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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JANET H GARFIELD,

No C 03-4124 VRW

Plaintiff,

ORDER

v

MICHAEL J ASTRUE, Commissioner of  
Social Security,

Defendants.

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On September 10, 2003, plaintiff Janet Garfield filed a complaint under 42 USC § 405(g) against defendant Michael J Astrue, Commissioner of Social Security. Doc #1. Plaintiff sought judicial review of an Administrative Law Judge's ("ALJ's") dismissal of plaintiff's request for hearing related to her disability insurance benefits ("DIB") application filed under Title II of the Social Security Act in April 1994 ("1994 DIB Application"). The dismissal had become final in October 1997. Doc #55, Administrative Record ("AR"), at 159. Under § 405(g), complaints for judicial review must be filed within sixty days of a final decision by the Commissioner of Social Security.

1           On July 26, 2004, Judge Martin J Jenkins remanded the  
2 matter to the Social Security Administration ("SSA") to determine  
3 whether good cause existed for plaintiff's delay in filing her  
4 complaint; the agency found no good cause and the matter was  
5 referred back to the district court. Doc #20 at 6-7, AR 6-7. On  
6 October 15, 2007, Judge Jenkins denied defendant's motion to  
7 dismiss, holding that although the sixty-day limitations period  
8 under § 405(g) had run, plaintiff had alleged facts that might  
9 warrant a finding of either equitable tolling or equitable  
10 estoppel. Doc #50 at 4-5 ("It is readily evident from the face of  
11 the complaint that, unless tolled, the sixty day period provided  
12 for in 42 USC § 405(g) has run.").

13           Both parties have now moved for summary judgment and, in  
14 accordance with the Procedural Order for Social Security Review  
15 Actions (Doc #2) and Judge Jenkins' October 15, 2007 order (Doc #50  
16 at 6) and re-assignment to the undersigned following Judge Jenkins'  
17 resignation, this matter has been submitted to the court for  
18 decision without oral argument. The parties present four issues to  
19 the court: (1) whether plaintiff has met her burden to establish  
20 that equity allows an otherwise untimely claim; (2) whether the  
21 SSA's Appeals Council erred in finding that plaintiff did not have  
22 good cause for failing to file a timely claim; (3) whether the  
23 court should exercise jurisdiction pursuant to the mandamus  
24 statute, 28 USC § 1361; and (4) whether the court should grant  
25 plaintiff's request to augment the record.

26           For the reasons stated herein, the court has determined  
27 that plaintiff is not entitled to equitable relief from the  
28 limitations period, the Appeals Council determination is not

1 reviewable by this court, and jurisdiction under the mandamus  
2 statute is not appropriate. These holdings render the request to  
3 augment the record moot. Accordingly, plaintiff's motion is DENIED  
4 and defendant's motion is GRANTED.

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6 I

7 A

8 Plaintiff was born on May 31, 1936 and was allegedly  
9 diagnosed with a bio-chemical mood disorder in 1976. AR 8, Doc #10  
10 at 2. Plaintiff's papers assert that she suffers from a variety of  
11 physical and mental conditions dating back to April, 1991 or  
12 earlier (Doc #65 at 18-19); she was originally found to be unable  
13 to work as of April 16, 1991, but later alleged an earlier onset  
14 date. AR 245, 369. Plaintiff's medical history includes bipolar  
15 affective disorder, back problems requiring surgery, diabetes,  
16 cancer, retinosis pigmentosa and psychiatric hospitalizations in  
17 April, October and November of 1996 and from November to December  
18 of 1999. Doc #65 at 18-20. Plaintiff presents a list of eighteen  
19 maladies purporting to explain her alleged "inability to effectuate  
20 an appeal to this Court within the 60 days post the Appeals  
21 Council's second denial on October 17, 1997." Doc #65 at 19-20.

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23 B

24 The procedural history of this case covers more than  
25 seventeen years, consisting of an administrative phase which ran  
26 from July 1991 to October 1997 followed by a judicial phase which  
27 began with plaintiff's September 2003 complaint.

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1           Plaintiff first filed a supplemental security income  
2 ("SSI") claim under Title XVI of the Social Security Act (the  
3 "Act") in July 1991 ("1991 SSI Application"). AR 151. An ALJ  
4 denied the application in 1992 and informed plaintiff that although  
5 she was disabled under the Act, she was financially ineligible for  
6 SSI due to excess countable income and resources. AR 150. The ALJ  
7 also noted that plaintiff's "attempt to circumvent the process by  
8 hiding such income and resources, [sic] justifies a determination  
9 by the [SSA] that [SSI] benefits in the future should not be  
10 awarded unless the claimant can, through substantial documentation,  
11 establish that the income and resources leading to the current  
12 denial of [SSI] benefit status have been expended." Id.

13           On August 27, 1991, plaintiff also filed for DIB under  
14 Title II of the Act ("1991 DIB Application") alleging a disability  
15 onset date of April 16, 1991. AR 369. Although the record is not  
16 entirely clear, it appears the 1991 DIB Application was denied and  
17 plaintiff did not appeal. AR 159.

18           Plaintiff filed a second application for DIB in April  
19 1994 ("1994 DIB Application"), which was denied both initially and  
20 upon reconsideration. Doc #9-2 4-5; AR 159-60. On September 20,  
21 1995, Elizabeth Price, the assigned ALJ in the matter, dismissed  
22 plaintiff's request for hearing on grounds of res judicata, stating  
23 that "the same issues are involved in this claim as were  
24 adjudicated in the 1991 claim." AR 159. Plaintiff timely filed a  
25 request for review with the Appeals Council, specifically not  
26 "appealing the SSI issue" but requesting medical documents from  
27 that determination to be referenced in reviewing the 1994 DIB  
28 Application. AR 173-74. On October 17, 1997 the Appeals Council

1 found "no basis under [SSA] regulations for granting your request  
2 for review" and that ALJ Price's dismissal was proper. AR 165.  
3 This ruling made the SSA's decision final under § 405(g), thus  
4 starting the aforementioned sixty-day limitations period.

5 Plaintiff alleges, inter alia, that "bias" motivated ALJ  
6 Price's ruling. Doc #65 at 18. Documents in the administrative  
7 record establish that in January 1998 ALJ Price, faced with a  
8 criminal investigation, recused herself from a number of cases and  
9 was re-assigned in a handful of others between January 1996 and  
10 February 1999. AR at 248-55. In October 1999, ALJ Price was  
11 convicted of committing perjury in a social security matter in  
12 which ALJ Price testified on behalf of her daughter. United States  
13 v Price, CR-99-00166 CRB, Doc #77 and #78, (ND Cal January 4,  
14 2000); AR 249. This misconduct had no connection with plaintiff's  
15 social security appeals.

16 On September 20, 2002 plaintiff signed a contingent fee  
17 agreement with Ian M Sammis, her counsel herein, under which Sammis  
18 undertook to "[r]epresent client in a Social Security Disability  
19 case at the Federal District Court Level." AR 177-80. Plaintiff  
20 also signed a fee-for-services agreement with Andrew P Ragnes,  
21 claim representative and Sammis's paralegal. AR 175-76. At that  
22 time, Sammis was fully aware of ALJ Price's conviction: in October  
23 2001 Sammis filed — and lost — a suit against the SSA seeking to  
24 compel disclosure of all social security applicants who received  
25 unfavorable rulings before ALJ Price. Sammis v Barnhardt, 2002 US  
26 Dist LEXIS 10420 (June 6, 2002) (Zimmerman, MJ). For reasons not  
27 stated in the opinion, Sammis wished to inform the unsuccessful

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1 applicants about Price's conviction. Id at \*2. The court  
2 determined Sammis "was never able to explain a legal basis on which  
3 the unsuccessful applicant could obtain a rehearing solely because  
4 of Judge Price's conduct." Id at \*6.

5 Not until September 10, 2003 — just shy of one full year  
6 after obtaining counsel — did plaintiff file her complaint in  
7 district court seeking, inter alia, judicial review of plaintiff's  
8 aforementioned applications. Doc #10. Defendant moved to dismiss,  
9 arguing that the court lacked subject matter jurisdiction and  
10 plaintiff's complaint was untimely. Doc #9 at 2-3.

11 On July 26, 2004, Judge Jenkins found that plaintiff  
12 "intended the 1994 application as one to reconsider a prior denial"  
13 and held that plaintiff's alleged mental impairment and lack of  
14 counsel in 1992 raised a colorable constitutional due process  
15 claim, affording the district court subject matter jurisdiction  
16 over plaintiff's complaint. Doc #20 at 5. The court then remanded  
17 the case to the SSA Appeals Council under authority of § 405(g) for  
18 a Social Security Ruling 91-5p ("SSR 91-5p") hearing "to determine  
19 whether good cause exists for extending the time to request  
20 judicial review because Plaintiff lacked the capacity to timely  
21 file an appeal with this Court at the time her appeal was denied in  
22 1997." Doc #20 at 6-7.

23 The Appeals Council assigned the hearing to an ALJ, who  
24 in turn wrote to plaintiff's representative Ragnes to afford him an  
25 opportunity to submit additional evidence and to advise him that a  
26 hearing would be scheduled separately. AR 211-16. On November 22,  
27 2005, however, Ragnes wrote to the ALJ, stating in part:

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1           You have not "afforded Garfield an opportunity for  
2           a hearing" for a period of 12 months. In the  
3           meanwhile, we have filled the file with additional  
4           evidence. Since it appears futile to request a  
5           hearing and since the additional evidence has not  
6           been properly entered and listed for this time, we  
7           hereby DEMAND that you close the file with this  
8           letter and send the file, with all of the evidence  
9           submitted, back to the Appeals Council.

10       AR 223. Ragnes subsequently waived plaintiff's right to a hearing  
11       conditioned upon the inclusion of hundreds of pages of new medical  
12       records and the matter was returned to the Appeals Council for  
13       decision based on the file per Ragnes's request. AR 279-A.

14           On March 16, 2006, the Appeals Council determined that  
15       plaintiff had not presented relevant evidence to support a finding  
16       that she had good cause for failing to seek timely judicial review.

17       AR 6-7. The Appeals Council based its decision in part on the  
18       following findings:

19           An [ALJ] dismissed the claimant's request for  
20       hearing on September 20, 1995. Thereafter, the  
21       claimant acted on her own behalf in filing a request  
22       for review of that order on November 21, 1995. On  
23       July 24, 1996, the claimant, again acting on her own  
24       behalf, visited the Social Security office in San  
25       Rafael, California, to ascertain the status of her  
26       request. There was no indication of any problem  
27       preventing the claimant from acting on her own  
28       behalf at that time.

          The Appeals Council denied the claimant's request  
for review on October 17, 1997. On February 25,  
1998, the claimant filed an application for  
retirement insurance benefits. The claimant was  
able to file this application without assistance.

AR 6-7. The Appeals Council also determined the additional medical  
records plaintiff submitted did not "pertain[] to the issue of  
whether, during the 60 days following the receipt of the Appeals  
Council's October 17, 1997 notice, the claimant was unable to file  
an appeal due to any mental or physical problem." AR 7.

1 Proceedings resumed in the district court and defendant  
2 renewed his motion to dismiss based on the Appeals Council's SSR  
3 91-5p ruling. Doc #29 at 1. In a October 15, 2007 order, Judge  
4 Jenkins court ruled that, "unless tolled, the sixty day period  
5 provided for in 42 USC § 405(g) has run," and that "the statute-of-  
6 limitations issue is not so clear-cut as to justify its resolution  
7 in this court prior to affording [Plaintiff] the opportunity to  
8 delineate further a factual basis for estoppel or equitable  
9 tolling." Doc #50 at 4-5. The court also recognized that  
10 traditional equitable tolling principles might be warranted when a  
11 claimant fails to file a timely complaint for judicial review under  
12 § 405(g) because of a mental impairment. Doc #50 at 5.  
13 Accordingly, Judge Jenkins set a briefing schedule calling for  
14 plaintiff to submit a motion for summary judgment, defendant to  
15 submit an opposition and cross-motion for summary judgment and  
16 plaintiff to file a reply in order for the matter to be submitted  
17 for decision without oral argument. Doc #50 at 6. On April 11,  
18 2008, the case was reassigned to the undersigned. Doc #64.

19  
20 II

21 Plaintiff's complaint seeking judicial review was filed  
22 almost six years after a final SSA determination. Accordingly,  
23 plaintiff must establish that the circumstances that delayed the  
24 filing of her complaint warrant relief from the applicable sixty-  
25 day limitations period. Plaintiff argues that: (1) defendant  
26 should be equitably estopped from asserting the limitations period;  
27 (2) defendant's actions and plaintiff's special circumstances  
28 warrant equitable tolling; (3) the Appeals Council erred when



1 refusing to extend plaintiff's time to seek judicial review; and  
2 (4) that defendant denied her a clear nondiscretionary duty  
3 warranting relief under the mandamus statute, 28 USC § 1361. Doc  
4 #65 at 14-24.

5  
6 A

7 Equitable estoppel "focuses primarily on the actions  
8 taken by the defendant in preventing a plaintiff from filing suit."  
9 Santa Maria v Pacific Bell, 202 F3d 1170, 1176 (9th Cir 2000).  
10 Plaintiff has the burden to show that defendant should be equitably  
11 estopped from asserting that plaintiff's claim is barred by the  
12 sixty-day limitation period. For the court to find equitable  
13 estoppel against a defendant, "the plaintiff must point to some  
14 fraudulent concealment, some active conduct by the defendant 'above  
15 and beyond the wrongdoing upon which the plaintiff's claim is  
16 filed, to prevent the plaintiff from suing in time.'" Lukovsky v  
17 City & County of San Francisco, 535 F3d 1044, 1052 (9th Cir 2008)  
18 (quoting Santa Maria v Pacific Bell, 202 F3d 1170, 1177 (9th Cir  
19 2000)). "In order for equitable estoppel to apply against the  
20 government, the government must have engaged in 'affirmative  
21 misconduct going beyond mere negligence' and caused 'a serious  
22 injustice.'" Cedars-Sinai Med Ctr v Shalala, 177 F3d 1126, 1130  
23 (9th Cir Cal 1999) (quoting Watkins v United States Army, 875 F2d  
24 699, 707 (9th Cir 1989). Read together, these cases present the  
25 applicable rule of decision for this issue: the government may be  
26 equitably estopped only if the government engaged in fraudulent  
27 concealment or other misconduct beyond mere negligence (or,  
28 presumably, an incorrect ruling); this misconduct prevented

1 plaintiff from filing within the sixty-day limitations period; and  
2 barring plaintiff's suit would cause a serious injustice.

3           Plaintiff attempts to meet her burden by alleging that  
4 the SSA's rulings denied her due process and kept her from  
5 understanding her rights, resulting in plaintiff's failure to file  
6 her complaint for almost six years. See doc #65 at 16. First,  
7 plaintiff argues that the ALJ deciding plaintiff's 1991 SSI  
8 Application was required, yet failed, to adjudicate plaintiff's  
9 1991 DIB application. Doc #65 at 4. Contrary to plaintiff's  
10 assertion, boilerplate language from plaintiff's 1994 application  
11 requesting SSI and "benefits under the other programs administered  
12 by the [SSA]," Doc #58-2 at 22, is not legal authority for the  
13 proposition that, when ruling on an SSI application, an ALJ is  
14 required to adjudicate a previously-filed DIB claim. Doc #65 at 4.  
15 Second, plaintiff argues that ALJ Price issued a "fraudulent" res  
16 judicata finding. Doc #65 at 16. But ALJ Price was clearly  
17 entitled under 20 CFR 404.957 to dismiss a request for hearing on  
18 res judicata grounds without conducting a hearing. Doc #9-2 at  
19 3-4; see Kelly v Apfel, No 97-6211, 1998 US App LEXIS 30127, \*12  
20 (6th Cir Nov 20, 1998) ("ALJ may refuse to conduct a hearing if res  
21 judicata bars the claims at issue in the application for  
22 benefits"). Finally, plaintiff argues the Appeals Council's  
23 October 1997 ruling denying review misled plaintiff by failing to  
24 note plaintiff "had been denied a hearing." Doc #65 at 16. No  
25 legal authority supports plaintiff's assertion, and the Appeals  
26 Council's denial of review bears no mark of fraud, concealment or  
27 other affirmative misconduct.

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1 Plaintiff further suggests, illogically, that ALJ Price's  
2 decision against plaintiff was motivated by bias based on ALJ  
3 Price's subsequent conviction for perjury in an unrelated matter.  
4 Doc #65 at 18. ALJs are presumed to be unbiased; overcoming this  
5 presumption requires showing "the ALJ's behavior, in the context of  
6 the whole case, was []so extreme as to display clear inability to  
7 render fair judgment.[]" Rollins v Massanari, 261 F3d 853, 857-58  
8 (9th Cir 2001). A subsequent conviction in an unrelated matter  
9 falls well short of the standard articulated in Rollins, especially  
10 when, as here, the challenged ALJ decision has been explicitly  
11 affirmed by the Appeals Council.

12 Most importantly, plaintiff's subsequent actions vitiate  
13 her argument that the alleged government misconduct prevented  
14 timely filing of her claim. Plaintiff timely requested review of  
15 ALJ Price's decision stating she "was never permitted to attend the  
16 hearing nor was told when it was scheduled." AR 173. If ALJ  
17 Price's denial of a hearing did not prevent plaintiff from filing  
18 for review with the Appeals Council, how could it have kept her  
19 from later filing for review with this court? Plaintiff does not  
20 attempt to explain this discrepancy.

21 Because plaintiff has sufficiently failed to allege that  
22 defendant engaged in fraudulent concealment or other active  
23 misconduct resulting in plaintiff's failure to file a timely  
24 complaint, defendant is not estopped from asserting the sixty-day  
25 statute of limitations.

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2 Equitable tolling "focuses on the plaintiff's excusable  
3 ignorance of the limitations period and on lack of prejudice to the  
4 defendant." Santa Maria, 202 F3d at 1176. "Generally, a litigant  
5 seeking equitable tolling bears the burden of establishing two  
6 elements: (1) that he has been pursuing his rights diligently, and  
7 (2) that some extraordinary circumstance stood in his way." Pace v  
8 DiGuglielmo, 544 US 408, 418 (2005). Acknowledging that it is the  
9 SSA's province to determine whether to extend a statutory period in  
10 social security proceedings, the Supreme Court has held that "cases  
11 may arise where the equities in favor of tolling the limitations  
12 period [of § 405(g)] are 'so great that deference to the agency's  
13 judgment is inappropriate.'" Bowen v New York, 476 US 467, 480  
14 (1986) (quoting Mathews v Eldridge, 424 US 319, 331 (1976)). In  
15 Bowen, the Court held that equitable tolling was appropriate when a  
16 secretive government policy prevented plaintiffs from learning of a  
17 violation of their rights. 476 US at 481. Equitable tolling can  
18 also be appropriate if the government's actions led plaintiff to be  
19 unaware of its wrongdoing, resulting in failure to bring an appeal.  
20 Cada v Baxter Healthcare Corp, 920 F2d 446, 451 (7th Cir 1990)  
21 (equitable tolling may apply when a plaintiff "cannot obtain  
22 information necessary to decide whether the injury is due to  
23 wrongdoing and, if so, wrongdoing by the defendant").

24 Denying defendant's motion to dismiss, Judge Jenkins  
25 recognized that "equitable tolling [of § 405(g)] is not limited to  
26 situations in which the government has hindered a claimant's  
27 attempts to exercise her rights by acting in a misleading or  
28 clandestine way." Doc # 50 at 5. Judge Jenkins denied defendant's

1 motion to dismiss specifically in order to afford plaintiff the  
2 opportunity to develop further a factual basis for equitable  
3 tolling based on her allegation that her "bi-polar mental  
4 impairment \* \* \* caused her to be ineffective in appealing her  
5 denial and without an attorney unable to appeal against Defendant  
6 in Federal Court." Doc #50 at 5.

7 Remarkably, plaintiff has largely foregone the argument  
8 that Judge Jenkins invited her to develop. Instead, plaintiff  
9 devotes the bulk of her equitable tolling argument to allegations  
10 that the government hindered plaintiff's ability to exercise her  
11 rights by failing to provide her information about ALJ Price's 1995  
12 denial. Plaintiff primarily argues that equitable tolling is  
13 warranted because "the Appeals Council failed to provide notice to  
14 Plaintiff that ALJ Price was required to provide Plaintiff with an  
15 oral hearing." Doc #65 at 17. As discussed previously, plaintiff  
16 has not established that she was entitled to an oral hearing before  
17 ALJ Price, and accordingly cannot show government wrongdoing.  
18 Plaintiff argues that "[w]hat is at issue here is the clandestine  
19 coverup by the Agency of ALJ Price's general bias towards  
20 claimants." Doc #65 at 18. The court will not entertain  
21 plaintiff's attempts to obfuscate the issue with unfounded  
22 accusations; plaintiff has presented no evidence supporting the  
23 type of secretive government conduct that warranted equitable  
24 tolling in Bowen.

25 Plaintiff responded to ALJ Price's decision by seeking  
26 review from the Appeals Council and asking the council to consider  
27 plaintiff's diagnosis of additional medical conditions and claims  
28 of an earlier disability onset date. AR 173-74. The Appeals

1 Council denied review, and the record provides no evidence of  
2 further efforts by plaintiff to seek an attorney or otherwise seek  
3 review between October 1997 and September 2002. Equitable tolling  
4 is "not available to avoid the consequences of one's own  
5 negligence." Lehman v United States, 154 F3d 1010, 1016 (9th Cir  
6 1998). Plaintiff's groundless allegation that the Appeals  
7 Council's affirmance of ALJ Price's ruling was a fraud merely  
8 expresses disagreement with the Appeals Council's decision, the  
9 appropriate remedy for which would have been a timely complaint  
10 seeking judicial review.

11 The Ninth Circuit has not ruled on whether failing to  
12 file a timely complaint because of incapacity due to mental  
13 impairment warrants equitable tolling of § 405(g), but Judge  
14 Jenkins allowed plaintiff to present arguments for equitable  
15 tolling relying in part on Canales v Sullivan, 936 F2d 755 (2d Cir  
16 1991). In Canales, the Second Circuit wrote:

17  
18 we believe that equitable tolling of the 60-day statute  
19 of limitations of Section 405(g) may be warranted in  
20 cases where an SSI disability claimant fails to seek  
21 judicial review in a timely manner because of mental  
22 impairment. Where a claimant avers incapacity due to  
23 mental impairment during the 60-day period, the  
24 district court should permit the claimant to present  
25 evidence in support of this claim. If the claimant  
26 proves that she was incapacitated for any length of  
27 time during the 60-day period, then the district court  
28 can determine whether, considering all of the  
circumstances of the case, equitable tolling is  
warranted.

936 F2d at 759 (emphasis added). Assuming arguendo that incapacity  
due to mental impairment could warrant equitable tolling, Canales  
would require plaintiff first to prove incapacity during some

\\

1 portion of the sixty-day period, and then to establish that the  
2 totality of the circumstances warrants equitable tolling.

3 Plaintiff first attacks as a "post hoc rationalization"  
4 defendant's assertion that plaintiff "has not presented evidence  
5 which would demonstrate that any alleged mental impairment  
6 prevented her from timely seeking judicial review." Doc #71 at 15.  
7 But defendant's assertion correctly focuses on the relevant sixty-  
8 day period and is consistent with the Appeals Council's  
9 determination that no good cause to extend the limitations period  
10 existed in the two months following October 17, 1997. AR 279-K,L.  
11 Plaintiff's papers document hospitalizations for manic episodes in  
12 April 1996 and October and November 1999, but provide no medical  
13 evidence of mental incapacity specifically during the relevant  
14 sixty days. Doc #65 at 18-19. Any implication that the  
15 hospitalizations are evidence of an ongoing and permanent  
16 incapacity to file a complaint is refuted by the Appeals Council's  
17 previously discussed finding that plaintiff effectively took action  
18 on her own behalf several times without assistance between November  
19 1995 and February 1998. AR 279-K,L.

20 More importantly, however, because plaintiff retained  
21 counsel on September 20, 2002, the court need not reach whether  
22 grounds existed for tolling the limitations period from October 17,  
23 1997 to September 19, 2002. In Vitt v Astrue, 2008 US Dist LEXIS  
24 14674 (February 14, 2008) (Wilken, J), the court rejected a request  
25 for equitable tolling under 42 USC § 405(g) when a plaintiff (also  
26 represented by Sammis) filed a complaint just five days after the  
27 statutory period had run. Judge Wilken wrote: "Plaintiff, who was  
28 represented by counsel, had enough information to file her social

1 security disability appeal on time. However, she and her attorney  
2 did not do so. Equitable tolling is not available to avoid the  
3 consequences of Plaintiff's negligence or that of her counsel."  
4 Vitt, 2008 US Dist LEXIS 14674 at \*13. Judge Wilken relied on  
5 Leorna v United States Dept of State, 105 F3d 548, 541 (9th Cir  
6 1997), which held "[o]nce a claimant retains counsel, tolling  
7 ceases because she has gained the means of knowledge of her rights  
8 and can be charged with constructive knowledge of the law's  
9 requirements."

10 Even assuming there was a basis for tolling the  
11 limitations period until plaintiff hired Sammis — which there is  
12 not — on September 20, 2002, plaintiff and Sammis together were  
13 aware of plaintiff's final administrative denial, the sixty-day  
14 limitations period in which to file for judicial review and ALJ  
15 Price's conviction in an unrelated matter — a fact that plaintiff  
16 misguidedly relies upon for her equitable estoppel and tolling  
17 arguments. Accordingly, tolling cannot help bridge the year-long  
18 chasm between the date plaintiff obtained counsel and the date her  
19 counsel filed suit. Plaintiff may have a cause of action for  
20 malpractice based on her attorney's failure to seek timely review  
21 after being hired to "represent client in a Social Security  
22 Disability case at the Federal District Court Level," but her suit  
23 against defendant is time-barred.

24  
25 C

26 Plaintiff alternatively argues that the SSA Appeals  
27 Council erred by refusing to extend plaintiff's time to request  
28 review. Doc #65 at 19-20. SSR 91-5p provides that the SSA shall



1 "determine whether or not good cause exists for extending the time  
2 to request review" when a "claimant presents evidence that mental  
3 incapacity prevented him or her from timely requesting review" and  
4 "claimant had no one legally responsible for prosecuting the  
5 claim." SSR 91-5p. Establishing mental incapacity requires a  
6 showing that plaintiff "lacked the mental capacity to understand  
7 the procedures for requesting review" and the SSA must consider  
8 whether claimant had "any mental or physical condition which limits  
9 the claimant's ability to do things for him/herself." SSR 91-5p.

10 "A refusal by the Appeals Council to grant a claimant's  
11 request for an extension of time to seek judicial review is not  
12 itself subject to judicial review." Doc #50 at 4 (citing Peterson  
13 v Califano, 631 F2d 628, 629-31 (9th Cir 1980)). Nonetheless,  
14 plaintiff appears to seek review of the Appeals Council's no-good-  
15 cause determination under the "colorable constitutional claim"  
16 exception recognized in Califano v Sanders, 430 US 99 (1977) and  
17 relied upon in Udd v Massanari, 245 F3d 1096 (9th Cir 2001). Doc  
18 #65 at 19-20. In Califano, the court held § 405(g) "cannot be read  
19 to authorize judicial review of alleged abuses of agency discretion  
20 in refusing to reopen claims for benefits." Califano, 430 US at  
21 107-8. The only exception to this rule is "where the Secretary's  
22 denial of a petition to reopen is challenged on constitutional  
23 grounds." Id at 109. In Udd, the plaintiff received two years of  
24 disability benefits before the SSA terminated them in 1976. 245  
25 F3d at 1098. In 1994 he asked the court to reopen the earlier  
26 claim, arguing that in 1976 he had been unrepresented and lacked  
27 the mental capacity to understand the termination decision. Id at  
28 1097. The court held that "[w]here a claimant alleges that a prior

1 determination should be reopened because he suffered from a mental  
2 impairment and was not represented by council at the time of the  
3 denial of benefits, he has asserted a colorable constitutional  
4 claim." 245 F3d at 1099.

5 Udd is inapposite here because plaintiff was represented  
6 by Sammis and Ragnes before, during and after the Appeals Council  
7 denied the requested extension for good cause under SSR 91-5p in  
8 connection with the federal court proceedings. Similar to the  
9 principle expressed in Vitt, representation by council negates the  
10 impact of plaintiff's alleged mental incapacity. Ragnes even  
11 waived plaintiff's right to a hearing and demanded the case file be  
12 given to the Appeals Council for decision. AR 279-J. Because the  
13 Udd exception is not available, the SSR 91-5p ruling is not  
14 reviewable by this court.

15 Plaintiff, moreover, misrepresents the record by  
16 contending that the Appeals Council's SSR 91-5P ruling was not  
17 based on substantial evidence and failed to discuss potentially  
18 relevant medical evidence. Doc #65 at 20. The Appeals Council  
19 cited specific evidence that plaintiff had the mental and physical  
20 capacity to understand the procedures for requesting review and  
21 took actions on her own behalf between November 1995 and February  
22 1998, including filing a request for review of ALJ Price's order  
23 with the Appeals Council, personally visiting the social security  
24 office to check on the status of her request for review and filing  
25 an application for retirement benefits. AR 279-K,L. The Appeals  
26 Council also considered the voluminous evidence presented by  
27 plaintiff and found that "[n]one of that evidence pertains to the  
28 issue of whether, during the 60 days following the receipt of the

1 Appeals Council's October 17, 1997 notice, the claimant was unable  
2 to file an appeal due to any mental or physical problem."

3 Plaintiff further argues that the Appeals Council erred  
4 in failing to provide an explanation of the weight given to the  
5 variety of medical records referred to by plaintiff. Doc #65 at  
6 20. But the Appeals Council properly granted these records no  
7 weight as they were not relevant to the question before it.

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Finally, plaintiff seeks relief under the mandamus statute, which provides "the district courts shall have original jurisdiction of any action \* \* \* to compel an officer or employee of the United States or an agency thereof to perform a duty owed to the plaintiff." 28 USC § 1361. Mandamus is only available to a plaintiff when "the defendant owes him a clear nondiscretionary duty." Heckler v Ringer, 466 US 602, 616 (1984). The Ninth Circuit has held that the Secretary of Health and Human Services owes a claimant a duty to adjudicate claims according to the Social Security Act, which does not include reopening lapsed claims. Johnson v Shalala, 2 F3d 918, 923 (9th Cir 1993). Because plaintiff's claim has lapsed as per the discussion above, § 1361 is unavailable under Johnson.

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III

For the foregoing reasons, plaintiff's motion is DENIED and defendant's motion is GRANTED. Because the court has determined that plaintiff's claim was not timely filed, plaintiff's request to augment the record is denied as moot. The clerk is directed to close the file and terminate all pending motions.

IT IS SO ORDERED.

  
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VAUGHN R WALKER  
United States District Chief Judge