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

Steven Harrison Smith	:	CIVIL ACTION
v.	:	
Social Security Administration	:	NO. 97-CV-3406

MEMORANDUM AND ORDER

Joyner, J. **June , 1999**

This is a civil action brought by Plaintiff, Steven Harrison Smith ("Smith") against Defendant Social Security Administration ("SSA"). Before the Court is SSA's motion to dismiss the plaintiff's Complaint pursuant to Federal Rules 12(b)(1) and/or 12(b)(6) of Civil Procedure. For the following reasons, the 12(b)(1) motion shall be granted, and the complaint is dismissed without prejudice.

Factual Background

Smith's claims arise out of SSA's decision to deny his social security disability benefits. Smith filed his complaint on May 19, 1997. It states that Smith needs a lawyer to commence proceedings against SSA. On a cases management track designation form, Smith apparently circled and checked the Social Security slot which includes cases requesting review of a decision of the Secretary of Health and Human Services to deny Plaintiff social security benefits. On December 8, 1997, Plaintiff filed an amendment to his complaint. Plaintiff alleged that he did not

receive until December 5, 1997 numerous letters from the Bureau of Disability Determination notifying him of his required medical examination on November 6, 1997. These letters, dated October 17, October 18, October 30, November 20, and November 27, 1997, inform Plaintiff that his failure to provide the required medical evidence documenting his impairment and his subsequent failure to appear at the appointed medical examination may result in the denial of his claim.

Discussion

I. Rule 12(b)(1) Standard

Dismissal is proper under Rule 12(b)(1) only when the claim "appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial or frivolous... When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-09 (3rd Cir. 1991). See also Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666, 94 S.Ct. 772, 776, 39 L.Ed.2d 73 (1974).

When a party attacks the factual allegations of jurisdiction, the courts are not limited in their review to the allegations of the complaint. Sitkoff v. BMW of North America, Inc., 846 F.Supp. 380, 383 (E.D.Pa. 1994) citing Moore's Federal Practice (Second Ed.) at ¶12.07[2.-1]. Any evidence may be

reviewed and any factual disputes resolved regarding the allegations giving rise to jurisdiction as it is for the Court to resolve all factual disputes involving the existence of jurisdiction. Id. at 383. In contrast, if the attack to jurisdiction is facial, that is, the allegations of jurisdiction stated in the complaint, the factual allegations of the complaint are presumed to be true and the complaint is reviewed to ensure that each element necessary for jurisdiction is present. Id. at note 1. If jurisdiction is based on a federal question, the pleader claiming federal jurisdiction simply must show that the federal claim is not frivolous. Radeschi v. Commonwealth of Pennsylvania, 846 F.Supp. 416, 419 (W.D.Pa. 1993), citing Bartholomew v. Librandi, 737 F.Supp. 32 (E.D.Pa.), aff'd 919 F.2d 133 (3rd Cir. 1990). Only if it appears to a certainty that the pleader will not be able to assert a colorable claim of subject matter jurisdiction may the complaint be dismissed. Kronmuller v. West End Fire Co. No.3, 123 F.R.D. 170, 172 (E.D.Pa. 1988); see also Mortensen v. First Federal Savings and Loan Association, 549 F.2d 884, 891 (3rd Cir. 1977).

II. Exhaustion of Administrative Remedies

SSA's motion to dismiss invokes 42 U.S.C. § 405(g), the federal statute authorizing the judicial review of decisions by the Social Security Administration. Section 405(g) provides, in relevant part:

> 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 such decision or within such further time as the Commissioner of Social Security may allow.

Thus, the jurisdictional prerequisite to obtain judicial review under this provision is the exhaustion of all administrative remedies available under the Social Security Act. Mathews v. Eldridge, 424 U.S. 319, 327, 96 S.Ct. 893, 899 (1976); Califano v. Sanders, 430 U.S. 99, 108, 97 S.Ct. 980, 986 (1977); Granberg v. Bowen, 716 F.Supp. 874, 877 (W.D.Pa. 1989); Sebrell v. Apfel, No. CIV A.98-516, 1998 WL 614719 (E.D.Pa. Sep. 10, 1998).

Smith apparently seeks review of a decision denying him social security benefits. The Complaint and the Amendment to the Complaint fail to indicate whether Smith exhausted his administrative remedies.[1] We are mindful that the pro se plaintiff's pleading must be construed liberally by the Court, as pro se plaintiffs are not held to as high a standard as litigants with representation. Jones v. Omni Bank, No. CIV. 98-2223, WL 761869 (E.D. Pa. Oct. 29, 1998)(citing Haines v. Kerner, 404 U.S.

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[1]Under the Code of Federal Regulations, Plaintiff is allowed the opportunity for reconsideration of the initial determination of his claim. 20 C.F.R. 404.909, 404.920. If Plaintiff is not satisfied with the reconsideration of his claim, he may request a hearing before an Administrative Law Judge, whose decision is binding unless one of the parties seeks a review of the decision by the Appeals Council. Only upon either the allowance or denial of the request to the Appeals Council for review is Plaintiff able to seek redress in a judicial forum. 20 C.F.R. 404.955, 404.981.

519, 520, 92 S.Ct. 594 (1972)). However, a pro se plaintiff filing a complaint must still plead the essential elements of his claim and is not excused from conforming to the standard rules of civil procedure. Id. (citing McNeil v. United States, 508 U.S. 106, 113, 113 S.Ct. 1980 (1993)). In the case at hand, Smith's status as a pro se plaintiff does not exempt him from the requirement of exhaustion of his administrative remedies prior to the opportunity for judicial review.

For the reasons stated above, Defendant's motion to dismiss Plaintiff's complaint will be granted.

Conclusion

An appropriate order follows.

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ORDER

AND NOW, this day of June, 1999, upon consideration of the Motion of Defendant Social Security Administration to Dismiss Plaintiff's Complaint and for the reasons set forth in the preceding Memorandum, it is hereby ORDERED that the Motion is GRANTED. Plaintiff's Complaint is DISMISSED without prejudice.

BY THE COURT:

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J. CURTIS JOYNER, J.