

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

KEVIN WEEKS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 99-229-B
)	
KENNETH S. APFEL, Commissioner)	
of Social Security,)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant, the Commissioner of Social Security, moves to dismiss this action, filed as an appeal from the final decision of the commissioner, on the grounds that no final action has been taken by the commissioner and this court therefore lacks jurisdiction over the matter. I recommend that the court grant the motion.

I. Background

The plaintiff filed this action, seeking judicial review of what he alleges is a final decision of the commissioner and claiming that he had exhausted administrative remedies, after the Appeals Council of the Social Security Administration on its own motion reviewed the hearing decision of an administrative law judge on the plaintiff’s application for benefits and remanded the case to the administrative law judge for further specific action. Complaint (Docket No. 1) and Exh. A thereto (Order of Appeals Council Remanding Case to Administrative Law Judge, hereafter “Order”). The

administrative law judge had found that the claimant was disabled as of March 6, 1998. Decision in the Case of Kevin E. Weeks, Exh. 6 to Declaration of William R. Waxman, Chief Court Case Preparation and Review Branch 1, etc., attached to Defendant's Brief in Support of Motion to Dismiss Plaintiff's Complaint ("Motion") (Docket No. 3), at 6. The Appeals Council ordered the administrative law judge to resolve four issues and to undertake six specific actions with respect to the plaintiff's application for benefits, including consulting both a medical expert and a vocational expert. Order at 2-3.

Claiming that the plaintiff had failed to exhaust administrative remedies and that there was accordingly no final decision of the commissioner for judicial review, the defendant moved to dismiss in a confusing memorandum mistakenly asserting, *inter alia*, that the plaintiff had failed to seek review by the Appeals Council of the administrative law judge's decision in his favor, an unnecessary step under the circumstances. Motion at 4-6. After the plaintiff filed an opposition to the motion to dismiss, the defendant clarified his position in his reply brief, contending that a remand to the administrative law judge by the Appeals Council is not the final decision of the commissioner on an application for benefits and therefore is not subject to judicial review pursuant to 42 U.S.C. § 405(g). Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss (Docket No. 6).

II. Discussion

The parties focus their arguments on various Social Security regulations and *Forney v. Apfel*, 118 S.Ct. 1984 (1998). The applicable statute provides, in relevant part:

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. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

42 U.S.C. § 405(g). The term “final decision” is not defined in the statutes governing Social Security.

The plaintiff’s application was for disability benefits, Order at [1], and Part 404 of Title 20 of the Code of Federal Regulations therefore applies to his claim, 20 C.F.R. § 404.1. Within 60 days after an administrative law judge issues a decision on an application, the Appeals Council may decide on its own motion to review that decision. 20 C.F.R. § 404.969(a).

The Appeals Council may remand a case to an administrative law judge so that he or she may hold a hearing and issue a decision or a recommended decision. The Appeals Council may also remand a case in which additional evidence is needed or additional action by the administrative law judge is required.

20 C.F.R. § 404.977(a). The administrative law judge must take whatever action is ordered by the Appeals Council. *Id.* (b).

After it has reviewed all the evidence in the administrative law judge hearing record and any additional evidence received, . . . the Appeals Council will make a decision or remand the case to an administrative law judge. The Appeals Council may affirm, modify or reverse the administrative law judge hearing decision or it may adopt, modify or reject a recommended decision.

20 C.F.R. § 404.979.

The plaintiff bases his argument on 20 C.F.R. § 404.981, which provides in full as follows:

Effect of Appeals Council’s decision or denial of review.

The Appeals Council may deny a party’s request for review or it may decide to review a case and make a decision. The Appeals Council’s decision, or the decision of the administrative law judge if the request for review is denied, is binding unless you or another party file an action in Federal district court, or the decision is revised. 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 plaintiff asserts that this section of the regulations “provides that an appeal to the court is permitted as long as it is taken within 60 days of the time the Plaintiff receives notice of the decision of the Appeals Council.” Opposition to Motion to Dismiss (“Opposition”) (Docket No. 4) at 4. The argument assumes that an order of remand is a “decision” of the Appeals Council within the meaning of that word as it is used in the regulation. However, the regulation merely sets forth the effect of an Appeals Council decision and the time limit for filing an action in court seeking review of such a decision. It does not equate remands and decisions. The regulations, at section 404.979, make clear that a remand by the Appeals Council to an administrative law judge and a decision by the Appeals Council are two different things.¹ Section 404.981 deals only with the latter. In the plaintiff’s case, the Appeals Council issued a remand. Further action within the Social Security Administration will be necessary before there can be a final decision of the commissioner.²

Nothing in the Supreme Court’s decision in *Forney* requires or even supports a different

¹ See also 20 C.F.R. § 404.901, defining “decision” as “the decision made by an administrative law judge or the Appeals Council” and “remand” as “to return a case for further review.”

² While I have been unable to locate case law on point, federal courts have certainly assumed that the commissioner’s final decision is made only after the proceedings initiated by an Appeals Council remand of a favorable hearing decision have been completed. See, e.g., *Jones v. Bowen*, 657 F. Supp. 342, 343 (N.D.Cal. 1987); *Gray v. Secretary of Health & Human Servs.*, 1983 WL 44313 (W.D.Ark. June 20, 1983), at *1.

conclusion. The Court in that case was careful to limit its holding to the question “whether a Social Security disability claimant seeking court reversal of an agency decision denying benefits may appeal a district court order remanding the case to the agency for further proceedings.” 118 S.Ct. at 1986. It specifically noted that cases in which federal courts of appeal had held that orders of agency appeals panels remanding cases for further agency hearing were not the type of final agency decisions that are reviewable in federal court, specifically *CH2M Hill Central, Inc. v. Herman*, 131 F.3d 1244, 1246-47 (7th Cir. 1997) and *Director, Office of Workers’ Compensation Programs v. Bath Iron Works Corp.*, 853 F.2d 11, 16 (1st Cir. 1988), “arose in less closely analogous circumstances” and consequently were not persuasive. 118 S.Ct. at 1988. If those cases, much more similar to the situation presented here than is the situation present in *Forney*, are distinguishable from *Forney*, then the result in *Forney* cannot control here.

The important point here is that the commissioner has not issued a final decision. Indeed, he plans, through the action of the Appeals Council, to undertake further evaluation of the plaintiff’s application before issuing a final decision. The fact that this action means a further delay in final resolution of the plaintiff’s application and may result in a reversal of the administrative law judge’s hearing decision awarding him benefits, a reversal which would be subject to judicial review, is unfortunate but inherent in the process established by Congress and the commissioner.

III. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion to dismiss be **GRANTED.**

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 this 19th day of January, 2000.

*David M. Cohen
United States Magistrate Judge*