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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BRANDEE JACOBSON,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. C17-5252-JPD

ORDER DENYING DEFENDANT’S
MOTION TO DISMISS

I. INTRODUCTION

This matter comes before the Court on the Commissioner of Social Security’s motion to dismiss. Dkt. 10. Specifically, the Commissioner asserts that plaintiff, who is proceeding *in forma pauperis* (“IFP”), failed to timely initiate this action challenging the denial of plaintiff’s claim for disability benefits under Titles II and XVI of the Social Security Act (“SSA”). *Id.* at 2; Dkt. 10-2 at ¶ 1 (Chung Decl.). Plaintiff contends that due to delayed receipt of the Notice of Appeals Council Action (“the Notice”), the applicable mailing presumption does not apply, and the Commissioner’s motion to dismiss should be denied because plaintiff’s case has been timely filed within the statute of limitations. Dkt. 12. After careful consideration of the Commissioner’s motion to dismiss, plaintiff’s response, the

ORDER DENYING DEFENDANT’S
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1 parties' declarations, the governing law, and the balance of the record, the Court DENIES the
2 Commissioner's motion to dismiss, Dkt. 10, and finds that plaintiff's action may proceed as
3 filed.

4 II. BACKGROUND

5 In October 2013, plaintiff filed applications for disability insurance benefits and
6 supplemental security income with the Social Security Administration. Dkt. 10-2 at 8 (Chung
7 Decl.). Plaintiff's claims were denied initially and upon reconsideration, so plaintiff requested
8 a hearing before an administrative law judge ("ALJ"). *Id.* She appeared and testified at a
9 hearing held in April 2015, and submitted supplemental evidence after the hearing, which was
10 admitted and considered upon review. *Id.* On July 31, 2015, an ALJ issued a final decision
11 denying plaintiff's claims for benefits. *Id.* at 5. Thereafter, plaintiff sought to review the
12 ALJ's unfavorable final decision. *Id.* at 20. The Appeals Council found no applicable reason
13 under its rules to reexamine the ALJ's final decision and denied plaintiff's request, issuing the
14 Notice dated January 27, 2017. *Id.* at 20–21; Dkt. 7 at ¶ 9.

15 Plaintiff maintains that she "never received the Notice of the Appeals Council
16 decision," which denied her benefits and outlined the requirements of seeking review in
17 federal court. Dkt. 7 at ¶ 9; Dkt. 13 at ¶ 5 (Jacobson Decl.). However, although plaintiff did
18 not personally receive a copy, her administrative attorney, Vickie Brewer, received the Notice
19 on February 4, 2017. Dkt. 7 at ¶¶ 9–10; Dkt. 7-1 at ¶ 2 (Brewer Decl.) ("I received the Notice
20 of the Appeals Council decision on February 4, 2017."). At that time, Ms. Brewer contacted
21 Christopher Dellert, plaintiff's counsel in the instant action, about pursuing an appeal in
22 federal court. Dkt. 7-1 at ¶ 3 (Brewer Decl.); Dkt. 7-2 at ¶ 2 (Dellert Decl.) ("Vickie
23 Brewer... contacted me about the Appeals Council denial via email on February 4, 2017.").

1 Mr. Dellert received plaintiff's signed fee agreement and IFP application on March 31, 2017
2 and filed plaintiff's complaint on April 4, 2017, without having ever obtained a copy of the
3 Notice from Ms. Brewer, plaintiff, or the Appeals Council. Dkt. 7-2 at ¶¶ 5, 6, 9 (Dellert
4 Decl.). A copy of the Notice was finally sent to Mr. Dellert on April 10, 2017, at which point
5 he "determined that the 65-day limit to file (60 days, plus five for mailing) [presumed from the
6 date on the Notice] had expired." *Id.* at ¶ 10. To verify the statute of limitations deadline, he
7 "contacted Ms. Brewer and determined that she had not received the notice until February 4,
8 2017." *Id.* at ¶ 11. Plaintiff filed an amended complaint on April 12, 2017, supported by
9 declarations from both attorneys explaining plaintiff's failure to receive the Notice and Ms.
10 Brewer's delayed receipt of the Notice beyond the typical five-day presumption. Dkt. 7; Dkt.
11 7-1 (Brewer Decl.); Dkt. 7-2 (Dellert Decl.).

12 The Commissioner moves to dismiss plaintiff's amended complaint, arguing that
13 "Plaintiff failed to bring this action within 60 days of receiving notice of the Commissioner's
14 final decision. . ." Dkt. 10 at 1. Consistent with applicable regulations, plaintiff is presumed
15 to have received the Notice five days after the January 27, 2017 date of issuance (printed on
16 the Notice), on February 1, 2017. *Id.* at 3. The Commissioner asserts that when the sixty-day
17 statute of limitations is calculated from the February 1, 2017 presumed date of receipt,
18 plaintiff had until April 2, 2017 to timely file her civil complaint. *Id.* The Commissioner
19 further acknowledges that because this deadline fell on a Sunday, under court rules, plaintiff
20 had until the following Monday, April 3, 2017 to timely file. *Id.*¹ Because plaintiff did not

21 ¹ Importantly, the Commissioner has incorrectly calculated the sixty-day statute of
22 limitations as beginning from the day *of* presumed receipt, as opposed to the day *after*
23 presumed receipt. Dkt. 10-2 at 22 (Chung Decl.) ("The 60 days start the day after you receive
this letter."); 20 C.F.R. § 422.210(c). By the Court's calculation, if it is presumed that plaintiff
received notice on February 1, 2017, the statutory period began the day after, on February 2,

1 initiate this civil suit until April 4, 2017, one day too late, defendant argues the complaint is
2 untimely. Dkt. 1.

3 The Commissioner’s motion to dismiss is supported by the declaration of Nancy
4 Chung, Chief of Court Case Preparation and Review Branch 1 of the Office of Appellate
5 Operations at the Office of Disability Adjudication and Review (“ODAR”), the individual
6 responsible for processing SSI and DIB claims whenever a civil action has been filed in
7 Washington. *See* Dkt. 10-2 at ¶ 3 (Chung Decl.). In her declaration, Ms. Chung provides that
8 “on July 31, 2015, an Administrative Law Judge issued a decision denying the plaintiff’s
9 claim for benefits under Titles II and XVI, and mailed a copy thereof to the plaintiff (Exhibit 1
10 [to Ms. Chung’s Declaration]). Thereafter, the plaintiff requested review of this decision.”
11 Dkt. 10-2 at ¶ 3(a) (Chung Decl.). Ms. Chung states that in response to plaintiff’s request for
12 review, “on January 27, 2017, the Appeals Council sent, by mail addressed to the plaintiff at
13 [her home address], with a copy to his [sic] representative, notice of its action on the
14 claimant’s request for review and of the right to commence a civil action within sixty (60)
15 days from the date of receipt (Exhibit 2).” *Id.*

16 The Notice instructs the claimant: “[y]ou have 60 days to file a civil action (ask for
17 court review) . . . The 60 days start the day after you receive this letter. We assume you
18 received this letter 5 days after the date on it *unless you show us that you did not receive it*
19 *within the 5-day period.*” *Id.* at 22 (emphasis added). The Notice also indicates that an
20 extension of time to initiate civil action may be requested if the claimant has “a good reason
21 for waiting more than 60 days to ask for court review.” *Id.* Neither party claims that plaintiff

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23 2017, and extended to April 3, 2017. However, the Commissioner’s error does not affect the
outcome of this case.

1 or her attorneys sought an extension of time. *See* Dkt. 10-2 at ¶ 3(b) (Chung Decl.).

2 Plaintiff argues that even after defendant filed the instant motion to dismiss, she had
3 not yet received a copy of the Notice. Dkt. 12 at 2; Dkt. 13 at ¶ 5 (Jacobson Decl.). As a
4 result, she must rely on the sworn declarations of her counsel, both of whom maintain that the
5 Notice was first received by plaintiff’s administrative attorney, Ms. Brewer, on February 4,
6 2017, three days later than the date of receipt presumed by the Commissioner. Dkt. 7-1 at ¶ 2
7 (Brewer Decl.); Dkt. 7-2 at ¶ 2 (Dellert Decl.). Plaintiff contends that these declarations are
8 sufficient to overcome the mailing presumption which establishes a date of receipt for
9 purposes of appeal. Dkt. 12 at 2.

10 III. ANALYSIS

11 A. Civil Actions Challenging the Final Decision of the Commissioner are Subject 12 to a Sixty-Day Statute of Limitations Pursuant to 42 U.S.C. § 405(g)

13 A Social Security claimant may obtain review of a final decision of the Commissioner
14 by commencing a civil action in the district court “within sixty days after the mailing to him of
15 notice of such decision or within such further time as the Commissioner of Social Security
16 may allow.” 42 U.S.C. § 405(g). In relevant part, 42 U.S.C. § 405(h) provides that “[n]o
17 findings of facts or decision of the Commissioner of Social Security shall be reviewed by any
18 person, tribunal, or governmental agency except as herein provided.” Sections 405(g) and (h)
19 act as a statute of limitations establishing the sixty-day time period in which a claimant may
20 appeal a final decision of the Commissioner. *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th
21 Cir. 1987). Thus, the sixty-day period is not jurisdictional; the only jurisdictional requirement
22 of Section 405(g) is that there be a final decision of the Commissioner after the claim for
23 benefits has been presented to the Administration. *See id.*; *see also Mathews v. Eldridge*, 424

1 U.S. 319, 328 n.9 (1976). As a statute of limitations, and because the SSA was designed to be
2 “unusually protective” of claimants, the deadline is also subject to equitable tolling.² *Bowen v.*
3 *City of New York*, 476 U.S. 467, 480 (1986); *see also Meyerzove v. Bowen*, 852 F.2d 1289,
4 1289 (9th Cir. 1988); *Troupe v. Colvin*, No. C12-1687-RSL, 2013 WL 4041474, at *4 (W.D.
5 Wash. Aug. 7, 2013).

6 Implementing regulations explain that the presumptive date of receipt of the Notice can
7 be extended based upon a sufficient showing by the claimant:

8 Any [such] civil action ... must be instituted within 60 days after the Appeals Council’s
9 notice of denial of request for review of the administrative law judge’s decision or
10 notice of the decision by the Appeals Council *is received by the individual, institution,*
11 *or agency*, except that this time may be extended by the Appeals Council upon a
12 showing of good cause. For purposes of this section, the date of receipt of notice of
13 denial of request for review of the administrative law judge’s decision or notice of the
14 decision by the Appeals Council shall be presumed to be 5 days after the date of such
15 notice, *unless there is a reasonable showing to the contrary.*

16 20 C.F.R. § 422.210(c) (emphasis added).

17 Absent “a reasonable showing to the contrary,” the Commissioner is entitled to a
18 rebuttable presumption that the claimant received notice of the Appeals Council’s decision
19 five days after the decision letter issuance. *Id.*; 20 C.F.R. § 404.901 (“Date you receive notice
20 means 5 days after the date on the notice, unless you show [the Social Security
21 Administration] that you did not receive it within the 5-day period.”). Notice may be received
22 by either the claimant or counsel. 20 C.F.R. § 404.1715(b) (“A notice or request sent to your
23 representative, will have the same force and effect as if it had been sent to you.”); *see also*
Fista v. Comm’r of Soc. Sec., 141 F.3d 1175 (9th Cir. 1998) (finding earlier notice of the final
decision properly mailed to claimant’s attorney displaces assertions of later receipt by

² In this instance, however, neither party has argued that equitable tolling is applicable.

1 claimant). Where a timely request is made to the Appeals Council in writing and a claimant
2 can show “good cause for missing the deadline,” an extension of the sixty-day filing cutoff
3 date will be granted by the Commissioner. 20 C.F.R. § 404.982; 20 C.F.R. § 422.210(c). A
4 showing that neither the claimant nor counsel “receive[d] notice of determination or decision”
5 within the presumed timeframe is one of many “circumstances where good cause may exist.”
6 20 C.F.R. § 404.911(b)(7).

7 B. Plaintiff Rebutted the Mailing Presumption By Showing Delayed Receipt, and
8 Therefore, Her Complaint Was Filed Within the Sixty-Day Limitations Period

9 As detailed above, on January 27, 2017, the Appeals Council issued the Notice
10 denying plaintiff’s request for review and advising that she had sixty days from receipt to file
11 a civil action challenging the Commissioner’s decision. Dkt. 7 at ¶ 8; Dkt. 10-2 at ¶ 3(a)
12 (Chung Decl.). Because plaintiff did not request an extension of time from Appeals Council,
13 the Commissioner presumes that plaintiff received the notice five days after the decision date.
14 20 C.F.R. § 422.210(c). Thus, under the regulations, plaintiff had until April 3, 2017, to
15 timely file. *See id.*; Dkt. 10 at 2. However, because plaintiff never personally received a copy
16 of the Notice, the deadline by which plaintiff’s claims become barred by the statute of
17 limitations depends on the date her counsel received the Notice. *See* 20 C.F.R. § 404.1715(b);
18 Dkt. 13 at ¶ 5 (Jacobson Decl.) (“I never received the Notice of Appeals Council decision.”).

19 The Court finds that plaintiff has made a “reasonable showing” that her administrative
20 attorney, Ms. Brewer, received the Notice, but not within the five-day period of the statutory
21 mailing presumption. Two attorneys have submitted sworn statements to the Court, attesting
22 to counsel’s receipt of the Notice on February 4, 2017. Dkt. 7-1 at ¶ 2 (Brewer Decl.); Dkt. 7-
23 2 at ¶ 2 (Dellert Decl.). The Court finds no reason why these declarations are insufficient to

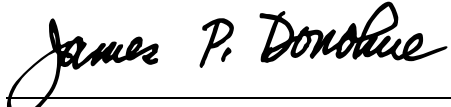
1 successfully rebut the presumption afforded to the Commissioner. Implementing regulations
2 like 20 C.F.R. § 422.210(c) do not create a statutory mandate or un rebuttable date of receipt;
3 on the contrary, the presumption can be overcome by a “reasonable showing” that receipt of
4 the Notice was delayed. Neither party has submitted, nor is the Court aware of, any binding
5 precedent which strictly defines “a reasonable showing” in this context. Although some courts
6 have held that declarations claiming delayed receipt are “bare allegations” insufficient to
7 overcome the presumption afforded to the Commissioner, this Court is not inclined to call into
8 question the honesty of attorneys who have submitted sworn statements under penalty of
9 perjury. *But see Rivera v. Sec'y of Health & Human Servs.*, 39 F.3d 1188 (9th Cir. 1994)
10 (unpublished opinion); *McCall v. Bowen*, 832 F.2d 862 (5th Cir. 1987); *Thompson v. Colvin*,
11 No. 3:16-CV-05442-KLS, 2016 WL 6126028, at *2–3 (W.D. Wash. Oct. 19, 2016) (finding
12 affidavits of claimant and his attorney “insufficient to rebut the presumption of notice” and
13 dismissing action filed three days late). Accordingly, the Court finds that the date plaintiff’s
14 counsel received notice was February 4, 2017, and the mailing presumption no longer applies.

15 Further, the sixty-day period within which to seek hearing and reconsideration of
16 denial of a claim for disability insurance benefits begins to run *from the day after notice is*
17 *received*, in this case, on February 5, 2017. Dkt. 10-2 at 22 (Chung Decl.) (“The 60 days start
18 the day after you receive this letter.”); 20 C.F.R. § 422.210(c). Plaintiff’s last day to timely
19 initiate this action to review the denial of her disability benefits was Thursday, April 6, 2017,
20 two days after plaintiff’s counsel filed the complaint. Dkt. 1; Dkt. 7-2 at ¶¶ 5, 9 (Dellert
21 Decl.). Taking into account plaintiff’s reasonable showing of delayed receipt of the Notice,
22 this action has been timely filed within the statute of limitations.

1 IV. CONCLUSION

2 For the foregoing reasons, the Commissioner's motion to dismiss, Dkt. 10, is
3 DENIED, and this case may proceed as filed.

4 DATED this 11th day of August, 2017.

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7 JAMES P. DONOHUE
8 Chief United States Magistrate Judge
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