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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
SOUTHERN DIVISION

GRETA REAFSNYDER, ) No. SACV 11-659-CW  
)  
Plaintiff, ) DECISION AND ORDER  
v. )  
)  
MICHAEL J. ASTRUE, )  
)  
Commissioner, Social )  
Security Administration, )  
)  
Defendant. )  
\_\_\_\_\_ )

The parties have consented, under 28 U.S.C. § 636(c), to the jurisdiction of the undersigned Magistrate Judge. Plaintiff seeks review of the Commissioner’s denial of disability benefits. Defendant has moved to dismiss the complaint for lack of jurisdiction due to failure to exhaust administrative remedies under Fed. R. Civ. P. 12(b)(1). For the reasons discussed below, the motion is **GRANTED**.

**I. BACKGROUND**

The relevant facts are not in dispute.

On July 29, 2008, Plaintiff filed a claim for supplemental security income ("SSI") and disability insurance benefits ("DIB") alleging disability since July 23, 2004. Her claims were denied

1 initially, and Plaintiff then filed a timely request for  
2 reconsideration. [Motion to Dismiss, ("MTD"), Declaration of Yolanda  
3 Vargas ("Vargas Decla") at 2.]

4 On August 28, 2009, the reconsideration request was denied, and,  
5 according to the electronic case processing system of the Office of  
6 Disability Adjudication and Review ("ODAR"), a copy was mailed to both  
7 Plaintiff and her attorney.<sup>1</sup> [Id. at 3.] The denial notice gave  
8 Plaintiff sixty (60) days within which to file a request for an  
9 administrative hearing. [Id.] The ODAR electronic case processing  
10 system does not show that either copy was returned by the U.S. Postal  
11 service as "undeliverable." [Id.]

12 Plaintiff's Request for Hearing was submitted approximately one  
13 year after it was due, on about September 28, 2010. [Varga Decla., Ex.  
14 2.] Along with the request, Plaintiff submitted declarations from  
15 herself and her attorney asserting under penalty of perjury that  
16 neither received the notice of the reconsideration determination.  
17 [Id.]

18 On November 5, 2010, an Administrative Law Judge ("ALJ") issued a  
19 notice of dismissal on the basis that the request for hearing was not  
20 filed in a timely manner and that Plaintiff's declarations failed to  
21 establish good cause for the late request. [Varga Decla., Ex. 3.] The  
22 dismissal noted Plaintiff had the same address since 2005; that she  
23 timely responded to most, if not all, prior correspondence; and there  
24 was nothing in the record to suggest she had a limitation that would  
25 prevent her from making a timely request. [Id.] Furthermore, the ALJ  
26 noted that other circumstances weighed against a finding of good

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28 <sup>1</sup> There is no dispute with respect to whether the correct  
addresses for Plaintiff and her attorney were used.

1 cause: Plaintiff abandoned a prior claim for benefits after the  
2 initial denial, and she waited an inordinately long time between  
3 receiving the initial determination in this case and inquiring about  
4 her claim. [Id.]

5 Plaintiff requested review of the ALJ's decision. On March 3,  
6 2011, the Appeals Council denied review. [Varga Decla., Ex. 4.]

7 This action followed. In the Complaint, Plaintiff seeks either a  
8 finding that she is disabled or a remand for a hearing on the merits  
9 of her disability claim on the basis that: the record supports a  
10 finding of disability, the good cause finding was in error or, in the  
11 alternative, her due process rights were violated by the denial of a  
12 hearing. [See Docket no. 1.]

## 13 **II. DISCUSSION**

14 Defendant contends this court lacks jurisdiction over the  
15 complaint because there has been no "final decision" after a hearing,  
16 and Plaintiff has thus failed to exhaust her administrative remedies.  
17 Plaintiff essentially urges that the exhaustion requirement should be  
18 waived in this case.

### 19 **A. Final Decision**

20 Judicial review of the denial of a DIB or SSI benefits claim is  
21 authorized and limited by 42 U.S.C. § 405(g), which provides, in  
22 relevant part: "Any individual, after any final decision of the  
23 Commissioner of Social Security *made after a hearing* to which [s]he  
24 was a party . . . may obtain a review of such decision by a civil  
25 action . . . ." 42 U.S.C. § 405(g) (emphasis added); see also Hoyer v.  
26 Sullivan, 985 F.2d 990, 991 (9th Cir. 1992). Relevant here, the final  
27 decision requirement is an exhaustion requirement, which may be  
28 waived. Cassim v. Bowen, 824 F.2d 791, 794 (9th Cir. 1987) (citing

1 Hironymous v. Bowen, 800 F.3d F.2d 888, 894 (9th Cir. 1986) and  
2 Mathews v. Eldridge, 424 U.S. 319, 328-30, 96 S. Ct. 893, 899-900, 47  
3 L. Ed. 2d 18 (1976)) (final decision includes two elements:  
4 presentment and exhaustion). Absent waiver of the exhaustion  
5 requirement, there is no other avenue for judicial review of a denial  
6 of a claim for benefits. 42 U.S.C. § 405(h) ("No . . . decision of  
7 the Commissioner of Social Security shall be reviewed by any person,  
8 tribunal, or governmental agency except as herein provided.")

9 By the terms of the Act, then, a dismissal without a hearing is  
10 not a "final decision" subject to judicial review. See Hoye, 985 F.2d  
11 at 991; Boettcher v. Sec'y of Health and Human Servs., 759 F.2d 719,  
12 720-21 (9th Cir. 1985); Bacon v. Sullivan, 969 F.2d 1517 (3rd Cir.  
13 1992) (holding that the decision by the Social Security Administration  
14 not to consider an untimely request for review is not a "final  
15 decision" subject to judicial review); Sheehan v. Sec'y of Health, Ed.  
16 & Welfare, 593 F.2d 323, 327 (8th Cir. 1979) ("If claimant may avoid  
17 the timely exhaustion of remedies requirement, any claimant could  
18 belatedly appeal his claim at any time and always obtain district  
19 court review of an ALJ's decision.").

20 Consequently, because the ALJ here dismissed Plaintiff's hearing  
21 request as untimely and found no good cause to rebut the presumption  
22 that she received notice of the denial of her reconsideration  
23 request,<sup>2</sup> there is no "final decision," and this court lacks  
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25 <sup>2</sup> A request for hearing must be filed within sixty (60) days  
26 after the date the claimant receives notice of the previous  
27 determination. 20 C.F.R. §§ 404.933(b)(1), 404.901. It is presumed  
28 that a claimant received notice within five days of the printed date  
of the letter, unless the claimant shows otherwise. 20 C.F.R. §§  
404.901, 416.1401. If a hearing is not requested in time, the claimant  
may ask for an extension of time to request a hearing supported by a

1 jurisdiction to consider the complaint, absent a waiver. See Burbage  
2 v. Schweiker, 559 F. Supp. 1371, 1372-73 (C.D. Cal. 1983) (dismissing  
3 complaint for lack of jurisdiction where ALJ dismissed hearing request  
4 as untimely, found no good cause for extension, and appeals council  
5 affirmed); Boettecher v. Sec'y of Health and Human Servs., 759 F.2d at  
6 723-24 (finding no waiver after request for hearing dismissed); Scott  
7 v. Astrue, 2009 WL 2338085 (D. Or. 2009)(dismissing complaint for lack  
8 of jurisdiction when plaintiff asked court to review commissioner's  
9 decision that he lacked good cause for untimely request for hearing).

10 **B. Waiver**

11 There is a waiver of the exhaustion requirement when a plaintiff  
12 makes a claim that is: (1) "collateral to a substantive claim of  
13 entitlement (collaterality), (2) colorable in its showing that denial  
14 of relief will cause irreparable harm (irreparability), and (3) one  
15 whose resolution would not serve the purpose of exhaustion  
16 (futility)." Kildare v. Saenz, 325 F.3d 1078, 1082 (9th Cir. 2003).

17 A claim is "collateral" to a claim for benefits when the  
18 plaintiff does not ultimately seek a benefits award, but rather  
19 challenges the Commissioner's failure to follow applicable  
20 regulations. Kildare v. Saenz, 325 F.3d at 1082. It is not enough  
21 for the plaintiff simply to challenge irregularities in her individual  
22 case, id., the complaint must allege a constitutional or statutory

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24 showing of good cause for missing the deadline. 20 C.F.R. §§ 404.911,  
25 416.1411, 404.933(c), 416.1433(c). An ALJ may dismiss a request for a  
26 hearing if the request was not filed within the sixty-five day period  
27 and the time period was not extended on a finding of good cause. 20  
28 C.F.R. §§ 404.957(c)(3), 416.1457(c)(3). If a claimant seeks to  
challenge a dismissal made on this basis, she may then do so by  
requesting the dismissal be vacated on a showing of good cause made  
within sixty (60) days of the dismissal. 20 C.F.R. §§ 404.960,  
416.1460.

1 challenge to a substantive policy of the Social Security  
2 Administration, Johnson v. Shalala, 2 F.3d 918, 921 (9th Cir. 1993).

3 Here, the complaint asks the court to find that the ALJ erred in  
4 concluding Plaintiff's request for a hearing was untimely and to  
5 either: (1) affirmatively find Plaintiff to be disabled or; (2)  
6 reverse for a hearing with respect to the merits of her disability  
7 claim. [See Complaint (docket no. 7) at 2, 3; see also Opposition to  
8 Motion to Dismiss at 7 (Conclusion).] Notwithstanding Plaintiff's  
9 allegation that due process was violated because her hearing request  
10 was dismissed, at its core this is a quintessential claim for  
11 benefits. See Hironymous v. Bowen, 800 f.2d 888, 894 (9th Cir. 1986)  
12 (holding that plaintiff's claim seeking to overturn a finding that he  
13 was ineligible for benefits is "inextricably intertwined" with claim  
14 for benefits, and that waiver of exhaustion requirement was thus not  
15 warranted). To the extent Plaintiff purports in her opposition to the  
16 motion to dismiss to seek a hearing limited to the issue of whether  
17 there was "good cause" for her untimely request - a suggestion she  
18 raises only in the body of that pleading [see Opposition to MTD at 3,  
19 7] - she does not challenge the constitutionality of the  
20 Administration's policies as they relate to good cause determinations,  
21 or allege that the Administration is failing to follow law or its own  
22 policies in making good cause determinations. Her argument remains  
23 simply that the ALJ and Appeals Council erred in making findings of  
24 fact in her case, a claim that is "entirely dependent on [her]  
25 underlying claim[] for benefits." Kildare v. Saenz, 325 F.3d at 1083  
26 (holding plaintiffs did not prove collaterality when they alleged a  
27 series of irregularities in individual cases).

28 With respect to the irreparability requirement, while economic

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2 hardship may constitute irreparable harm, Kildare v. Saenz, 325 F.3d  
3 at 1083, other than the conclusory statement that she would suffer an  
4 economic loss if she does not receive benefits, Plaintiff makes no  
5 allegation of irreparable economic hardship. As Defendant points out,  
6 Plaintiff may file a new application for benefits. [Motion to Dismiss  
7 at 6.] Plaintiff's vague statement that she "could be" foreclosed  
8 from receiving Title II benefits because there "might" be *res judicata*  
9 effect to a later-filed claim does not suffice to make a "colorable  
10 showing of irreparable harm." Mathews v. Eldridge, 424 U.S. at 331  
11 (finding waiver where plaintiff established colorable claim that  
12 because of his physical condition and dependency upon the disability  
13 benefits, an erroneous termination would damage him in a way not  
14 recompensable through retroactive payments).

15       Moreover, Plaintiff's claim of error appears to be without merit.  
16 A review of the record reveals the ALJ carefully weighed Plaintiff's  
17 claim of good cause against the evidence in the record suggesting she  
18 received the denial notice but abandoned her claim as she had  
19 abandoned her prior application upon a denial. [Vargas Decla. at 3,  
20 Exs. 3, 4.] Under agency policy, the ALJ was not required to hold a  
21 hearing with respect to plaintiff's claim of good cause. See HALLEX I-  
22 2-60(D)(1). Plaintiff had the opportunity to appeal the ALJ's  
23 dismissal and to provide additional evidence to support her good cause  
24 contention to the Appeals Council. [Vargas Decla. at 3, Ex. 4.]  
25 Plaintiff was thus afforded the "opportunity to be heard at a  
26 meaningful time and in a meaningful manner," and she does not  
27 establish a colorable constitutional claim denial of which could  
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2 conceivably cause her irreparable harm. See Boettcher v. Sec'y of  
3 Health and Human Servs., 759 F.2d 719, 722 (9th Cir. 1985) (citing  
4 Mathews v. Eldridge, 424 U.S. at 333).

5 Finally, Plaintiff has not established futility. Notwithstanding  
6 her use of the words "due process" in the complaint, Plaintiff does  
7 not articulate a constitutional challenge to the policies or practices  
8 of the Social Security Administration, thus asserting a constitutional  
9 claim that is beyond the experience and the expertise of the Social  
10 Security Administration to resolve. See Weinberger v. Salfi, 422 U.S.  
11 749, 765-66, 95 S. Ct. 2457, (1975). Furthermore, to the extent  
12 Plaintiff seeks an award of benefits, there is no "decision" for this  
13 court to review, and still something "to be gained from permitting the  
14 compilation of a detailed factual record, or from agency expertise."  
15 Cassim v. Bowen, 824 F.2d 791, 795 (9th Cir. 1987)(citing Bowen v.  
16 City of New York, 477 U.S. 467, 106 S. Ct. 2022, 2032, 90 L. Ed. 2d  
17 462 (1986)). And to the extent she seeks remand for a hearing on the  
18 merits or on her good cause claim, the policies underlying exhaustion  
19 would not be served by remand. Bowen v. City of New York, 476 U.S. at  
20 484-85 (exhaustion is not to be excused when a claimant alleges  
21 irregularity in the agency's administration of its own regulations,  
22 because such errors are fully correctable upon administrative review).  
23 In sum, Plaintiff has not established the requisites for a waiver  
24 of the exhaustion requirement, and the court thus lacks jurisdiction  
25 to consider her complaint.

26 **III. ORDERS**

27 Accordingly, **IT IS ORDERED** that:  
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1. The motion to dismiss is **GRANTED**.

2. This action is **DISMISSED**.

3. The Clerk of the Court shall serve this Decision and Order and the Judgment herein on all parties or counsel.

DATED: November 2, 2011



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CARLA M. WOEHRLE  
United States Magistrate Judge