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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

MICHAEL W. LYONS,  
Plaintiff,  
v.  
CAROLYN W. COLVIN, Commissioner of  
Social Security Administration,  
Defendant.

No. SACV 12-125-AGR

**MEMORANDUM OPINION AND ORDER**

On January 27, 2012, Plaintiff Michael W. Lyons (“Lyons”) filed a complaint to review and set aside a decision by the Commissioner to deny benefits. Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before this court on February 24 and March 12, 2012. (Dkt. Nos. 8-9.)

**I.**

**SUMMARY OF PROCEEDINGS**

On August 21, 2012, Plaintiff’s counsel filed a motion to withdraw as attorney of record. On December 18, 2012, this Court issued an order granting the motion to withdraw, which became effective upon the filing of a proof of service evidencing that Lyons was served with the order. (Dkt. No. 13.) In addition, the order explained that if Lyons did not obtain new counsel on or before February 1, 2013, the matter would proceed with

1 Lyons appearing pro se and with a revised schedule. (*Id.*) The proof of service was filed  
2 on February 12, 2013. (Dkt. No. 14.) No counsel filed a Notice of Appearance for Lyons.  
3 Nor did Lyons request an extension of time to obtain new counsel.

4 According to the order, Lyons was to file and serve a motion for judgment on the  
5 pleadings on or before February 8, 2013. The order expressly warned that “[i]f Plaintiff  
6 does not file and serve a timely motion for judgment on the pleadings, this action will be  
7 subject to dismissal without prejudice for failure to prosecute and failure to comply with a  
8 court order. Fed. R. Civ. P. 41(b); *Link v. Wabash Railroad Co.*, 370 U.S 626, 629-30  
9 (1962).” (Dkt. No. 13.) The order set forth guidelines as to the preparation of a motion for  
10 judgment on the pleadings. (*Id.*) Lyons did not file a motion for judgment on the pleadings  
11 and did not request an extension of time to do so.

12 On February 12, 2013, this Court issued an Order to Show Cause (“OSC”) that  
13 required Lyons to show cause on or before March 11, 2013, why this case should not be  
14 dismissed without prejudice for failure to prosecute and/or failure to comply with a court  
15 order. The filing and service of a motion for judgment on the pleadings on or before March  
16 11, 2013, was expressly deemed compliance with the OSC. (Dkt. No. 15.) The Order to  
17 Show Cause expressly warned Lyons that “[i]f Plaintiff fails to file and serve a motion for  
18 judgment on the pleadings or otherwise respond to this Order to Show Cause on or before  
19 March 11, 2013, this Court will dismiss this action without prejudice for failure to prosecute  
20 and/or failure to comply with a court order. Fed. R. Civ. P. 41(b); *Link v. Wabash Railroad*  
21 *Co.*, 370 U.S. 626, 629-30 (1962).” (*Id.*)

22 To date, Lyons has not filed a motion for judgment on the pleadings and has not  
23 otherwise responded to the OSC.

## 24 II.

### 25 DISCUSSION

26 It is well established that a district court has authority to dismiss a plaintiff’s action  
27 because of his or her failure to prosecute or to comply with court orders. See Fed. R. Civ.  
28 P. 41(b); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629-30, 82 S. Ct. 1386, 8 L. Ed. 2d

1 734 (1962) (court's authority to dismiss for lack of prosecution is necessary to prevent  
2 undue delays in the disposition of pending cases and avoid congestion in district court  
3 calendars); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (district court may  
4 dismiss action for failure to comply with any order of the court).

5 In determining whether to dismiss a case for failure to prosecute or failure to comply  
6 with court orders, a district court should consider five factors: (1) the public's interest in  
7 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk  
8 of prejudice to the defendants; (4) the public policy favoring the disposition of cases on  
9 their merits; and (5) the availability of less drastic sanctions. See *In re Eisen*, 31 F.3d  
10 1447, 1451 (9th Cir. 1994) (failure to prosecute); *Ferdik*, 963 F.2d at 1260-61 (failure to  
11 comply with court orders).

12 The first two factors -- the public's interest in expeditious resolution of litigation and  
13 the Court's need to manage its docket -- weigh in favor of dismissal. Plaintiff failed to file  
14 a motion for judgment on the pleadings, failed to request an extension of time to do so, and  
15 failed to respond to the Court's Order to Show Cause why this action should not be  
16 dismissed for failure to prosecute. Given that this case cannot move forward to resolution  
17 in the absence of Plaintiff filing a motion for judgment on the pleadings, Plaintiff's conduct  
18 hinders the Court's ability to move this case toward disposition, and indicates that Plaintiff  
19 does not intend to litigate this action diligently.

20 The third factor -- prejudice to defendants -- also weighs in favor of dismissal. A  
21 rebuttable presumption of prejudice to defendants arises when there is a failure to  
22 prosecute diligently. *Eisen*, 31 F.3d at 1452-53. That presumption may be rebutted where  
23 a plaintiff proffers an excuse for delay. Plaintiff has failed to come forward with any excuse  
24 or reason for delay.

25 The fourth factor -- public policy in favor of deciding cases on their merits -- weighs  
26 against dismissal. It is, however, a plaintiff's responsibility to move a case towards a  
27 disposition at a reasonable pace and to avoid dilatory tactics. See *Morris v. Morgan*  
28 *Stanley Co.*, 942 F.2d 648, 652 (9th Cir. 1991). Plaintiff has not discharged this

1 responsibility. In these circumstances, the public policy favoring resolution of disputes on  
2 the merits does not outweigh plaintiff's failure to file a motion for judgment on the pleadings  
3 or request an extension of time to do so, and failure to respond to orders of the court.

4 The fifth factor -- availability of less drastic sanctions -- weighs in favor of dismissal.  
5 The Court attempted to avoid dismissal by issuing an Order to Show Cause reminding  
6 Plaintiff of the obligation to file a motion for judgment on the pleadings and deeming a filing  
7 of the motion on or before March 11, 2013, as compliance with the Order to Show Cause.  
8 Despite this warning, Plaintiff has failed to fulfill this obligation or respond in any way to the  
9 court.

10 Taking all of the above factors into account, dismissal for failure to prosecute is  
11 appropriate. Such a dismissal, however, should not be entered unless Plaintiff has been  
12 notified that dismissal is imminent. In this case, Plaintiff has been cautioned twice about  
13 the possibility of dismissal in the order dated December 18, 2013, and the Order to Show  
14 Cause dated February 12, 2013.

15 **III.**

16 **ORDER**

17 IT IS HEREBY ORDERED that judgment be entered dismissing this action without  
18 prejudice for failure to prosecute.

19 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this Order  
20 and the Judgment herein on all parties or their counsel.

21 **IT IS SO ORDERED.**

22  
23 DATED: March 20, 2013



ALICIA G. ROSENBERG  
United States Magistrate Judge