

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GINA MARIE ROGERS,
Plaintiff,
v.
NANCY BERRYHILL,
Defendant.

Case No.17-cv-05519-JSC

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT ON ISSUE OF
TIMELINESS**

Re: Dkt. No. 14

Plaintiff Gina Rogers requests review of the denial of her claim for social security disability benefits. (Dkt. No. 1.) Defendant, Nancy Berryhill, the Commissioner of Social Security, moves to dismiss the action under Federal Rule of Civil Procedure 12(b)(6) as barred by the statute of limitations. (Dkt. No. 14.) Because the motion and Plaintiff’s opposition raised issues not adequately addressed in the parties’ filings, the Court ordered the parties to submit additional briefing and provided notice that the Court intended to convert the motion to dismiss into a motion for summary judgment. (Dkt. No. 17.) Having considered the parties’ supplemental briefing, the Court GRANTS Defendant’s motion for summary judgment. This action is time barred because it was filed more than 30 days after the date on which Plaintiff contends she received notice of the Appeals Council’s notice of extension and Plaintiff has failed to demonstrate that she is entitled to equitable tolling.¹

¹ Both parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). (Dkt. Nos. 6 & 10.)

1 **BACKGROUND**

2 On May 26, 2016, the Administrative Law Judge (ALJ) issued a decision denying
3 Plaintiff’s application for disability insurance benefits. (Dkt. No. 14-1 at 8.²) The Appeals
4 Council denied Plaintiff’s request for review on May 5, 2017. (Id. at 20.) The Appeals Council’s
5 denial advised Plaintiff that she had 60 days within which to file a civil action challenging the
6 Agency’s denial. (Id. at 22.) The letter also advised Plaintiff that she could request an extension
7 of this time, which Plaintiff’s representative did on July 5, 2017. (Id. at 24.) On August 16, 2017,
8 the Appeals Council granted Plaintiff an extension of time to file her request for review. The letter
9 stated that:

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

15 (Id. at 25.) Plaintiff’s representative received the letter on August 22, 2017. (Dkt. No. 18-2.)
16 Plaintiff forwarded the letter to her current counsel on August 29, 2017. (Dkt. No. 15-1 at 5.)
17 This civil action was filed on September 22, 2017. (Dkt. No. 1.)

18 **LEGAL STANDARD**

19 As the Court previously advised the parties, because the Commissioner’s motion relies
20 upon extra-complaint evidence—namely, the Declaration of Nancy Chung and the exhibits thereto
21 including the Appeals Council’s August 16, 2017 letter granting Plaintiff a 30-day extension of
22 time to file her request for review—the Court must convert the motion into a Rule 56 motion for
23 summary judgment. See Fed. R. Civ. P. 12(d).

24 Summary judgment is proper where the pleadings, discovery and affidavits show that there
25 is “no genuine issue as to any material fact and that the moving party is entitled to judgment as a
26 matter of law.” Fed. R. Civ. P. 56(c). The moving party for summary judgment bears the initial
27 burden of identifying those portions of the pleadings, discovery and affidavits which demonstrate

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² Record citations are to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of the documents.

1 the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323
2 (1986). When the moving party has met this burden of production, the nonmoving party must go
3 beyond the pleadings and, by its own affidavits or discovery, set forth specific facts showing that
4 there is a genuine issue for trial. *Id.* If the nonmoving party fails to produce enough evidence to
5 show a genuine issue of material fact, the moving party wins. *Id.* At summary judgment, the
6 Court must view the evidence in the light most favorable to the nonmoving party: if evidence
7 produced by the moving party conflicts with evidence produced by the nonmoving party, the judge
8 must assume the truth of the evidence set forth by the nonmoving party with respect to that fact.
9 *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014).

10 **DISCUSSION**

11 The sole issue here is the timeliness of Plaintiff’s civil suit seeking review of the denial of
12 her claim for disability insurance benefits.

13 **A. The Statute of Limitations Bars Plaintiff’s Complaint**

14 A civil action seeking judicial review of a final decision of the Commissioner “must be
15 commenced within sixty days after the mailing to him of notice of such decision or within such
16 further time as the Commissioner of Social Security may allow.” 42 U.S.C. § 405(g). Although §
17 405(g) uses the word “mailing,” the related regulation provides that a civil action “must be
18 instituted within 60 days after the Appeals Council’s notice ... is received by the individual”
19 except as that time is extended upon a showing of good cause and that “the date of receipt ... shall
20 be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the
21 contrary.” 20 C.F.R. § 422.210(c) (emphasis added); see also *Vernon v. Heckler*, 811 F.2d 1274,
22 1277 (9th Cir. 1987) (“‘Mailing’ [as used in § 405(g)] is construed as the date of receipt of the
23 notice, which is presumed to occur five days after the date of the notice.” (citing 20 C.F.R. §
24 422.210(c))). The regulation “creates a rebuttable presumption that receipt of notice shall be
25 presumed to occur ‘5 days after the date of such notice.’” *Matsibekker v. Heckler*, 738 F.2d 79, 81
26 (2nd Cir. 1984) (citing 20 C.F.R. § 422.210(c)). Where the claimant makes a “reasonable showing
27 to the contrary” and successfully rebuts the statutory presumption, the government may attempt to
28 prove that the claimant “received actual notice more than 60 days prior to filing the complaint in

1 district court.” See *id.*

2 Here, the Appeal’s Council granted Plaintiff’s request for an extension of time to file a
3 civil action on August 16, 2017. (Dkt. No. 14-1 at 25.) With the five days for presumed mailing,
4 her civil action needed to be filed by September 20, 2017—35 days after August 16. However, this
5 action was not filed until two days later—September 22. (Dkt. No. 1.) Plaintiff contends that her
6 filing is nonetheless timely because the Appeal’s Council’s notice was not received until August
7 22, 2017. (Dkt. No. 15.) In her supplemental brief, Plaintiff’s prior representative, Deirdre H.
8 McCaskell, attests she “received the attached letter from the Social Security Appeals Council on
9 August 22, 2017.” (Dkt. No. 18 at 2.) However, as the Commissioner points out, 30 days from
10 August 22 is September 21, not September 22. Thus, construing the evidence in the light most
11 favorable to Plaintiff, this civil action was filed one day late and is thus barred by the statute of
12 limitations.

13 **B. Plaintiff has not Established Equitable Tolling Applies**

14 Plaintiff’s failure to comport with the statute of limitations may be excused if she can
15 demonstrate that she is entitled to equitable tolling. See *Bowen v. City of New York*, 476 U.S. 467,
16 479–80 (1986); see also *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th Cir. 1987) (noting that
17 “Section 405(g)’s 60-day filing requirement, as a statute of limitations, is subject to equitable
18 tolling.”). Generally, a litigant is entitled to equitable tolling of a limitations period only if she can
19 show “(1) that [s]he had been pursuing [her] rights diligently, and (2) that some extraordinary
20 circumstance stood in [her] way’ and prevented timely filing.” *Holland v. Florida*, 560 U.S. 631,
21 649 (2010) (internal citation and quotation omitted). Federal courts “have typically extended
22 equitable relief only sparingly,” such as “where the claimant has actively pursued [her] judicial
23 remedies by filing a defective pleading during the statutory period, or where the complainant has
24 been induced or tricked by [her] adversary’s misconduct into allowing the filing deadline to pass.”
25 *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990). “Equitable tolling is typically granted
26 when litigants are unable to file timely [documents] as a result of external circumstances beyond
27 their direct control.” *Harris v. Carter*, 515 F.3d 1051, 1055 (9th Cir. 2008). “[T]he failure of a
28 retained attorney to timely file a federal social security complaint does not necessarily constitute

1 an ‘extraordinary circumstance’ warranting equitable tolling.” *Torres v. Barnhart*, 417 F.3d 276,
2 280 (2d Cir. 2005).

3 Plaintiff’s brief in opposition to the motion to dismiss suggests that she is entitled to
4 equitable tolling because she “was homeless,” “had difficulty obtaining counsel,” and was “unable
5 to represent herself because of her mental disability.” (Dkt. No. 15 at 3.) These statements,
6 however, are contradicted by the attachment to Plaintiff’s opposition brief; namely an August 29,
7 2017 email from Plaintiff to her current counsel which states “I wanted you to have a copy of this
8 new extension I just received. My mail is just slow. This should help us.” (Dkt. No. 15-1 at 5.)
9 Further, both these statements are in contrast to the allegations in her complaint which offer a third
10 explanation for the delay: that the letter was sent to the wrong address and that Plaintiff’s father
11 died during this time frame. (Dkt. No. 1 at 2.) And all of these explanations contradict her
12 supplemental opposition which asserts that no equitable tolling is needed because the complaint
13 was filed on September 22, 2017. (Dkt. No. 18.)

14 Putting aside these inconsistencies, Plaintiff has failed to make a showing through
15 admissible evidence that she is entitled to equitable tolling. As the Court stated in its Order
16 advising the parties of its intent to convert the Commissioner’s motion into a motion for summary
17 judgment, factual contentions “must be supported by an affidavit or declaration and by appropriate
18 references to the record.” (Dkt. No. 17 at 2 (quoting Civil L.R. 7-5(a)).); see also *Simmons v.*
19 *Navajo Cty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010) (the court can “rely on the nonmoving
20 party to identify with reasonable particularity the evidence that precludes summary judgment”).
21 Neither Plaintiff nor her counsel submitted a declaration in support of her argument for equitable
22 tolling; the arguments as to her shelter status and her father’s death are simply unsupported
23 attorney argument and even that argument does not explain why the complaint could not be filed
24 on September 21 rather than September 22. Moreover, the August 29 email attached to the
25 opposition brief shows that her current counsel who filed the complaint on September 22 was
26 aware of the notice of extension (and its date) on August 29. And there is no evidence, or even
27 unsupported explanation, as to why counsel could not file by September 21 although she was able
28 to do so on September 22. See *Lazerson v. Colvin*, No. 4:13-CV-02832-YGR, 2014 WL 967048,

1 at *6 (N.D. Cal. Mar. 6, 2014) (denying equitable tolling where it appeared “to be a case of
2 attorney negligence [because] that does not warrant this extraordinary remedy”); Vitt v. Astrue,
3 No. C 06-7184 CW, 2008 WL 425936, at *5 (N.D. Cal. Feb. 14, 2008) (“Equitable tolling is not
4 available to avoid the consequences of Plaintiff’s negligence or that of her counsel.”); Garfield v.
5 Astrue, No. C 03-4124 VRW, 2008 WL 5221095, at *8 (N.D. Cal. Dec. 12, 2008), aff’d sub nom.
6 Walter ex rel. Estate of Garfield v. Astrue, 403 F. App’x 228 (9th Cir. 2010) (“Plaintiff may have
7 a cause of action for malpractice based on her attorney’s failure to seek timely review after being
8 hired to ‘represent client in a Social Security Disability case at the Federal District Court Level,’
9 but her suit against defendant is time-barred.”). Plaintiff has therefore failed to offer any
10 admissible evidence demonstrating exceptional circumstances and entitlement to equitable tolling.
11 See Nelson v. Pima Cmty. Coll., 83 F.3d 1075, 1081–82 (9th Cir. 1996) (“mere allegation and
12 speculation do not create a factual dispute for purposes of summary judgment.”).

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14 This action is barred by the statute of limitations because Plaintiff’s request for review was
15 filed more than 30 days after her receipt of the Appeals Council’s extended deadline to appeal.
16 While this result is harsh, given that Plaintiff has not offered any evidence that creates at least a
17 genuine dispute as to whether she is entitled to equitable tolling, or even offered any unsupported
18 argument that explains the delay given counsel’s knowledge of the deadline, the Court cannot
19 excuse the late filing. Accordingly, the Commissioner’s motion for summary judgment is
20 GRANTED.

21 **CONCLUSION**

22 For the reasons stated above, the Commissioner’s motion for summary judgment is
23 GRANTED.

24 Plaintiff’s counsel is ordered to serve Plaintiff with a copy of this Order and file proof of
25 service of the same within three days.

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The Clerk will enter judgment by separate order.

IT IS SO ORDERED.

Dated: April 16, 2018



JACQUELINE SCOTT CORLEY
United States Magistrate Judge