

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

PATRICIA JONES,)	
)	
Plaintiff)	
)	
v.)	Civil No. 93-296-P-H
)	
DONNA E. SHALALA,)	
Secretary of Health)	
and Human Services,)	
)	
Defendant)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The plaintiff in this action seeks judicial review of the Secretary's refusal to reopen her initial application for Supplemental Security Income ("SSI") benefits filed on April 5, 1988. The Secretary has moved for dismissal, arguing that this court lacks subject matter jurisdiction over the Secretary's decision not to reopen the plaintiff's application. I agree and recommend that this case be dismissed.

I. Procedural Background

The plaintiff claims to have been disabled since February 1988 because of a heart condition. Record p. 16. The plaintiff first filed for SSI benefits on April 5, 1988, alleging a disability onset date of February 6, 1988. See Exh. A to Defendant's Motion to Dismiss Plaintiff's Complaint with Incorporated Memorandum in Support (Docket No. 4).¹ This application was denied on August 2,

¹ The administrative record does not contain this application since it apparently has been lost. The parties, however, do not dispute the existence of this application or the date of its filing.

1988. Record p. 209. The plaintiff pursued no administrative review of this denial. The plaintiff filed a second application on November 24, 1989, again alleging a disability onset date of February 6, 1988 stemming from her heart condition. *Id.* at 53-65. This second application was denied on January 11, 1990. *Id.* at 75. Again, the plaintiff sought no administrative reconsideration of this denial.

The plaintiff filed her third and current application on November 29, 1991, once again alleging a disability stemming from her 1988 heart condition. *Id.* at 87-99. After being denied initially, the plaintiff this time sought administrative review. *Id.* at 178. Following an administrative hearing on November 13, 1992, an administrative law judge found that the plaintiff was disabled since November 24, 1989, the date of her second application. *Id.* at 20. In so ruling, the Administrative Law Judge treated her current application as a request to reopen her earlier, second application. *Id.* at 17. An earlier, adverse decision of the Secretary's may be reopened and revised within two years of the initial determination if the Secretary finds good cause to do so, such as the presentation of new and material evidence. 20 C.F.R. 416.1488(b); 416.1489(a)(1). In the absence of reopening, and after the time for review has run, the Secretary's initial determination is final and binding against a claimant. *Id.* 416.1457(c)(1); 416.1487(a)

Because the plaintiff's current application was filed less than two years from the initial determination on her second application, and because new and material medical evidence concerning her heart condition was then available, the Administrative Law Judge found that good cause existed to reopen the earlier determination on her second application. Record p. 17. After considering the new medical evidence, the Administrative Law Judge concluded that the plaintiff's heart condition equaled two of the Secretary's listed impairments. *Id.* at 17, 19. Accordingly, the Administrative Law Judge revised the determination on the second application, ruling that the plaintiff was under a disability from the time of her second application. *Id.* at 19.

As for the plaintiff's first application, the Administrative Law Judge noted initially that there

was no record of a 1988 application. *Id.* at 17. The plaintiff's first application, having been lost, was not part of the record before the Administrative Law Judge. Nevertheless, the Administrative Law Judge ruled that such a claim, if it indeed existed, would not be amenable to reopening for good cause because more than two years had passed between the date the plaintiff claimed the 1988 application was initially denied and the date she filed her current claim. *Id.* (August 2, 1988 to November 29, 1991). After the two-year time period for good cause reopening has elapsed, a prior determination may be reopened and revised only upon a showing that it was obtained by fraud or similar fault. 20 C.F.R. 416.1488(c). The plaintiff did not produce any evidence to support such a finding. Record p. 17. Consequently, the Administrative Law Judge concluded that the determination on her first application was not subject to reopening, and thus considered the plaintiff's claim of disability only from the date of her second application. *See id.*

The plaintiff sought further review of the Administrative Law Judge's decision not to reopen her first application. Record p. 11. Upon the plaintiff's supplementation of the record, the Appeals Council found that she had indeed filed an application for SSI benefits in 1988. *Id.* at 3. Nonetheless, the Appeals Council agreed with the Administrative Law Judge's ultimate conclusion that that claim was not amenable to reopening because the plaintiff had made no showing of fraud or similar fault. *Id.* (citing 20 C.F.R. 416.1488(c)). The plaintiff then filed this action, seeking judicial review of the Secretary's decision not to reopen her first application. *See* Complaint 4-5.

II. Subject Matter Jurisdiction

“Absent a colorable constitutional claim not present here, a district court does not have jurisdiction to review the Secretary's discretionary decision not to reopen an earlier adjudication.” *Torres v. Secretary of Health & Human Servs.*, 845 F.2d 1136, 1138 (1st Cir. 1988). The congressional grant of authority that permits judicial review of the Secretary's benefits

determinations is 42 U.S.C. 405(g). The pertinent part of section 405(g) provides that "[a]ny individual, after any final decision of the Secretary made after a hearing to which he was a party . . . , may obtain a review of such decision by a civil action commenced within sixty days . . . or within such further time as the Secretary may allow." The Supreme Court has ruled that this section does not authorize judicial review of a final decision of the Secretary not to reopen a prior claim for benefits. *Califano v. Sanders*, 430 U.S. 99, 107-08 (1977). According to the Supreme Court, section 405(g) authorizes judicial review only for those final decisions made after a *mandatory* hearing on the initial substantive decision of the Secretary denying the benefits claim. *See id.* at 108; *see also Rios v. Secretary of Health & Human Servs.*, 614 F.2d 25, 26 (1st Cir. 1980). Because the Secretary may deny a petition for reopening without a hearing, section 405(g) confers no jurisdiction for judicial review of the Secretary's refusal to reopen a prior determination, even though the Secretary in fact held a hearing on the matter. *See id.* "A purely discretionary hearing such as that held here for purposes of receiving allegedly new and material evidence is not a 'hearing' within the meaning of 405(g)."² *Rios*, 614 F.2d at 26. Except in "those rare instances where the Secretary's denial of a petition to reopen is challenged on constitutional grounds," a district court simply lacks jurisdiction to review the Secretary's discretionary refusal to reopen a prior determination. *Sanders*, 430 U.S. at 109; *Colon v. Secretary of Health & Human Servs.*, 877 F.2d 148, 152-53 (1st Cir. 1989).

The jurisdictional lines drawn by *Sanders* and corresponding First Circuit caselaw would seem to foreclose the plaintiff's present claim for judicial review. To clear this jurisdictional hurdle, the plaintiff argues that the Secretary incorrectly calculated the two-year time period for good cause

² The plaintiff does not contend that this is a situation where the Administrative Law Judge, in refusing to reopen her first application, conducted a *de facto* 405(g) hearing on the merits of her first application and then refused to reopen it after reaching a decision on the merits of that claim. Such a situation would give rise to judicial review under 405(g), since the first application would have been, in fact, reopened and reconsidered. *See Torres*, 845 F.2d at 1138-39; *Morin v. Secretary of Health & Human Servs.*, 835 F. Supp. 1414, 1422-23 (D.N.H. 1992). Here, the Administrative Law Judge expressly refused to consider the merits of the plaintiff's first application, considering her claim of disability from the date of the second application only. Record p. 17.

reopening, and thus erred in her nondiscretionary application of the reopening timing requirements. The plaintiff claims that sets of applications may have a "domino" or "stacking" effect for calculating the two-year period for reopening under 20 C.F.R. 416.1488(b). That is, treating each subsequent application as an implied request to reopen an earlier application, as long as no more than two years has passed between each set of applications, the reopening of one allows for the reopening of all earlier applications, with the two-year requirement being satisfied in a domino fashion from one application to the next. Assuming that the Administrative Law Judge would have found good cause to reopen her first application, given his treatment of the second application, the plaintiff thus argues that the Secretary's denial of reopening based solely on elapsed time, without having considered the domino effect, constitutes reversible error. This so-called "domino" approach to measuring the reopening period has gained the approval of three district courts. *Schulze v. Sullivan*, 1991 W.L. 204943, at *5 n.3 (D. Colo. Oct. 7, 1991); *Gonzales v. Secretary of Health & Human Servs.*, Unemp. Ins. Rep. (CCH) 16,034A (D.N.M. Nov. 25, 1988); *Brunckhurst v. Heckler*, Unemp. Ins. Rep. (CCH) 16,644 (N.D. Cal. Oct. 15, 1985). The Tenth Circuit, however, has recently rejected it outright, ruling that the Secretary's determination as to when reopening lapses is within the discretion of the Secretary and not subject to judicial review under Supreme Court precedent. *Montes v. Secretary of Health & Human Servs.*, 16 F.3d 416, 1994 W.L. 44840, at *1-2 (10th Cir. Feb. 16, 1994).³ The Northern District of Illinois has also refused to adopt the domino approach to reopening, also on the basis of a lack of jurisdiction to review the Secretary's reopening decisions. *Vatistas v. Sullivan*, 1993 W.L. 8766, at *3 (N.D. Ill. Jan. 14, 1993).

Like the Tenth Circuit and the Northern District of Illinois, I conclude that this court lacks

³ Although the Tenth Circuit's unpublished opinions are not binding precedents, *In re Citation of Unpublished Opinions/Orders and Judgments*, 151 F.R.D. 470 (10th Cir. 1993), its ruling in *Montes* effectively voids the persuasive value of the *Schulze* and *Gonzales* cases on domino reopening, since these two cases came from district courts sitting within the Tenth Circuit. This thus leaves *Brunckhurst* as the only viable precedent supporting domino reopening.

the authority to order the Secretary to utilize a domino approach when calculating the two-year time period for good cause reopening. The three district courts that have endorsed the domino approach have all failed to explain adequately how the courts, in light of *Sanders*, initially acquire jurisdiction over the Secretary's decisions not to reopen. The law in this area is very clear -- federal courts simply lack jurisdiction to act on the Secretary's refusal to reopen a prior claim absent a colorable constitutional challenge. The plaintiff does not contend, nor can she, that the Secretary's failure to stack her applications for timing purposes raises a constitutional question. If, for example, the Secretary made a patent mathematical error in computing the two-year time period from the initial determination, an error that would violate the plaintiff's right to procedural due process, this court would indeed have jurisdiction to review the Secretary's computation.⁴ *Cf. Gonzalez v. Sullivan*, 914 F.2d 1197, 1202-03 (9th Cir. 1990) (refusal to reopen when claimant not given adequate notice of finality of initial determination violates procedural due process).

Yet this is not the case. The plaintiff is asking this court to direct the Secretary to adopt a novel, equitable tolling rule for deciding when to reopen prior determinations after the passing of two years. This the court cannot do. Reopening, as a creature of regulation, is committed to the sound discretion of the Secretary and, aside from constitutional challenges, the courts lack all authority to act in this area. The Secretary, in her discretion, is free to adopt a domino approach for calculating the reopening time period if she so wishes.⁵ But as long as the Secretary has not ruled

⁴ The two-year time period for good cause reopening starts on the date of the notice of the initial determination, 20 C.F.R. 416.1488(b), and, according to the Secretary's internal rules, runs to the filing date of the current application, *see* Hearings, Appeals and Litigation Law Manual (HALLEX), I-2-920(A), 1993 W.L. 643072 (S.S.A). Absent any stacking, this gives the claimant two full years in which to make a timely request for reopening under 20 C.F.R. 416.1488(b). This is also how the Administrative Law Judge computed the time period for reopening the plaintiff's first application. *See* Record p. 17 (August 2, 1988 to November 29, 1991).

⁵ I note that the Secretary has expressly rejected adoption of the domino approach to reopening. *See* HALLEX, I-2-920(B),

that a reopening request is time barred when it was actually made within two years of the initial determination, a plain misapplication of the regulations and violation of procedural due process, this court lacks authority to review the Secretary's determination that the time for reopening has lapsed.⁶ Accordingly, this court cannot direct the Secretary to utilize a domino approach for measuring the two-year reopening period, as this would run afoul of the jurisdictional limits established by the Supreme Court and the First Circuit.

1993 W.L. 643072 (S.S.A.). In fact, the Secretary uses a hypothetical fact pattern identical to the plaintiff's situation as an example of how not to stack applications for counting purposes. *See id.*

⁶ As already discussed, the Secretary measures the two-year time period from the date of the initial determination until the date of the request for reopening. This gives claimants two full years in which they must act in order to obtain reopening. As long as this two-year period has actually elapsed, the Secretary has fulfilled her reopening obligations under the regulations, since this period obviously satisfies the two-year timing requirement of 20 C.F.R. 416.1488(b). For the purposes of judicial review of the Secretary's reopening decisions, no more is required. *See Robertson v. Sullivan*, 979 F.2d 623, 625 (8th Cir. 1992) (due process satisfied where Secretary fully complied with reopening regulations).

III. Conclusion

Because I find that the court lacks subject matter jurisdiction to review the alleged error of the Secretary, I recommend that the Secretary's motion to dismiss be **GRANTED** and that the case be **DISMISSED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 15th day of July, 1994

David M. Cohen
United States Magistrate Judge