

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION at LEXINGTON

DENNIS DYE,)
)
Plaintiff,)
)
v.)
)
CAROLYN W. COLVIN, Acting)
Commissioner of Social)
Security,)
)
Defendant.)

Civil Case No.
12-cv-351-JMH

MEMORANDUM OPINION & ORDER

This matter is before the Court upon the Defendant’s Motion to Dismiss [DE 9] Plaintiff’s claim pursuant to Fed R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.¹ The motion is ripe for consideration and shall be granted.²

42 U.S.C. § 405(g) provides that:

Any individual, after any final decision of the Commissioner made after a hearing to which he was a party, irrespective of the amount in

¹ Defendant’s Motion was filed on March 15, 2013. A response was due no later than April 8, 2013, in light of the time limits set forth in LR 7.1(c) and Fed. R. Civ. P. 6(d). No request for an extension of time to file a response was requested nor did Plaintiff request leave to file the response which he filed on April 22, 2013—two weeks after the deadline to respond had passed [DE 11] . Accordingly, upon the Court’s own motion, the Clerk shall strike Plaintiff’s Response as untimely.

² Defendant requests that Acting Commissioner of Social Security Carolyn W. Colvin be substituted for now former Commissioner Michael J. Astrue as Defendant in this matter. The request for relief will be granted. See Fed. R. Civ. P. 25(d).

controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within further time as the Commissioner may allow.

20 C.F.R. 422.210(c) further provides that:

...the date of receipt of notice of denial of request for review of the presiding officer's decision or notice of the decision by the Appeals Council shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

Plaintiff filed for Title II and XVI disability benefits, which were denied initially, on reconsideration, and after a hearing before an administrative law judge (ALJ) in a written decision dated January 23, 2012. In a Notice, dated March 29, 2012, the Appeals Council denied Plaintiff's request for review of the ALJ's decision, rendering the ALJ's decision the final decision of the Commissioner. In that Notice, the Appeals Council advised Plaintiff and his counsel of the denial, his right to commence a civil action within sixty (60) days from the date of receipt of the Appeals Council's denial notice, and that the notice would be presumed to be received five (5) days after the date on the notice, unless the Plaintiff could show that he did not receive it within that five (5) day period. Plaintiff filed the present appeal on November 28, 2012.

Assuming, in the absence of evidence to the contrary, that Plaintiff received the March 29, 2012, Notice from the Appeals

Counsel no later than April 3, 2012, see 20 C.F.R. 422.210(c), Plaintiff's action in this Court should have been commenced no later than June 4, 2012, to be considered timely. See 42 U.S.C. § 405(g). There is no evidence of extraordinary circumstances which would permit equitable tolling of the deadline. See *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000); see also *Kellum v. Commissioner of Social Sec.*, 295 Fed. Appx. 47,49 (6th Cir. 2008). As it stands, the action was commenced 177 days out of time. Accordingly, this action shall be dismissed.

Accordingly, **IT IS ORDERED:**

(1) That, upon the Court's own motion, the Clerk shall **STRIKE** Plaintiff's Response [DE 11] as untimely.

(2) That Defendant's Motion to Substitute Acting Commissioner of Social Security Carolyn W. Colvin for now former Commissioner Michael J. Astrue as Defendant in this matter [DE 9] is **GRANTED**.

(3) That the Defendant's Motion to Dismiss [DE 9] is **GRANTED**;

(4) That Plaintiff's Complaint [DE 1] is **DISMISSED** as untimely.

(5) That this order is **FINAL AND APPEALABLE** and **THERE IS NO JUST CAUSE FOR DELAY**.

(6) That the Clerk shall **STRIKE THIS MATTER FROM THE ACTIVE DOCKET.**

This the 23rd day of April, 2013.



Signed By:

Joseph M. Hood *JMH*

Senior U.S. District Judge