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6 UNITED STATES DISTRICT COURT  
7 CENTRAL DISTRICT OF CALIFORNIA  
8 EASTERN DIVISION  
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10 RONALD WELCH, ) Case No. EDCV 11-0740-MLG  
11 )  
12 Plaintiff, ) MEMORANDUM OPINION AND ORDER  
13 )  
14 v. )  
15 )  
16 MICHAEL J. ASTRUE, )  
17 Commissioner of the )  
18 Social Security )  
19 Administration, )  
20 )  
21 Defendant. )  
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18 Plaintiff Ronald Welch seeks judicial review of the Appeals  
19 Council's denial of an application to reopen the dismissal of a request  
20 for review. Plaintiff seeks remand to the Appeals Council with an  
21 instruction that it consider Plaintiff's request for review on the  
22 merits. For the reasons set forth below, the action is dismissed for  
23 lack of subject matter jurisdiction.

24  
25 **I. Background**

26 On March 29, 1999, Plaintiff applied for Social Security Disability  
27 benefits alleging an onset date of September 13, 1996. (Joint Stip., Ex  
28 A at 3.) On February 27, 2002, the ALJ issued an unfavorable decision.

1 (*Id.* at 11.) On July 15, 2003, Plaintiff requested that the Appeals  
2 Council review the February 27, 2002 unfavorable determination. On July  
3 15, 2003, the Appeals Council remanded the case to the ALJ for further  
4 proceedings. (*Id.* at 17-19.) On August 28, 2003, the ALJ again denied  
5 benefits. (*Id.* at 20-28.)

6 Plaintiff had 60 days, or until October 27, 2003, to request that  
7 the Appeals Council review the August 28, 2003 decision. 20 C.F.R. §  
8 404.968. An untimely request for review will result in the Appeals  
9 Council dismissing the request. 20 C.F.R. § 404.971. Plaintiff contends  
10 that on September 25, 2003, he faxed to the Appeals Council a request  
11 for review. In support of this contention, Plaintiff attached to his  
12 pleadings the following documents: (1) a fax cover sheet dated September  
13 25, 2003; (2) a request for review; and (3) a fax transmission log dated  
14 September 25, 2003. (*Id.* at 31 to 33) ("the September 2003 request for  
15 review").

16 There being no action taken on the request for review, on August 9,  
17 2004, Plaintiff faxed a status request to the Appeals Council. (*Id.* at  
18 39-40) ("the August 2004 status request"). On March 29, 2005, at the  
19 request of the Appeals Council, Plaintiff faxed a copy of the September  
20 2003 request for review and the August 2004 status request. (*Id.* at 34-  
21 43.)

22 On January 13, 2006, the Appeals Council dismissed Plaintiff's  
23 request for review, finding that it was not filed within 60 days of the  
24 ALJ's unfavorable decision, as required by 20 C.F.R. 404.968(a). The  
25 denial states in pertinent part:

26 The representative, Bill LaTour, faxed a request for review  
27 for the claimant to the Appeals Council on March 29, 2005. The  
28 request for review is dated September 25, 2003 and a cover

1 sheet dated September 25, 2003 is attached. There is also a  
2 "receipt" showing a fax was sent to the Appeals Council on  
3 September 25. However, the representative did not submit any  
4 clear proof that this particular request for review was faxed  
5 to the Appeals Council in a timely manner.

6 (*Id.* at 44-46.)

7 On February 7, 2006, Plaintiff faxed a request to the Appeals  
8 Council seeking reconsideration of the January 13, 2006 dismissal of his  
9 request for review. (*Id.* at 46-58.) That request was apparently denied  
10 on February 20, 2007. (*Id.* at 60).

11 On February 23, 2009, Plaintiff faxed a request to reopen the  
12 August 2003 unfavorable decision, accompanied by a declaration by  
13 attorney Bill LaTour, signed under penalty of perjury, authenticating  
14 the September 2003 request for review.<sup>1</sup> (*Id.* at 84-88.) On August 13,  
15 2010, Plaintiff again requested that the Appeals Council reopen the  
16 August 2003 unfavorable decision. (*Id.* at 81-82.) According to the  
17 parties, on March 30, 2011, the Appeals Council denied review of the  
18 second application for benefits and again denied Plaintiff's request to  
19 reopen of the 2003 decision.

## 21 **II. Standard of Review**

22 The Social Security Act authorizes judicial review of "any final  
23 decision of the Commissioner of Social Security made after a hearing to  
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25 <sup>1</sup> Prior to this, Plaintiff apparently filed a new application for  
26 benefits. As part of that application, Plaintiff requested that the ALJ  
27 reopen the 1999 application as well as the 2006 Appeals Council  
28 determination. On July 29, 2009, the ALJ denied the application as well  
as Plaintiff's request to overturn the Appeals Council's 2006 decision,  
stating that he lacked authority or jurisdiction to do so. (*Id.* at 74-  
77, 98-101.)

1 which he was a party[.]” 42 U.S.C. § 405(g). The Act itself provides  
2 that this is the exclusive basis for the district court’s jurisdiction  
3 to review such decisions. See 42 U.S.C. § 405(h) (“No ... decision of  
4 the Commissioner of Social Security shall be reviewed by any person,  
5 tribunal, or governmental agency except as herein provided.”). “A  
6 decision not to reopen a prior, final benefits decision is discretionary  
7 and ordinarily does not constitute a final decision; therefore, it is  
8 not subject to judicial review.” *Udd v. Massanari*, 245 F.3d 1096,  
9 1098-99 (9th Cir. 2001)) (citing *Califano v. Sanders*, 430 U.S. 99,  
10 107-09 (1977)).

11 This general rule is subject to an exception, however, where the  
12 claimant raises a “colorable constitutional claim of due process  
13 violation that implicates a due process right either to a meaningful  
14 opportunity to be heard or to seek reconsideration of an adverse  
15 benefits determination.” *Udd*, 245 F.3d at 1099 (citing *Sanders*, 430 U.S.  
16 at 109; *Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997)). A  
17 “colorable” constitutional claim is one “that is not wholly  
18 insubstantial, immaterial, or frivolous.” *Udd*, 245 F.3d at 1099. As the  
19 Supreme Court has explained, this exception exists because  
20 “[c]onstitutional questions obviously are unsuited to resolution in  
21 administrative hearing procedures, and therefore, access to the courts  
22 is essential to the decision of such questions.” *Sanders*, 430 U.S. at  
23 109. However, the mere allegation of a due process violation does not  
24 assure that the claim is colorable. See *Hoye v. Sullivan*, 985 F.2d 990,  
25 992 (9th Cir. 1992) (per curiam).

26 The cases in which claimants have asserted a “colorable  
27 constitutional claim” sufficient to permit judicial review and allow the  
28 reopening of an unfavorable decision generally involve allegations by

1 the claimant that, at the time of the adverse ruling, the claimant  
2 suffered from a mental impairment which "prevented the making of a  
3 timely request for review of an adverse determination" and that he was  
4 not represented by counsel in that proceeding. *See, e.g., Evans*, 110  
5 F.3d at 1483 (citing SSR 91-5p); *Udd*, 245 F.3d at 1099.

### 6 7 **III. Discussion**

8 The Commissioner contends that Plaintiff's factual assertion that  
9 he timely filed his request for review with the Appeals Council in  
10 September 2003 does not set forth a colorable constitutional claim.  
11 (Joint Stip. at 19.) In the alternative, the Commissioner contends that  
12 the Appeals Council reasonably determined that Plaintiff's proffered  
13 documentary evidence did not provide "clear proof" that he in fact  
14 timely faxed his request for review to the Appeals Council. (*Id.* at 20.)  
15 Defendant's first argument is dispositive.

16 "It is axiomatic that due process requires that a claimant receive  
17 meaningful notice and an opportunity to be heard before his claim for  
18 disability benefits may be denied." *Udd*, 245 F.3d at 1099 (citing  
19 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Here, Plaintiff received  
20 "meaningful notice and an opportunity to be heard" with respect to his  
21 request to reopen the application. The Appeals Council received and  
22 considered Plaintiff's proffered documentation on more than one occasion  
23 and concluded that it did not provide sufficient proof that Plaintiff  
24 had timely filed his request for review. This is all the process to  
25 which Plaintiff is due. *See, e.g., Efinchuk v. Astrue*, 480 F.3d 846,  
26 848-49 (8th Cir. 2007) (where claimant was represented by counsel and  
27 evidence was received and considered, decision not to reopen did not  
28 violate claimant's due process rights); *Blacha v. Sec. of Health & Hum.*

1 *Services*, 927 F.2d 228, 232 (6th Cir. 1990) (same).

2 Plaintiff was represented by counsel at all times and he has not  
3 alleged that he suffered from any mental impairment which prevented him  
4 from making a timely request for review, unlike the claimants in *Evans*  
5 and *Udd*. He has had a fair opportunity to be heard on the issues of  
6 whether the request for review was timely filed and whether the  
7 application should be reopened. This meets the minimal requirements of  
8 procedural due process. Disagreement with the merits of an adverse  
9 decision on a request to reopen, even if the decision is subject to  
10 debate as this one certainly is, does not implicate the Due Process  
11 Clause.

12 Plaintiff has failed to raise a colorable due process claim which  
13 would give rise to an exception to the general rule that the  
14 Commissioner's decision not to reopen a prior claim is not subject to  
15 judicial review, and therefore this Court lacks jurisdiction to consider  
16 Plaintiff's claim. Accordingly, Defendant's motion to dismiss for lack  
17 of subject matter jurisdiction is **GRANTED**.

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19 DATED: February 29, 2012  
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22 MARC L. GOLDMAN

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Marc L. Goldman  
United States Magistrate Judge  
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