

disability insurance benefits in 1981, 1982, and 1986. The Social Security Administration (SSA) denied all of these applications. In May 1987, she filed a fourth application. SSA denied this application initially and upon reconsideration, and the claimant did not request further administrative review. In June 1988, the claimant filed a fifth application which was denied initially and upon reconsideration. The claimant requested and received a hearing before an Administrative Law Judge (ALJ). The ALJ issued a decision denying her application, finding that she was not disabled through December 31, 1986, the date on which her insured status expired. The claimant filed a request for Appeals Council review. The Appeals Council granted the request, vacated the ALJ's decision, and dismissed the request for hearing on the basis of administrative *res judicata*.

The Appeals Council concluded that under the doctrine of administrative *res judicata*, 20 CFR 404.957(c)(1), the determination denying the claimant's fourth application was dispositive of her subsequent claim.

The claimant then filed a civil action. The district court remanded the case to the Secretary to determine whether the determination on the claimant's fourth application should have been reopened pursuant to 20 CFR 404.988(a). The Appeals Council found no basis for reopening that determination, and again determined that the request for hearing on the fifth application should be dismissed on the basis of *res judicata*. The case was returned to the district court which upheld the action of the Appeals Council. The claimant then appealed to the United States Court of Appeals for the Sixth Circuit. In her appeal, the claimant maintained that the ALJ's decision to hold a hearing and issue a decision on the merits was not subject to review by the Appeals Council. She further argued that even if the ALJ erred in holding the hearing, the Appeals Council could not dismiss the request for hearing on the basis of *res judicata* after the ALJ heard the case on the merits.

The Court of Appeals stated that the ALJ's action in holding a hearing and issuing a decision appeared to be erroneous and that it knew of no reason why it was not within the province of the Appeals Council to correct the error. The court held that the Appeals Council has authority to vacate an ALJ's decision and dismiss the request for hearing on *res judicata* grounds even though the ALJ held a hearing and issued a decision on the merits.

Per Curium

This is a social security case in which the appellant filed a series of claims

asserting that she had become disabled before her insured status expired. The main question before us is whether, after an administrative law judge has conducted an evidentiary hearing despite the existence of an earlier final decision denying the same claim, the Appeals Council can deny the hearing request retroactively, thereby foreclosing judicial review. The district court answered this question in the affirmative and dismissed the claimant's case. We agree with the district court's decision, and we shall affirm the dismissal.

I

The claimant, Edith Harper, held a job for a ten-year period ending in January of 1981. She has not worked since that time, and her insured status expired on December 31, 1986.

Ms. Harper filed applications for disability insurance benefits on April 7, 1981, February 8, 1982, April 22, 1986, May 19, 1987, and June 23, 1988. The first, third, and fourth applications were denied initially and upon reconsideration. The second was denied initially, and no appeal was taken from its denial. Ms. Harper did not request a hearing before an administrative law judge with respect to any of the first four applications.

After the denial upon reconsideration of her fifth claim, Ms. Harper sought and was granted a hearing before an administrative law judge. The ALJ denied the fifth claim on its merits, finding that Ms. Harper had not been disabled as of the last date on which she was insured. Ms. Harper sought review by the Appeals Council, which granted review in a letter dated March 12, 1990. In the same letter, the council alerted Ms. Harper to the possibility that her claim would be disposed of on administrative *res judicata* grounds.

On May 25, 1990, the Appeals Council vacated the decision of the ALJ and retroactively denied the request pursuant to which the ALJ had conducted the hearing. The council took the position that under the doctrine of administrative *res judicata*, the denial of Ms. Harper's fourth claim was dispositive of any subsequent claim.

Following initiation of the present suit for judicial review, the district court remanded the matter to the Appeals Council for a determination as to whether Ms. Harper's fourth application for benefits should have been reopened under 20 C.F.R. § 404.988(a). The council declined to reopen the fourth claim, finding that Ms. Harper had presented no new evidence as to her condition before December 31, 1986. The council again determined that the

fifth claim was barred by the doctrine of *res judicata*. In a well reasoned opinion filed by the district court (Graham, J.) on November 18, 1991, the court then dismissed Ms. Harper's lawsuit. This appeal followed.

The first question we must address is whether the federal courts have jurisdiction. The pertinent statute, 42 U.S.C. § 405(g), provides, in relevant part, as follows:

"Any individual, after any final decision of the Secretary *made after a hearing to which he was a party*, irrespective of the amount in controversy, may obtain a review of such a decision by a civil action commenced within sixty days. * * * " (Emphasis supplied.)

The Appeals Council determined that the final decision of the Secretary was the denial upon reconsideration of the fourth claim in 1987. The final decision of the Secretary thus appears to have been made *before* any evidentiary hearing took place, which would normally preclude judicial review. A refusal to reopen a prior application is not a final decision and may not be reviewed by the courts. *Califano v. Sanders*, 430 U.S. 99, 107-09, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Blacha v. Secretary of Health and Human Services*, 927 F.2d 228 (6th Cir.1990).

Ms. Harper claimed before the district court, and she claims here, that she was deprived of property without due process of law in violation of her rights under the Fifth Amendment of the United States Constitution. As *Califano* noted, where a constitutional claim is made in conjunction with a social security benefits case, jurisdiction may attach outside the scope of 42 U.S.C. 405(g) and despite the foreclosure, in 42 U.S.C. 405(h), of general federal question jurisdiction over social security appeals. (The latter section provides that "[n]o action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.") The district court thus had jurisdiction to entertain Ms. Harper's constitutional claim, regardless of whether jurisdiction existed under 42 U.S.C. 405(g).

II

Ms. Harper contends, as we have said, that the action of the Appeals Council in vacating the ALJ's decision to grant a hearing on the merits and disposing of the case on *res judicata* grounds constituted a denial of due process. As a preliminary matter we note a potential stumbling block not addressed in the parties' briefs.

Under the language of the Fifth Amendment, due process protections