

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

LAURA L. SALSURY,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 01-CV-3547
LARRY G. MASSANARI,	:	
Acting Commissioner of Social Security,	:	
Defendant.	:	

MEMORANDUM ORDER

Presently before the Court is Defendant’s unopposed Motion to Dismiss Plaintiff’s Complaint pursuant to Rules 41(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Laura M. Salsbury brings this action seeking judicial review of the denial of a claim for Social Security Disability Insurance benefits under Title II of the Social Security Act. Defendant asserts that Plaintiff’s Complaint should be dismissed for lack of subject matter jurisdiction because Plaintiff failed to exhaust her administrative appeal remedies, and therefore, has not received a “final decision” of the Secretary as required to obtain judicial review under the Social Security Act, section 205(g), as amended, 42 U.S.C. § 405(g). For the following reasons, Defendant’s motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 2, 1997, Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income payments under Title II and Title XVI of the Social Security Act (the “Act”). On June 23, 1997, the Social Security Administration (“SSA”) denied Plaintiff’s application for Disability Insurance Benefits and subsequently, on October 22, 1997, denied her request for reconsideration, finding that the denial of Disability Insurance Benefits was correct.

(See Def.’s Mot. to Dismiss, Ex. 1.) In the Notice of Reconsideration Claim denying Plaintiff’s request, the SSA advised Plaintiff that if she believed that the reconsideration determination was not correct, she could request a hearing before an administrative law judge (“ALJ”) of the Office of Hearings and Appeals. (See id.) She was advised that any such request must be made within sixty days from the date she received the notice. (See id.)

On January 30, 1998, Plaintiff filed a request for an administrative hearing. (See id., Ex. 2.) On April 20, 1999, through her personal representative, Plaintiff sent a letter and affidavit to the ALJ requesting that good cause be found for the late filing of the request for hearing. (See id., Ex. 3.) On July 7, 1999, finding that good cause had not been established as to the late filing for Plaintiff’s request for a hearing, the ALJ issued an order dismissing Plaintiff’s request for a hearing. (See id., Ex. 4.) In the Notice of Dismissal, the ALJ indicated to Plaintiff that she may “submit evidence to show why you think I should not have dismissed your request for hearing [and] should submit any evidence you wish the Appeals Counsel to consider **with** your request for review.” (Id.) (emphasis in original). On August 12, 1999, Plaintiff requested the Appeals Council to review the ALJ’s dismissal of Plaintiff’s request for a hearing. (See id., Ex. 5.) On May 9, 2001, the Appeals Council denied Plaintiff’s request for review, finding that Plaintiff had no basis to challenge the dismissal of her claim by the ALJ. (See id., Ex. 6.)

On July 16, 2001, Plaintiff filed a civil action in the United States District Court for the Eastern District of Pennsylvania seeking judicial review of the denial of her claim for benefits under Title II of the Social Security Act. On September 20, 2001, Defendant filed the instant Motion to Dismiss Plaintiff’s Complaint on the basis that the Court lacks jurisdiction over Plaintiff’s claim since an ALJ’s dismissal of an administrative appeal for untimeliness does not constitute a “final decision” subject to judicial review.

II. DISCUSSION

Federal courts have limited jurisdiction. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Federal courts only have such power as is granted to them by Article III of the Constitution and by congressional statutes enacted pursuant to that Article. See *id.* Thus, “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)).

As such, in Social Security Act benefit cases pursuant to Title II of the Act, judicial review is limited to “final decisions of the Secretary made after a hearing.” 42 U.S.C. §405(g).¹ The Secretary of Social Security, who has been delegated by Congress to determine, through regulations, what constitutes a “final decision,” has determined that the dismissal of an appeal for being untimely by the Appeals Counsel does not constitute a “final decision.” See *Bacon*, 969 F.2d at 1520-21. Accordingly, “[a] decision by the Secretary not to consider an untimely request for review is not a “final decision” that is subject to judicial review.” *Lear v. Apfel*, No. 00-5517, 2001 U.S. Dist. LEXIS 1889, No. 00-5517, at *5 (E.D. Pa. Feb. 22, 2001) (citing *Bacon*, 969 F.2d at 1519).

Therefore, a court lacks judicial review absent a “final decision” by the Secretary of Social Security. See *Bacon*, 969 F.2d at 1520-21; see also *Fitzgerald v. Apfel*, 148 F.3d 232, 234 (3d Cir. 1998). However, in instances where the Complaint raises a colorable constitutional claim, the lack of a final decision by the Secretary will not bar judicial review. See *Califano v. Sanders*, 430 U.S. 99, 108-09 (1977); see also *Aponte v. Sullivan*, 823 F. Supp. 277, 280-81

¹ Pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, effective March 31, 1995, the role of the Secretary of Health and Human Services was transferred to the Commissioner of Social Security in social security cases. As such, all references to the Secretary apply equally to the Commissioner.

(E.D. Pa. 1993). The Supreme Court created this exception because “constitutional questions are obviously unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions.” Califano, 430 U.S. at 109.

Upon consideration of the Complaint, Plaintiff fails to indicate any evidence that the Secretary violated her due process or equal protection rights or acted in any way that was unconstitutional. In fact, Plaintiff has failed to respond to Defendant’s motion at all. Therefore, because the Court does not believe that Plaintiff’s Complaint raises a colorable constitutional claim and because her claim requests judicial review of the Secretary’s denial to consider an untimely request for review, and is therefore, not a “final decision,” the Court lacks jurisdiction over Plaintiff’s claim.

AND NOW, this ____ day of November, 2001, upon consideration of Defendant’s Motion to Dismiss and in the absence of any response thereto, **IT IS HEREBY ORDERED** that Defendant’s motion is **GRANTED** and this action is **DISMISSED**.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.