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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LINDA HABA,)	CASE NO. C10-540-MAT
)	
Plaintiff,)	
)	
v.)	ORDER DENYING DEFENDANT’S
)	MOTION TO DISMISS
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
_____)	

INTRODUCTION

16 Plaintiff, proceeding *pro se*, seeks relief from a decision of the Commissioner of the
17 Social Security Administration (Commissioner) assessing an overpayment of Disability
18 Insurance Benefits (DIB). (Dkt. 4.) The Commissioner moves to dismiss this action under
19 Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction and/or under
20 Rule 12(b)(6) for failure to state a claim upon which relief may be granted. (Dkt. 11.) Now,
21 having considered all submissions associated with the pending motion, as well as the remainder
22 of the record, the Court concludes that the Commissioner’s motion to dismiss should be denied.

01 BACKGROUND

02 In February 1992, plaintiff was found disabled and entitled to DIB as of April 22, 1990.
03 (Dkt. 4 at 11 (Ex. 4).) The Social Security Administration (SSA) subsequently advised
04 plaintiff, in a notice dated August 13, 2000, that she was not entitled to benefits for the period of
05 January 1999 through February 2000 due to her participation in substantial gainful activity.
06 (Dkt. 19 at 6 (Ex. 1).) The SSA explained that plaintiff had been overpaid \$12,012.00 in
07 benefits. (*Id.* at 7.)

08 Plaintiff requested a waiver of the overpayment. In a notice dated July 18, 2001, the
09 SSA stated it could not approve the request for a waiver based on the facts in its possession at
10 that time. (*Id.* at 14 (Ex. 2).) The notice scheduled a personal conference, to take place on
11 August 13, 2001, in order to consider plaintiff's request for a waiver of the overpayment, which
12 at that time totalled \$8,544.00. (*Id.*) A subsequent letter, dated August 22, 2001, reflected
13 that plaintiff failed to appear for a personal conference on either August 13, 2001 or on the date
14 of the letter. (*Id.* at 16 (Ex. 3).) The letter informed plaintiff that the SSA found no basis for
15 changing its decision to deny the waiver request and directed plaintiff to refund the outstanding
16 overpayment within thirty days. (*Id.*)

17 Plaintiff timely filed a request for hearing. On October 16, 2002, an Administrative
18 Law Judge (ALJ) held a hearing, with plaintiff appearing and offering testimony. (*Id.* at 20
19 (Ex. 4).) The ALJ issued a decision, on January 12, 2003, finding plaintiff was not “without
20 fault” in accepting the overpayment and, therefore, that a waiver of the overpayment, at that
21 point totalling \$8,070.00, could not be granted. (*Id.* at 20-23.)

22 In a letter dated February 12, 2003, plaintiff requested review of the ALJ's decision.

01 (Dkt. 4 at 9 (Ex. 3).) The Appeals Council, on April 2, 2003, found no basis for review,
02 making the ALJ’s decision the final decision of the Commissioner. (Dkt. 19 at 24-25 (Ex. 5).)
03 The Appeals Council advised plaintiff that she could commence a civil action within sixty days
04 of the date of its decision and that it would be presumed she received a copy of the decision
05 within five days of the decision date “unless a reasonable showing to the contrary [was] made.”
06 (*Id.* at 24.) The notice also advised plaintiff that, if she could not file a civil action within sixty
07 days, she could ask the Appeals Council for an extension upon provision of a “good reason for
08 not meeting the deadline.” (*Id.* at 25.)

09 Plaintiff did not commence a civil action within sixty days of the date of the Appeals
10 Council’s decision. She contends she was not aware any overpayment was outstanding until
11 she received a billing statement in October 2009. (Dkt. 15 at 1.) In a letter to the Appeals
12 Council dated October 9, 2009, plaintiff stated: “I sent in a request for an appeal of a decision
13 in February 2003, and have not heard anything back. I had heard that it may take a long time to
14 receive an answer, but this is a little longer than I expected.” (Dkt. 19 at 26 (Ex. 6).) She
15 again asked for a waiver of the overpayment. (*Id.*) The SSA responded, in a letter dated
16 February 1, 2010, by enclosing a copy of the Appeals Council’s April 2003 decision denying
17 plaintiff’s request for review. (*Id.* at 27 (Ex. 7).) Plaintiff submitted her complaint to this
18 Court on March 30, 2010. (Dkt. 1.)

19 DISCUSSION

20 Pursuant to section 405(g) of title 42, a Social Security claimant may obtain review of a
21 “final decision” of the Commissioner by commencing a civil action “within sixty days after the
22 mailing to him of notice of such decision or within such further time as the Secretary may

01 allow.” 42 U.S.C. § 405(g). Absent “a reasonable showing to the contrary[.]” a claimant is
02 presumed to have received notice of the decision five days after the decision date. 20 C.F.R. §
03 422.210(c).

04 The requirement to obtain a final decision of the Commissioner is jurisdictional.
05 *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th Cir. 1987) (citing *Mathews v. Eldridge*, 424 U.S.
06 319, 328 (1976)). In this case, with the Appeals Council’s decision denying plaintiff’s request
07 for review, the Commissioner issued a final decision subject to review in this Court. See 20
08 C.F.R. § 404.981; accord § 422.210.

09 The sixty-day period for filing a civil action is not jurisdictional. *Vernon*, 811 F.2d at
10 1277. Instead, this time period constitutes a statute of limitations. *Id.* (citing *Mathews*, 424
11 U.S. at 328 n.9; *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975)). As a statute of limitations,
12 the sixty-day filing deadline is subject to equitable tolling. *Id.* (citing *Bowen v. City of New*
13 *York*, 476 U.S. 467, 480 (1986)). The question in this case is, therefore, whether this action is
14 subject to dismissal based on the applicable statute of limitations or whether that limitations
15 period may be equitably tolled.

16 The affirmative defense of statute of limitations is properly raised in a responsive
17 pleading. *Vernon*, 811 F.2d at 1278 (citing Fed. R. Civ. P. (8)(c)). However, it may, in
18 certain situations, “be raised in a motion to dismiss when the running of the statute is apparent
19 from the face of the complaint.” *Id.* (citing *Conerly v. Westinghouse Elec. Corp.*, 623 F.2d
20 117, 119 (9th Cir. 1980)). “Yet such a motion to dismiss should be granted ““only if the
21 assertions of the complaint, read with the required liberality, would not permit the plaintiff to
22 prove that the statute was tolled.”” *Id.* (quoting *Jablon v. Dean Witter & Co.*, 614 F.2d 677,

01 682 (9th Cir. 1980)).

02 In this case, the Commissioner neither raised an affirmative defense in a responsive
03 pleading, nor raised an argument properly discussing the statute of limitations, or in any way
04 addressing equitable tolling, in its motion to dismiss. The Commissioner, instead, argued that
05 plaintiff's claims were jurisdictionally barred and/or had in some way failed to state a claim
06 upon which relief may be granted.

07 The Commissioner specifically argued that plaintiff failed to show "good cause" for
08 obtaining an extension of the sixty-day time period for seeking court review. This argument
09 recognizes that an extension of the sixty-day filing deadline may be granted by the
10 Commissioner where a request is made to the Appeals Council in writing and with a showing
11 that a claimant had "good cause for missing the deadline[.]" 20 C.F.R. § 404.982; *accord* §
12 422.210(c). *See also* § 404.911 (in considering the existence of good cause, the SSA
13 considers: (1) circumstances that kept the claimant from making the request on time; (2)
14 whether any action of the agency misled the claimant; (3) whether the claimant did not
15 understand the requirements of the Social Security Act resulting from amendments to the Act,
16 other legislation, or court decisions; and (4) whether the claimant had any limitations which
17 prevented her from timely filing). Good cause may, for example, be found where a claimant
18 "did not receive notice of the determination or decision." § 404.911(b)(7).

19 The Commissioner argued, with the support of a declaration, that it was not aware of
20 any request for extension filed by plaintiff (Dkt. 11 at 5 and Dkt. 19 at 5) and that, consequently,
21 plaintiff failed to bring forth a judicially reviewable final decision. However, while a request
22 for an extension of time might avert the need for litigation, "a claimant apparently need not

01 request an extension from the [Commissioner] prior to raising an . . . equitable tolling
02 argument[.]” *Vernon*, 811 F.2d 1278 (citing *Bowen*, 476 U.S. 467).

03 Equitable tolling “focuses on whether there was excusable delay by the plaintiff[.]” and
04 “may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information
05 bearing on the existence of his claim.” *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th
06 Cir. 2000). A statute of limitations may, therefore, be equitably tolled where a plaintiff shows
07 “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary
08 circumstance has stood in his way.” *Harris v. Carter*, 515 F.3d 1051, 1054-55 (9th Cir. 2008)
09 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). As explained by the Ninth Circuit:

10 We have stated that the purpose of the equitable tolling doctrine “is to soften the
11 harsh impact of technical rules which might otherwise prevent a good faith
12 litigant from having a day in court.” *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir.
13 2004). Equitable tolling also serves to “prevent the unjust technical forfeiture of
14 causes of action.” *Id.* Equitable tolling is typically granted when litigants are
15 unable to file timely petitions as a result of external circumstances beyond their
16 direct control. *See [Stillman v. LaMarque*, 319 F.3d 1199, 1202 (9th Cir. 2003)].
17 Equitable tolling is typically denied in cases where a litigant’s own mistake
18 clearly contributed to his predicament. *See [Lawrence v. Florida*, 549 U.S. 327,
19 336-37 (2007)].

20 *Id.* at 1055.

21 In this case, plaintiff filed her complaint more than six and half years after the
22 presumptive deadline for filing. However, plaintiff claims she was not aware that the
overpayment issue was still outstanding until she received a billing statement in October 2009.
(*See* Dkt. 15.) She avers that, on the advice of a local Social Security office, she thereafter sent
the Appeals Council the above-described October 2009 letter inquiring as to the status of her
appeal, and that she filed her complaint within sixty days of receiving the February 2010 letter

01 which enclosed the Appeals Council’s decision. (*Id.*) Plaintiff contends that “[t]he local office
02 stated they also had never received a response to the request for an appeal.” (*Id.* at 1.)

03 The extensive delay between the filing of plaintiff’s request for review and her inquiry
04 as to its status raises doubts as to plaintiff’s diligence and the question of whether this is one of
05 the “rare” cases “in which the equities of tolling are compelling.” *Bowen*, 476 U.S. at 480-81
06 (finding tolling appropriate where the government’s “secretive conduct” prevented timely
07 filing). *See also Vernon*, 811 F.2d at 1275, 1278 (reversing and remanding for consideration
08 of equitable tolling where plaintiff alleged he was told by an SSA employee that an extension to
09 filing would be granted). However, the Commissioner, despite being asked for additional
10 briefing on the subject (*see* Dkt. 16), failed to counter plaintiff’s contention as to a gap of some
11 six and a half years between the issuance of the Appeals Council’s decision and plaintiff’s
12 receipt of a billing statement for the overpayment. Nor did the Commissioner address
13 plaintiff’s assertions as to her conversations with the local SSA office. At the very least, the
14 Court requires additional information and properly supported argument in order to consider the
15 issue of equitable tolling. *See, e.g., Vernon*, 811 F.2d at 1278 (reversing and remanding where
16 the statute-of-limitations issue was “not so clear-cut as to justify its resolution . . . prior to
17 affording [the claimant] the opportunity to further a factual basis for . . . equitable tolling.”)
18 The Court, therefore, finds insufficient basis, at this time, for dismissing plaintiff’s claims.

19 CONCLUSION

20 For the reasons stated above, the Commissioner’s motion to dismiss (Dkt. 11) is
21 DENIED. This dismissal is without prejudice to the Commissioner seeking dismissal based
22 on the statute of limitations, either before or after the filing of a responsive pleading. *See id.*;

01 *Jablon*, 614 F.2d at 682.

02 DATED this 18th day of November, 2010.

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05 Mary Alice Theiler
06 United States Magistrate Judge
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