

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

GARY DAY, and C.D.G. and E.D.G. ,  
by and through their father  
GARY DAY, [REDACTED]  
Tampa, Florida 33606

Case: 1:08-cv-00896  
Assigned To : Kollar-Kotelly, Colleen  
Assign. Date : 5/28/2008  
Description: Admin Agency Review

Plaintiffs,

v.

SOCIAL SECURITY  
ADMINISTRATION, and MICHAEL  
J. ASTRUE, in his Official Capacity  
as Commissioner of the Social  
Security Administration, 6401 Security  
Boulevard, Baltimore, Maryland 21235

Defendants.

)  
) **COMPLAINT**  
)  
) **INJUNCTIVE AND**  
) **DECLARATORY RELIEF**  
) **DEMANDED**  
)  
)  
)  
)

Gary Day and his children C.D.G. and E.D.G., through their father Gary Day, (collectively, "Plaintiffs") bring this action against Defendants Social Security Administration ("SSA") and, in his official capacity, its Commissioner Michael J. Astrue (collectively, "Defendants") to compel Defendants to review Plaintiffs' application for Social Security Child Insurance Benefits and issue a decision on that application, which Defendants have failed to do for more than two years, and to enjoin Defendants from continuing to avoid their obligations under the Social Security Act and the Administrative Procedures Act.

## PRELIMINARY STATEMENT OF THE CASE

1. Defendants in this case have excessively and unreasonably delayed the discharge of their legal duties under the Social Security Act, the Administrative Procedures Act, and the United States Constitution to afford Plaintiffs a timely resolution of their claims for Child Insurance Benefits. As set forth below, although Defendants rendered a fully favorable decision in January 2006 recognizing that Plaintiff Gary Day is disabled and entitled to Social Security Disability Insurance Benefits, Defendants have failed to act for more than two years on the timely application by his legal children to determine their eligibility for Child Insurance Benefits as dependents of a disabled worker.

2. Defendants have claimed that an initial determination is delayed because of unspecified and unexplained "legal questions and policy issues," that supposedly excuse Defendants' legal obligations to issue an initial determination in a timely manner. Defendants' inexcusable delay is discriminatory and arbitrary, is lacking in any legal or rational basis, and is contrary to the legal obligations imposed on Defendants by the Social Security Act.

3. By failing to provide Plaintiffs with an initial determination as to eligibility, and by not even issuing findings of fact, Defendants have created a situation in which a disabled father has struggled for more than two years to provide life's necessities for his dependent children, yet cannot seek administrative or judicial review of a determination that the SSA refuses to make in the first place.

Defendants' indefensible conduct leaves Plaintiffs with no administrative remedies available, relegating Plaintiffs to seek equitable relief to require Defendants to comply with the law. Defendants' failure to discharge their legal duty is unreasonable and in contravention of law.

#### JURISDICTION AND VENUE

4. This case arises under the Constitution and laws of the United States. This Court has jurisdiction over the action on the federal questions pursuant to 42 U.S.C. § 405(g), and has jurisdiction to grant judicial relief under the Mandamus Act, 28 U.S.C. § 1361, and under the Administrative Procedures Act, 5 U.S.C. § 551 - § 596 and 5 U.S.C. § 701 - § 706.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e)(1) because the Defendants are an agency of the United States and an officer or employee of an agency of the United States acting in his official capacity.

#### PARTIES

6. Plaintiff Gary Day ("Plaintiff Gary Day") is a citizen of the United States and resident of Tampa, Florida, whom the Social Security Administration has determined to be a disabled worker entitled to Social Security Disability Insurance Benefits.

7. Plaintiff C.D.G., born in the year 2000, is a citizen of the United States and resident of Tampa, Florida, and is the legal son of Plaintiff Gary Day.

8. Plaintiff E.D.G. (collectively with Plaintiff C.D.G., "Plaintiff Children"), born in the year 2003, is a citizen of the United States and resident of Tampa, Florida, and is the legal daughter of Plaintiff Gary Day.

9. Defendant Social Security Administration ("the SSA") is an agency of the United States Government that, in relevant part, is charged with administering the federal retirement, survivors and disability insurance programs.

10. Defendant Michael J. Astrue ("Defendant Astrue") is the Commissioner of the Social Security Administration. Defendant Astrue is sued in his official capacity. In that capacity, Defendant Astrue is required to supervise and direct the operation of the SSA and the administration of the disability insurance program at issue in this case.

### **STATEMENT OF FACTS**

#### **The Birth of Plaintiff Gary Day's Children**

11. On November 8, 2000, the Superior Court of California for the County of Los Angeles entered a Judgment Establishing the Parental Rights regarding then-unborn C.D.G. ("November 8, 2000 Order"). The November 8, 2000 Order establishes Plaintiff Gary Day's paternity of C.D.G. and provides that Plaintiff Gary Day has custody of C.D.G. and is financially responsible for him.

12. The child who was the subject of the November 8, 2000 Order, subsequently named C.D.G., was born in the year 2000.

13. Plaintiff Gary Day is listed as a parent of C.D.G. on his Certificate of Live Birth issued by the Department of Health Services of the State of California.

14. On July 11, 2003, the Superior Court of California for the County of Los Angeles entered a Judgment Establishing Parental Rights regarding then-unborn E.D.G. ("July 11, 2003 Order," and, collectively with "November 8, 2000 Order," "Judgments Establishing Parental Rights"). The July 11, 2003 Order establishes Plaintiff Gary Day's paternity of E.D.G., and provides that Plaintiff Gary Day has custody of E.D.G. and is financially responsible for her.

15. The child who was the subject of the July 11, 2003 Order, subsequently named E.D.G., was born in the year 2003.

16. Plaintiff Gary Day is listed as a parent of E.D.G. on her Certificate of Live Birth issued by the Department of Health Services of the State of California.

17. Neither of the Judgments Establishing Parental Rights was based on any presumption in, nor operation of, California law respecting the relationship between Plaintiff Gary Day and any other adult person.

18. Plaintiff Gary Day's parental relationship to Plaintiff Children does not rely upon, nor is the parental relationship in any way dependent upon, Plaintiff Gary Day's relationship to any other adult person.

**Plaintiff Gary Day's Applications for Disability Benefits**

**On His Behalf and on Behalf of His Children**

19. Plaintiff Gary Day had been in the workforce since graduating from college in 1981, until his medical condition required that he take a medical leave of absence in June of 2002. Prior to taking medical leave, Plaintiff Gary Day worked for Northwest Airlines as a head flight attendant, where he had been employed continuously since 1990.

20. Plaintiff Gary Day started having severe back pain and trouble walking more than seven years ago. He has been through three operations since 2000, including a hemilaminectomy and spinal fusion.

21. On November 6, 2003, Plaintiff Gary Day applied for Social Security Disability Insurance Benefits because of his disability.

22. On January 13, 2006, the SSA issued a fully favorable decision, finding that Plaintiff Gary Day suffers from "failed back syndrome," has been disabled since June 23, 2003, and is entitled to Disability Insurance Benefits.

23. The Social Security Act provides, in relevant part, that every legal or adoptive child dependent on "an individual entitled to . . . disability insurance benefits" shall be entitled to child insurance benefits where the child "has filed [an] application for child's insurance benefits," was unmarried and either under the age of 18 or was a full-time elementary or secondary school student under the age of 19,

and was dependent upon the individual, if the individual was living at the time the application was filed. 42 U.S.C. § 402(d)(1).

24. Plaintiff Children are currently, and have been at all times relevant to this action, under the age of 18 and unmarried.

25. Pursuant to 42 U.S.C. § 202 (d)(3), a child is deemed dependent on his or her parent unless the parent was not living with or contributing to the support of the child.

26. Plaintiff Children are currently, and have been at all times relevant to this action, living with and dependent on Plaintiff Gary Day for more than 50% of their needs, including but not limited to their food, their clothing, and their health care. Prior to his disability, Plaintiff Gary Day contributed at least 60% of the children's total support. Plaintiff Gary Day has declared C.D.G. and E.D.G. as his dependents to the Internal Revenue Service on his federal tax return forms each year since each child was born.

27. On February 21, 2006, Plaintiff Gary Day completed the applications for Child Insurance Benefits on behalf of Plaintiff Children, in which he acknowledged Plaintiff Children as his own in a signed writing, under threat of criminal penalties.

28. On February 23, 2006, Plaintiff Gary Day received a receipt from the SSA acknowledging the SSA's receipt of the Child Insurance Benefits application. The receipt provided he would "hear from [the SSA] within 45 days."

29. The SSA did not contact Plaintiff Gary Day within 45 days.

30. After 435 days - over 14 months - passed without an initial determination on Plaintiff Children's Child Insurance Benefits application, on May 4, 2007, an attorney with Lambda Legal ("Lambda Legal" or "Plaintiffs' Counsel") sent a letter to Ms. Rizzo, the SSA representative assigned to oversee the application, on behalf of Plaintiff Gary Day ("the May 4, 2007 letter"). Lambda Legal is a national civil rights organization.

31. The May 4, 2007, letter explained that Plaintiff Gary Day had provided the SSA with court and government documents reflecting that Plaintiff Children are Plaintiff Gary Day's legal children and requested that the SSA award Plaintiff Gary Day back benefits and order a disability award that encompassed Plaintiff Children. The May 4, 2007 letter requested that the SSA fulfill its obligation to "to aid dependent children and to pay benefits to replace the support lost by a child when [the parent] . . . becomes disabled."

32. Neither Plaintiff Gary Day nor Lambda Legal received a response from the SSA to the May 4, 2007 letter.

33. On June 18, 2007, Lambda Legal wrote another letter to Mr. Montenez, Office Manager at the Tampa branch of the SSA, again requesting prompt action on the application for benefits for Plaintiff Children and also requesting that the matter be treated as a Critical Case going forward ("the June 18, 2007 letter").



34. Rather than issuing an initial determination as requested by the May 4, 2007 letter and the June 18, 2007 letter, Defendant SSA, through an Administrative Law Judge, issued a July 26 Order of Dismissal ("the July 26 SSA Order") denying a hearing to Plaintiff Gary Day because the SSA had not yet issued its initial determination on Plaintiff Children's application. The Administrative Law Judge issued the July 26 SSA Order despite the fact that neither Plaintiff Gary Day nor Lambda Legal had requested a hearing on the matter.

35. In response to the July 26 SSA Order, Plaintiffs' Counsel wrote to the SSA on September 26, 2007, requesting that the July 26 SSA Order be vacated because Plaintiff Gary Day had never requested a hearing and simply had sought - as he continues to seek - from the SSA an initial determination of eligibility regarding Plaintiff Children's right to Child Insurance Benefits, as dependent children of a disabled worker ("the September 26, 2007 letter").

36. Neither Plaintiff Gary Day nor Lambda Legal has received a response from the SSA to the September 26, 2007 letter.

37. To this day, more than two years after completing the application for Child Insurance Benefits, Plaintiff Gary Day and Plaintiff Children continue to seek a response from Defendants recognizing (or not) his dependent children and their right to Child Insurance Benefits.

## **Plaintiff Gary Day's Legal Relationship to Plaintiff Children**

### **Under the Social Security Act**

38. In the July 26 SSA Order, the SSA claimed that "[b]ecause of the legal questions and policy issues involved with [Plaintiff Gary Day's] application, the Agency has not yet issued a decision on this claim."

39. The SSA has never specified to Plaintiff Gary Day or to Plaintiffs' Counsel what the "legal questions and policy issues involved" are.

40. Since receiving the application for Plaintiff Children's insurance benefits, the SSA has requested no further information or documents to make its assessment.

41. The SSA has never claimed that the delay in issuing a determination on Plaintiff Gary Day's applications for Child Insurance Benefits on behalf of Plaintiff Children is a result of a backlog of applications, inadequate staff available to process applications, or inadequate finances available to process applications.

42. Under the Social Security Act, the only legal question or policy issue about which the SSA can concern itself, when considering Plaintiff Gary Day's application for Child Insurance Benefits on behalf of Plaintiff Children, is whether Plaintiff Children are entitled to Child Insurance Benefits as dependents of a disabled individual.

43. Under the Social Security Act, "child" means "(1) the child or legally adopted child of an individual, (2) a stepchild who has been such stepchild for not

less than one year immediately preceding the day on which application for child's insurance benefits is filed . . . and (3) a person who is the grandchild or stepgrandchild of an individual or his spouse . . . ." 42 U.S.C. § 416(e).

44. The Social Security Act sets forth a particular method by which the Commissioner is to determine whether an individual and the individual's son or daughter are considered parent and child under the Social Security Act. 42 U.S.C. § 416(h).

45. Pursuant to the Social Security Act, the Commissioner must find that an individual and a son or daughter are parent and child for the purposes of the Social Security Act if the individual and the son or daughter are considered parent and child under the intestate property laws of the state in which the individual is domiciled. 42 U.S.C. § 416(h)(2)(A).

46. If the individual and the son and daughter are deemed parent and child under state intestacy property law, they are deemed parent and child under the Social Security Act, and no further inquiry is required.

47. If the individual and the son or daughter are not deemed parent and child under the state's intestate property laws, further inquiry *is* required, and the Commissioner must nonetheless find that the individual and the son or daughter have the status of parent or child if, prior to the most recent period of the individual's disability, the individual:

(I) has acknowledged in writing that the applicant is his or her son or daughter, (II) has been decreed by a court to be the mother or father of the applicant, or (III) has been ordered by a court to contribute to the support of the applicant because the applicant is his or her son or daughter[.]

42 U.S.C. § 416(h)(3)(B)(i).

48. If the individual and the son and daughter are deemed parent and child under any of the three methods described in paragraph 47 above, the SSA must recognize the parent-child relationship, ending the inquiry into familial status.

49. If the individual and the son or daughter are not deemed parent and child under the methods set out in paragraphs 45 and 47 above, the Commissioner may still find that the individual and the son or daughter are parent and child if the individual presents evidence that satisfies the SSA that the insured is the mother or father of the applicant and the insured was living with or contributing to the support of the applicant when the application for benefits was filed. 42 U.S.C. § 416(h)(3)(B)(ii).

50. Plaintiff Gary Day and Plaintiff Children satisfy all of the requirements for parent-child status set out in the SSA.

51. Because Plaintiff Gary Day and Plaintiff Children are residents of, and domiciled in, the state of Florida, the SSA must examine Florida state law when determining whether Plaintiff Gary Day and Plaintiff Children have the status of parent and child under the Social Security Act.

52. Under Florida law, "A final order of paternity entered in a foreign jurisdiction . . . shall be given the same legal effect as if such final order was entered or affidavit was signed pursuant to this chapter. In any proceeding in this state, a certified copy of the final order of paternity from a foreign jurisdiction shall be conclusive evidence of paternity." Fla. Stat. § 742.105. Therefore, the Judgments Establishing Parental Rights issued by the California Courts are conclusive proof in the State of Florida of Plaintiff Gary Day's paternity of Plaintiff Children.

53. Under Florida's intestate property law, an intestate decedent's estate will be inherited by the descendants of the decedent if there is no surviving spouse. Fla. Stat. § 732.103(1). Plaintiff Gary Day is currently, and has been at all times relevant to this action, unmarried, so he would have no surviving spouse should he die. Because Plaintiff Gary Day is listed as a parent on Plaintiff Children's Judgment Establishing Parental Rights and birth certificates and because Florida recognizes the Judgment Establishing Parental Rights as conclusive proof of Plaintiff Gary Day's paternity of Plaintiff Children, Plaintiff Children would inherit Plaintiff Gary Day's property under Florida's intestate property laws. Therefore, Plaintiff Gary Day and Plaintiff Children must be deemed parent and child under the Social Security Act. 42 U.S.C. § 416(h)(2)(A).

54. Because Plaintiff Gary Day and Plaintiff Children have the status of parent and child under Florida's intestate property laws, they have the status of parent and child under the Social Security Act, and no further inquiry is required.

55. However, even if further inquiry into their familial status were required, Plaintiff Gary Day and Plaintiff Children can nonetheless demonstrate their status as parent and child in the methods set out in paragraph 47 above.

56. Before his most recent period of disability, which the SSA deemed began on June 23, 2003, Plaintiff Gary Day acknowledged in writing, in the applications for Plaintiff Children's Judgment Establishing Parental Rights, that Plaintiff Children were his children. Plaintiff Gary Day and Plaintiff Children must therefore be found to have the status of parent and child under 42 U.S.C. § 416(h)(3)(B)(i)(I).

57. The California courts decreed that Plaintiff Gary Day was a parent of Plaintiff Children. Plaintiff Gary Day and Plaintiff Children must therefore be found to have the status of parent and child under 42 U.S.C. § 416(h)(3)(B)(i)(II).

58. The California courts decreed that Plaintiff Gary Day was responsible for the financial support of Plaintiff Children. Plaintiff Gary Day and Plaintiff Children must therefore be found to have the status of parent and child under 42 U.S.C. § 416(h)(3)(B)(i)(III).

59. Because Plaintiff Gary Day and Plaintiff Children have the status of parent and child under the methods set out in paragraphs 45 and 47 above, they have the status of parent and child under the Social Security Act, and no further inquiry into their familial status is required.

60. However, even if further inquiry into their familial status were required, Plaintiff Gary Day and Plaintiff Children can nonetheless demonstrate their status as parent and child in the method set out in paragraph 49 above.

61. Since Plaintiff Children were born, Plaintiff Gary Day and Plaintiff Children have lived together, and continue to live together, as a family. Plaintiff Children are dependent on Plaintiff Gary Day for all their material needs, including food, clothing, and shelter, and Plaintiff Gary Day is responsible for, and has actively contributed to, the financial support of Plaintiff Children. Plaintiff Gary Day and Plaintiff Children must therefore be found to have the status of parent and child under 42 U.S.C. § 416(h)(3)(B)(ii).

62. Plaintiff Gary Day and Plaintiff Children have the status of parent and child under not one, but five methods by which the SSA allows such status to be demonstrated. Thus, contrary to the SSA's suggestion that the determination of this application is difficult, it is in fact straightforward, rendering the delay of over two years completely unjustifiable.

63. Because the SSA's refusal to act has thwarted Plaintiffs' efforts to secure an initial decision on Plaintiffs' application for Child Insurance Benefits, Plaintiffs' administrative efforts are currently exhausted, and Plaintiffs have no alternative but to seek relief from this Honorable Court.

**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF  
(Violation of The Social Security Act, 42 U.S.C. § 405(b))**

64. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 63 as though they were set forth in full herein.

65. The Social Security Act requires that applicants for insurance benefits receive an initial determination; if the initial determination is unsatisfactory to the applicants, they have the right to seek administrative or judicial review of the initial determination.

66. Under the Social Security Act, the Commissioner of the SSA "is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title. . . . Any such decision by the Commissioner . . . shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based." 42 U.S.C. § 405(b)(1) (emphasis added).

67. The use of mandatory terms such as "is directed" and "shall" impose a legal duty on the SSA to act on applications for insurance benefits.

68. Despite the passage of two years and repeated requests for a decision from Plaintiff Gary Day and his legal representatives, Defendants have refused to issue a decision on Plaintiffs' application for Child Insurance Benefits, frustrating the



administrative process of application, determination, and review under the Social Security Act.

69. In failing to issue a determination as to the Plaintiff Children's eligibility for Child Insurance Benefits for more than two years, Defendant Astrue has failed to discharge a legal duty in violation of the Social Security Act.

70. In failing to make findings of fact with respect to the rights of Plaintiffs because of unspecified and unexplained "legal questions and policy issues," Defendants have failed to discharge their legal duty in violation of the Social Security Act.

**SECOND CLAIM FOR RELIEF  
(Violation of the Fifth Amendment to the U.S. Constitution)**

71. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 63 as though they were set forth in full herein.

72. The Fifth Amendment to the United States Constitution provides, in relevant part, that no person shall be deprived of liberty or property without due process of law.

73. In failing to issue an initial determination on the eligibility of Plaintiff Children to Child Insurance Benefits for more than two years, without which Plaintiffs may not avail themselves of administrative or judicial review, Defendants have caused an unreasonable and excessive delay in administrative

procedures and wrongfully deprived Plaintiffs of benefits in violation of the due process clause of the United States Constitution.

74. In depriving Plaintiff Children of their right to receive Child Insurance Benefits to which they are entitled without an opportunity to be heard, Defendants have deprived Plaintiffs of a property interest in violation of the due process clause of the United States Constitution.

**THIRD CLAIM FOR RELIEF**  
**(Violation of the Administrative Procedures Act, 5 U.S.C. § 551 - § 596 and**  
**5 U.S.C. § 701 - § 706)**

75. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 63 as though they were set forth in full herein.

76. Under the Administrative Procedures Act, "With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b).

77. Defendants' failure to issue an initial decision on the eligibility of the Plaintiff Children to Child Insurance Benefits for more than two years is a violation of the requirement that agencies conclude matters before them within a reasonable time.

78. Plaintiffs are entitled to judicial review under the Administrative Procedure Act because they are "suffering [a] legal wrong because of agency action, or [are] adversely affected or aggrieved by agency action within the meaning of a

relevant statute . . . " 5 U.S.C. § 702. An agency's failure to act is included in the Administrative Procedure Act's definition of "agency action." 5 U.S.C. § 551(13).

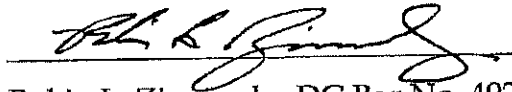
**RELIEF**

WHEREFORE, Plaintiffs pray for judgment under all their causes of action and request that this Court grant the following relief:

- (1) A writ of mandamus compelling Defendants to discharge their duty by reaching a determination on the Plaintiffs' application for Child Insurance Benefits;
- (2) An injunctive order enjoining the Defendants from continuing to avoid their obligations under the Social Security Act and the Administrative Procedures Act through their failure to act on the Child Insurance Benefits application of Plaintiffs;
- (3) Awarding costs for the suit herein, including Plaintiffs' reasonable attorneys' fees and expert fees pursuant to 5 U.S.C. § 504 and 28 U.S.C. § 2412; and
- (4) Awarding all other relief that the Court deems just and proper.

Dated this 28th day of May, 2008.

Respectfully submitted,



Robin L. Zimmerly, DC Bar No. 492505  
Daniel A. Mullen, DC Bar No. 469672  
McDermott Will & Emery LLP  
600 13th Street, N.W., 12th Floor  
Washington, DC 20005-3096  
(202) 756-8000 - telephone  
(202) 756-8087 - facsimile

Elizabeth Littrell, GA Bar No. 454949  
Gregory Nevins, GA Bar No. 539529  
Lambda Legal Defense and Education Fund  
Southern Regional Office  
730 Peachtree Street N.E., Suite 1070  
Atlanta, GA 30308-1210  
(404) 897-1880 - telephone  
(404) 897-1994 - facsimile

Lisa A. Linsky, Esq., NY Bar No. LL 1804  
McDermott Will & Emery LLP  
340 Madison Avenue, 14th Floor  
New York, New York 10173-1922  
(212) 547-5587 - telephone  
(212) 547-5444 - facsimile