

Case 1:17-cv-00702-GSA Document 9 Filed 08/29/17 Page 1 of 21

AUG 29 2017

Ericka Kameelah Allen
Personal Representative
Fresno, CA, 93706
(559)371-4257
mrs.allen.7.5.9@gmail.com

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ERICKA KAMEELAH ALLEN,
Plaintiff,
vs.
NANCY A. BERRYHILL,
Acting Commissioner of Social Security,
Defendants

Case No.: 1:17-cv- 00702 GSA

FIRST AMENDED COMPLAINT (DOC 7)

Plaintiff, Ericka Kameelah Allen seeks judicial review of decisions made denying Social Security Disability Income Benefits under Titles II and XVI of the Social Security Act. Plaintiff requests review of final decision by commencing a civil action in the federal district court for the judicial district in which the Plaintiff resides, 42 U.S.C. 405(g). My name is Ericka Kameelah Allen, Pro se Plaintiff, and I wish to amend my complaint concerning denial decision rendered on March 10, 2016 by the Administrative Law Judge and again on December 5, 2016 by Office of Disability Adjudication and Review dated May 19, 2017.

I would first like to request acceptance of proof that the Appeals Council sent letter dated April 17, 2017 giving me, Ericka Allen more time to file 35 days from the date of letter. This letter was supposed to be attached to original complaint.

FIRST AMENDED COMPLAINT - 1

It is my hopes that I amend my complaint to request my claim to be considered as the basis. My complaint is the ALJ failed to explain why no weight she gave to the treating doctors opinions or even the doctor notes and supporting evidence such as x-rays and labs. Upon review of denial no good reason was given as to why no weight was given to the doctors and ignores their opinions entirely.

The Administrative Law Judge indicated in page 2 of 5 of decision: "In looking at your case, we considered the reasons you disagree with the decision in the material listed on the enclosed Order of Appeals Council. We found that this information does not provide a basis for changing the Administrative Law Judge's decision." Nowhere in the decision does it clearly address what my wife disagreed with and therefore I am also unclear what information the Council used to determine a basis. In fact, in a letter dated June 17, 2016 the Appeals Council states: "We found no reason under our rules to review the Administrative Law Judge's decision. Therefore, we have denied your request for review." The Council plainly states that they didn't even bother to review the Administrative Law Judge's decision, therefore in what manner was the Appeal Council able to apply the rules to determine if (1) The Administrative Law judge appears to have abused his or her discretion, (2) There is an error of law, (3) The decision is not supported by substantial evidence, (4) There is a broad policy or procedural issue that may affect the public interest and (3) We receive new and material evidence and the decision is contrary to the weight of all the evidence now in the records.

I was alerted immediately after hearing on December 16, 2015 by Attorney, Marvin Amoya, asking: "Do you know the judge? I have never seen a judge with absolutely no compassion for a United States Veteran... don't worry we will continue to appeal." Clearly, the Judge appeared bias towards me at the hearing as I also stated that the judge seemed to have an attitude with me from the start of the hearing. Upon reviewing the decision with My husband, there was a lot of confusion and things I disagreed with. First the periods I engaged in substantial gainful activity was not correct. In the periods of 2005-2006 I was still in the United States Army (in psychiatric ward care) and was discharged June 27, 2006, and received basic pay despite inpatient hospitalization for most of 2005 and outpatient care for 2006 in which I was not working pending medical board. Prior to October 15, 2007 I continued to get let go from jobs due to medical issues however, from October 15, 2007 until December 31, 2007 I began working at the Internal Revenue Service Intermittent employee under the 10-point preference for

having a disability rating of 30% or more. That would account for over \$7,000 of the reported \$9,076.12 for the year 2007. I was employed by the Internal Revenue Service from January 1, 2008- March 24, 2013 as a Customer Service Representative and was protected by the Family Medical Leave Act as during these periods I continue to battle with each of my conditions and under continual medical care from the Veterans Affairs Medical Center and I have documented evaluations, Sick Leave Letters from 2008-2014. In 2012 there was no reported income as I was on Leave of Absence from November 24, 2011 until March 24, 2013. I returned to work with the Internal Revenue Service in a different position as an Individual Taxpayer Assistant Service Representative from March 24, 2013 until October 21, 2014 in which I was not covered by Family Medical Leave Act due to the care I was receiving from the VA at McClellan AFB and Mather Field..

Per the findings page 3 of 12, #4. The claimant has the following severe impairments: migraine headaches, unspecified, major depressive disorder, post-traumatic stress disorder, hip arthralgia, and obesity (20 CFR 404.1520(c)). "The above medically determinable impairments are severe, because they are documented in the medical record and have more than a minimal effect on the claimant's ability to perform basic work activities. The claimant's history of irritable bowel syndrome, gastroesophageal reflux disorder, iron deficiency anemia, insomnia, history of bilateral shoulder dislocations, history of bladder tumor, history of vitamin D deficiency, tinea ingrown, history of pinched neck nerve, candidiasis, sickle cell trait, tobacco use, and alcohol abuse by history (in remission) are slight impairments that have only minimal, if any, effects on her ability to work. There is no evidence that these conditions have required more than sporadic medical treatment or resulted in any medical complication." The judge will provide a handful of procedures and labs from the time frame of 2009-2015. Many of which were procedures which were conducted in locations like Palo Alto, San Jose, CA or Presidio, San Francisco, CA where I would have to miss work to travel usually needing someone to accompany me to drive her there and back and a few times she had to stay over night. There was no mention of procedures such as infusions of Iron to bring her out of the anemia conducted four hours out of the day for sometimes once a week or several days out of the week for the prescribed amount of weeks to bring up iron levels. Hospital visits for Anxiety attacks or Migraine, and GERD related conditions. Her records does not reflect drop file from employers reflecting unscheduled leave requested for emergencies from Migraines, Anxiety Attacks, Insomnia related issues, PTSD episodes, Pinched nerve related and

even more embarrassing, Irritable Bowel Syndrome related such as accidents at work in which my wife had to leave work early because self-defecation. These are the same conditions listed as “minimal, if any, effects on her ability to work”, when combined with the several “severe impairments” per (20 CFR 404.1520(c)) clearly draws a picture of how all of my wife’s conditions contributes to her inability to work. This also answer’s #5 “The claimant does not have impairment or combination of impairments that meets or medically equals the severity of time of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 404.1525 and 404.1526). The fact that my wife has been found to be non-workability status for the Veterans Affairs makes it hard for me as her Husband to believe that neither of her providers would provide opinions in respect to my wife’s conditions and her ability to work as such evidence was used to determine status on her behalf.

The Judge’s findings #6 “After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform less than the full range of light work in that within an 8-hour workday, the claimant can lift and carry 20 pounds occasionally and 10 pounds frequently, and climb, balance, stoop, kneel, crouch, and crawl frequently. She should avoid working in a loud environment. She can perform simple repetitive tasks with occasional public contact. In making this finding, the undersigned has considered all symptoms and the extent to which these symptoms can reasonably be accepted as consistent with the objective medical evidence and other evidence, based on the requirements of 20 CFR 404.1529 and SSRs 96-4p and 96-7p. The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and SSRs 96-2p, 96-5p, 96-6p, and 06-3p.” The judge gave more weight in area of opinions she supported and less weight in others despite how the opinions correlated with each other and the evidence gathered from my medical history per her available medical records. Generous weight seemed to always be given to the State Agency medical consultant vs Consultative examiner Dr. Robert Poston and Consultative examiner Dr. Tessie Rallos. Page 8 of 12 of the decision, Judge states: “As for the opinion evidence, in July 2006, Dr. Jack Papazian rated the claimant’s global assessment of functioning (GAF) at 50 (Exhibit 1F, p. 795). The Administrative Law Judge gives little weight to this GAF score as it is nine years old, and the record now contains additional medical evidence that establishes the claimant’s impairments and resulting limitations were not as severe as they might have appeared at that time.” In page 9 of 12 breaks down evidence or events from medical records from notes of Dr. Jeanette

Rylander painting a clear picture that though my wife was employed her employment was unstable and she feared being let go. Though such evidence was clear upon my reading the judge would state: "The record generally suggests that the claimant was seeing a physician primarily in order to generate evidence for this application and appeal, rather than in a genuine attempt to obtain relief from allegedly disabling symptoms." There is clear evidence that my wife has had an ongoing medical care since 2006 since the discharge of her military career and there is no evidence which supports the "suggested)" claim by the Judge that my wife only sought out care as a result of her social security claim or even sought out more care as a result of her social security claim. Much of my wife's medical history is missing from emergency room visits in Sacramento, CA in which care was sought out from October 2011 until December 2014. Care has been giving in hospitals like: Kaiser Permanente, Mercy, Methodist, Sutter General, Sutter Medical Group, Sutter Urgent Care, Mather AFB and McClellan Veterans Affairs. Many of the providers noted in my medical record encouraged on many occasions that I apply for social security however out of fear of being homeless, not being apart of the working class at her age and blend in with the rest of the world also believed she could overcome the several elements that she lived with. My conditions not only affects my ability to work but it affects her personal life as she has a problem building relationships, even in our relationship there was so much I didn't understand until now and many of her family and friends would just say she needs her medication or to be patient with her. I am a personal witness that life isn't easy for my wife and she loved working. Since we have been together we have two children in which her conditions complicated both of her pregnancies. I don't believe my wife ever planned on stop working but her manager at her last job made it clear that she was not dependable because she missed so much time out of work and advised her that she needed to submit her disability retirement packet. The disability retirement coordinator explained along w. To conclude, Plaintiff, Ericka Kameelah Allen deserves a fair review of disability claim.

Dated this 29 of August, 2017.



Ericka Kameelah Allen

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UNITED STATES DISTRICT COURT
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EASTERN DISTRICT OF CALIFORNIA
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9 ERIKA ALLEN,
10 Plaintiff,
11 v.

12 NANCY BERRYHILL, Acting
13 Commissioner of Social Security
14 Defendant.

Case No. 1:17 -cv-00702 GSA

**ORDER STRIKING UNSIGNED FIRST
AMENDED COMPLAINT**
(Doc. 7)

15 Plaintiff, Erika Allen is proceeding *pro se* and *in forma pauperis* in this civil case
16 contesting a denial of her disability benefits. (Doc. 1). On July 6, 2017, the Court issued an order
17 dismissing Plaintiff's complaint and requiring that Plaintiff file an amended complaint. (Doc. 6).
18 Plaintiff was advised that if she continued to represent herself that only she could sign the
19 pleading, and that the pleading needed be signed under penalty of perjury. (Doc. 6, pg. 7; ln 8-9).
20 Plaintiff filed a First Amended Complaint (Doc. 7), however it does not contain any signature.
21 The Court cannot consider unsigned pleadings and therefore the First Amended Complaint will be
22 stricken from the record. Fed. R. Civ. P. 11(a); Local Rule 131(b).

23 Plaintiff is advised that the First Amended Complaint (Doc. 7) sufficiently addressed the
24 Court's concerns that were outlined in the order dismissing the complaint, *but for* the lack of a
25 signature signed under penalty of perjury.¹ Therefore, the Court will give Plaintiff one *final*
26

27
28 ¹The Court's order advised Plaintiff that she needed to state a claim and establish that jurisdiction is proper. The
First Amended Complaint addressed those issues.

1 opportunity to submit a First Amended Complaint which must be filed **no later than August 31,**
2 **2017.** Plaintiff is advised that the First Amended Complaint (with exhibits) as currently written
3 will be accepted by the Court as long as it is signed by Plaintiff under penalty of perjury. As a
4 general rule, an amended complaint supersedes any earlier complaints. *Lacey v. Maricopa Cnty.*,
5 693 F.3d 896 (9th Cir. 2012) (noting that there may be limited exceptions to this rule on appeal).
6 In other words, the First Amended Complaint must be “complete in itself without reference to the
7 prior or superseded pleading.” Local Rule 220.

8 **Order**

9 The Clerk of the Court shall STRIKE Plaintiff's First Amended Complaint filed on July
10 31, 2017 (Doc.7). Thereafter, the Court or the Clerk shall send a copy of this order, along with a
11 copy of the Plaintiff's First Amended Complaint with the CM/ECF file stamp information deleted
12 from the heading of each page, to Plaintiff at the address listed on the docket. Plaintiff may refile
13 the existing First Amended Complaint signed under penalty of perjury to satisfy the requirements
14 of this order.

15 Plaintiff advised that failure to file a First Amended Complaint by August 31, 2017 in
16 compliance with the instructions outlined above will result in dismissal of this action.

17 IT IS SO ORDERED.
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19 Dated: August 6, 2017

20 /s/ Gary S. Austin
21 UNITED STATES MAGISTRATE JUDGE
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MIME-Version:1.0 From:caed_cmecl_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain. Message-Id: Subject:Activity in Case 1:17-cv-00702-GSA (SS) Allen v. Commissioner of Social Security et al Order. Content-Type: text/html

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U.S. District Court

Eastern District of California – Live System

Notice of Electronic Filing

The following transaction was entered on 8/7/2017 at 9:47 AM PDT and filed on 8/7/2017

Case Name: (SS) Allen v. Commissioner of Social Security et al

Case Number: 1:17-cv-00702-GSA

Filer:

Document Number: 8

Docket Text:
ORDER striking unsigned [7] First Amended Complaint signed by Magistrate Judge Gary S. Austin on 8/3/2017. (Amended Complaint due by 8/31/2017). (Lundstrom, T)

1:17-cv-00702-GSA Notice has been electronically mailed to:

1:17-cv-00702-GSA Electronically filed documents must be served conventionally by the filer to:

Ericka Allen
245 W. Almy Avenue
Fresno, CA 96706

The following document(s) are associated with this transaction:

Ericka Allen
245 W. Almy Avenue
Fresno, CA 96706

United States District Court
Eastern District of California

JUL 31 2017

Ericka K. Allen
(Plaintiff)

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

1:17-cv-702-GSA

Vi

Nancy A. Berryhill

Amended Complaint

Acting Commissioner

To whom it may concern

Please accept my request of

extension to file civil action dated

April 17, 2017 given 35 days from

date of letter.

Complaint:

The ALJ failed to explain
why weight was not given to
Doctors in my medical records

and evidence Supporting conditions

listed in claim Request claim be

rendered back for review as a

good reason was not provided

explaining why Opinions from doctors

Supporting my Conditions was ignored

entirely. Please consider

this formal letter as my Amended

Argument.

Ericker Allen

7/31/2017



SOCIAL SECURITY ADMINISTRATION

Refer to: ██████████

Office of Disability Adjudication
and Review
5107 Leesburg Pike
Falls Church, VA 22041-3255
Telephone: (877) 670-2722
Date:

APR 17 2017

Ericka Allen
245 W Almy Street
Fresno, CA 93706-5603

Dear Ms. Allen:

On December 5, 2016, the Appeals Council denied a request for review of the Administrative Law Judge's decision. The Council has now received a request from Ms. Laura Krank, an individual who declined to represent you in Federal Court, for more time for you to find an attorney to represent you in Federal Court and to file a civil action (ask for court review).

We Are Giving You More Time to File a Civil Action

The Appeals Council now extends the time within which you may file a civil action (ask for court review) for 30 days from the date you receive this letter. We assume that you received this letter 5 days after the date on it unless you show us that you did not receive it within the 5-day period.

See Next Page

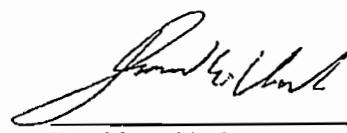
Ericka Kameelah Allen (545-75-9898)

Page 2 of 2

If You Have Any Questions

If you have any questions, you may call, write, or visit any Social Security office. If you do call or visit an office, please have this notice with you. The telephone number of the local office that serves your area is (877)311-2640. Its address is:

Social Security
865 Fulton Mall
Fresno, CA 93721-2816



David E. Clark
Administrative Appeals Judge

cc:

Jonathan Pena
5740 N Palm Ave,
Suite 103
Fresno, CA 93704

ERIKA ALLEN,

AGRICULTURAL COMMISSION, Plaintiff,
v.
E. T. O. A. LEVINS.

NANCY A. BERRYHILL; LAURA D. ORT-PRESLEY; TRAVIS M. NAGY; and CYNTHIA FORD,

16 Defendants.

1:17-cv-702-GSA

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

(Doc. 1)

I. INTRODUCTION

Plaintiff, Erika Allen (“Plaintiff”), filed a Social Security complaint (the “complaint”) on May, 19, 2017. (Doc. 1). In the complaint, Plaintiff challenges a denial of her application for Disability Insurance Benefits. The Court has reviewed the complaint and dismisses the pleading with leave to amend because it fails to state a claim, and because it appears that jurisdiction is not proper. Although Plaintiff filed an appeal with the Appeals Council, it appears that Plaintiff did not file her complaint in this Court within sixty days of the receiving Appeals Council decision as required. Failure to timely file an appeal results in divesting this Court’s jurisdiction to hear this case. Notwithstanding this lack of jurisdiction, Plaintiff will be granted leave to file a First Amended Complaint to possibly establish that jurisdiction is proper, as well as to cure the deficiencies outlined in this order.

1 **II. DISCUSSION**

2 **A. Screening Standard**

3 Under 28 U.S.C. § 1915(e)(2), the Court must conduct an initial review of the complaint
4 to determine whether it “state[s] a claim on which relief may be granted,” is “frivolous or
5 malicious,” or “seek[s] monetary relief against a defendant who is immune from such relief.” If
6 the Court determines that the complaint fails to state a claim, it must be dismissed. *Id.* Leave to
7 amend may be granted to the extent that the deficiencies of the complaint can be cured by
8 amendment. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

9 A complaint must contain “a short and plain statement of the claim showing that the
10 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
11 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
12 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
13 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). Plaintiff must set
14 forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its face.’”
15 *Ashcroft v. Iqbal*, 556 U.S. at 663 (quoting *Twombly*, 550 U.S. at 555). While factual allegations
16 are accepted as true, legal conclusion are not. *Id.* at 678.

17 To determine whether a complaint states an actionable claim, the Court must accept the
18 allegations in the complaint as true, *Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738,
19 740 (1976), construe pro se pleadings liberally in the light most favorable to the Plaintiff, *Resnick*
20 *v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000), and resolve all doubts in the Plaintiff’s favor.
21 *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Pleadings of pro se plaintiffs “must be held to
22 less stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338,
23 342 (9th Cir. 2010) (holding that pro se complaints should continue to be liberally construed after
24 *Iqbal*).

25 **B. Plaintiff’s Allegations**

26 In the complaint, Plaintiff alleges that Administrative Law Judge Cynthia Floyd (“ALJ”)
27 was biased against her and improperly denied her disability claim. Specifically, Plaintiff contends
28 that the ALJ did not properly identify all of Plaintiff’s severe impairments, she improperly

1 opinion, making broad assertions, or rendering legal conclusions without a factual and legal basis.

2 **2. Plaintiff's Appeal May Be Time-Barred**

3 Additionally, it appears that the filing of Plaintiff's initial complaint in this Court is time-
4 barred and consequently divests this Court of jurisdiction. Plaintiff is advised that judicial review
5 of the Commissioner's administrative decisions is governed by Section 405(g) and (h) of the
6 Social Security Act, which reads in relevant part:

7 (g) Any individual, after any final decision of the Commissioner of Social Security
8 made after a hearing to which [she] was a party, irrespective of the amount in
9 controversy, may obtain a review of such decision by a civil action commenced
10 within sixty days after the mailing to him of notice of such decision or within such
further time as the Commissioner of Social Security may allow.

11 (h) The findings and decision of the Commissioner after a hearing shall be binding
upon all individuals who were parties to such hearing. No findings of facts or
12 decision of the Commissioner shall be reviewed by any person, tribunal, or
13 governmental agency except as herein provided. No action against the United
14 States, the Commissioner, or any officer or employee thereof shall be brought
under section 1331 or 1346 of Title 28 to recover on any claim arising under this
subchapter.

15 Section 405(g) and (h) therefore operates as a statute of limitations setting a sixty day time
16 period in which a claimant may appeal a final decision of the Commissioner. As part of this
17 process, Plaintiff must have exhausted her administrative remedies prior to filing a case in this
18 Court. Specifically, upon receiving her denial from an administrative law judge, Plaintiff had
19 sixty days to file an Appeal with the Appeals Council. 20 CFR §§ 404.967 and 404.968. When
20 the Appeals Council reviews the case, it will either affirm, modify, or reject the ALJ's
21 recommendation. 20 CFR § 404.979. It may also remand the case. 20 CFR § 404.977. The
22 Appeals Council's decision is binding unless a party files an action in federal district court within
23 sixty days of the Appeals Council's decision. 20 CFR §§ 422.210 and 404.981.

24 It appears that Plaintiff has exhausted her administrative remedies. She submitted two
25 Appeals Council's decisions dated June 17 and December 5, 2016, denying her appeal.¹ (Doc. 1,
26 pgs. 12- 14, and pgs. 15-22). Both of the decisions advised Plaintiff that unless she obtained an

27 ¹ In the December 5, 2016 decision, the Appeals Council set aside the June 17, 2016 decision after considering
28 additional evidence. (Doc. 1, pg. 15). In the latter decision, the Appeals Council found that the additional
information Plaintiff submitted did not provide a basis for changing the ALJ's decision. (Doc. 1, pg. 16).

1 extension of time from the agency, she had sixty days after receiving the decision to file an appeal
2 in this Court. (Doc. 1, pgs. 13 and 17). The agency assumes the letter was received five days
3 after the date on the order unless it is demonstrated that it was not received within the five day
4 period. (Doc. 8, pgs. 13 and 17). Plaintiff did not file her complaint in this Court until May 19,
5 2017 (Doc. 1), which is well beyond sixty days from the latest Appeals Council order which is
6 dated December 5, 2016. Based on the face of the documents, it appears that Plaintiff's appeal is
7 untimely.

8 Plaintiff is advised that in certain rare circumstances, the doctrine of equitable tolling
9 allows a plaintiff to avoid the statute of limitations. *Supermail Cargo Inc. v. United States*, 68
10 F.3d at 1206. "Generally, a litigant seeking equitable tolling bears the burden of establishing two
11 elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary
12 circumstances stood in his way." *Credit Suisse Sec. (USA) LLC v. Simmonds*, — U.S. —, 132
13 S.Ct. 1414, 1419 (2012) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)) (emphasis
14 omitted). Equitable tolling is only warranted where "litigants are unable to file timely documents
15 as a result of external circumstances beyond their direct control." *Kwai Fun Wong v. Beebe*, 732
16 F.3d 1030, 1052 (9th Cir. 2013) (quoting *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008))
17 (alterations and internal quotation marks omitted). "Generally, equitable circumstances that might
18 toll a limitation period involve conduct (by someone other than the claimant) that is misleading or
19 fraudulent." *Turner v. Bowen*, 862 F.2d 708, 710 (8th Cir. 1988).

20 For example, in *Bowen v. City of New York*, 476 U.S.467 (1986), the court applied
21 equitable tolling because plaintiffs were prevented from filing because of "the Government's
22 secretive conduct." *Bowen*, 476 U.S. at 467. Likewise, in *Vernon v. Hecker*, 811 F. 2d 1274,
23 1275 (9th Cir. 1987) the court reasoned that equitable tolling was appropriate because the plaintiff
24 had allegedly been told by an employee of the Social Security Administration that the deadline
25 would be extended. In contrast, however, in *Turner v. Bowen*, 862 F.2d 708 (8th Cir. 1988), the
26 court did not find equitable tolling applicable because the plaintiff was not "unusually
27 disadvantaged in protecting his own interests" despite his being illiterate and unrepresented when
28 he received the letter from the Appeals Council denying his benefits and informing him of his

1 right to file a civil action. *Turner*, 862 F.2d at 709. Thus, equitable tolling only applies in rare
2 circumstances. If Plaintiff did not file her complaint within sixty days of receiving the last
3 Appeals Council decision and she did not get an extension of time from the agency to file her
4 complaint late, she needs to articulate facts similar to those outlined above in order to establish
5 equitable tolling applies and that her claim is not time barred.

6 Given the above, Plaintiff will be given a final opportunity to amend the complaint to
7 establish that jurisdiction is proper. In any amended complaint, Plaintiff must establish that she
8 filed this case within sixty days of receiving the Appeals Council denial of her benefits, that she
9 received an extension of time from the agency to file a late complaint, or that equitable tolling
10 applies to her case.

11 3. Proper Defendant

12 Plaintiff is advised that the Commissioner of Social Security, presently, Nancy A.
13 Berryhill, is the proper defendant in an action challenging the denial of Social Security benefits.
14 42 U.S.C. § 405(g) (referring to the "Commissioner's Answer"). 20 CFR 422.210(d) elaborates:
15 the Office of Proper defendant. Where any civil action described in paragraph (a)
16 of this section is instituted, the person holding the Office of the
17 Commissioner shall, in his official capacity, be the proper
18 defendant. Any such civil action properly instituted shall survive
19 notwithstanding any change of the person holding the Office of the
20 Commissioner or any vacancy in such office. If the complaint is
21 erroneously filed against the United States or against any agency,
22 officer, or employee of the United States other than the
23 Commissioner, the plaintiff will be notified that he has named an
24 incorrect defendant and will be granted 60 days from the date of
25 receipt of such notice in which to commence the action against the
26 correct defendant, the Commissioner.

27 20 CFR § 422.210.

28 Plaintiff's complaint currently lists the Commissioner of Social Security, Nancy A.
Berryhill, as well as several other individuals including: Laura D. Ort-Presley, Division Chief
Administrative Appeals Judge, Travis Nagy, an Appeals Officer, and Cynthia Ford,
Administrative Law Judge. The proper Defendant in this action is Nancy A. Berryhill, who is
now the Acting Commissioner of Social Security. Plaintiff shall exclude any other Defendant
from any amended complaint.

III. Conclusion and Order

2 As set forth above, it appears the Court lacks jurisdiction to hear Plaintiff's case.
3 However, if Plaintiff believes that there are other facts that the Court should consider to establish
4 proper jurisdiction, she may file an Amended Complaint no later than **July 31, 2017**. If Plaintiff
5 chooses to file a First Amended Complaint, she must establish that this Court has jurisdiction, and
6 state a claim in the amended pleading. An amended complaint must bear the docket number
7 assigned in this case and be labeled "First Amended Complaint." As previously explained,
8 Plaintiff's husband may not act as Plaintiff's representative. If Plaintiff is representing herself,
9 only she can sign the pleading which must be signed under penalty of perjury. Plaintiff is advised
10 that as a general rule, an amended complaint supersedes any earlier complaints. *Lacey v.*
11 *Maricopa Cnty.*, 693 F.3d 896 (9th Cir. 2012) (noting that there may be limited exceptions to this
12 rule on appeal). In other words, the First Amended Complaint must be "complete in itself without
13 reference to the prior or superseded pleading." Local Rule 220. If Plaintiff no longer wishes to
14 pursue her case after reviewing this order, she shall file a Notice of Voluntary Dismissal.
15 *Plaintiff is advised that failure to file a First Amended Complaint by July 31, 2017 will*
16 *result in dismissal of this action.*

IT IS SO ORDERED.

Dated: July 5, 2017

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE

MIME-Version:1.0 From:caed_cmeclf_helpdesk@caed.uscourts.gov To:CourtMail@localhost.localdomain Message-Id: Subject:Activity in Case 1:17-cv-00702-GSA (SS) Ericka Allen v. Commissioner of Social Security et al Order Dismissing Case with Leave to Amend. Content-Type: text/html

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U.S. District Court

Eastern District of California – Live System

Notice of Electronic Filing

The following transaction was entered on 7/6/2017 at 7:44 AM PDT and filed on 7/6/2017

Case Name: (SS) Ericka Allen v. Commissioner of Social Security et al

Case Number: 1:17-cv-00702-GSA

Filer:

Document Number: 6

Docket Text:

ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND signed by Magistrate Judge Gary S. Austin on 7/5/2017. **First Amended Complaint due by 7/31/2017. (Jessen; A)**

1:17-cv-00702-GSA Notice has been electronically mailed to:

1:17-cv-00702-GSA Electronically filed documents must be served conventionally by the filer to:

Ericka Allen
245 W. Almy Avenue
Fresno, CA 96706

The following document(s) are associated with this transaction:

Ericka Allen
245 W. Almy Avenue
Fresno, CA 96706
