

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HAROLD DUDLEY,)
)
 Plaintiff)
)
 v.)
)
 KENNETH S. APFEL, Commissioner of)
 Social Security,)
)
 Defendant)

Docket No. 99-242-B

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant, the Commissioner of Social Security, moves to dismiss the complaint in this action which seeks review of his decision that the plaintiff’s claim for disability benefits was barred by *res judicata*. I recommend that the motion be granted.

I. Background

The plaintiff filed an application for disability insurance benefits under the Social Security Act on December 12, 1990 alleging disability beginning in August 1984 by reason of multiple impairments. Decision in the Case of Harold Dudley, dated October 30, 1992 (“First ALJ Decision”), Exh. 2 to Declaration of William R. Waxman, Chief, Court Case Preparation and Review Branch 1, etc. (“Waxman Decl.”), submitted with Defendant’s Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiff’s Complaint (Docket No. 2), at 1. The claim proceeded through the stages of review by the Social Security Administration to a hearing before an administrative law judge at which the plaintiff was represented by a non-attorney representative. *Id.*

The administrative law judge found that the plaintiff was not disabled prior to December 31, 1987, the last date on which the plaintiff met the disability insured status requirements of the Social Security Act. *Id.* at 8-9. The plaintiff's representative received notice of the unfavorable decision, *see* Letter dated October 30, 1992 from Social Security Administration to plaintiff, Exh. 2 to Waxman Decl., at 2 (“cc: Name and Address of Representative/William Macdonald, Esq.”), but no appeal was taken.¹ Decision in the Case of Harold Dudley, dated January 28, 1999 (“Second ALJ Decision”), Exh. 5 to Waxman Decl., at 5.

On April 1, 1997 the plaintiff filed another application for disability benefits alleging the same onset date as that alleged in his first application. Waxman Decl. ¶ 5(c). This claim was denied at the administrative level on the grounds that it did not differ from the claim filed in 1990. *Id.* ¶ 5(d) & Exh. 4. The plaintiff, represented by his current lawyer, proceeded to a hearing before an administrative law judge who issued a recommended decision dated January 28, 1999 granting him benefits and finding that the claimant's failure to file an appeal of the adverse 1992 administrative law judge's decision was excused pursuant to Social Security Ruling 91-5p (“SSR 91-5p”) due to evidence showing that the plaintiff at the relevant time did not have the mental capacity to understand the process and was “effectively not represented” at the time. Second ALJ Decision at 1, 5, 7.

The Appeals Council, after reviewing the recommended decision, notified the plaintiff that it had concluded that his request for a hearing on his second application should have been dismissed

¹ The plaintiff states, without citation to an affidavit, sworn testimony or other document of evidentiary quality, that the paralegal who represented him at his first hearing “contacted the Appeals Council on [his] behalf after the unfavorable decision, asking for an extension of time to file further documents but then dropped the case, failing to pursue the appeal.” Plaintiff's Opposition to the Defendant's Motion to Dismiss the Complaint (“Plaintiff's Opposition”), Docket No. 8, at 2.

on the ground of *res judicata* because it did not present new and material evidence concerning the existence of a disability before December 31, 1987 and that it proposed to dismiss the claim, allowing the plaintiff the opportunity to submit further material. Letter from Gabriel E. DePass to the plaintiff, Exh. 6 to Waxman Decl., at 3. The plaintiff did submit additional materials, Exhs. 7-8, 10 to Waxman Decl., and the Appeals Council issued an order dated September 22, 1999 dismissing the claim pursuant to 20 C.F.R. § 404.957, Order, Exh. 11 to Waxman Decl., at 2, which provides, in relevant part:

An administrative law judge may dismiss a request for a hearing under any of the following conditions:

* * *

(c) The administrative law judge decides that there is cause to dismiss a hearing request entirely or to refuse to consider any one or more of the issues because —

(1) The doctrine of *res judicata* applies in that we have made a previous determination or decision under this subpart about your rights on the same facts and on the same issue or issues, and this previous determination or decision has become final by either administrative or judicial action.

The decision of the first administrative law judge became final when no appeal was perfected during the time period allowed for an appeal. 20 C.F.R. § 404.955(a).

The plaintiff filed this action, seeking review of the action of the Appeals Council, Complaint (Docket No. 1), ¶ 2 & Exh. A, on October 18, 1999, Docket. The defendant filed a confusing document which is apparently a motion to dismiss the action (Docket No. 2) on December 29, 1999.

II. Discussion

The defendant contends that this court is without jurisdiction over the plaintiff's complaint because there has been no "final decision" as required by 42 U.S.C. § 405(g), which 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 . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of such decision or within such further time as the Commissioner of Social Security may allow.

Dismissal of a hearing request on *res judicata* grounds is not subject to judicial review absent a colorable constitutional claim. *Torres v. Secretary of Health & Human Servs.*, 845 F.2d 1136, 1138 (1st Cir. 1988); *see generally Colon v. Secretary of Health & Human Servs.*, 877 F.2d 148, 152-53 (1st Cir. 1989).

The plaintiff argues that he has raised a colorable constitutional claim in this case, asserting that he suffered from a significant mental problem, presumably at the time of the first administrative law judge's decision, that caused him to be unable to understand or carry out the necessary steps to obtain review of that decision.² Plaintiff's Opposition at 2, 5. The plaintiff identifies his constitutional claim as the deprivation of due process of law³ and invokes SSR 91-5p. *Id.* at 2-3.

Of course, a social security ruling cannot create a constitutional right. Even if that were not the case, however, SSR 91-5p would not provide the plaintiff with relief or bestow jurisdiction upon this court. The Ruling provides, in relevant part:

When a claimant presents evidence that mental incapacity prevented him or her from timely requesting review of an adverse determination, decision, dismissal, or review by a Federal district court, and the claimant had no one legally responsible for prosecuting the claim (e.g., a parent of a claimant

² The plaintiff's memorandum refers to "Dr. Pasternak's testimony at the 1999 hearing," which has not been provided to the court, and the "contemporaneous findings by Dr. Josefewicz and the retrospective opinion of Dr. DiTullio," attachments to Exh. 10 to the Waxman Decl., as support for his position, Plaintiff's Opposition at 6.

³ *But see Harper v. Secretary of Health & Human Servs.*, 978 F.2d 260, 263-64 (6th Cir. 1992), questioning whether any right to due process exists where a claimant has never received Social Security benefits.

who is a minor, legal guardian, attorney, or other legal representative) at the time of the prior administrative action, SSA will determine whether or not good cause exists for extending the time to request review.

Social Security Ruling 91-5p, *reprinted in West's Social Security Reporting Service Rulings 1983-1991*, at 810. Assuming, as the parties apparently do, that this ruling applies to requests for review within the Social Security Administration, specifically by the Appeals Council, as well as to requests for court review, the ruling by its terms applies only when the claimant was not represented *at the time of the prior administrative action*. In this case, that action was the decision of the administrative law judge, and at that time the plaintiff was represented. Accordingly, SSR 91-5p provides no basis for the claim raised here by the plaintiff.

It is still necessary to determine whether the plaintiff has established a colorable due process claim based on his claimed mental incapacity independent of SSR 91-5p. Several courts have ruled that notice of administrative appellate time limits is constitutionally defective if the claimant who seeks disability benefits because of mental illness is too mentally ill to understand the notice. *Stieberger v. Apfel*, 134 F.3d 37, 39 (2d Cir. 1997), and cases cited therein. However, such claims may invoke federal jurisdiction

only upon a particularized allegation of mental impairment plausibly of sufficient severity to impair comprehension. A claim of constitutionally defective notice, even in the context of a claim for disability benefits based on mental illness, cannot invoke federal court jurisdiction merely upon a generalized allegation, long after the fact, that the claimant was too confused to understand available administrative remedies.

Id. at 40-41. Here, the plaintiff's second application is clearly based on a claim of "depression/neurosis," Second ALJ Decision at 1, and the first application apparently alleged a depressive disorder, First ALJ Decision at 5. However, the plaintiff's presentation to this court does not provide anything more than a generalized and unsupported allegation of mental incapacity.

Plaintiff's Opposition at 5-6.

When a defendant moves to dismiss on the ground that the court lacks subject matter jurisdiction, the plaintiff has the burden of demonstrating that the court does have jurisdiction. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). For the purposes of such a motion, the plaintiff may establish the actual existence of subject matter jurisdiction through extra-pleading material. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1350 at 213 (2d ed. 1990). Here, the plaintiff has provided no material beyond his memorandum. Omission from the record before the court of material necessary to support the plaintiff's factual assertions must be held against him. I will of course refer to material submitted by the defendant to the extent that it is cited by the plaintiff.

The only evidence addressing the plaintiff's mental status in the record before the court is the reports of Drs. Jozefowicz and DiTullio, submitted by the plaintiff to the Appeals Council after it notified him that it proposed to dismiss his application on the basis of *res judicata*. Exh. 10 to Waxman Decl. The report of Dr. Jozefowicz, a physician, is dated June 17, 1986, and accordingly could have no bearing on the plaintiff's ability to understand the notice of appeal rights that he received in October 1992. Dr. DiTullio, a licensed clinical psychologist, examined the plaintiff on February 23, 1998, five and one-half years after the time period at issue. Dr. DiTullio reports that the plaintiff told him that he had been diagnosed as suffering from depression in 1986 and that "things have not changed significantly since." Letter from William DiTullio, Ed. D., to Francis M. Jackson, P.A., dated February 24, 1998, at 1. However, Dr. DiTullio himself makes no diagnosis of the plaintiff's condition at any time other than the date of his examination. Dr. DiTullio's diagnosis as of February 1998 does not mention any inability to understand documents such as a notice of

appeal rights from the Social Security Administration, nor does it allow the reader to draw the inference that such an inability existed at that time. The plaintiff's own report to Dr. DiTullio that things had not changed significantly since 1986 provides no basis for an inference that his depression in 1992 was sufficiently severe to render him incapable of comprehending the Social Security appeals process.

Accordingly, the plaintiff has failed to establish that the court has jurisdiction over his claim due to a colorable claim that he was deprived of due process when he failed to pursue his 1990 application for benefits.

As an alternative basis for the existence of subject matter jurisdiction in this court, the plaintiff contends that the fact that an administrative law judge held a hearing on the merits on his second application means that the defendant in fact reopened his 1990 application and as a result is estopped to argue that the decision on that application is *res judicata* with respect to his 1997 application. Plaintiff's Opposition at 8-10. The First Circuit has held that

[t]he ALJ [is] entitled to make a threshold inquiry and review the evidence presented by the claimant in order to resolve the reopening issue. A purely discretionary hearing . . . for purposes of receiving allegedly new and material evidence is not a hearing within the meaning of § 405(g).

Torres, 845 F.2d at 1139 (citations and internal punctuation omitted). In this case, however, unlike the situation in *Torres*, the administrative law judge issued a recommended decision on the merits of the plaintiff's claim. Still, the action of the administrative law judge was not the only action of the defendant in this case, and under the circumstances of this case it is not the action that governs in determining whether there has been a *de facto* reopening of an application for benefits.

When the Appeals Council determines that an administrative law judge improperly reopened an earlier application and dismisses a subsequent application on the grounds of *res judicata*, the

courts do not have jurisdiction to review the commissioner's decision. *Tobak v. Apfel*, 195 F.3d 183, 187 (3d Cir. 1999) (citing cases reaching the same conclusion from the Fifth, Sixth and Seventh Circuits). The plaintiff cites one case in which a federal circuit court held to the contrary, *Taylor v. Heckler*, 738 F.2d 1112, 1114-15 (10th Cir. 1984), but that case is distinguishable because the Appeals Council did not invoke *res judicata* but rather affirmed the administrative law judge's decision denying benefits on the merits, *id.* at 1114. To the extent that the *Taylor* court based its decision on a conclusion that consideration of an earlier claim on the merits at any administrative level within the Social Security Administration bars the commissioner from applying *res judicata*, *see id.* at 1115, I find that reasoning unpersuasive.

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 2nd day of March, 2000.

David M. Cohen
United States Magistrate Judge