

RENDERED: June 26, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1750-MR

JAMES L. HAMILTON

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 96-CI-001806

BIG SANDY COMMUNITY ACTION PROGRAM
and
TAMMY HANEY

APPELLEE

OPINION
AFFIRMING

* * *

BEFORE: ABRAMSON, HUDDLESTON, AND KNOX, JUDGES.

KNOX, JUDGE: This appeal is from a summary judgment in favor of appellees, Big Sandy Community Action Program and Tammy Haney, dismissing them from appellant Hamilton's action alleging breach of contract and negligence. Following review of 20 C.F.R. § 416.601 (1995) et seq., which controls the parties' conduct in this matter, we affirm the Pike Circuit Court.

In August 1995, Herbie A. Bailey (Bailey) entered into a written contract with appellant, James L. Hamilton (Hamilton), for the purpose of employing Hamilton to represent Bailey and his

family before the Social Security Administration (SSA). Bailey sought to obtain social security disability and/or supplemental security income benefits. In the event that any benefits were awarded, the contract provided for Hamilton to be compensated by the lesser of 25% of the total award or \$4,000.00. Additionally, the contract required Bailey to reimburse Hamilton for reasonable costs incurred in effecting his representation, such as expenses for medical reports, telephone charges, postage and mileage.

As far as the record indicates, Hamilton succeeded in procuring \$11,766.00 for Bailey in back supplemental security income benefits. Likewise, Bailey's ex-spouses collected a total of \$9,759.00 in back benefits on behalf of themselves and their children. The Administrative Law Judge's December 1995 order found Bailey incompetent of managing his financial affairs and, presumably under 20 C.F.R. § 417.610, directed that Big Sandy Community Action Program (Big Sandy) be appointed representative payee on Bailey's behalf. It is undisputed that Big Sandy commenced officially acting as Bailey's representative payee on January 17, 1996.

Sometime between January 1996 and July of that year, the SSA located a more suitable representative payee. It is standard procedure for the SSA to select a new representative payee should it find a preferable person to act in that capacity. 20 C.F.R. § 416.650. Pursuant to the criteria set forth in 20 C.F.R. § 416.620, the SSA considers the relationship, legal authority, and familiarity between the beneficiary and the

representative payee, relevant information to be considered in the selection of a representative payee. 20 C.F.R. § 416.620. The SSA determined Ira Bailey, appellant's mother, to be a more appropriate representative payee and directed that she replace Big Sandy in this capacity. It is the effective date of Ira Bailey's replacement that remains the core issue in dispute and which resolves whether summary judgment was appropriate in this case.

Appellant states that he contacted Big Sandy regarding possible payment of his representation fee shortly following Big Sandy's being appointed representative payee in January 1996. Appellee, Tammy Haney (Haney), was acting as Big Sandy's social security benefits bookkeeper during this time. Hamilton contends Haney assured him that Big Sandy was withholding 25% of Bailey's benefits payable toward a representative fee.

Apparently, in July 1996, Ira Bailey notified Big Sandy that she had assumed the role of Herbie Bailey's representative payee. On August 6, 1996, Haney contacted the local social security office to ascertain what procedure need be followed regarding the transfer of Bailey's benefits. Kim Thompson, of the local social security office, confirmed Ira Bailey's replacement of Big Sandy and directed Haney to turn over the funds to the new representative. The sum of \$3,940.00, embodying the total amount of funds held by Big Sandy on Bailey's behalf, was turned over to Ira Bailey on August 12, 1996. However, written confirmation of this administrative directive was not

received by Big Sandy until sometime toward the end of August 1996.

Appellant argues that the trial court erred in granting summary judgment as there exists a genuine issue of material fact concerning Big Sandy's legal authority to transfer the subject funds to Ira Bailey on August 6, 1996. The gist of appellant's argument remains that Tammy Haney, as Big Sandy's agent, had notice that appellant lay claim to that portion of the benefits being withheld for possible payment of a representative fee. Further, appellant contends that on August 6, 1996, the Administrative Law Judge (ALJ) authorized the payment of the representative fee, obligating appellees to conserve these funds separately from any disbursement made to the new representative payee. Under these premises, appellant claims entitlement to relief since: (1) appellant retained third party beneficiary status under an alleged contract between Bailey and Big Sandy; (2) appellant detrimentally relied on statements attributed to Haney regarding the 25% withholding, and collection thereof; and, (3) appellee was negligent in releasing all of Bailey's funds to the new representative payee.

Our review of summary judgment is limited to whether the facts alleged by appellant and the evidence contained in the record fail to support a claim. Capitol Holding Corp. v. Bailey, Ky., 873 S.W.2d 187, 189 (1994) (citations omitted). As such, without reaching the merit of appellant's arguments, we, as did the trial judge, must adhere to the application of the proper

federal regulation when reviewing administration of the federal code. Accordingly, 20 C.F.R. § 416.660 states:

A representative payee who has conserved or invested benefit payments shall transfer these funds, and the interest earned from the invested funds, to either a successor payee, or to us, as we will specify. If the funds and the earned interest are returned to us, we will recertify them to a successor representative payee or to the beneficiary.

The language of the regulation, specifically, directs the representative payee to follow the instruction of the social security administration in the payment of conserved or invested benefits.

By affidavit, Tammy Haney described the instructions the SSA provided to her concerning the transfer of Bailey's benefit funds, as stated above. Moreover, James Kelly, manager of the social security office administering the Bailey file, provided an affidavit reflecting that Big Sandy was removed as representative payee on July 22, 1996. At this time no representative fee had been authorized by the ALJ. Rather, Mr. Kelly's affidavit further explained that the August 6, 1996, authorization to pay a representative fee was erroneously entered, in that the ALJ had mistakenly assumed Hamilton's assistant, Nancy Bolton, to be an attorney.¹ A corrective order was issued on September 16, 1996, approving a non-attorney fee for both Hamilton and Bolton. It is this subsequent order which,

¹ The August 6, 1996 order authorized Nancy Bolton, as an attorney at law to receive a representative fee. Ms. Bolton is appellant's non-attorney assistant.

according to Mr. Kelly's affidavit, the SSA considers controlling with respect to the effective date of the representative fee authorization. The date of the accurate authorization order succeeded the date of transfer by more than one month. As such, appellees properly released the benefit funds as directed by the SSA.

There remains further force negating Hamilton's argument that the ALJ's order of August 6, 1996, controls with respect to the date of fee authorization, hence precluding the release of representative fee funds. With respect to fees for a non-attorney, the "Authorization To Charge and Collect A Fee," Social Security Administration Form 99A-1560A-U5 provides:

The representative should look to the claimant for payment of the fee in this case. **The law does not permit direct payment of a fee by us when** there are no past due benefits, when the representative is not an attorney, or when the representative provided services in connection with a claim for Supplemental Security Income.

The second and third factors eliminating the authorization of fee compensation by the SSA are applicable to appellant in this case. First, payment is precluded as Hamilton is a non-attorney. Second, the record reflects the scope of Hamilton's representation included obtaining supplemental security income.

While in the process of preparing a fee petition, Hamilton sought the ALJ's advice in how to calculate his fee amount and applicable proportions of same. In a letter dated July 16, 1996, Hamilton's assistant wrote, "I have not collected

any fee at this time, because I have not received a letter stating the amount of Mr. Bailey's Title II back-benefits. However, I did receive a letter stating that Mr. Bailey was entitled to \$11,766.00 SSI back-benefits." Other than this letter to the ALJ from appellant's office, the record is void of the type and extent of benefits awarded to Bailey. Nonetheless, Hamilton's letter clearly concludes that representation before the SSA included providing services in connection with a claim for supplemental security income. The obvious result is that appellant is precluded from receiving payment from Big Sandy since as of July 22, 1996, it no longer acted in the capacity of representative payee.

As can be seen, Big Sandy and its employee are compelled to follow the instruction of the Social Security Administration with respect to allocation of conserved benefits funds. The Social Security Administration directed Big Sandy's employee to transfer Bailey's funds to a new representative payee, Ira Bailey. Big Sandy complied with this instruction. Further, according to the local Social Security Administration office manager, Big Sandy was removed as representative payee on July 22, 1996, and, therefore, had neither the right nor duty to withhold any sums from the new representative payee. Lastly, regardless of the ALJ fee authorization, appellant is precluded from claiming a fee award under the order since (1) he is a non-attorney; and, (2) the scope of his representation encompassed obtaining supplemental security income. There is no genuine

issue of material fact, and appellant must look to the claimant, Herbie Bailey or his replacement representative, for payment of the fee.

The judgment of the trial court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James L. Hamilton, pro se
Pikeville, Kentucky

BRIEF FOR APPELLEE:

John David Preston
Paintsville, Kentucky