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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEAN TRACEY PICARD,

Plaintiff,

v.

CAROLYN W. COLVIN,
Commissioner of Social Security,

Defendant.

CASE NO: 2:14-CV-0121-TOR

ORDER DENYING MOTION TO
DISMISS

BEFORE THE COURT is Defendant's Motion to Dismiss (ECF No. 6) and Magistrate Judge Rodgers' Report and Recommendation to Deny Defendant's Motion to Dismiss with Prejudice (ECF No. 7).¹ Dustin Deissner represents Plaintiff. Special Assistant United States Attorney General Benjamin J. Groebner

¹ The parties have not timely consented to the Magistrate Judge's jurisdiction.

Although the parties filed their consent to proceed before a Magistrate Judge on November 24, 2014, ECF No. 13, the deadline to file consent was May 9, 2014, *see* ECF No. 2. Accordingly, this case remains assigned to this Court for all further proceedings.

1 represents Defendant. This matter was submitted for consideration without oral
2 argument. The Court has reviewed the briefing and the record and files herein, and
3 is fully informed.

4 **BACKGROUND**

5 Plaintiff applied for disability insurance benefits and social security income
6 benefits on December 2, 2010. ECF No. 1 at 2. His application was denied
7 initially and upon reconsideration. *Id.* Plaintiff appeared for a hearing before an
8 administrative law judge (“ALJ”), who issued a decision denying Plaintiff benefits
9 on February 24, 2012. *Id.* Plaintiff requested review of the ALJ’s decision by the
10 Appeals Council. *Id.* The Appeals Council denied Plaintiff’s request for a review
11 on February 21, 2014. *Id.* In its letter denying review, the Appeals Council
12 advised Plaintiff that he may file a civil action within 60 days, which period would
13 start the day after he received notice of the Appeals Council’s denial. ECF No. 1-2
14 at 3. The Appeals Council further advised Plaintiff that unless he showed
15 otherwise, it would assume receipt of the letter 5 days after the date on the notice.
16 *Id.* If Plaintiff needed more time, he was advised that he could file an extension.
17 *Id.* Thus, without an extension, Plaintiff would need to file suit by April 27, 2014.

18 Plaintiff filed his Complaint on April 29, 2014. ECF No. 1. Plaintiff did not
19 file a request for an extension; however, Plaintiff’s Complaint states that he
20 received the Appeals Council’s letter on or about March 1, 2014. *Id.* at 2.

1 Attached to Plaintiff's Complaint is the Appeals Council's letter, date-stamped as
2 received on March 1, 2014. ECF No. 1-1.

3 On October 24, 2014, Defendant moved to dismiss Plaintiff's action,
4 asserting that Plaintiff failed to commence the action within the 60-day statutory
5 timeframe. ECF No. 6. On November 3, 2014, before Plaintiff filed any response
6 in opposition, Magistrate Judge Rodgers filed a Report and Recommendation,
7 advising this Court to deny Defendant's motion. ECF No. 7. Magistrate Rodgers
8 acknowledged the 60-day time limit; however, based on his review of Plaintiff's
9 Complaint, Magistrate Rodgers concluded that Plaintiff did not actually receive
10 notice of the Appeals Council's denial until March 1, 2014. Therefore, he
11 determined that Plaintiff's Complaint was timely filed. *Id.* at 2-3.

12 On November 14, 2014, Plaintiff filed his opposition and supporting
13 declarations in response to Defendant's Motion to Dismiss. ECF Nos. 9, 10, 11,
14 12. In support of his assertion that his Complaint was timely filed, Plaintiff filed a
15 supporting declaration from Mr. Allan Bonney, the attorney who represented
16 Plaintiff during the Social Security proceedings. ECF No. 9. Mr. Bonney's
17 declaration stated that he received the Appeals Council's denial on March 1, 2014,
18 which he personally date-stamped upon receipt. *Id.* at 1-2 ("I can therefore state
19 with certainty that the Appeals Council Decision in this matter was received by me
20 the day it was stamped, March 1, 2014."); *see* ECF No. 9-1. Plaintiff's personal

1 declaration stated that he never received a copy of the decision. ECF No. 10 at 1
2 (“I do not have a copy of the decision mailed to me by the Social Security Appeals
3 Council, and I do not recall ever receiving one.”). Rather, Plaintiff stated that he
4 first received notice of the denial by letter from Mr. Bonney dated March 3, 2014.
5 *Id.* at 1-2.

6 **DISCUSSION**

7 A claimant may file suit against the Commissioner for denial of Social
8 Security benefits “within sixty days after the mailing to him of notice of such
9 decision or within such further time as the Commissioner of Social Security may
10 allow.” 42 U.S.C. § 405(g); *see* 42 U.S.C. § 1383(c)(3) (indicating that section
11 405(g) also applies to applications for social security income benefits). The
12 regulations clarify that suit must commence “in a Federal district court within 60
13 days after the date [the claimant] receive[s] notice of the Appeals Council’s
14 action.” 20 C.F.R. §§ 404.981, 416.1481. A claimant is presumed to have
15 received notice of the Appeals Council’s decision five days after the date on the
16 notice, unless he demonstrates otherwise. 20 C.F.R. § 404.901 (“Date you
17 receive notice means 5 days after the date on the notice, unless you show us that
18 you did not receive it within the 5-day period.”), 422.210(c) (“[T]he date of receipt
19 of notice of denial of request for review of the presiding officer’s decision or
20 notice of the decision by the Appeals Council shall be presumed to be 5 days after

1 the date of such notice, unless there is a reasonable showing to the contrary.”); *see*
2 *Phillips v. Astrue*, 2011 WL 6753089 (W.D. Wash. Nov. 29, 2011) (finding
3 plaintiff had made a reasonable showing rebutting the presumptive date of receipt
4 when she submitted a printout of receipt of notice by her counsel, which was
5 further bolstered by plaintiff’s declaration that she had never personally received
6 the notice). The time to file suit is “not jurisdictional, but rather constitutes a
7 period of limitations.” *Bowens v. City of New York*, 476 U.S. 467, 478 (1986);
8 *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th Cir. 1987). Thus, a claimant’s failure
9 to file suit within this statutory timeframe, may preclude judicial review.

10 Here, this Court finds Plaintiff timely filed suit. Although Plaintiff was
11 presumed to have received notice of the Appeals Councils’ denial on February 26,
12 2014, which in turn meant he was required to file suit by April 27, 2014, Plaintiff
13 has made a reasonable showing rebutting the presumptive date of receipt and thus
14 demonstrated that his action is not time-barred. Plaintiff’s declaration confirms
15 that he never personally received the Appeals Council’s notice of denial but rather
16 first received notice from his attorney by letter dated March 3, 2014. Plaintiff’s
17 attorney, Mr. Bonney, has certified to this Court that he received notice of the
18 denial on March 1, 2014, which testimony he has bolstered with the date-stamped
19 letter from the Appeals Council. Thus, because Plaintiff had 60 days from actual
20 receipt of notice to commence this action, his Complaint, filed April 29, 2014, was

1 timely filed. Accordingly, Defendant's Motion to Dismiss (ECF No. 6) is
2 **DENIED** for the reasons stated and Magistrate Judge Rodgers' Report and
3 Recommendation to Deny Defendant's Motion to Dismiss (ECF No. 7) is denied
4 as moot.

5 **IT IS HEREBY ORDERED:**

- 6 1. Defendant's Motion to Dismiss (ECF No. 6) is **DENIED**.
- 7 2. Magistrate Judge Rodgers' Report and Recommendation to Deny
8 Defendant's Motion to Dismiss (ECF No. 7) is denied as moot.

9 The District Court Executive is hereby directed to file this Order and provide
10 copies to counsel.

11 **DATED** January 21, 2015.



12 *Thomas O. Rice*

13 THOMAS O. RICE
14 United States District Judge