

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**BONNIE S. FENNEKEN,**

**Plaintiff,**

v.

**Civil Action 2:10-cv-00111  
Judge Algenon L. Marbley  
Magistrate Judge E.A. Preston Deavers**

**COMMISSIONER OF SOCIAL  
SECURITY,**

**Defendant.**

**OPINION AND ORDER**

This matter is before the Court for consideration of Defendant's Motion to Dismiss Untimely Complaint, or Alternatively, Motion for Summary Judgment (Doc. # 10).<sup>1</sup> Defendant specifically maintains that Plaintiff has failed to timely file her request for review and, therefore, the Court should dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons that follow the Court will **CONVERT** Plaintiff's Motion to Dismiss into a motion for summary judgment and will allow the parties time to submit further material as detailed below.

**I. BACKGROUND**

On October 21, 2008, an Administrative Law Judge ("ALJ") denied Plaintiff's application for supplemental security income. (Compl. ¶ 4.) On March 17, 2009, the Appeals Council denied review of the ALJ's decision. (*Id.*) Plaintiff indicates in her Complaint that her

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<sup>1</sup> Although the caption indicates that he requests summary judgment in the alternative, Defendant's Motion seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(6) and applies motion to dismiss standards. Other than this reference in the caption, Defendant does not again mention the summary judgment procedure.

counsel was not provided a copy of this decision. (*Id.*) In a December 18, 2009 letter, the Appeals Council granted a thirty (30) day extension to Plaintiff to file a civil action. (*Id.*) Plaintiff submitted her Complaint on February 5, 2010.

Defendant maintains that Plaintiff failed to bring her civil action within the original sixty (60) day time limit under the Social Security Act and also failed to bring the action within the thirty (30) day extension that the Appeals Council granted in its December 18, 2009 letter. (Def.'s Mot. Dismiss 3–4.) In her Response, Plaintiff contends that neither she nor her attorney received notice of the March 17, 2009 decision. (Pl.'s Resp. 1.) Plaintiff further asserts that her attorney's office contacted the Appeals Council asking it to re-issue its decision. (*Id.*) According to Plaintiff's Response to Defendant's Motion to Dismiss, it was in response to this contact that the Appeals Council issued its December 18, 2009 extension letter. (*Id.*) Plaintiff attached a copy of the December 18, 2009 letter to her Response.<sup>2</sup> (Pl.'s Resp. Ex. A.) Plaintiff maintains that she received this letter on December 28, 2009, as evidenced by her attorney's date-stamp at the bottom right hand corner of the letter. (Pl.'s Resp. 1, Ex. A.) Consequently, Plaintiff contends she did not receive written notice of the Appeals Council's March 17, 2009 denial until December 28, 2009, and, therefore, she had sixty days from December 28, 2009 to bring a civil action.<sup>3</sup> Under this interpretation, Plaintiff's February 5, 2010 filing would be

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<sup>2</sup> The letter indicates that Plaintiff's attorney sent the Appeals Council a letter dated October 27, 2009 in which the attorney requested a copy of the March 17, 2009 decision and more time to file a civil action. (Pl.'s Resp. Ex. A.)

<sup>3</sup> Plaintiff also maintains that even if the Appeals Council was allowed to impose a thirty (30) day deadline, under the circumstances, the Court should apply equitable tolling to this period. (*See* Pl.'s Resp. 2, 5.)

timely.<sup>4</sup>

## II. APPLICABLE LAW

The Social Security Act provides:

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in 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 such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g) (emphasis added); *see also* 20 C.F.R. §§ 404.981, 416.1481 (“You may file an action in a Federal district court within 60 days after the date you receive notice of the Appeals Council’s action.”). The Regulations provide further clarification of the claimant’s time frame for instituting a civil action:

For purposes of this section, the date of receipt of notice of denial of request for review of the administrative law judge’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.*

20 C.F.R. § 422.210(c) (emphasis added); *see also* 404 C.F.R. §§ 404.901, 416.1401 (“Date you receive notice means 5 days after the date on the notice, unless you show us that you did not receive it within the 5-day period.”). Finally, the sixty-day period is “not jurisdictional but a period of limitations.” *Cook v. Comm’r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007) (quoting *Day v. Shalala*, 23 F.3d 1052, 1058 (6th Cir.1994)). Accordingly, the Court may apply principles of traditional equitable tolling to the limitations period of 42 U.S.C. § 405(g). *Cook v. Comm’r of Soc. Sec.*, 480 F.3d 432, 437 (6th Cir. 2007) (citing *Bowen v. City of New York*, 476 U.S. 467, 480 (1986)).

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<sup>4</sup> Defendant did not file a reply to Plaintiff’s Response.

### III. ANALYSIS

In this case, the Court will convert Defendant's Motion to Dismiss into a motion for summary judgment. Under Federal Rule of Civil Procedure 12(d), if the Court considers "matters outside the pleadings" in addressing a motion under Rule 12(b)(6) "the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). The Court has broad discretion to decide whether to consider matters outside the pleadings and convert the motion. *See Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010) (applying an abuse of discretion standard to district court's decision to convert a 12(b)(6) motion to dismiss into a motion for summary judgment).

Here, Plaintiff attached the Appeals Council's December 18, 2009 extension letter to their Response to Defendant's Motion. (*See* Pl.'s Resp. Ex. A.) As this letter is detailed in the Complaint (Compl. ¶ 4), the Court could consider the letter itself without converting the motion. *See Song v. City of Elyria, Ohio*, 985 F.2d 840, 842 (6th Cir. 1993) (holding that materials that merely verify or reiterate the contents of the complaint are not outside the pleadings). Nevertheless, Plaintiff emphasizes the December 28, 2009 date-stamp that her counsel allegedly placed in the bottom right hand corner of this letter. (Pl.'s Resp. 3–4.) The date-stamp, and not the letter itself, is relevant to the legal issues at stake here. Based on this date-stamp, Plaintiff asserts that December 28, 2009 is the time from which the sixty-day deadline, under 42 U.S.C. § 405(g), should begin to run. (*Id.* at 4.) Additionally, Plaintiff contends in the alternative that the Court should consider December 28, 2009 as the date of receipt of the Appeals in accessing whether equitable tolling is appropriate. (*See id.* at 5.) The date stamp, however, and the details surrounding it, are matters extraneous to the pleadings and cannot be considered under Rule 12(b).

Accordingly, because the Court finds it proper to consider the totality of the facts presented in determining the timeliness of Plaintiff's action and equitable tolling, including the date-stamped Appeals Council letter, the Court finds it appropriate to convert Defendant's Motion to Dismiss into one for summary judgment. *See Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008) (citing *Kostrzewa v. City of Troy*, 247 F.3d 633, 643 (6th Cir.2001)) ("If the district court considers evidence outside the complaint, it effectively converts the motion to dismiss to a motion for summary judgment."). This course of action seems especially appropriate here because the facts surrounding central issues, such as whether Plaintiff has made a reasonable showing that she did not receive the March 17, 2009 denial, remain somewhat unclear from the current state of the briefing.<sup>5</sup>

When converting a motion to dismiss into a motion for summary judgment, "[t]he district court must then give the parties a reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Winget*, 537 F.3d at 576 (internal quotations omitted). Consequently, the Court will allow the parties an opportunity to present affidavits, and other materials under Rule 56, relevant to Defendant's Motion. Furthermore, the Court will allow the parties to submit additional briefing in conjunction with any materials they offer.<sup>6</sup>

Based on the foregoing, the Court **CONVERTS** Plaintiff's Motion to Dismiss into a motion for summary judgment. Defendant is **DIRECTED** to submit any additional materials

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<sup>5</sup> For example, Plaintiff maintains that she has shown that she never received the Appeals Council's March 17, 2009 denial. (Pl.'s Resp. 3.) The attached the Appeals Council extension letter, however, does not provide why the Appeals Council chose to grant a 30 day extension. (See Pl.'s Resp. Ex. A.)

<sup>6</sup> The Court is particularly concerned with whether Plaintiff has made a reasonable showing to rebut the presumption, under the Regulations, that she received notice five days after the date of the Appeals Council's denial. *See* 20 C.F.R. § 422.210(c).

and briefing within **TWENTY-ONE (21) DAYS** of the date of this Order. Within **FOURTEEN (14) DAYS** from the date of Defendant's filing,<sup>7</sup> Plaintiff may submit additional materials and responsive briefing. If necessary, Defendant shall file a reply within **SEVEN (7) DAYS** of the response.

**IT IS SO ORDERED.**

November 17, 2010

/s/ Elizabeth A. Preston Deavers

Elizabeth A. Preston Deavers  
United States Magistrate Judge

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<sup>7</sup> Or the running of such time if Defendant chooses not to file.