

# Denver Law Review

---

Volume 68  
Issue 4 *Tenth Circuit Surveys*

Article 36

---

February 2021

## Social Security

Denver University Law Review

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

---

### Recommended Citation

Denver University Law Review, Social Security, 68 Denv. U. L. Rev. 735 (1991).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

## SOCIAL SECURITY

*Brown v. Sullivan*, 912 F.2d 1194

Per Curiam

Plaintiff, Brown, received social security benefits since August, 1972. In August, 1982, however, the Secretary of Health and Human Services ("Secretary"), terminated Brown's benefits. In November, 1984, Brown once again filed for the benefits but was denied. Brown appealed the district court's affirmation of the denial of benefits. On appeal, Brown argued: (1) his application should have been treated as a re-opening of his termination of benefits, under which an easier standard of review is applied; (2) the Administrative Law Judge ("ALJ") "non-explicitly" re-opened the case; (3) the ALJ erred in failing to call a vocational expert to evaluate Brown's complaints of pain and skin cancer; and (4) the ALJ erred in ruling Brown's complaints of pain as not credible.

The Tenth Circuit affirmed the decision of the district court. First, the court stated that Brown did not previously appeal his termination of benefits. Consequently, the Secretary properly considered his application as one for benefits and not one for a re-opening of his termination of benefits. Accordingly, since the Secretary's decision not to re-open a previously adjudicated claim is discretionary, it is not a final decision reviewable under 42 U.S.C. § 405(g). Thus, the court held it did not have jurisdiction to review the Secretary's determination. Second, the court found that the ALJ invoked the doctrine of *res judicata* which precluded a re-opening of the prior termination case. As to Brown's third and fourth arguments, the court held that the ALJ thoroughly considered both the medical and subjective evidence. Thus, the court held that the arguments were without merit.

*Diaz v. Secretary of Health and Human Servs.*, 898 F.2d 774

Author: Judge Tacha

Plaintiff, Diaz, requested social security benefits from the Secretary of Health and Human Services ("SHHS"). Diaz's request was denied. Upon an administrative hearing, the administrative law judge ("ALJ") also denied Diaz's request for the benefits. The ALJ found that Diaz was no longer able to perform his earlier job, but that his complaints about functional limitations were not supported by the record. In reaching this conclusion, the ALJ rejected the opinion of Diaz's treating physician, and instead relied on the vocational expert's opinion that Diaz retained residual capacity to undertake sedentary work. The district court declined to reverse SHHS's decision. On appeal, Diaz contended: (1) SHHS's decision to deny social security benefits was not supported by substantial evidence; (2) SHHS failed to meet its burden of proof in showing that Diaz had residual functional capacity and was capable of

holding a sedentary job; and (3) SHHS erred in refusing to order a psychological examination.

The Tenth Circuit affirmed the district court's rulings. First, SHHS's decision was supported by substantial evidence. Second, the court ruled that SHHS demonstrated that Diaz had residual functional capacity to hold a sedentary job. The court explained that Diaz's complaints of headaches, pain, and blurred vision were discounted due to his questionable credibility and the lack of corroborative evidence by the available expert witnesses. Moreover, evidence existed that Diaz failed to follow the prescribed treatment regimen for his epilepsy. Third, SHHS did not err in refusing to order an examination because Diaz failed to present objective evidence that his depression was separable from his other non-exertional impairments.

*Miller v. McGovern*, 907 F.2d 957

Author: Judge McWilliams

Defendant, Secretary of Air Force McGovern, denied plaintiff, Miller, certain benefits pursuant to the military's Survivor Benefit Plan ("SBP"), 10 U.S.C. §§ 1447-55. McGovern appealed, claiming that: (1) the district court granted summary judgment on a ground not argued by Miller; (2) the "plain meaning" applied by the district court was erroneous; and (3) McGovern's interpretation of the SBP was permissible and should be afforded substantial deference.

The Tenth Circuit reversed the decision of the district court. The court concluded that the "plain meaning" the district court assigned to 10 U.S.C. § 1451(e)(3) was erroneous and, therefore, ineffectual. The court ruled that under § 1451(e)(3), a widow's SBP benefits are to be offset by the equivalent of the social security payment attributable to her husband's military service. The court also found that McGovern's interpretation to that effect was permissible and entitled to substantial deference. Consequently, summary judgment was not proper.

*Potter v. Secretary of Health and Human Servs.*, 905 F.2d 1346

Per Curiam

Plaintiff, Potter, applied for disability benefits under Title II of the Social Security Act. She asserted that symptoms of multiple sclerosis rendered her disabled in 1980. The district court affirmed the Secretary of Health and Human Services' ("Secretary") decision denying Potter's application. Potter appealed, contending the Secretary's decision: (1) was not supported by substantial evidence; and (2) was invalid because incorrect legal standards were applied.

The Tenth Circuit affirmed the Secretary's decisions. First, there was substantial evidence in the record to support the Secretary's determination that Potter was not disabled prior to the end of 1981. The court explained that none of the reports submitted by Potter identified a disability as of 1981. Retrospective diagnosis without evidence of actual

disability is insufficient. Second, the Secretary properly relied on a five step procedure outlined in the Social Security Act to determine that prior to December 31, 1981, Potter could have returned to work.

