

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

FRANK BING	:	CIVIL ACTION
Plaintiff,	:	
	:	
vs.	:	NO. 04-3231
	:	
JO ANNE B. BARNHART	:	
Commissioner SOCIAL SECURITY	:	
ADMINISTRATION	:	
	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 19th day of January, 2005, upon consideration of defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6), and plaintiff's Response, and after careful review of the Report and Recommendation of United States Magistrate Judge Jacob P. Hart dated October 26, 2004, and Plaintiff's Objections to the Report and Recommendation, **IT IS ORDERED** that:

1. The Report and Recommendation of United States Magistrate Judge Jacob P. Hart dated October 26, 2004, is **APPROVED** and **ADOPTED**;
2. Plaintiff's Objections to the Report and Recommendation are **OVERRULED**;
3. Defendant's Motion to Dismiss is **GRANTED**; and,
4. The action is **DISMISSED WITH PREJUDICE**.

MEMORANDUM

In this social security action plaintiff, Frank Bing, seeks review of the decision of the Appeals Council affirming the Administrative Law Judge's dismissal of his request for a hearing. The Commissioner of Social Security Administration ("Commissioner") filed a Motion to Dismiss the action under Federal Rule of Civil Procedure 12(b)(6) on the ground that the Court lacks jurisdiction over an appeal from the denial of a request for a hearing. Plaintiff, in response, requested a remand to the Appeals Council for a hearing to determine the sufficiency of plaintiff's excuse for failing to attend the hearing. The Magistrate Judge, Jacob P. Hart, recommended that the Commissioner's Motion be granted by Report and Recommendation ("R&R") dated October 26, 2004.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed an Application for Supplemental Security Income, claiming disability as a result of high blood pressure and a heart condition. The Application was denied by letter dated May 28, 2003. Plaintiff then filed a timely request for a *de novo* hearing before an Administrative Law Judge ("ALJ").

The Social Security Administration mailed a Notice of Hearing to plaintiff which was dated September 2, 2003. The Notice set a hearing date of November 5, 2003.

Attached to the Notice of Hearing was a form entitled: "Acknowledgment of Receipt (Notice of Hearing)." On that form, plaintiff checked off the option which read: "I will be present at the time and place shown on the Notice of Hearing. If an emergency arises after I mail this form and I cannot be present, I will immediately notify you at the telephone number shown on the Notice of Hearing." Plaintiff signed the form and returned it to the Social Security office.

Plaintiff, who was not represented by counsel, failed to appear at the November 5, 2003, hearing. On November 28, 2003, the ALJ dismissed plaintiff's request for a hearing because he had not heard from plaintiff, stating that plaintiff had not shown "good cause" for his failure to appear.

On January 4, 2004, plaintiff requested review of the ALJ's Order of Dismissal by the Appeals Council. Contrary to the Acknowledgment of Receipt form, he declared in his request for an appeal that "I did not receive the notice informing me of my previous court date of 5 November, 2003. I recently moved to a new address" In another reversal of position, plaintiff, in his counseled response to the pending Motion, admits that he signed and returned the Acknowledgment of Receipt. By way of explanation, plaintiff states that he simply forgot the Acknowledgment of Receipt form, and he also forgot to appear at the hearing.

II. JURISDICTION

Jurisdiction over Social Security benefits cases is provided by the following sections of the Social Security Act:

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.

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 reviewed by any person, tribunal, or governmental agency except as herein provided.**

42 U.S.C. §§ 405(g) and (h) (emphasis supplied).

Section 405(g) "clearly limits judicial review to a particular type of agency action;" not all agency decisions are considered "final." *Califano v. Sanders*, 430 U.S. 99, 108 (1976); *Bacon v. Sullivan*, 969 F.2d 1517, 1519 (3d Cir. 1992). Ordinarily, as was stated by the Court in *Sanders*, only a decision "made after a hearing" may be called "final." The *Sanders* Court went on to state that a hearing was not necessary when a Constitutional issue was raised. *Sanders*, 430 U.S. at 109.

The touchstone of jurisdiction over a Social Security action is what is meant by the phrase "a final decision made after a hearing." At least one Supreme Court decision states that the meaning of the term has been "left to the Secretary to flesh out by regulation." *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975).

III. DISCUSSION

Plaintiff, in his response to the pending Motion, points to *Granberg v. Bowen*, 716 F. Supp. 874 (W.D. Pa. 1989). That case is strikingly similar to the instant case - a Social Security claimant there asked the District Court to review the dismissal of his Request for a Hearing based on his failure to appear. The District Court concluded that it had jurisdiction over the claim notwithstanding the fact that a hearing had not taken place. The Court notes, however, that in the many years since it was decided, *Granberg* has not been followed, and this Court will not do so.

In a similar case relied upon by the Magistrate Judge, the District Court for the District of Delaware concluded it had no jurisdiction to hear an appeal of a dismissal of a Request for a Hearing stemming from the claimant's late filing because it was not a final decision made after a hearing. *Brittingham v. Barnhart*, Civ. A. No. 02-459-JJF, 2003 WL 22740882 (D. Del. Nov. 17, 2003). That decision was based on the regulations about which the Court stated: "[t]hat such

denials are not subject to judicial review is ... 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 or the Appeals Council." *Id.* at *3. The Magistrate Judge in his R&R cited two other cases which reached the same conclusion as the court in *Brittingham, Bacon v. Sullivan*, 969 F.2d 1517, 1519 (3d Cir. 1992); and, *Sebrell v. Apfel*, Civ. A. No. 98-516, 1998 WL 614719 (E.D. Pa. Sept. 10, 1998). In each such case the court determined that because there was no final decision after a hearing, the court lacked jurisdiction.

Plaintiff, in his Objections, attempts to distinguish the *Brittingham* and *Bacon* cases on the ground that they all concern a request for hearing that was filed late.¹ This Court agrees with the Magistrate Judge's statement that there is no logical reason why an ALJ's decision to dismiss a second request for a hearing because the claimant failed to show up at the scheduled hearing should be treated any differently than a dismissal based on the untimeliness of such a request. That is so because, in both situations, no hearing was held on the merits, and in both cases the ALJ's decision not to hold a hearing was based on the claimant's procedural mistake and was upheld by the Appeals Council.

Assuming *arguendo* the Court had jurisdiction over the claim, the evidence is sufficient to sustain the decision in favor of the Commissioner. That conclusion is based on the fact that plaintiff's position before both the ALJ and the Appeals Council was that he had never received

¹Plaintiff also attempted to distinguish *Sebrell* in his Objections on the ground that, like *Brittingham* and *Bacon*, it dealt with a request for hearing that was filed out-of-time. A review of *Sebrell* discloses that the Court granted the Motion to Dismiss on the ground that, after receiving a Notice of Determination as to her ineligibility for supplemental social security income, plaintiff filed an action in District Court instead of requesting reconsideration under 20 C.F.R. § 416.407. The rationale for the dismissal was the failure to exhaust administrative remedies.

notice of the hearing. The Acknowledgment of Receipt form, signed by plaintiff, provides ample evidence to the contrary and supports the decision of the Appeals Council.

Plaintiff now argues that he failed to appear because he simply forgot about the Notice, the Acknowledgment of Receipt, and the hearing. This would not be a basis upon which this Court could grant plaintiff relief because the Court is limited to reviewing the Commissioner's decision. *Richardson v. Perales*, 402 U.S. 389 (1971). Because the Commissioner was never presented with this argument, she cannot be faulted for failing to consider it. *See Matthews v. Apfel*, 239 F.3d 589, 593 (3d Cir. 2001).

BY THE COURT:

/s/ **Honorable Jan E. DuBois**
JAN E. DUBOIS, J.