

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ZACHARY LEE BARTHELMAN,)
)
) **Plaintiff,**)
)
) **v.**)
)
) **CAROLYN W. COLVIN,**)
) **Commissioner of**)
) **Social Security Administration,**)
)
) **Defendant.**)
 _____)

Case No. 12-cv-1349-JAR

MEMORANDUM AND ORDER

Plaintiff filed this action on September 20, 2012 seeking judicial review of a decision of the Commissioner of Social Security¹ (“Commissioner”) denying disability insurance benefits (“DIB”) and supplemental security income (“SSI”) under sections 216(i), 223(d) and 1614(a)(3)(A) of the Social Security Act, 42 U.S.C. §§ 416(i), 423(d) and 1382c(a)(3)(A) (hereinafter the Act).² The Court granted Plaintiff’s motion to proceed *in forma pauperis*, and the United States Marshal served the summons and Complaint on the Commissioner.³

In accordance with District of Kansas Local Rule 83.7.1, the Commissioner timely filed an Answer and filed the transcript of the record below on December 11, 2012.⁴ Plaintiff filed a

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2012. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action needs to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

²Doc. 1.

³Docs. 5–8.

⁴Docs. 9–10.

Motion for Extension of Time to file his initial brief.⁵ The Court granted the motion, extending the deadline for Plaintiff to file his initial brief to March 11, 2013.⁶ When Plaintiff failed to timely file his Social Security Brief by the extended March 11, 2013 deadline, the Court entered a Notice and Order to Show Cause, ordering Plaintiff to show cause in writing to the Honorable Julie A. Robinson, United States District Judge, on or before March 29, 2013, why this case should not be dismissed with prejudice for lack of prosecution under Fed. R. Civ. P. 41(b) and D. Kan. Rule 41.1.⁷ Notice of the Notice and Order to Show Cause was sent electronically to Plaintiff's counsel of record on the date it was entered, March 20, 2013. To date, Plaintiff has not responded to the Notice and Order to Show Cause, has not requested an extension of time, and has not filed his Social Security Brief or any other document. In short, the Court does not know Plaintiff's present desire with regard to his request for judicial review of the Commissioner's decision denying benefits.

“A district court undoubtedly has discretion to sanction a party for failing to prosecute or defend a case, or for failing to comply with local or federal procedural rules.”⁸ Because dismissal is a severe sanction, it should be imposed only if a “lesser sanction would not serve the ends of justice.”⁹ In evaluating whether dismissal is an appropriate sanction, the district court should consider the following factors: (1) the degree of actual prejudice to the opposing party, (2) the degree of interference with the judicial process, (3) the litigant's culpability, (4) whether

⁵Doc. 11.

⁶Doc. 12.

⁷Doc. 13.

⁸*Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002).

⁹*Id.* (quotation omitted).

the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance, and (5) whether a lesser sanction would be effective.¹⁰ “It is within a court's discretion to dismiss a case with prejudice if, after considering all the relevant factors, it concludes that dismissal alone would satisfy the interests of justice.”¹¹

Turning to the first factor, the Commissioner has suffered some prejudice by Plaintiff's failure to actively prosecute this case. The Commissioner has invested time and effort into researching and preparing an answer in this case and into preparing the administrative record and converting it into a format which is compatible with filing in the Court's electronic case filing system. Moreover, the Commissioner was required to utilize resources to monitor and review each of the Court's orders and Plaintiff's motions to determine whether any action on her part was necessary or appropriate in the circumstances.

The second factor also supports dismissal of this action. The manner in which Plaintiff has prosecuted this case (or, perhaps more accurately, not prosecuted this case) has risen to the level of interfering with the judicial process. The Court has invested time and effort into shepherding this case through the briefing process laid out in Local Rule 83.7.1, without success. Plaintiff's responses so far do not indicate that any amount of time will result in production of a Social Security Brief stating his position on the Commissioner's decision of his case.

This leads to consideration of the third factor, which focuses on the plaintiff's culpability. The third factor more heavily weighs in favor of dismissal. As is more fully laid out above, Plaintiff has failed to prepare and file a Social Security Brief since the Commissioner filed his

¹⁰*Gripe v. City of Enid*, 312 F.3d 1184, 1188 (10th Cir. 2002) (citing the factors set forth in *Ehrenhaus v. Reynolds*, 965 F.2d 916 (10th Cir. 1992)).

¹¹*Ehrenhaus*, 965 F.2d at 916.

answer and the administrative record on December 11, 2012. Furthermore, Plaintiff failed to respond to the Court's Notice and Order to Show Cause.

The fourth factor is also satisfied. The Court's Notice and Order to Show Cause specifically warned Plaintiff that his failure to respond could result in dismissal of his case, and the docket reflects that Plaintiff's counsel was served with that order by electronic mail on March 20, 2013.¹²

Finally, the Court considers the efficacy of lesser sanctions. Here, the Court has granted an extension of time for Plaintiff to file his brief, and when Plaintiff failed to file within the extended deadline, ordered Plaintiff to show cause why the case should not be dismissed. Plaintiff failed to respond to the show cause order. Moreover, the Court has been unable to identify any appropriate lesser sanction in a Social Security case which would secure prosecution of the case. After carefully reviewing the record before the Court and the history of this case, the Court concludes that no remedy short of dismissal would be effective.

After consideration of the five *Ehrenhaus* factors in light of the circumstances of this case, the Court concludes that the factors weigh in favor of dismissal of this action. Defendants have suffered prejudice by virtue of having devoted resources to preparing and filing an answer and the administrative record in this case, and monitoring the motions and orders entered by the Court in its attempts to secure prosecution of the case. Meanwhile, this case is interfering with the judicial process because it continues to linger on the Court's docket without any meaningful progress toward resolution. Plaintiff's culpability for this predicament is high, as he is represented by counsel who is well aware of the obligation to prepare a brief. And, the Court

¹²Doc. 13.

forewarned Plaintiff that his failure to respond could result in dismissal and yet he still has not done so. At this point in time, the Court believes that dismissal is the only remedy that would be effective.

IT IS THEREFORE ORDERED BY THE COURT that this case is dismissed in accordance with Rule 41(b) of the Federal Rules of Civil Procedure for Plaintiff's failure to prosecute the case or to comply with the rules of procedure and the Court's orders.

IT IS SO ORDERED.

Dated: April 2, 2013

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE