mathews*, 542 F.2d 993, 997 (7th Cir. 1976); *Futernick v. Richardson*, 484 F.2d 647, 648 (6th Cir. 1973); SSR 85-5c²; *see also* POMS DI 11020.050 (SSA)³, *available at* <https://secure.ssa.gov/apps10/poms/nsf/lrx/0411020050> (directing SSA field offices to deny child’s disability benefits without a disability determination when the claimant cannot establish an onset date “prior to age 22 because substantial gainful activity was performed after age 22”.); *but see* *Axe v. Dep’t of Health & Human Servs.*, 564 F. Supp. 789, 791–92 (E.D. Pa. 1983).

Disability for purposes of child’s disability benefits is defined by statute using the same language used to define “disability” for DIB and SSI eligibility. Therefore, a claimant is considered “disabled” for purposes of entitlement to child’s disability benefits if he is “[unable] to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). When making a disability determination related to a child’s disability benefits application, the Commissioner applies the same five-step sequential process used to make disability determinations related to DIB and SSI applications. 20 C.F.R. § 404.1520(a)(4). The Commissioner considers whether (1) the claimant is engaged in substantial gainful activity; (2)

²Social Security Rulings (“SSRs”), published in the Federal Register under the authority of the Commissioner of Social Security, are binding on all components of the Social Security Administration. 20 C.F.R. § 402.35(b)(1). The SSA relies upon SSRs as precedents in adjudicating other cases. *Id.* SSRs do not have the force and effect of law, but are binding on the agency. *Lauer v. Bowen*, 818 F.2d 636, 640 (7th Cir. 1987).

³The SSA’s Program Operations Manual System (“POMS”) is not binding on this Court or the SSA because it is not a regulation and has no legal force. *See Schweiker v. Hansen*, 450 U.S. 785 (1981).

the claimant has an impairment or combination of impairments that is severe; (3) whether the severe impairment or combination of impairments meets or equals a listed impairment, or “Listing,” in the appendix to the regulations; (4) the claimant’s residual functional capacity leaves him unable to perform any past relevant work; and (5) the claimant can perform other work in the national economy given the claimant’s RFC, age, education, and experience. 20 C.F.R. § 404.1520(a)(4)(i)-(v); *see also Scheck v. Barnhart*, 357 F.3d 697, 699-700 (7th Cir. 2004). If the ALJ can find that the claimant is disabled or not disabled at any step, the analysis ends. 20 C.F.R. § 404.1520(a)(4).

C. Issues for Review

Both parties agree, and the undisputed evidence shows that Welch is now, has always been, and will always be permanently limited in his functioning due to his cerebral palsy. Similarly, the record is clear, and the parties do not dispute, that Welch (1) was deemed legally disabled before his 22nd birthday by the Commissioner based on Welch’s SSI application; (2) was deemed legally disabled by the Commissioner as of January 1, 1995, based on his DIB application; (3) engaged in substantial gainful activity in 1999–2000, which led to the suspension of DIB in January 2000;⁴ and (4) has been unable to engage in substantial gainful activity since his DIB was reinstated in May 2000, making him legally disabled ever since. Given the lack of dispute over these facts, the only question the Court need address is the legal one of whether Welch was continuously disabled, as that term is defined by statute, from his

⁴The record indicates that Welch also engaged in some work in 1993 and 1994 that may have constituted substantial gainful activity. The parties indicate that the Commissioner’s decision to define Welch’s disability onset date as January 1, 1995, when considering Welch’s DIB application may have been influenced by Welch’s work in 1993 and 1994. However, neither party raises any arguments connecting the 1993 and 1994 work to Welch’s application for child’s disability benefits. Therefore, the Court only addresses the impact of Welch’s 1999 and 2000 substantial gainful activity on his application for child’s disability benefits.

22nd birthday until he applied for child's disability benefits in satisfaction of the requirements of 42 U.S.C. § 402(d)(1)(B). If Welch has been continuously disabled, the Appeals Council's decision must be reversed. If Welch was not continuously disabled, the Court must affirm the Appeals Council's decision.

D. Welch Was Not Continuously Disabled and Therefore Is Not Entitled to Child's Disability Benefits.

1. Continuous Disability Remains a Requirement for Entitlement to Child's Disability Benefits.

Under 42 U.S.C. § 402(d)(1)(B), an applicant for child's disability benefits must establish, among other criteria, that "at the time such application was filed . . . [he] is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22." In 1973, the Sixth Circuit in *Futernik v. Richardson* held that any substantial gainful activity between the age of 22 and the date of a claimant's child's disability benefits application precluded the claimant's entitlement to child's disability benefits. 484 F.2d at 648. In turn, the Eighth Circuit in *Anderson v. Heckler* relied upon *Futernik* for the proposition that child's disability benefits applicants must show continuous disability from the age of 22 until the date of his application in order to meet the Section 402(d)(1)(B) requirement and qualify for benefits. *Anderson*, 726 F.2d at 456. The Third, Sixth, and Seventh Circuits subsequently applied the *Futernik/Anderson* continuous disability requirement in child's disability benefits cases. *Kidda*, 769 F.2d at 167; *Parish*, 642 F.2d at 189; *Reading*, 542 F.2d at 997. The Social Security Administration then adopted the continuous disability requirement into its interpretive rule, SSR 85-5c, which merely republished the *Anderson* opinion.

Even now, almost thirty years since SSR 85-5c was published, the continuous disability requirement remains good law. Congress has not changed Section 402(d)(1)(B) in response to

Futernik, Anderson, and SSR 85-5c despite having ample opportunity to do so. Similarly, no court has overturned the cases applying the continuous disability requirement. And the Social Security Administration has not retracted or clarified SSR 85-5c. Moreover, Welch has cited no legal authority to suggest that *Futernik, Anderson*, and SSR 85-5c are now invalid and that substantial gainful activity after age 22 does not preclude qualification for child's disability benefits. Instead, Welch relies upon the legislative history of statutes related, tangentially at best, to Section 402(d)(1)(B) in an attempt to convince the Court to strike SSR 85-5c and eliminate the continuous disability requirement. In other words, Welch hopes the Court will nullify applicable law so that his substantial gainful activity in 1999 and 2000 will not preclude him from receiving child's disability benefits. This the Court will not do.

Instead, the Court will consider Welch's arguments in support of the contention that he was indeed continuously disabled despite his substantial gainful activity. First, Welch argues that because his impairments have met or equalled a Step Three Listing since birth, and will necessarily meet or equal the same Listing throughout the rest of his life, he must have been continuously disabled. Second, Welch contends that because the Commissioner determined he was under a period of disability even when he was engaged in substantial gainful activity, he was continuously disabled for purposes of child's disability benefits.

2. Welch's Listing Argument is Irrelevant in Determining Whether He Was Continuously Disabled.

Welch states, in a conclusory fashion without much further explanation, that his impairments due to his cerebral palsy will forever meet or equal Listing 11.07. *See* 20 C.F.R. Part 404, Subpart P, Appendix 1; § 404.1525. The Commissioner does not contest Welch's assertion. However, the Commissioner correctly points out that the Step Three Listing analysis

is never reached in determining whether Welch was continuously disabled for purposes of child's disability benefits eligibility.

The first step in the five-step disability analysis used to determine whether a claimant is disabled pursuant to 42 U.S.C. § 423(d) is ascertaining whether the claimant is engaged in substantial gainful activity. 20 C.F.R. § 404.1520(a)(4)(i)–(v); *see also Scheck v. Barnhart*, 357 F.3d 697, 699–700 (7th Cir. 2004). If a claimant is engaged in substantial gainful activity, he is found “not disabled” at step one and the disability analysis ends. 20 C.F.R. § 404.1520(a)(4). None of the subsequent steps in the analysis, including the Step Three Listing analysis, matter because finding a claimant to be “not disabled” at any step precludes eligibility for any disability benefits, whether that be SSI, DIB, or child's disability benefits. In other words, there is no presumption that a claimant with a Listing level impairment is unable to engage in substantial gainful activity if a claimant is actually engaging in substantial gainful activity.

Here, there is no dispute that the Commissioner found that Welch was legally disabled for purposes of SSI beginning on December 1, 1987. The Commissioner's SSI disability analysis, no doubt, found Welch legally disabled at Step Three's Listing evaluation because Welch was not engaged in substantial gainful activity at that time. Similarly, the Commissioner found Welch legally disabled for purposes of DIB as of January 1, 1995, because he was not engaged in substantial gainful activity at that time.⁵ But when the Commissioner considered Welch's child's disability benefits application, she was required to ascertain whether Welch was continuously disabled from before October 1991 through March 2008. *See, e.g., Reading*, 542

⁵The record appears to reflect that Welch presumptively engaged in Substantial gainful activity in 1993 and 1994, which may have affected the Commissioner's decision to define the disability onset date as January 1, 1995. Neither party addresses the 1993–1994 Substantial gainful activity for purposes of this action. Therefore, the Court will not address it either.

F.2d at 997. Consequently, the Commissioner’s burden was somewhat different than it had been when evaluating Welch’s earlier SSI and DIB applications. For this application, the Commissioner’s disability analysis ended at Step One—before reaching the Step Three Listing analysis—because Welch admittedly engaged in substantial gainful activity in 1999–2000. Regardless of how Welch’s substantial gainful activity affected his SSI and DIB benefits, the Commissioner could not find that Welch had been continuously disabled because of his substantial gainful activity. Consequently, Welch’s ongoing Listing level impairment did not and cannot equate to a finding of legal “disability” as necessary to entitle him to child’s disability benefits.

3. Welch’s Period of Disability Argument is Misplaced.

In another attempt to show that he was continuously disabled, Welch relies upon part of the Notice of Appeals Council Action dated July 23, 2012, regarding Welch’s entitlement to a period of disability. The section of the Notice at issue states:

By virtue of your application for disability insurance benefits, you [Welch] are entitled to a period of disability pursuant to 20 CFR 404.320 beginning January 1, 1995. Your period of disability continues even though the Administration determined that your disability ceased due to your performance of substantial gainful activity in October 1999; suspended your entitlement for benefits in January 2000; and reinstated your entitlement in May 2000 as set forth at 20 CFR 404.1592a.

Nevertheless . . . entitlement to child’s benefits requires that you have an impairment that meets the requirements of disability as defined in section 223(d)(1)(A) of the Act. Entitlement to a period of disability is not a factor in determining whether you are entitled to child’s benefits under section 202(d) of the Act.

Tr. 186. Welch cites the Notice’s assertion that he was entitled to a “period of disability that existed continuously through 1999–2000.” Doc. No. 15 at 14. Based on that phrase alone,

Welch concludes that the Commissioner, through the Appeals Council, admitted that he was continuously disabled and therefore entitled to child's disability benefits.

Because the Commissioner did not directly address this argument in her response brief, Welch contends that she has waived the argument and invites the Court to summarily rule in his favor. The Court cannot do so. In making his argument, Welch has cherry-picked phrases from the Notice. Reading the paragraph in context, the Court cannot agree with Welch's conclusion that the Commissioner admitted that Welch's legal disability continued through 1999–2000. Quite the opposite, the Appeals Council, in this Notice, find that Welch's legal disability ceased in 1999 and 2000 due to his substantial gainful activity. In addition, Welch ignores the introductory phrase at the beginning of this section of the Notice that limits the reason for Welch's entitlement to a period of disability to his application for DIB.

Moreover, Welch's argument fails because his brief does not cite any legal authority to convince the Court that entitlement to a period of disability establishes legal disability under 42 U.S.C. § 423(d). A "period of disability" is a continuous period of time during which a claimant is disabled.⁶ 42 U.S.C. § 416(i)(2)(A) and 20 C.F.R. § 404.320(a). However, Welch cites nothing to support a finding that a child's disability benefits applicant meets the continuous disability requirement just because he was entitled to a period of disability for DIB purposes. Without any authority to connect a "period of disability" to the continuous disability requirement, Welch has not persuaded the Court to ignore his substantial gainful activity in 1999

⁶*Compare* 42 U.S.C. § 416(i)(2)(A) ("a continuous period (beginning and ending as hereinafter provided in this subsection) during which an individual was under a disability"), *with* 20 C.F.R. § 404.320(a) ("a continuous period of time during which you [the claimant] are disabled").

and 2000, which necessarily precludes entitlement to child's disability benefits as discussed above. Therefore, Welch's "period of disability" argument is misplaced.

E. Welch's Other Legal Theories Fail.

In his briefs, Welch advanced other legal theories in an effort to persuade the Court to reverse the final decision of the Commissioner and award him child's disability benefits. For instance, Welch asked the Court to apply the principles of collateral estoppel to the Commissioner's SSI and DIB decisions in order to establish that he was continuously disabled. Welch also challenged the legality of the Social Security Administration's interpretive rule SSR85-5c invoking rules of statutory interpretation and the legislative history of the child's disability benefits statutes. And lastly, Welch raised an equal protection argument suggesting that disabled adult children who engage in substantial gainful activity before they are even eligible to apply for child's disability benefits should not be treated differently than those who engage in substantial gainful activity after qualifying for and receiving child's disability benefits.

Having afforded Welch's arguments great consideration, the Court is not convinced that they represent viable legal theories in light of the unambiguous legal authority establishing the continuous disability requirement under 42 U.S.C. § 402(d)(1)(B). Rejecting these arguments, the Court's analysis ends having determined that Welch was continuously disabled, as defined by statute, and therefore is not entitled to child's disability benefits.

IV. CONCLUSION

Based on the foregoing, the Court **DENIES** Welch's motion. [Doc. No. 15]. The Court **AFFIRMS** the Commissioner's decision. The clerk is instructed to term the case and enter

judgment in favor of the Commissioner. In addition, because the Court was able to resolve this matter on the briefs alone, the Court **DENIES AS MOOT** Welch's motion for oral argument.

[Doc. No. 16].

SO ORDERED.

Dated this 28th day of August, 2014.

S/Christopher A. Nuechterlein
Christopher A. Nuechterlein
United States Magistrate Judge