

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MARY WILKINS,

Plaintiff,

vs.

CAROLYN W. COLVIN, COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

Case No. 2:13-cv-00918-JCM-PAL

ORDER

(Am. Complaint - Dkt. #4)

This matter is before the court on Plaintiff's Amended Complaint (Dkt. #4), filed July 1, 2013. Plaintiff is proceeding in this case pro se, and on June 4, 2013, the court granted Plaintiff's Application to Proceed In Forma Pauperis (Dkt. #1). *See* Order (Dkt. #2). The court then screened Plaintiff's Complaint (Dkt. #3) pursuant to 28 U.S.C. § 1915 and found Plaintiff had not stated a claim upon which relief could be granted. Specifically, the court found that Plaintiff had not alleged she had exhausted her administrative remedies, and she alleged the Complaint was filed outside of the sixty-day period in which to commence a civil action after a final decision of the Commissioner of Social Security. Therefore, the court dismissed Plaintiff's Complaint with leave to amend, and Plaintiff filed the Amended Complaint, which the court will now screen.

Federal courts are given the authority dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915(a), the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

1 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for
2 failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a
3 ruling on a question of law. *North Star Intern. v. Arizona Corp. Comm'n*, 720 F.2d 578, 580 (9th Cir.
4 1983). In considering whether the plaintiff has stated a claim upon which relief can be granted, all
5 material allegations in the complaint are accepted as true and are to be construed in the light most
6 favorable to the plaintiff. *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). Allegations of a
7 pro se complaint are held to less stringent standards than formal pleading drafted by lawyers. *Haines v.*
8 *Kerner*, 404 U.S. 519, 520 (1972) (per curiam).

9 Plaintiff's Amended Complaint alleges that she is disabled and entitled to disability insurance
10 benefits. Before Plaintiff can sue the SSA in federal court, she must exhaust his administrative
11 remedies. 42 U.S.C. § 405(g). *See Bass v. Social Sec. Admin.*, 872 F.2d 832, 833 (9th Cir. 1989) (per
12 curiam) ("Section 405(g) provides that a civil action may be brought only after (1) the claimant has
13 been party to a hearing held by the Secretary, and (2) the Secretary has made a final decision on the
14 claim"). Generally, if the SSA denies a claimant's application for disability benefits, he can request
15 reconsideration of the decision. If the claim is denied at the reconsideration level, a claimant may
16 request a hearing before an Administrative Law Judge ("ALJ"). If the ALJ denies the claim, a claimant
17 may request review of the decision by the Appeals Council. If the Appeals Council declines to review
18 the ALJ's decision, a claimant may then request review by the United States District Court. *See*
19 *generally* 20 C.F.R. §§ 404, 416. Plaintiff has alleged she exhausted her administrative remedies and
20 received a final decision of the Commissioner on March 5, 2013. Plaintiff had sixty days to file her
21 Complaint measured from the date the final decision was mailed.

22 Plaintiff filed her application to proceed in forma pauperis and submitted her Complaint on May
23 23, 2013. Plaintiff has not alleged she has received an extension of time from the Commissioner to file
24 a civil action in federal court. However, Plaintiff asserts she calculated the time period in which to file
25 her Complaint based on court days, rather than calendar days. She also contends she would not have
26 been able to submit her Complaint in a timely manner in any event because of an emergency medical
27 situation involving her mother and Plaintiff's eviction from her home. Plaintiff does not allege she

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1 requested an extension of time from the Social Security Administration in which to file her federal
2 lawsuit.

3 42 U.S.C. § 405(g) provides that after a final decision of the Commissioner, a claimant may
4 obtain review of the decision by a civil action “commenced within sixty days after the mailing to him
5 notice of such decision or within such further time as the Secretary may allow.” *Id.* Further, 20 C.F.R.
6 § 404.900(b) provides that if a claimant is dissatisfied with the decision of the Social Security
7 Administration, but does not take the next step within the prescribed time frame, the claimant loses her
8 right to judicial review. *Id.* The sixty-day limitations period in section 405(g) may be extended by
9 either: (a) the Commissioner of Social Security pursuant to 20 C.F.R. §§ 404.1482 or 404.1411; or (b)
10 the courts applying equitable tolling principles. *See Johnson v. Shalala*, 2 F.3d 918, 923 (9th Cir.1993)
11 (citing *Bowen v. City of New York*, 476 U.S. 467, 479 (1986)). The sixty-day filing requirement
12 provided for in 42 U.S.C. § 405(g) is treated as a statute of limitations period, is not jurisdictional, and
13 is subject to equitable tolling. *Bowen*, 476 U.S. at 479. Because it is not jurisdictional, the court will
14 screen the Amended Complaint.

15 The Amended Complaint should state the nature of Plaintiff’s disability, when Plaintiff claims
16 he became disabled, and when and how he exhausted his administrative remedies. It should also
17 contain a plain, short, and concise statement identifying the nature of Plaintiff’s disagreement with the
18 determination made by the Social Security Administration and show that Plaintiff is entitled to relief. A
19 district court can affirm, modify, reverse, or remand a decision if Plaintiff has exhausted his
20 administrative remedies and timely filed a civil action. However, judicial review of the
21 Commissioner’s decision to deny benefits is limited to determining: (a) whether there is substantial
22 evidence in the record as a whole to support the findings of the Commissioner; and (b) whether the
23 correct legal standards were applied. *Morgan v. Commissioner of the Social Security Adm.*, 169 F.3d
24 595, 599 (9th Cir. 1999).

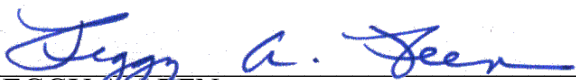
25 Here, Plaintiff’s Amended Complaint seeks judicial review of the Commissioner’s decision and
26 requests the court reverse it. Plaintiff contends she is entitled to Social Security benefits because she
27 has a disabling back injury, a problem with her right leg, and neuropathy. Plaintiff has stated a claim
28 for initial screening purposes under 28 U.S.C. § 1915.

1 Accordingly,

2 **IT IS ORDERED:**

- 3 1. The Clerk of the Court shall serve the Commissioner of the Social Security
4 Administration by sending a copy of the summons and Amended Complaint by certified
5 mail to: (1) Office of the Regional Chief Counsel, Region IX, Social Security
6 Administration, 160 Spear St., Suite 899, San Francisco, CA,94105-1545; and (2) the
7 Attorney General of the United States, Department of Justice, 950 Pennsylvania Avenue,
8 N.W., Room 4400, Washington, D.C. 20530.
- 9 2. The Clerk of Court shall issue summons to the United States Attorney for the District of
10 Nevada and deliver the summons and Amended Complaint to the U.S. Marshal for
11 service.
- 12 3. From this point forward, Plaintiff shall serve upon Defendant or, if appearance has been
13 entered by counsel, upon the attorney, a copy of every pleading, motion or other
14 document submitted for consideration by the court. Plaintiff shall include with the
15 original paper submitted for filing a certificate stating the date that a true and correct
16 copy of the document was personally served or sent by mail to the defendants or counsel
17 for the defendants. The court may disregard any paper received by a district judge or
18 magistrate judge which has not been filed with the Clerk, and any paper received by a
19 district judge, magistrate judge or the Clerk which fails to include a certificate of service.

20 Dated this 30th day of August, 2013.

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23 PEGGY A. LEEN
24 UNITED STATES MAGISTRATE JUDGE
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