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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LAQUESHA COLEMAN,)	1:09-cv-1319 LJO GSA
)	
)	
Plaintiff,)	FINDINGS AND RECOMMENDATIONS
)	RE: DEFENDANT’S MOTION TO
v.)	DISMISS
)	
MICHAEL J. ASTRUE, Commissioner of)	(Doc. 14)
Social Security.)	
)	
Defendant.)	

Plaintiff LaQuesha Coleman (“Plaintiff”) filed the instant action on July 28, 2009. On January 8, 2010, Defendant filed a Motion to Dismiss pursuant to [Federal Rules of Civil Procedure 12\(b\)\(6\)](#). Defendant argues that the Complaint is untimely. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Gary S. Austin, United States Magistrate Judge for findings and recommendations to the District Court.

BACKGROUND

On February 25, 2009, an Administrative Law Judge issued a decision denying Plaintiff’s claim for benefits under Titles II and XVI of the Social Security Act. *See*, Declaration of Dennis Ford Dated October 16, 2010 (“Ford Decl.”) (Doc. 14-2 at ¶ 3(a)). Plaintiff appealed the action. On April 14, 2009, the Appeals Council denied her request for review. *Id.* In the Notice of Action, the Appeals Council notified Plaintiff that she had 60 days to file a civil action, and the

1 60 days start to run the day after she receives the Notice. *Id.* Using these dates, Plaintiff had
2 until June 18, 2009, to file her civil action.¹ Plaintiff did not request an extension of time to file a
3 Complaint. *Id.* at ¶ 3(b). Plaintiff filed this action on July 28, 2009. (Doc. 1).

4 Defendant filed the instant motion to dismiss on January 8, 2010. (Doc. 14-1). Plaintiff
5 filed an opposition on January 13, 2010. (Doc. 17). Defendant filed a reply on February 8, 2010.
6 (Doc. 20).

7 DISCUSSION

8 A. Motion To Dismiss Standards

9 [Fed. R. Civ. P. 12\(b\)\(1\)](#) authorizes a motion to dismiss for lack of subject matter
10 jurisdiction. Limits upon federal jurisdiction must not be disregarded or evaded. [Owen Equip. &](#)
11 [Erection Co. v. Kroger](#), 437 U.S. 365, 374 (1978). A plaintiff has the burden to establish that
12 subject matter jurisdiction is proper. [Kokkonen v. Guardian Life Ins. Co.](#), 511 U.S. 375, 377
13 (1994). When a defendant challenges jurisdiction “facially,” all material allegations in the
14 complaint are assumed true, and the question for the Court is whether the lack of federal
15 jurisdiction appears from the face of the pleading. [Thornhill Publ’g Co. v. Gen. Tel. & Elecs.](#),
16 [594 F.2d 730, 733 \(9th Cir. 1979\)](#); [Mortensen v. First Fed. Sav. & Loan Ass’n](#), 549 F.2d 884,
17 [891 \(3d Cir. 1977\)](#); [Cervantez v. Sullivan](#), 719 F.Supp. 899, 903 (E.D. Cal. 1989), *rev’d on other*
18 [grounds](#), 963 F.2d 229 (9th Cir. 1992).

19 A motion to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) challenges the
20 sufficiency of the pleadings set forth in the complaint. [Navarro v. Block](#), 250 F.3d 729, 732 (9th
21 [Cir. 2001](#)). A motion to dismiss for failure to state a claim should not be granted unless it
22 appears beyond doubt that plaintiff can prove no set of facts to support the claim to entitle him to
23

24 ¹ Pursuant to [42 U.S.C. § 405](#), the only permitted civil action on a claim arising under Title II or Title XVI
25 of the Social Security Act is to review the “final decision of the [Commissioner] made after a hearing” and which
26 must be “commenced within 60 days after mailing to [the claimant] notice of such decision.” [20 C.F.R. § 422.210](#)
27 further provides that a civil action, such as the instant action, “must be instituted **within 60 days** after the Appeals
28 Council’s notice of denial of request for review of the administrative law judge’s decision or notice of the decision
by the Appeals Council is received by the individual . . .” (Emphasis added.) The regulation further provides “the
date of receipt of the presiding officer’s decision or notice of the decision by the Appeals Council shall be presumed
to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.” [McCall v. Bowen](#),
[832 F. 2d 862 \(5th Cir. 1987\)](#) (Citing 20 C.F.R. § 422.210(c)).

1 relief. See [Hishon v. King & Spalding](#), 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355
2 U.S. 41, 45-46 (1957)); see also [Palmer v. Roosevelt Lake Log Owners Ass'n](#), 651 F.2d 1289,
3 [1294 \(9th Cir. 1981\)](#). When a federal court reviews the sufficiency of a complaint, before the
4 reception of any evidence, either by affidavit or admissions, its task is necessarily a limited one.
5 The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to
6 offer evidence to support the claim. [Gilligan v. Jamco Dev. Corp.](#), 108 F.3d 246, 249 (9th Cir.
7 [1997](#)).

8 B. Analysis

9 *1. Untimely Complaint*

10 Judicial review of the Commissioner's administrative decisions is governed by Section
11 405(g) and (h) of the Social Security Act, which reads in relevant part:

12 (g) Any individual, after any final decision of the Commissioner of Social
13 Security made after a hearing to which he was a party, irrespective of the amount
14 in controversy, may obtain a review of such decision by a civil action commenced
15 within sixty days after the mailing to him of notice of such decision or within such
16 further time as the Commissioner of Social Security may allow.

17 (h) The findings and decision of the Commissioner after a hearing shall be
18 binding upon all individuals who were parties to such hearing. No findings of
19 facts or decision of the Commissioner shall be reviewed by any person, tribunal,
20 or governmental agency except as herein provided. No action against the United
21 States, the Commissioner, or any officer or employee thereof shall be brought
22 under section 1331 or 1346 of Title 28 to recover on any claim arising under this
23 subchapter.
24 [42 U.S.C. § 405\(g\)](#).

25 Section 405(g) and (h) therefore operates as a statute of limitations setting the time period
26 in which a claimant may appeal a final decision of the Commissioner. [Bowen v. City of New](#)
27 [York](#), 476 U.S. 467, 479 (1986); [Vernon v. Heckler](#), 811 F.2d 1274, 1277 (9th Cir. 1987).

28 Because the time limit set forth in [42 U.S.C. § 405\(g\)](#) is a condition on the waiver of sovereign
immunity it must be strictly construed. [Bowen v. City of New York](#), 476 U.S. at 479. See, e.g.,
[Fletcher v. Apfel](#), 210 F.3d 510 (5th Cir. 2000) (affirming summary judgment in favor of
commissioner for untimely filing of one day). "The limitations to final decisions and to a
sixty-day filing period serve to compress the time for judicial review and to limit judicial review
to the original decision denying benefits, thereby forestalling repetitive or belated litigation of

1 stale eligibility claims.” [Anderson v. Astrue, 2008 WL 4506606 *3 \(E.D.Cal. Oct. 7, 2008\)](#)
2 (Snyder, J).

3 Here, Plaintiff’s complaint was untimely because she filed it on July 28, 2009, and that is
4 beyond the sixty-day statute of limitations set forth in [42 U.S.C. § 405\(g\)](#). (Doc. 1). On April
5 14, 2009, the Appeals Council sent notice of its action to Plaintiff, informing her of the right to
6 request review and of the right to commence a civil action within sixty days from the date of the
7 receipt. (Doc. 14-2). For purposes of this order, Plaintiff presumptively received notice of the
8 Appeals Council’s action no later than April 19, 2009. See [20 C.F.R. § 422.210\(c\)](#). The duration
9 between April 19, 2009 and July 28, 2009 is 101 days, which supercedes the sixty day filing
10 period.² Defendant has indicated that no request for an extension of time to file a civil action was
11 made. Ford Decl. at ¶ 3(b) (Doc. 14-2).³ Accordingly, the Court finds no acceptable explanation
12 for Plaintiff’s tardiness.

13 2. *Equitable Tolling*

14 Section 405(g) has been strictly construed to permit extensions of time only by the
15 Commissioner pursuant to [20 C.F.R. §§ 404.911](#) and 416.1411, or by a Court applying traditional
16 equitable tolling principles in cases where the equities in favor of tolling the limitations period
17 are so great that deference to the agency’s judgment is inappropriate. [Bowen v. City of New York,](#)
18 [476 U.S. at 479-82](#). In *Bowen*, the Plaintiffs were prevented from filing because of “the
19 Government’s secretive conduct.” [Bowen v. City of New York, 476 U.S. at 481](#). In *Vernon*,
20 Plaintiff had allegedly been told by an employee of the Social Security Administration that the
21 deadline would be extended. [Vernon v. Heckler, 811 F.2d at 1275](#).

22 Here, Plaintiff argues traditional equitable tolling is proper. (Doc. 17). In her opposition
23 to the Motion to Dismiss, Plaintiff attaches documents showing an unsuccessful attempt to
24 secure representation by John Waterman, a private practice attorney. *Id.* at pg. 5-7. Waterman

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26 ² Specifically, Plaintiff’s complaint is forty-one days past the filing period. See Doc. 14-1.

27 ³ The administrative record in this case is limited to Ford’s declaration, the SSA’s notice of an unfavorable
28 decision to Plaintiff, and the ALJ’s decision. Defendant did not prepare a certified administrative record because, it
argues, Plaintiff’s complaint was untimely. Doc. 20 at 2. Therefore, Defendant does not have access to the record
other than what was submitted with their Motion to Dismiss. *Id.* See Doc. 14-2.

1 declined to represent Plaintiff because she lacked sufficient medical evidence to support her
2 claim. *Id.* at pg. 7 Specifically, Mr. Waterman provided Plaintiff with verification forms to be
3 filled out by a doctor, and Plaintiff failed to carry out this task. *Id.* In her opposition brief,
4 Plaintiff states she was “released because verification from doctors had not been completed[.]”
5 (Doc. 17 at pg. 2). Furthermore, she was “unaware that legal action had not taken place.” *Id.*

6 Plaintiff also attaches the opinion of Ajit Singh Khaira, M.D., to her opposition. Doc 17
7 at pg. 8. Dr. Khaira opines Plaintiff has “Psych” symptoms, such as Bipolar disorder, and
8 “disability consistent with Epilepsy.” *Id.* Dr. Khaira also notes Plaintiff “has grand mal epilepsy
9 and [he] has witnessed [Plaintiff having a] seizure in [his] office at least once which was
10 consistent with G.M. epilepsy.” *Id.* Dr. Khaira also opined that Plaintiff has “blur[red]” [sic]
11 speech and needs supervision at all times for grand mal seizures. Although Plaintiff’s opposition
12 is unclear, she appears to assert that these conditions kept her from filing a timely complaint, and
13 that equitable tolling is proper. The Court rejects Plaintiff’s arguments for several reasons.

14 First, to the extent that Plaintiff is arguing she was unable to timely file her complaint
15 because of a mental or psychological impairment, she has failed to do so. As a preliminary
16 matter, Dr. Khaira’s opinion is not supported by any other evidence, nor is Dr. Khaira a
17 psychologist who can make mental health determinations. Moreover, a failure to timely file
18 based on mental or physical reasons do not form a basis for the tolling of the statute of
19 limitations. Equitable tolling principles apply when the cause of action is based on undue
20 influence or when Defendant fraudulently conceals the cause of action. [Bowen v. City of New](#)
21 [York, 476 U.S. at 479](#); [Vernon v. Heckler, 811 F.2d at 1277-78](#). This is not the case here.

22 Finally, if the basis for Plaintiff’s failure to file an appeal is based on mental or physical reasons,
23 Plaintiff could have filed a request for an extension of time with the Commissioner; however, she
24 failed to do so. See [20 C.F.R. §§ 404.982](#), 416.1482 (“Any party to the Appeals Council’s
25 decision or denial of review . . . may request that the time for filing an action in a Federal district
26 court be extended. The request must be in writing and it must give the reasons why the action
27 was not filed within the stated time period. The request must be filed with the Appeals
28 Council”).

1 A review of the facts demonstrates this is not one of the “rare” cases such as *Bowen v.*
2 *City of New York*, “in which the equities of tolling are compelling.” [Bowen v. City of New York,](#)
3 [476 U.S. at 480-481.](#) Additionally, there is no evidence of misleading conduct by the
4 Commissioner that interfered with Plaintiff’s attempt to exercise her right of appeal. [Vernon v.](#)
5 [Heckler, 811 F.2d at 1278.](#) Accordingly, this Court rejects Plaintiff’s arguments that the Court
6 should excuse the untimely filing. Inasmuch as the instant Complaint was filed more than sixty
7 days after the receipt of the Secretary’s final determination, the action is barred by the sixty-day
8 statute of limitations set forth in [42 U.S.C. § 405\(g\).](#)

9 **CONCLUSION**

10 For the reasons discussed above, it is recommended that Defendant’s Motion to Dismiss
11 be GRANTED and that the case be closed.

12 These findings and recommendations will be submitted to the Honorable Lawrence J.
13 O’Neill pursuant to the provisions of [Title 28 of the United States Code section 636\(b\)\(1\).](#)
14 Within thirty (30) days after being served with these findings and recommendations, the parties
15 may file written objections with the Court. The document should be captioned “Objections to
16 Magistrate Judge's Findings and Recommendations.” The parties are advised that failure to file
17 objections within the specified time may waive the right to appeal the District Court's order.
18 [Martinez v. Ylst, 951 F.2d 1153 \(9th Cir. 1991\).](#)

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21 IT IS SO ORDERED.

22 **Dated: June 25, 2010**

23 **/s/ Gary S. Austin**
24 UNITED STATES MAGISTRATE JUDGE
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