

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ANNA SEMKIW : CIVIL ACTION
 :
 v. :
 :
 :
 LARRY G. MASSANARI, Acting :
 Commissioner of Social Security : NO. 99-3503

MEMORANDUM ORDER

This is an action to recover Social Security benefits. Presently before the court is defendant's motion to dismiss.

Plaintiff filed applications for Social Security Disability Insurance Benefits under Title II and for Title XVI Supplemental Security Income disability benefits. After an initial denial of benefits, hearings were held before an Administrative Law Judge ("ALJ") who determined that plaintiff was not eligible for benefits. A Notice of Decision was mailed to plaintiff with explicit instructions for appealing the ALJ's decision.

The notice informed plaintiff in clear language that she had sixty days from receipt to appeal the unfavorable decision of the ALJ and of the rebuttable presumption that the notice was received no later than five days after the mailing date. The notice clearly informed plaintiff that "[t]o file an appeal you or your representative must request that the Appeals Council review the decision" and that if plaintiff did not so appeal, she would "not have a right to court review."

Plaintiff filed an appeal of the ALJ's decision three days after the time to appeal had expired. She submitted an explanation for her untimeliness which stated that she thought she could not appeal until she found a lawyer and that after consulting an attorney a week before the deadline who told her to file the appeal, she "misplaced the notice."

The Appeals Council denied plaintiff's appeal as untimely. The Council determined that plaintiff had not demonstrated good cause for her belated filing. The Council discounted plaintiff's explanation that she believed she needed counsel to appeal given the clear language of the notice advising that either petitioner or her representative could file an appeal. The Council also noted that "the record shows that the claimant had attorney representation."

Defendant argues that the court lacks jurisdiction to adjudicate plaintiff's claim since a dismissal of an administrative appeal for untimeliness does not constitute a "final decision" subject to judicial review. Defendant is correct.

Federal courts are courts of limited jurisdiction, deriving their power of review from Article III of the Constitution and the statutes passed by Congress pursuant thereto. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). As such, "Congress may prescribe the procedures

and conditions under which federal courts may review administrative orders." Bacon v. Sullivan, 969 F.2d 1517, 1519 (3d Cir. 1992) (citing Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958)).

The Social Security Act limits judicial review to "final decision[s] of the Secretary made after a hearing." 42 U.S.C. §§ 405(g), (h). See also Fitzgerald v. Apfel, 148 F.3d 232, 234 (3d Cir. 1998); Lear v. Apfel, 2001 WL 179861, *2 (E.D. Pa. Feb. 22, 2001). The determination of what constitutes a "final decision" has been delegated to the Commissioner of Social Security to determine through regulations. See Bacon, 969 F.2d at 1520. Under the relevant regulations, a dismissal of an appeal as untimely by the Appeals Council does not constitute a reviewable "final decision." Id. at 1520-21 (Secretary's finding that plaintiff had not shown good cause to excuse untimely appeal is "unreviewable" decision). See also Brandyburg v. Sullivan, 959 F.2d 555, 558 (5th Cir. 1992); Matlock v. Sullivan, 908 F.2d 492, 494 (9th Cir. 1990); Turner v. Bowen, 862 F.2d 708, 709-710 (8th Cir. 1988); Adams v. Heckler, 799 F.2d 131, 133 (4th Cir. 1986); Dietsch v. Schweiker, 700 F.2d 865, 867 (2d Cir. 1983); Watters v. Harris, 656 F.2d 234, 238-39 (7th Cir. 1980); Lear, 2001 WL 179861, at *1.

Plaintiff has not claimed that the Administration has arbitrarily or selectively enforced its regulations governing the

filing of administrative appeals or acted in any unconstitutional manner. Indeed, she has not responded at all to defendant's motion.

ACCORDINGLY, this day of June, 2001, upon consideration of defendant's Motion to Dismiss (Doc. # 11) and in the absence of any response thereto, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and this action is **DISMISSED**.

BY THE COURT:

JAY C. WALDMAN, J.