

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

BERTHA J. BRITTINGHAM, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action No. 02-459-JJF  
 :  
 JO ANNE B. BARNHART, :  
 Commissioner of Social :  
 Security Administration, :  
 :  
 Defendant. :  
 :  
 :

---

Paul G. Enterline, Esquire of PAUL G. ENTERLINE, ATTORNEY AT LAW,  
Georgetown, Delaware.  
Attorney for Plaintiff.

Colm F. Connolly, Esquire, United States Attorney, and Patricia  
C. Hannigan, Esquire, Assistant United States Attorney, of the  
OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware.  
Of Counsel: Lisa de Soto, Esquire, General Counsel, Charlotte  
Hardnett, Esquire, Principal Deputy General Counsel, Jack  
Sacchetti, Esquire, Associate General Counsel of the OFFICE OF  
PROGRAM LITIGATION DIVISION OF THE SOCIAL SECURITY  
ADMINISTRATION, Philadelphia, Pennsylvania and Sharon Sands,  
Esquire of the OFFICE OF GENERAL COUNSEL OF THE SOCIAL SECURITY  
ADMINISTRATION, Philadelphia, Pennsylvania.  
Attorneys for Defendant.

---

**MEMORANDUM OPINION**

November 17, 2003

Wilmington, Delaware

**Farnan, District Judge.**

Presently before the Court is an Amended Motion To Dismiss, Or, In The Alternative, For Summary Judgment (D.I. 11) filed by Defendant, the Commissioner of the Social Security Administration requesting dismissal of Plaintiff's appeal from the Commissioner's decision dismissing her Request For Hearing on the denial of her claim for disability benefits under Title II of the Social Security Act. In response to Defendant's Motion, Plaintiff filed a Cross-Motion For Summary Judgment (D.I. 17). For the reasons discussed, Plaintiff's Motion For Summary Judgment will be denied, and Defendant's Motion To Dismiss will be granted on the grounds that the Court lacks subject matter jurisdiction to review the Commissioner's decision dismissing her request for a hearing.<sup>1</sup>

---

<sup>1</sup> Defendant has attached materials outside the pleadings to her Motion To Dismiss, and has alternatively moved for summary judgment. However, the Court will treat Defendant's Motion as a Motion To Dismiss, because the Court may consider materials outside the pleadings when adjudicating the question of subject matter jurisdiction. Lear v. Apfel, 2001 WL 179861, \*1 n.1 (E.D. Pa. Feb. 22, 2001) (citations omitted). Indeed, the question of subject matter jurisdiction should be adjudicated through the procedural vehicle of a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure, and not through a motion for summary judgment, because a motion for summary judgment goes to the merits of an action. Freeman v. Herman, 1998 WL 813426, \*2 (E.D. Pa. Nov. 24, 1998). In adjudicating a motion to dismiss pursuant to Rule 12(b)(1), "the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case," and "[u]nlike the practices under Rule 12(b)(6), the fact that matters outside the pleadings are considered does not transform a Rule 12(b)(1) motion to dismiss into a motion for summary judgment." Id. (citations omitted).

## BACKGROUND

On September 21, 1999, Plaintiff filed an application for disability insurance benefits ("DIB") pursuant to Title II of the Social Security Act (the "Act"). Plaintiff's application was denied initially, and Plaintiff sought reconsideration of her claim. On March 22, 2000, Plaintiff's request for reconsideration was denied. (D.I. 12, Ex. 1 at A-5-A-8). By the Notice of Reconsideration denying her request for reconsideration, Plaintiff was advised that if she disagreed with the decision denying her benefits, she had sixty days to request a hearing. (D.I. 12, Ex. 1 at A-6).

Nearly one year later, on March 12, 2001, the agency received a Request For Hearing form completed by Plaintiff. (D.I. 12, Ex. 2 at A-9). By cover letter dated March 8, 2001, Plaintiff's attorney advised the agency that a request for a hearing had been mailed in a timely fashion by his assistant in the form of a letter dated April 3, 2000.<sup>2</sup> (D.I. 12, Ex. 2 at A-10-A-12). Plaintiff's attorney stated that he had not received a response from the agency to the April 3, 2000 correspondence. Plaintiff's attorney then requested the agency to deem his April 3 letter to serve as a hearing request "since that was our intent

---

<sup>2</sup> The April 3, 2000 letter by Plaintiff's assistance reads: "I am requesting a date and time that I may review and/or copy the files regarding the above matter. Please let me know what date and time would be convenient for your office." (D.I. 12, Ex. 2 at A-12).

in sending it" and "the claimant is utterly blameless in the failure to file the proper forms." (D.I. 12, Ex. 2 at A-10).

In a Report Of Contact with the subject label "Good Cause For Late Filing," the District Office accepted Plaintiff's request for a hearing as timely filed, and a notice of hearing was scheduled. (D.I. 12, Ex. 3 at A-13). Plaintiff was sent a Notice Of Hearing indicating the time of the hearing and setting forth the issues that the A.L.J. planned to consider at the hearing. (D.I. 20, Appendix ("App.") at A-67-A-70). The Notice Of Hearing did not indicate that the A.L.J. would be considering the timeliness of Plaintiff's request for a hearing.

On November 8, 2001, the A.L.J. held a hearing. (D.I. 12, Ex. 4 at A-14-A-37). At the beginning of the hearing, the A.L.J. stated that there was an additional issue concerning the timeliness of Plaintiff's request for a hearing. (D.I. 12, Ex. 4 at A-17). The A.L.J. acknowledged that the Notice Of Hearing did not contain this issue and stated that he explained to Plaintiff's counsel that before proceeding with the hearing, he would either have to waive notice of that additional issue or the hearing would be rescheduled. (D.I. 12, Ex. 4 at A-17). Plaintiff's Counsel expressly waived advance notice of that issue and stated that he was prepared to proceed with argument on the issue of timeliness. The A.L.J. then permitted Plaintiff's counsel to make his argument concerning the timeliness of his

request for a hearing. (D.I. 12, Ex. 4 at A-17-A-21). The A.L.J. then permitted the hearing to proceed on the merits of Plaintiff's claim, reserving his decision on the issue of timeliness until after the hearing. Following the hearing, Plaintiff's counsel was given the opportunity to submit additional materials on this issue, and Plaintiff's counsel submitted a letter and exhibits further detailing his argument. (D.I. 12, Ex. 5).

On January 24, 2002, the A.L.J. issued an Order Of Dismissal dismissing Plaintiff's request for a hearing as untimely filed. (D.I. 12, Ex. 6 at A-60-A-61). The A.L.J. also found that Plaintiff did not establish good cause for the untimely filing. The A.L.J. did not address the merits of the Plaintiff's DIB claim in his decision.

On March 18, 2002, Plaintiff sought review of the A.L.J.'s Order Of Dismissal by the Appeals Council. (D.I. 12, Ex. 7 at A-62-A-64). The Appeals Council denied Plaintiff's request for review. (D.I. 12, Ex. 8 at A-65). Thereafter, Plaintiff filed the instant action seeking review of the Commissioner's dismissal order.

## **DISCUSSION**

### **I. The Parties' Contentions**

The threshold question presented by this appeal is whether the Court has jurisdiction to review the A.L.J.'s decision that

Plaintiff's Request For Hearing was untimely. Defendant contends that the Court lacks jurisdiction over Plaintiff's appeal, because the decision is not a "final decision made after a hearing" as required by 42 U.S.C. §§ 405(g) and (h). Defendant maintains that the Commissioner has the authority to dismiss a hearing request as untimely and that decision is unreviewable, unless the plaintiff presents the Court with a colorable constitutional challenge. Defendant contends that Plaintiff in this case has not established a colorable constitutional challenge, and Plaintiff waived any colorable constitutional challenge she may have had as a result of her attorney's express waiver. In the alternative, Defendant contends that the A.L.J. properly concluded that Plaintiff did not show good cause to justify her untimely filing, and therefore, the A.L.J. properly dismissed her Request For Hearing, leaving the March 22, 2000 denial of her claim upon reconsideration in effect.

In response, Plaintiff contends that the Court has jurisdiction over this action pursuant to the plain language of 42 U.S.C. §§ 405(g) and (h). In support of his position, Plaintiff relies on the decision of the Eleventh Circuit Court of Appeals in Bloodsworth v. Heckler, 703 F.2d 1233, 1237 (11th Cir. 1983). However, even if the statute does not provide for direct review, Plaintiff contends that jurisdiction exists, because she has advanced a colorable constitutional claim based on the denial

of her due process rights.

With respect to the substance of the A.L.J.'s decision, Plaintiff contends that the A.L.J.'s decision to dismiss Plaintiff's Request For Hearing as untimely was erroneous. Specifically, Plaintiff's counsel maintains that he filed a timely request for a hearing in the form of his assistant's April 3, 2000 letter and his December 22, 1999 Request For Hearing. In the alternative, Plaintiff contends that he demonstrated good cause to justify a late filing, and therefore, Plaintiff's claim for disability benefits should be remanded to the Commissioner for a determination on the merits. The Court will consider each of the parties' arguments in turn.

## **II. Whether The Court Has Jurisdiction Over This Appeal**

### **A. Whether The Commissioner Has Issued A Final Reviewable Decision Pursuant To Section 205(g) And (h) Of The Social Security Act**

The basis for judicial review of claims arising under Title II of the Act is provided in Sections 205(g) and (h) of the Act as follows:

(g) Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. . .

(h) The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing.

No findings of fact or decision of the Commissioner of Social Security shall be reviewable by any person, tribunal, or governmental agency except as herein provided . . .

42 U.S.C. §§ 405(g) and (h). Interpreting these provisions, the Supreme Court has recognized that the plain language of these sections "clearly limits judicial review to . . . a 'final decision of the Secretary made after a hearing.'" Califano v. Sanders, 430 U.S. 99, \*108 (1977). The term "final decision" refers to a particular type of agency action, and not all agency decisions are considered "final decisions." Bacon v. Sullivan, 969 F.2d 1517, 1519 (1992) (citing Califano, 430 U.S. at 107-108). Rather, the meaning of the term "final decision" has been "left to the Secretary to flesh out by regulations." Weinberger v. Salfi, 422 U.S. 749, 766 (1975).

For purposes of this case, the relevant regulation is set forth in 20 C.F.R. § 404.903. Section 404.903 lists those actions which are not considered "initial determinations" and are "not subject to judicial review." Among the actions listed are actions "[d]enying your request to extend the time period for requesting review of a determination or a decision." 20 C.F.R. § 404.903(j). As the Third Circuit recognized in the context of a decision by the Appeals Council not to review a claimant's late filed appeal, "[s]uch a denial therefore is neither a 'final decision' of the Commissioner nor an 'initial determination' subject to judicial review." Bacon, 969 F.2d at 1521. That such

denials are not subject to judicial review is further confirmed by 20 C.F.R. § 404.959, which states that “[t]he dismissal of a request for a hearing is binding, unless it is vacated by an administrative law judge of the Appeals Council.”

In this case, the A.L.J. did not issue a decision on the merits of Plaintiff’s claim and addressed only the issue of whether Plaintiff’s request for a hearing was timely. The A.L.J. found that Plaintiff did not timely request a hearing and denied any request for an extension on the basis that Plaintiff did not show good cause to accept a late filing. As a result, the A.L.J. issued an order dismissing the request and concluding that the agency’s reconsideration determination was binding upon Plaintiff. Because the A.L.J.’s decision was limited to an action denying Plaintiff’s request for an extension of time to review the agency’s reconsideration determination through the procedural means of a hearing and the A.L.J.’s decision to dismiss the request was binding on Plaintiff, the Court concludes that it lacks jurisdiction to entertain Plaintiff’s appeal. See Lear v. Apfel, 2001 WL 179861, \*1 (E.D. Pa. Feb. 22, 2001) (holding that court lacked jurisdiction to consider A.L.J.’s notice of dismissal based on plaintiff’s untimely filed request for hearing before an administrative law judge).

Defendant urges the Court to adopt the view set forth in the Eleventh Circuit’s decision in Bloodsworth, 703 F.2d at 1237,

that an administrative decision declining to extend time and review the merits is a final decision. However, the Third Circuit expressly considered the Bloodsworth decision in Bacon and declined to follow it, opting instead to adhere to the majority view that dismissals of untimely requests for review of agency determinations are not reviewable by district courts because they are not final decisions. Bacon, 969 F.2d at 1519 (recognizing that of the courts considering this issue, the Eleventh Circuit is the only appellate court to take the contrary position and collecting cases espousing the majority view). Because the Court is constrained by the Third Circuit's decision in Bacon, the Court cannot adopt the rationale of the Bloodsworth court.

Plaintiff also contends that the Court has jurisdiction over her appeal, because only the merits of her claim, and not the timeliness of her hearing request were properly before the A.L.J. In support of her position, Plaintiff directs the Court to the fact that the local office of the Social Security Administration accepted her late filed Request For Hearing as timely filed.

With respect to the actions of the local office of the Social Security Administration, the Court recognizes that the office accepted Plaintiff's late filed Request For Hearing as timely filed based on counsel's representation that he contacted the office on April 3, 2000 to file an appeal, and subsequently

lost his secretary and believed that all the paperwork was timely filed.<sup>3</sup> However, the fact that the local office accepted the filing did not preclude the A.L.J. from considering the timeliness issue. As described in the subject line of the Report Of Contact completed by the local office, the local office considered the issue of whether Plaintiff had "good cause" for her late filing. However, pursuant to the regulations that define the Social Security Administration's internal procedures, the determination of whether a plaintiff had "good cause" for an untimely filing is reserved for the A.L.J. Hearings, Appeals and Litigation Law Manual ("HALLEX") I-2-415 HEARING REQUEST NOT TIMELY FILED. Thus, the A.L.J. was not precluded from considering whether Plaintiff's hearing request was timely. 20 C.F.R. § 404.946(b)(1) (stating that A.L.J. or a party may raise new issues beyond those issues decided in any initial or reconsideration decisions).

Plaintiff points out, however, that the A.L.J. did not notify Plaintiff that he would be considering the timeliness

---

<sup>3</sup> Plaintiff asked the local office to deem his assistant's April 3, 2000 letter to be a request for a hearing since that was his "intent in sending it." (D.I. 12, Ex. 2 at A-10). Interestingly, however, the April 3 letter makes no mention of a hearing and only requests a time to copy the files. In his filings in this Court, Plaintiff's counsel also suggests that the local office improperly failed to respond to his April 3 letter, but in his March 8, 2001 letter, counsel admits that he did not know if his assistant, who was no longer with his office, ever received a response, and he had no record of any further follow-up by his office. (D.I. 12, Ex. 2 at A-10 at ¶¶ b,c).

issue as required by the notice requirements of 20 C.F.R. § 404.946(b)(2), and thus, Plaintiff maintains that the issue of timeliness was not properly before the A.L.J. As the Court will discuss in the context of Plaintiff's alleged constitutional claims, Plaintiff's counsel expressly waived her right to challenge the A.L.J.'s adjudication of the timeliness issue by waiving the regulations' notice requirements before the start of the hearing. Accordingly, the Court cannot conclude that the A.L.J. improperly considered the timeliness issue.

In sum, the Court concludes that the A.L.J. was not precluded from considering the issue of timeliness, and Plaintiff expressly waived any right to challenge the A.L.J.'s consideration of this issue. The A.L.J. was not required to consider the merits of Plaintiff's claim, 20 C.F.R. § 404.957(c)(3), and the A.L.J. did not issue a final decision as that term is defined by the Commissioner. Because a "final decision" did not issue, the Court lacks jurisdiction to entertain Plaintiff's appeal pursuant to Sections 205(g) and (h) of the Act.

B. Whether The Court Should Exercise Jurisdiction Over This Appeal On The Grounds That Plaintiff Has Raised A Colorable Constitutional Question

Although Section 205(g) and (h) of the Act may not provide a basis for the Court to exercise jurisdiction over Plaintiff's claim, jurisdiction may still be appropriate if Plaintiff's

appeal raises colorable constitutional questions. In Penner v. Schweiker, 701 F.2d 256, 260 (3d Cir. 1983), the Third Circuit reviewed the district court's order dismissing for lack of jurisdiction the Plaintiff's appeal from the Commissioner's refusal to grant Penner's request for a hearing on the grounds that the request was untimely filed. While the Third Circuit recognized that jurisdiction did not lie under Section 205(g) of the Act, because the Commissioner was not required to grant a hearing where the application was untimely filed, the Third Circuit nevertheless permitted judicial review of Penner's claim on the grounds that Penner raised constitutional issues which were "unsuited to resolution in administrative hearing procedures" and dependent upon access to the court. 701 F.2d at 260. Specifically, the Third Circuit found that Penner's due process rights were violated, because he did not receive adequate notice of the Commissioner's adverse determination.

In this case, Plaintiff contends that she has a colorable claim involving the denial of her due process rights. Specifically, Plaintiff contends that her due process rights were violated, because (1) her request for a hearing was timely filed, despite the A.L.J.'s finding to the contrary, by virtue of her December 22, 1999 filing, and (2) she was not notified under the proper procedures that the A.L.J. would be considering the timeliness of her request for a hearing.

After reviewing Plaintiff's claims, the Court concludes that they do not raise colorable constitutional questions justifying the exercise of jurisdiction over Plaintiff's appeal. Plaintiff first contends that she filed a timely request for a hearing in the form of a December 22, 1999 filing by her attorney. In his letter dated December 22, 1999, Plaintiff's attorney enclosed several documents including a completed Request For Hearing By Administrative Law Judge and a Request For Reconsideration. Plaintiff's attorney contends that this Request For Hearing, which was made after the initial determination denying Plaintiff's claim, but before the reconsideration decision, is an "overly prompt" request that satisfies the regulations' requirements for requesting a hearing within sixty days of a "previous determination." 20 C.F.R. § 404.933.

In pertinent part, Section 404.933 provides that a request for a hearing must be filed "within 60 days after the date you receive notice of the previous determination or decision (or within the extended time period if we extend the time as provided in paragraph (c) of this section." Plaintiff contends that his December 22 Request For Hearing was filed within 60 days of the initial determination, and therefore, it is timely filed. However, Plaintiff's argument fails to take into account another relevant regulation, 20 C.F.R. § 404.930(a)(1) & (b). In pertinent part, Section 404.930 provides:

(a) You or another party may request a hearing before an administrative law judge if we have made --

(1) A reconsideration determination;

(b) We will hold a hearing only if you are or another party to the hearing files a written request for a hearing.

20 C.F.R. § 404.930(a)(1) & (b) (emphasis added). That a reconsideration determination is needed before a hearing can be requested is further reinforced by Section 404.900(a)(3), which explains that a hearing before the administrative law judge is only available "[i]f you are dissatisfied with the reconsideration determination . . ."

In this case, Plaintiff's request for a hearing was not made after the reconsideration determination, but before it. Under the plain language of the regulations, it is apparent to the Court that the right to a hearing does not accrue until after a reconsideration determination is made. Indeed, to hold otherwise would, in the Court's view, disrupt the administrative scheme contemplated by the regulations and overburden the Commissioner by requiring her to activate premature requests for a hearing. Accordingly, the Court concludes that Plaintiff has not stated a colorable due process claim based on the Commissioner's failure to accept her December 22, 1999 filing as a timely filed request for a hearing.

As for Plaintiff's argument that her due process rights were violated by the A.L.J.'s failure to notify her that the

timeliness of her hearing request was in issue, the Court likewise concludes that Plaintiff's claim does not raise a colorable constitutional issue because any such issue was expressly waived by her counsel. Pursuant to 20 C.F.R. § 404.938, the claimant must be notified in writing of the issues that the A.L.J. plans to consider at the hearing. New issues may be raised without such notice, if the claimant indicates in writing that she does not wish to receive such notice. 20 C.F.R. § 404.946(b)(2).

In this case, it is undisputed that the initial notice sent out by the A.L.J. did not indicate that the A.L.J. would consider the timeliness of Plaintiff's hearing request. However, the A.L.J. recognized this at the hearing and expressly indicated that the hearing would not go forward unless Plaintiff agreed to waive the notice requirements. Plaintiff's counsel expressly agreed to the waiver, stated his readiness to address the timeliness issue, proceeded to argue the issue, and supplemented the record on this issue after the hearing. Plaintiff now contends that his waiver was not effective because it was not in writing as required by 20 C.F.R. § 404.946(b)(2) and her due process rights were violated because the Commissioner did not follow his own regulations in obtaining a written waiver from her. The Court, however, is not persuaded by Plaintiff's argument. Plaintiff was not proceeding pro se, but was

represented by counsel. Counsel was apprised of the timeliness issue and expressly agreed to waive notice of that issue. Counsel's waiver was knowing, intelligent and unconditional, and therefore, in the Court's view, should operate as a full waiver of the requirements of both Section 404.946(b) (2) and Section 404.938. Accordingly, the Court concludes that any constitutional issues Plaintiff may have had as a result of the A.L.J.'s deficient notice were expressly and unconditionally waived by her counsel, and therefore, the Court lacks jurisdiction to entertain Plaintiff's appeal.

Because the Court has concluded that it lacks jurisdiction to hear Plaintiff's appeal, the Court declines to address the question of whether good cause existed for Plaintiff's late filing. The question of good cause goes to the merits of the A.L.J.'s decision concerning the timeliness of Plaintiff's request and, as the Court has explained, that decision is binding upon Plaintiff and not subject to judicial review. Accordingly, the Court will dismiss Plaintiff's Complaint for lack of jurisdiction.

#### **CONCLUSION**

For the reasons discussed, the Court will grant Defendant's Amended Motion To Dismiss.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

BERTHA J. BRITTINGHAM, :  
 :  
 Plaintiff, :  
 :  
 v. : Civil Action No. 02-459-JJF  
 :  
 JO ANNE BARNHART, :  
 Commissioner of Social :  
 Security, :  
 :  
 Defendant. :  
 :  
 :

**FINAL ORDER**

At Wilmington, this 17th day of November 2003, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendant's Amended Motion To Dismiss (D.I. 11) is GRANTED.

JOSEPH J. FARNAN, JR.  
UNITED STATES DISTRICT JUDGE