

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Judy Diane Seward,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 3:16-cv-301 (RNC)
	:	
Carolyn W. Colvin,	:	
Commissioner of	:	
Social Security,	:	
	:	
Defendant.	:	

RULING AND ORDER

Plaintiff Judy Diane Seward brings this action seeking judicial review of a final decision of the Commissioner of Social Security regarding an application for supplemental security income benefits (SSI) under Title XVI of the Social Security Act. The Commissioner argues that the action should be dismissed because plaintiff missed the 60-day deadline for seeking court review and equitable tolling does not apply. In addition, the Commissioner argues that the decision in question is fully favorable to the plaintiff and thus not subject to judicial review. I agree with the Commissioner and therefore grant the motion to dismiss.

I. Background

Plaintiff applied for SSI benefits on August 30, 2011, alleging a disability onset date of November 1, 2004. She had previously filed applications in August 2005 under Titles II and

XVI of the Act alleging the same onset date. Those prior claims had been denied on April 14, 2008.

Plaintiff's August 2011 application for SSI benefits was denied initially and on reconsideration. On June 28, 2013, Administrative Law Judge Matthew Kuperstein granted the application, finding that plaintiff has been disabled since August 30, 2011, the date the application was filed. The ALJ stated that he did not find a basis for reopening plaintiff's prior applications. The ALJ further explained that because SSI does not become payable until the month after the month the application is filed, 20 C.F.R. § 416.335, his decision was fully favorable to the plaintiff, even though he did not adopt her alleged onset date. See Balardi v. Barnhart, 33 F. App'x 562, 564 (2d Cir. 2002) (in a Title XVI case, the alleged onset date is merely "administrative dicta").

Plaintiff asked the Appeals Council to review the ALJ's decision. On February 2, 2015, the Appeals Council sent her notice of its denial of her request. The notice informed her that she could ask for court review by filing a complaint in this Court within 60 days of her receipt of the notice, which meant she had to file a complaint on or before April 8, 2015. The notice informed her that copies of the complaint and the summons issued by the Court would have to be delivered by her or her representative to the U.S. Attorney. Plaintiff did not file this

action until February 26, 2016, more than ten months beyond the 60-day deadline.

With regard to the lengthy delay in filing, plaintiff states the following. After receiving the notice from the Appeals Council on February 10, 2015, she called the attorney who had represented her during the administrative process. The call was not returned until April 16, 2015, and she went to see the attorney a week later. At that time, the attorney told her he would need \$600 to cover court costs. After speaking with the attorney, plaintiff decided she did want him to represent her any longer. Two weeks later, on May 7, 2015, she sent a letter to the U.S. Attorney's office asking for help with regard to the steps she would have to take to get disability benefits retroactive to 2005. She did not get a response. She eventually called the U.S. Attorney's office on February 23, 2016, then filed her complaint three days later.

II. Discussion

Section 405(g) of the Social Security Act provides that a claimant may seek judicial review of a final decision of the Commissioner by commencing a civil action within 60 days after receiving notice of the decision (or within such further time as the Commissioner may allow). The Supreme Court has held that the 60-day requirement is not jurisdictional. Bowen v. City of New York, 476 U.S. 467, 478 (1986). But the 60-day period must be

enforced unless equitable tolling applies. To gain the benefit of equitable tolling, a claimant must show that “[she] has been pursuing [her] rights diligently” and that “some extraordinary circumstance stood in [her] way.” Torres v. Barnhart, 417 F.3d 276, 279 (2d Cir. 2005).

Equitable tolling “is appropriate only in rare and exceptional circumstances in which a party is prevented in some extraordinary way from exercising [her] rights.” Twumwaa v. Colvin, No. 13 CIV. 5858 (AT) (JLC), 2014 WL 1928381, at *4 (S.D.N.Y. May 14, 2014) (citation and quotation marks omitted). For example, the Second Circuit has permitted equitable tolling when a claimant “fails to seek judicial review because of mental impairment” and when “misleading or covert action by the government or an attorney impedes a claimant from timely pursuing the correct judicial avenues.” Bender v. Astrue, No. 09-cv-5738KAM, 2010 WL 3394264, at *5 (E.D.N.Y. Aug. 23, 2010) (citing Canales v. Sullivan, 936 F.2d 755, 758-59 (2d Cir. 1991); State of N.Y. v. Sullivan, 906 F.2d 910, 917 (2d. Cir. 1990)). Plaintiff bears the burden of demonstrating that the particular circumstances of her situation warrant equitable tolling. Boos v. Runyon, 201 F.3d 178, 185 (2d Cir. 2000).

The circumstances on which plaintiff relies fall short of satisfying the demanding standard that must be met for equitable tolling to apply. Accepting plaintiff’s allegations as true,

they may be construed to raise the following argument in support of equitable tolling: (1) plaintiff promptly contacted her lawyer soon after receiving the Appeals Council notice but he failed to respond for about two months, (2) she reasonably relied on him to protect her interest until they met in his office and he demanded money she did not have, leading her to conclude that she did not want him to represent her, (3) soon after meeting with the lawyer, plaintiff wrote to the U.S. Attorney's office for help, (4) she thought the letter served to protect her interest as a self-represented party and expected to receive a timely response, (5) she received no response, (6) having received no response for over nine months, she called the U.S. Attorney's office and filed her complaint three days later. This chronology does not support a reasonable finding that plaintiff acted diligently throughout the period she seeks to have tolled and was prevented from filing her complaint due to extraordinary circumstances.

Assuming plaintiff acted with due diligence in contacting her lawyer and relying on him to file a complaint on her behalf (or obtain an extension of time), and assuming further that his failure to respond could constitute an extraordinary circumstance preventing timely filing, at most these circumstances would arguably permit tolling of the 60-day period through April 23, 2015. Even on this view of the case, plaintiff still had to file a complaint within 60 days after she saw the lawyer, that is,

before the end of June 2015. No complaint was filed. Instead, plaintiff wrote to the U.S. Attorney and apparently took no further action for approximately nine months.

Plaintiff's submissions in opposition to the motion to dismiss may be understood to suggest that her letter to the U.S. Attorney's office should be treated as the equivalent of filing a complaint in court for purposes of the 60-day deadline. But the Appeals Council notice specifically stated that the complaint had to be filed with this Court and copies of the complaint delivered to the U.S. Attorney along with a summons issued by the Court. While the notice might have been clearer - for example, by specifically stating that the complaint had to be delivered to the Office of the Clerk of Court in the first instance - the lack of greater clarity in the form notice cannot constitute an extraordinary circumstance justifying equitable tolling. There is no allegation that plaintiff has difficulty reading or understanding English and her handwritten submissions indicate that she is quite capable of both.

Plaintiff may have felt it was appropriate to wait a week or two after writing to the U.S. Attorney's office before following up with a phone call. But she had an obligation to act diligently to protect her rights and could not wait indefinitely. Plaintiff offers no allegation that would permit the Court to find that she acted diligently after writing to the U.S. Attorney

notwithstanding the lengthy delay that ensued without any follow up on her part. Nor does plaintiff allege an extraordinary circumstance that prevented her from acting. In particular, there is no allegation that she was misled by the U.S. Attorney's office or the Commissioner. For all these reasons, equitable tolling does not apply. See Marquez v. Comm'r of Soc. Sec., 12 CIV. 8151 (PAE), 2013 WL 3344320, at *5 (S.D.N.Y. July 2, 2013) (no equitable tolling when claimant failed to demonstrate that extraordinary circumstances, misunderstanding, or incapacity prevented her from filing within 60-day period); Twumwaa v. Colvin, No. 13 CIV. 5858(AT) (JLC), 2014 WL 1928381, at *4 (S.D.N.Y. May 14, 2014) (declining to apply equitable tolling, noting that "[w]hile the result here may be harsh, given that [plaintiff] only missed her filing deadline by seven days, the 60-day limit is a statute of limitations that must be strictly construed because it is a condition of a sovereign immunity waiver.").

In addition to relying on the 60-day statute of limitations as a barrier to court review, the Commissioner argues that judicial review is not available to the plaintiff because the ALJ's decision was fully favorable to her. The relevant statute, 42 U.S.C. § 405(g), "makes no provision for judicial review of a determination favorable to the complainant." Jones v. Califano, 576 F.2d 12, 18 (2d Cir. 1978). Plaintiff filed her application

for SSI benefits on August 30, 2011 and the ALJ determined that she was eligible for SSI as of that date. Plaintiff contends that she was disabled as of November 1, 2004, and it is apparent she would like to recover benefits retroactive to that date. However, as the Commissioner notes, SSI is not payable for any period prior to the month after the application is filed. See 20 C.F.R. § 416.335.

III. Conclusion

Accordingly, the motion to dismiss is hereby granted.

So ordered this 16th day of December 2016.

/s/

Robert N. Chatigny
United States District Judge