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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Deborah Bagood,

No. CV-16-02055-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Commissioner of Social Security
Administration,

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14 Defendant.

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At issue is Defendant Commissioner of Social Security Administration's Motion to Dismiss (Doc. 7, Mot.), to which Plaintiff filed a Response (Doc. 8, Resp.). Defendant did not file a Reply brief. The Court finds this matter appropriate for resolution without oral argument. *See* LRCiv 7.2(f).

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I. BACKGROUND

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On January 16, 2015, an Administrative Law Judge ("ALJ") issued a decision denying Plaintiff's application for Title II benefits under the Social Security Act for failure to file an appeal within 60 days of the notice date of denial of benefits as required by 20 C.F.R. § 404.901.

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On March 31, 2015, Plaintiff submitted a request for review of the ALJ's decision, coupled with a request to find good cause excusing the tardy appeal. Plaintiff averred that her counsel did not receive the January 16, 2015 decision until March 30, 2015 and that Plaintiff's request was therefore timely. Even if not timely, Plaintiff moved to excuse the delay for good cause. Plaintiff's request was denied as untimely and no good cause

1 found. Regardless of the date Plaintiff received the decision, she admits that the appeal
2 was at least “eight days late.” (Resp. at 1.)

3 **II. LEGAL STANDARD**

4 The United States, as sovereign, is immune from suit “save as it consents to be
5 sued . . . and the terms of its consent to be sued in any court define that court’s
6 jurisdiction to entertain the suit.” *Hercules, Inc. v. United States*, 516 U.S. 417 (1996)
7 (quotation and citation omitted). The Government’s waiver of sovereign immunity should
8 be strictly construed—with respect to scope—in favor of the sovereign. *Lane v. Pena*,
9 518 U.S. 187, 192 (1996). When ruling on a jurisdictional challenge under Federal Rule
10 of Civil Procedure 12(b)(1), “a court may look beyond the complaint and consider
11 extrinsic evidence.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1141 n.5 (9th
12 Cir. 2003).

13 For cases arising under Title II of the Social Security Act, 42 U.S.C. § 405(g) is
14 the exclusive jurisdictional basis for judicial review. *See* 42 U.S.C. § 405(h). Under that
15 section, “any individual, after any final decision of the Commissioner of Social Security
16 made after a hearing to which he was a party . . . may obtain a review of such decision by
17 a civil action commenced within sixty days after the mailing to him of notice”
18 42 U.S.C. § 405(g).

19 The term “final decision” is not defined by the Social Security Act and “its
20 meaning is left to the [Commissioner of Social Security] to flesh out by regulation.”
21 *Weinberger v. Salfi*, 422 U.S. 749, 676 (1975). The regulations provide that a “final
22 decision” is available only when a claimant has received an initial determination and has
23 sought review of that determination through the administrative appellate process. *See* 20
24 C.F.R. § 416.1400(a); *Califano v. Sanders*, 430 U.S. 99, 102 (1977).

25 **III. ANALYSIS**

26 Defendant moves to dismiss Plaintiff’s action on the grounds that the Court lacks
27 jurisdiction due to her untimely appeal, which is not a final decision that this Court may
28 review. (Mot. at 4-5.) Additionally, the failure to file a timely appeal resulted in a failure

1 to exhaust administrative remedies, also precluding jurisdiction. (Mot. at 4-5). Given the
2 following, the Court agrees.

3 Under the administrative appellate process, a claimant dissatisfied with the initial
4 benefits determination may ask for reconsideration and a hearing before an ALJ. *See* 20
5 C.F.R. §§ 416.1402, 416.1407, 416.1414. If still dissatisfied after receiving the ALJ's
6 decision, the claimant may request that the Appeals Council review the decision. *See* 20
7 C.F.R. § 416.1467. The Appeals Council may (1) deny the request for review, resting on
8 the ALJ's decision as the final decision of the Commissioner of Social Security, (2) grant
9 the request for review and issue its own final decision, or (3) dismiss the request. *See* 20
10 C.F.R. §§ 416.1471, 416.1481. In the former two scenarios, the claimant may seek
11 judicial review of those final decisions in federal district court. *See* 20 C.F.R. § 416.1481.
12 In the latter, where the Appeals Council dismisses the request for review, the dismissal
13 "is binding and not subject to further review." *See* 20 C.F.R. §§ 416.1471, 416.1472. If
14 claimants fail to pursue all of the steps of the administrative appellate process within the
15 time period specified, they will "lose their right to further administrative review and their
16 right to judicial review," unless they demonstrate "good cause" for failing to timely
17 request review. 20 C.F.R. § 416.1400(b); *see also Bowen v. City of New York*, 476 U.S.
18 467, 472 (1986) ("Proceeding through these three stages exhausts the claimant's
19 administrative remedies").

20 Defendant issued notice of the ALJ's decision on January 16, 2015. Plaintiff filed
21 her request for review on March 31, 2015. After reviewing Defendant's request to allow
22 the review as timely or to allow the appeal on a showing of good cause, the Appeals
23 Council found no good cause for the lateness and dismissed the untimely request. That
24 dismissal was "binding and not subject to further review" in federal court. *See* 20 C.F.R.
25 §§ 416.1471, 416.1472. The regulatory scheme does not provide for judicial review of
26 the dismissal of a request for Appeals Council review. *Compare* 20 C.F.R. § 416.1472
27 *with* § 416.1403(8). Further, the Ninth Circuit has rejected the argument that the Appeals
28 Council's dismissal of a request of review of the ALJ decision is a "final decision" under

1 § 405(g). *See Peterson v. Califano*, 631 F.2d 628, 630 (9th Cir. 1980) (noting that judicial
2 review of decisions on extensions would “make decisions on disability claims infinitely
3 reviewable, because a claimant could, at any point down the road, ask [the Secretary] to
4 exercise its discretion to extend the filing period”). Indeed, that is the dominant holding
5 in circuits which have addressed the issue. *See Matlock v. Sullivan*, 908 F.2d 492, 493
6 (9th Cir. 1990) (collecting cases). Accordingly, there is no final decision to assess and
7 this Court lacks jurisdiction. *See* 42 U.S.C. § 405(g).

8 Plaintiff’s only response is to repeat her good cause argument—that she cannot
9 demonstrate when the decision actually arrived, that the appeal was only eight days late,
10 that the amount of benefits at issue outweigh the short delay, and that Defendant was
11 dilatory in mailing her decision—which was also lodged to the Appeals Council. (Resp.
12 at 1-3.) This argument is unreviewable. The Court has no jurisdiction to determine
13 whether the Appeals Council erred in finding Plaintiff’s request for review to be untimely
14 or her delay without good cause.

15 **III. CONCLUSION**

16 Because the Appeals Council’s dismissal is not a final decision, this Court has no
17 jurisdiction to hear this action. Further, by failing to timely appeal, Plaintiff did not
18 exhaust the administrative remedies available to her, also precluding district court
19 jurisdiction.¹ This determination gives effect to the intent of Congress in requiring a final
20 decision for judicial review. *See Sanders*, 430 U.S. at 108; *Matlock*, 908 F.2d at 494
21 (“permitting claimants to obtain judicial review of denials of their requests for extensions
22 of time would frustrate Congress’ intent to forestall belated litigation of stale claims”).

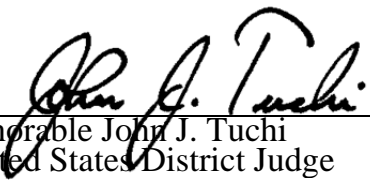
23 **IT IS THEREFORE ORDERED** granting Defendant’s Motion to Dismiss
24 (Doc. 7).

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27 ¹ The Court is aware that, unlike the underlying jurisdictional requirement, the
28 requirement that a claimant exhaust administrative remedies is waivable. *See Bowen*, 476
U.S. 467. However, given the briefing, it is clear that Defendant has not waived
jurisdiction. Moreover, lack of jurisdiction due to absence of a final decision alone is
dispositive.

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IT IS FURTHER ORDERED directing the Clerk of Court to enter final judgment accordingly and close this action.

Dated this 25th day of January, 2017.



Honorable John J. Tuchi
United States District Judge