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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Brandon East Dykens,
10 Plaintiff,

No. CV-18-08330-PCT-JAT

ORDER

11 v.

12 Commissioner of Social Security
13 Administration,
14 Defendant.

15 Pending before the Court is Defendant Commissioner of Social Security
16 Administration's (the "Administration") Motion to Dismiss under Federal Rule of Civil
17 Procedure ("Rule") 12(b)(1) for lack of subject matter jurisdiction. (Doc. 10). Plaintiff
18 Brandon Dykens ("Plaintiff") has responded (Doc. 13), Defendant has not replied. The
19 Court now rules on the motion.

20 **I. Background**

21 Plaintiff filed for Social Security benefits under both Title II and Title XVI on
22 August 1, 2017. (Doc. 10-1 at 3). The Administration, on October 14, 2017, denied both
23 claims. (Id. at 4, 8). Plaintiff requested a reconsideration, but the Administration denied his
24 claims again on January 11, 2018. (Id. at 12).

25 Some five months later, on June 20, 2018, Plaintiff requested a hearing before an
26 Administrative Law Judge ("ALJ"), attributing his delayed request to the fact that he never
27 "received any decision letter or correspondence" from the Administration related to his
28 request for reconsideration. (Id. at 19–20). On July 11, 2018, an ALJ dismissed the request

1 as untimely without good cause to extend the sixty-day regulatory deadline for hearing
2 requests. (Id. at 22, 26). Plaintiff sought the Appeals Council’s review of the ALJ’s
3 dismissal on September 7, 2018, but the Appeals Council denied review on September 27,
4 2018. (Id. at 36–38).

5 Plaintiff then filed a complaint in this Court on November 11, 2018, claiming the
6 ALJ denied him due process by refusing to hold a hearing on whether good cause existed
7 to extend the sixty-day regulatory deadline or, at the least, to “consider any evidence that
8 would refute Plaintiff’s evidence of good cause, particularly when the unrefuted evidence
9 establishe[d] that the original notice of denial of [his] claim was never received.” (Doc. 1
10 at 4-5). Plaintiff seeks either reversal of the ALJ’s dismissal or a remand for a hearing on
11 the issue of good cause. (Id. at 5).

12 **II. Discussion**

13 **a. Legal Standard**

14 “Federal courts are courts of limited jurisdiction,” possessing only those powers that
15 the Constitution or statutes grant to them. *Kokkonen v. Guardian Life Ins. Co. of Am.* 511
16 U.S. 375, 377 (1994). As such, under Rule 12(b)(1), a court must dismiss a claim it lacks
17 subject matter jurisdiction to decide. Fed. R. Civ. P. 12(b)(1). When resolving a Rule
18 12(b)(1) motion, courts “may review any evidence to resolve factual disputes concerning
19 the existence of jurisdiction.” *Milsap v. Social Sec. Admin*, No. CV 10-1757-PHX-JAT,
20 2011 WL 2135079, at *2 (D. Ariz. May 31, 2011). Because a federal court “presume[s] a
21 cause lies outside [its] limited jurisdiction, . . . the burden of establishing the contrary rests
22 upon the party asserting jurisdiction.” *Kokkonen*, 511 U.S. at 377.

23 “Absent a waiver, sovereign immunity shields the Federal Government and its
24 agencies from suit.” *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). Given
25 that “[s]overeign immunity is jurisdictional in nature,” *id.*, a court’s jurisdiction to decide
26 suits brought against the Federal Government is limited to “the terms of its consent to be
27 sued,” *United States v. Sherwood*, 312 U.S. 584, 586 (1941). For claims arising under the
28 Social Security Act, 42 U.S.C. § 405(g) provides the sole avenue for judicial review, see

1 42 U.S.C. § 405(h), allowing unsuccessful claimants to seek review of “any final decision
2 of the [Administration] made after a hearing . . . within sixty days after the mailing to him
3 of notice of such decision,” 42 U.S.C. § 405(g). The Social Security Act does not define
4 the term “final decision;” instead, the Administration fleshes out its meaning by regulation.
5 *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975).

6 Those regulations require claimants to proceed through a four-step administrative
7 review process before any decision becomes “final”:

8 First, the claimant must seek an initial determination as to his eligibility.
9 Second, the claimant must seek reconsideration of the initial determination.
10 Third, the claimant must request a hearing, which is conducted by an ALJ.
11 Fourth, the claimant must seek review of the ALJ’s decision by the Appeals
Council. If a claimant has proceeded through all four steps on the merits, all
agree, § 405(g) entitles him to judicial review in federal district court.

12 *Smith v. Berryhill*, 139 S. Ct. 1765, 1772 (2019) (citing 20 C.F.R. § 416.1400). Claimants
13 seeking successive stages of review face regulatory deadlines, including, as relevant here,
14 sixty days to request a hearing from an ALJ following reconsideration. See 20 C.F.R. §
15 416.1433(b). Although claimants who miss this deadline may request an extension for good
16 cause, 20 C.F.R. § 416.1433(c); see also 20 C.F.R. § 416.1411 (explaining the
17 Administration’s standards for good cause), “[b]ecause the [Administration’s] decision
18 whether, for good cause shown, to entertain an untimely hearing request . . . is strictly
19 discretionary, it is not final and thus not generally reviewable by a district court,” *Dexter*
20 *v. Colvin*, 731 F.3d 977, 980 (9th Cir. 2013) (citations omitted); see also *Peterson v.*
21 *Califano*, 631 F.2d 628, 630–31 (9th Cir. 1980) (holding that judicial review is available
22 under § 405(g) only after a statutorily mandated hearing takes place (first citing *Califano*
23 *v. Sanders*, 430 U.S. 99, 108 (1977), and then citing *Cappadora v. Celebrezze*, 356 F.2d 1,
24 4–5 (2d Cir. 1966)).¹

25 ¹ The Court notes that dicta in *Smith*, rebuffs the notion that § 405(g) authorizes judicial
26 review only after a statutorily mandated hearing has taken place. See *Smith*, 139 S. Ct. at
27 1774, 1777. But the claimant in *Smith* had, in fact, “obtained the kind of hearing that §
28 405(g) most naturally suggests: an ALJ hearing on the merits,” *id.* at 1775, and the Supreme
Court made clear that its opinion did not address a factual scenario like this case, where a
claimant “whose request for an ALJ hearing [is] dismissed as untimely and who then
appealed that determination to the Appeals Council before seeking judicial review.” *Id.* at
1777 n.17. Thus, although *Smith* might call into question the rationale of *Dexter v. Colvin*,

1 A limited exception exists, however, for “any colorable constitutional claim of due
2 process violation that implicates a due process right to a meaningful opportunity to be heard
3 or to seek reconsideration of an adverse benefits determination.” *Udd v. Massanari*, 245
4 F.3d 1096, 1099 (9th Cir. 2001). A constitutional claim is colorable if it is not “wholly
5 insubstantial, immaterial, or frivolous.” *Id.* (quoting *Boettcher v. Sec’y of Health & Human*
6 *Servs.*, 759 F.2d 719, 722 (9th Cir. 1985)). To meet this test, a claimant cannot rely on
7 “mere allegation[s],” but must instead support his claim with “facts sufficient to state a
8 violation of substantive or procedural due process.” *Klemm v. Astrue*, 543 F.3d 1139, 1144
9 (9th Cir. 2008) (quoting *Anderson v. Babbitt*, 230 F.3d 1158, 1163 (9th Cir. 2000)).

10 **b. Jurisdiction**

11 Because the ALJ dismissed Plaintiff’s request for a hearing as untimely, an
12 inherently discretionary determination, the Court has no jurisdiction unless he has stated a
13 colorable constitutional claim of a due process violation. See *Dexter*, 731 F.3d at 979–80.

14 The Court first rejects Plaintiff’s general contention that due process entitled him
15 “to a hearing on the question whether he received notice of the denial letter.” (Doc. 1 at 4).
16 As the Ninth Circuit explained in *Dexter*, an ALJ need not hold a hearing on the issue of
17 good cause prior to denying an untimely request for a hearing, the ALJ need only consider
18 a claimant’s evidence of “potentially valid reasons for [the] delay” and offer “some
19 explanation . . . of why . . . [those reasons] are rejected” to comport with the dictates of due
20 process. *Id.* at 980–81; *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985) (“[A] claimant
21 is not entitled to a hearing where she has failed to [timely] seek reconsideration . . . unless
22 she can prove ‘good cause’ for missing the deadline.” (citation omitted)).

23 Plaintiff maintains that, by failing to “consider any evidence that would refute the
24 [his] evidence of good cause,” (Doc. 1 at 4), the ALJ failed to satisfy even this requirement
25 of due process. Plaintiff thus advances a similar argument to the claimant in *Dexter* which
26 held that a claimant states a colorable due process claim if the ALJ failed to address
27 “facially legitimate reason[s] that constitute[] good cause under the [Administration’s]

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in the absence of binding authority to the contrary, the Court will continue to apply binding
Ninth Circuit precedent.

1 regulations.” 731 F.3d at 980–81.

2 Although the Administration’s regulations provide that “good cause may exist” if a
3 claimant “did not receive notice of the initial determination or decision,” 20 C.F.R. §
4 416.1411(b)(7), Plaintiff has not stated a colorable constitutional claim because—unlike
5 Dexter—the ALJ’s order sufficiently addressed his proffered reason for good cause.

6 The ALJ first noted that Plaintiff’s representative claimed neither he nor Plaintiff
7 ever received notice of the reconsideration decision. (Doc. 10-1 at 25). But the ALJ also
8 explained that, under 20 C.F.R. § 416.1401, the Administration presumes that claimants
9 receive notice five days after it is dated, absent a contrary showing. (Id. at 25). The ALJ
10 found Plaintiff had made no such showing, stating that “[n]one of the reconsideration
11 determination notices were returned . . . as undeliverable” and “[s]ystems information
12 available to the . . . Administration confirms that the notice was sent to the claimant and
13 representative’s current mailing address and neither have submitted a change in address.”
14 (Id. at 26). Thus, unlike the ALJ in Dexter, the ALJ here clearly considered and rejected
15 Plaintiff’s excuse for his five-month-long delay. Because the ALJ addressed Plaintiff’s
16 ground for good cause, Plaintiff fails to state a colorable due process claim. See Dexter,
17 731 F.3d at 980, 982 (stating that the ALJ did not even know two reasons for a delayed
18 request “notwithstanding that . . . regulations list them as ‘[e]xamples of circumstances
19 where good cause may exist’ (citation omitted)); *Munson v. Berryhill*, No. C16-5737-TSZ,
20 2017 WL 3225499, at *3 (W.D. Wash. July 31, 2017) (stating that claimant had no
21 colorable claim on this basis); see also *Alatrisme v. Berryhill*, No. CV 17-4327 SS, 2017
22 WL 8186753, at * 6 (C.D. Cal. Dec. 7, 2017) (remanding to Administration when it failed
23 to “provide any explanation as to which specific factors the ALJ considered, or why the
24 facts in Plaintiff’s case did not rise to the level of good cause”); *Hunnicut-Lott v. Colvin*,
25 No.12cv2741 AJB (KSC), 2014 WL 11281, at *7 (S.D. Cal. Mar. 20, 2014) (remanding to
26 Administration when reasons for good cause were not even mentioned by order of
27 dismissal). Accordingly, Plaintiff has not carried his burden to establish the Court has
28 subject matter jurisdiction over his claim.


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III. Conclusion

For these reasons,

IT IS ORDERED that Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 10) is **GRANTED**. The Clerk of the Court shall enter judgment accordingly.

Dated this 18th day of September, 2019.



James A. Teilborg
Senior United States District Judge