

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
OXFORD DIVISION**

TERESA JONES

PLAINTIFF

V.

NO. 3:15-CV-00049-DMB-DAS

**COMMISSIONER OF SOCIAL
SECURITY**

DEFENDANT

ORDER OF DISMISSAL

Teresa Jones has moved to dismiss this social security appeal based on her attorney's determination that Jones has "no basis to overcome [the] substantial evidence standard." Doc. #14. The Commissioner of Social Security has informed the Court that it has no opposition to dismissal. Doc. #15.

Where, as here, a request for dismissal in a social security appeal does not seek dismissal pursuant to a specific rule, courts will treat the motion as brought under Rule 41 of the Federal Rules of Civil Procedure. See *King v. Comm'r of Soc. Sec.*, No. CIV.A. 07-178-C, 2008 WL 4298566, at *1 (M.D. La. Sept. 16, 2008) ("The court will therefore consider the claimant's letter to be a notice of dismissal under Rule 41(a)(1)(A)(I) of the Federal Rules of Civil Procedure."); *Nandan v. Apfel*, No. 00 CV 6630, 2001 WL 477233, at *1 (E.D.N.Y. Feb. 26, 2001) ("[P]laintiff informed the court that he no longer wished to pursue his claim The court will construe this request as a motion for voluntary dismissal pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure."). Pursuant to this rule, the Court interprets Jones' motion as a motion to dismiss pursuant to Rule 41(a)(2), which grants a court authority to dismiss an action "at the plaintiff's request." Where, as here, "a party seeking to voluntarily dismiss a claim pursuant to Rule 41(a)(2) is silent as to whether the dismissal should be with or without prejudice, the

district judge is required to interpret the motion one way or the other.” *Rucker ex rel. Rucker v. Indianola Health and Rehab. Ctr.*, No. 4:05-cv-78, 2006 WL 3307505, at *2 (N.D. Miss. Nov. 13, 2016) (quoting *GF Gaming Corp. v. City of Black Hawk, Colo.*, 405 F.3d 876, 888 (10th Cir. 2005)).

When interpreting a motion to dismiss, “the court should keep in mind the interests of the defendant, for it is his position which should be protected. Nevertheless, in most cases a dismissal [without prejudice] should be granted unless the defendant will suffer some legal harm.” *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976) (internal citation omitted). Legal harm, is defined as “plain legal prejudice other than the mere prospect of a second lawsuit.” *Elbaor v. Tripath Imaging, Inc.*, 279 F.3d 314, 318 (5th Cir. 2002). The Fifth Circuit has identified four factors a court should consider in determining the existence of plain legal prejudice: “(1) the defendant’s effort and the expense involved in preparing for trial; (2) excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficient explanation of the need to take a dismissal; and (4) the fact that a motion for summary judgment has been filed by the defendant.” *Fuhgetaboutit, LLC v. Columbus Police Dep’t*, No. 1:10-CV-207, 2011 WL 4529665, at *3 (N.D. Miss. Sept. 28, 2011).

Here, the relevant factors are somewhat mixed. The record reflects little effort on Defendant’s part in preparing for trial, no excessive delay and no lack of diligence on the part of Plaintiff, and no motion for summary judgment filed by Defendant. However, the reason for dismissal, which in essence concedes the lack of sufficient evidence to prevail on appeal, counsels against a dismissal with prejudice. While it is a close call, the Court, out of an abundance of caution, will deem the motion as seeking a dismissal without prejudice.

Accordingly, Jones' unopposed motion to dismiss [14] is **GRANTED** and this action is **DISMISSED without prejudice**.

SO ORDERED, this 28th day of June, 2016.

/s/ Debra M. Brown
UNITED STATES DISTRICT JUDGE