

Council denied Plaintiff's request. See Defendant's Motion, Exhibit 2. The Appeals Council's notice advised Plaintiff of her right to commence a civil action in United State District Court within 60 days from the receipt of the notice and further advised Plaintiff she could petition the Appeals Council for an extension of time to begin a civil action. The notice did not place a time limit on filing a petition for an extension and explained an extension may be granted provided a showing of good cause for not meeting the deadline. Plaintiff also alleges to have filed an additional appeal to the Appeals Council on August 14, 2000 ("Second Appeal"). Plaintiff acknowledges that the Second Appeal was inappropriately filed and blames the misstep on a lack of communication between herself and her attorneys and her attorneys' inability to connect her to the First Appeal because Plaintiff was married in the interim period and changed her last name. On November 11, 2000, Plaintiff filed a civil action in the United States District Court for the Eastern District of Pennsylvania. It is this action that Defendant seeks to dismiss.

II. DISCUSSION

Defendant asks the Court to dismiss Plaintiff's complaint because it was not filed within the statutorily prescribed time limit. The sole source of jurisdiction for a civil action challenging the denial of claimed benefits is 42 U.S.C. § 405(g). Mathews v. Eldridge, 424 U.S. 319, 327 (1976); Weinberger v. Salfi, 422 U.S. 749, 763 (1975). That statute requires, *inter alia*, that a claimant commence a civil action within sixty days after the mailing of the notice of the Commissioner's final decision. This court has held:

While the 60-day statute of limitations contained in 42 U.S.C. § 405(g) is waivable by the parties, Weinberger v. Salfi, *supra*, 422 U.S. at 764, it is a restriction upon this court's jurisdiction which may not be altered by judicial action. Whipp v. Weinberger, 505

F.2d 800 (6th Cir. 1974); Richardson v. Secretary of HEW, Social Security Administration, 403 F.Supp 1316 (E.D. Pa. 1975). Even one day's delay in filing the action is fatal. Davidson v. Secretary of HEW, 53 F.R.D. 270 (N.D. Okl. 1971); accord, Estep v. Weinberger, 405 F. Supp. 1097 (S.D.W. Va. 1976).

Wiss v. Weinberg, 415 F. Supp. 293, 294-95 (E.D. Pa. 1976).

The period of sixty days begins from the date of receipt by the Plaintiff. Here, it was presumed Plaintiff was given five days from the date of the June 14, 2000, notice before the limitation period began to run. See Defendant's Motion, Exhibit 2 (stating that the notice is presumed received within five days from the date of the notice unless a reasonable showing to the contrary is made). Accordingly, the time limit expired on August 18, 2000. Since Plaintiff did not file her complaint until November 11, 2000, the Court is without jurisdiction to review the decision of the Defendant, and Defendant's Motion to Dismiss will be granted.

In response to Defendant's Motion to Dismiss, rather than submitting a formal response, Plaintiff submitted to the Court a letter she had previously submitted to the Clerk of the Court. Nonetheless, the Court accepts the letter as a response and interprets it as asking the Court to order that the Second Appeal be treated as Plaintiff's petition to the Appeals Council for an extension of time for commencing a civil action in a district court. Section 404.954 of the Social Security Regulations clearly addresses the extension procedure. The relevant provision of section 404.954 reads as follows:

(a) In general. Any party to a . . . decision of the Appeals Council may petition for an extension for filing a . . . request for commencing a civil action in a district court, although the time for commencing such action has passed The petition shall be filed with the Appeals Council. The petition shall be in writing and state the reasons why the action was not filed within the required time. For good cause shown, . . . the Appeals Council . . . may extend the time for filing such . . . action. (Emphasis added).

20 C.F.R. § 404.954 (1976).

Since the procedure for filing an extension is through the Appeals Council and not the district court, the Court will not make a determination as to the treatment of the Second Appeal. The Court also notes Plaintiff's request to apply equitable tolling is misplaced since section 404.954 states no time limit in which Plaintiff must petition the Appeals Council.

The Court's dismissal of the complaint will be without prejudice to the right of the Plaintiff to petition the Appeals Council, pursuant to 20 C.F.R. § 404.954, for an extension of time in which to file a civil action in a district court. See *Wiss v. Weinberger*, 415 F. Supp 293, 295 (E.D. Pa. 1976).

III. CONCLUSION

For the reasons set forth above, Defendant's Motion to Dismiss will be GRANTED.

An appropriate order follows.

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

ELIZABETH HESS (FORMERLY McINTYRE)	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
LARRY G. MASSANARI, ACTING	:	
COMMISSIONER OF SOCIAL SECURITY	:	00-CV-5973
	:	
Defendant.	:	

ORDER

AND NOW, this 11th day of June, 2001, upon consideration of the Motion to Dismiss of Defendant Larry G. Massanari, Acting Commissioner of Social Security (Docket No. 8), and the response of Plaintiff Elizabeth Hess thereto (Docket No. 9), it is hereby ORDERED that said Motion is GRANTED. Plaintiff's Complaint is DISMISSED, without prejudice.

This case is CLOSED for statistical purposes.

BY THE COURT:

RONALD L. BUCKWALTER, J.