



(question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

## **II. Background**

The plaintiff filed an application for Supplemental Security Income (“SSI”) benefits on October 31, 1994 (“First Application”), claiming that since August 13th of that year his multiple sclerosis had rendered him unable to work. Record at 313. The First Application was denied initially and on reconsideration, following which on September 21, 1995 a hearing was held before an administrative law judge in Bangor, Maine. *Id.* Prior to the hearing, on May 10, 1995, attorney William E. Macdonald entered his appearance on the plaintiff’s behalf. *Id.* at 268. The plaintiff was represented at the hearing by Thomas Jones, an attorney employed by Macdonald. *Id.* at 313.

By decision dated March 14, 1996 (“First ALJ Decision”) the administrative law judge determined that the plaintiff had not been under a disability at any time through the date of decision. *Id.* at 319. A “Notice of Decision – Unfavorable” advised the plaintiff that he had sixty days within which to appeal the adverse decision to the Appeals Council. *Id.* at 310. By letter dated March 21, 1996 H. Benedict Obermann, a paralegal employed by Macdonald’s firm, informed the plaintiff that Jones had departed the firm and that the plaintiff’s file had been passed on to Obermann for handling. *Id.* at 328. The letter also stated:

The critical question, of course, is whether to file an appeal or submit a new application. I have carefully reviewed the file in an effort to make that determination.

A review of the file would indicate that you may be better served by completing a new application rather than filing an appeal. . . . I would be happy to assist you in this matter.

*Id.* The plaintiff nonetheless wanted to appeal the decision. Affidavit [of Wallace Leach] (“Leach Aff.”) (Docket No. 6) ¶¶ 3-4. He did so by letter dated April 19, 1996. Record at 326-27. On April 25, 1996 he consulted with attorney LouAnna C. Perkins regarding his wish to appeal. Affidavit of

LouAnna C. Perkins (“Perkins Aff.”) (Docket No. 8) ¶ 1.<sup>1</sup> Perkins, a general practitioner with a small solo practice and no experience in SSI law, looked over the plaintiff’s paperwork and explained what he would have to do for an appeal. *Id.* ¶ 3. She did not actively represent the plaintiff but rather spoke with him primarily about how things were going, making suggestions about doctor reports he might want to submit and helping him to understand what the paperwork meant. *Id.* ¶ 5.

By letter dated July 30, 1997, which indicates that it was copied to Perkins, the Appeals Council denied review. Record at 329-30. The letter stated in relevant part: “If you desire a court review of the Administrative Law Judge’s decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter.” *Id.* at 329.

At about this time Perkins advised the plaintiff that she would be unable to help him further. *See* Leach Aff. ¶ 5 (“Ms. Perkins is not a social security lawyer and she was unable to help me with an appeal from the Appeals Council to the federal courts.”); Record at 50-51 (testimony of plaintiff, in response to question whether Perkins advised him of right to file in federal court, “She told me [she] was not able to do it. It wasn’t in her field and she was going to try to contact another lawyer in hopes of having someone else represent me that knew more about SSI.”). At the time that the plaintiff essentially was released by Perkins because of her unwillingness to go ahead with the federal-court filing, the plaintiff did want to file in federal court. *Id.* at 51. The plaintiff “waited quite a while before I was finally contacted by an attorney” Francis M. Jackson, who continues to represent him in this case. *Id.*; *see also* Perkins Aff. ¶ 6 (“I ultimately referred [the plaintiff] to a lawyer specializing in SSI.”).

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<sup>1</sup> The plaintiff also indicates that he received “some help from the Volunteer Lawyers Project” in appealing the adverse decision. Leach Aff. ¶ 4. This apparently was in addition to Perkins’ help. *See* Record at 50.

After the Appeals Council denial the plaintiff was unrepresented. Leach Aff. ¶ 6. During the running of the appeal period following that denial he was “quite depressed and unable to do much.” *Id.* ¶ 7. To the best of his recollection, he was “so depressed [he] couldn’t even get to the doctor’s much during that time.” *Id.* Because of his multiple sclerosis and his depression, he “was just not able to understand how to manage to take an appeal to federal court on [his] own without a lawyer.” *Id.* ¶ 8.

In August 1997 the plaintiff filed *pro se* a new application for SSI benefits (“Second Application”). Record at 356-65. The Second Application was denied initially by decision dated January 5, 1998. *Id.* at 331. On February 5, 1998 Jackson entered his appearance as the plaintiff’s counsel. *Id.* at 345. The Second Application was denied on reconsideration by decision dated April 14, 1998. *Id.* at 332. A hearing was held before a second administrative law judge in Bangor, Maine on December 2, 1998, following which he ruled that the plaintiff had established that he had been disabled from working as of March 15, 1996 as the result of a combination of multiple sclerosis, an anxiety disorder and a dysthymic disorder (“Second ALJ Decision”). *Id.* at 17, 23. This determination rested in part on the October 28, 1997 report of State of Maine Disability Determination Services examiner A.J. Butler, Ed.D., who diagnosed the plaintiff with dysthymic disorder and personality disorder NOS (with mixed features). *Id.* at 459. Dr. Butler observed *inter alia*: “It is the impression of the examiner that the claimant is apt to function intellectually within the low-average range and to process information cognitively concretely. The claimant’s affective responsiveness was somber and he did process information slowly throughout the evaluation.” *Id.* at 458.

The administrative law judge nonetheless denied the plaintiff’s request to reopen the 1994 claim, noting that “[t]here is no allegation or proof that the prior decision was in any way the product of fraud or similar fault, and therefore there are no grounds upon which the earlier decision may be

reopened.” *Id.* at 18. The administrative law judge further noted that, pursuant to Social Security Ruling 91-5p, “where it is proven that mental incapacity prevented an individual from requesting review of an adverse determination, and where the claimant had no one legally responsible for prosecuting the claim at the time of the prior administrative action, a determination will be made of whether good cause exists for extending the time to request review.” *Id.* at 18 n.1. The administrative law judge stated that the ruling did not apply inasmuch as the plaintiff had been represented in conjunction with the prior claim both at hearing and in the review before the Appeals Council. *Id.*

Among materials submitted in conjunction with the Second Application was a letter from William M. DiTullio, Ed.D., a licensed clinical psychologist, stating in relevant part:

Regarding your question of whether or not Mr. Leach was mentally/emotionally able to pursue an appeal to the federal court without the assistance of an attorney in the time period of 3/14/96 to 5/20/96, it is my opinion that he neither was, nor is, capable of such an undertaking. Historically, Mr. Leach reported that he initially did have an attorney, who he said “disappeared”. He later learned that the lawyer had cancer. Mr. Leach tried to file an appeal on his own, but with no success. He reports having found this “too overpowering” on his own, and additionally does not feel he has “the intelligence for it”.

*Id.* at 4A-4B.<sup>2</sup>

The plaintiff appealed the Second ALJ Decision to the Appeals Council, which noted by decision dated April 18, 2000: “The Appeals Council acknowledges your request for reopening and revision of the final decision made in connection with your prior application. However, the Administrative Law Judge addressed the issue. . . . Pursuant to the regulatory provisions in 20 CFR 416.1403, you are not entitled to court review under section 1631(c)(3) of the Social Security Act of

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<sup>2</sup> The relevant time period in this case was not from March 14, 1996 through May 20, 1996 but rather was the sixty-day period commencing July 30, 1997, following the denial of Appeals Council review. However, even in the absence of Dr. DiTullio’s opinion the outcome is the same in this case.

the issue of reopening.” *Id.* at 5-5A.<sup>3</sup> The instant suit was filed on May 8, 2000. *See* Complaint (Docket No. 2).

### III. Discussion

The commissioner rests his Motion on two basic principles: (i) that 42 U.S.C. § 405(g) empowers the federal courts to review only “final” decisions of the commissioner, and (ii) that a declination to reopen a prior claim generally does not qualify as “final.” *See* Motion at 3-8.

The plaintiff invokes two exceptions to these principles: (i) that the court retains jurisdiction to the extent that a claimant raises a colorable constitutional claim (here, a claim of denial of due process), and (ii) that the *de facto* reopening of a prior claim renders a new decision on it “final” and hence reviewable. *See generally* Plaintiff’s Opposition to the Defendant’s Motion To Dismiss the Complaint (“Opposition”) (Docket No. 7). I do not reach the second point inasmuch as I find the first dispositive.

The record in this case discloses that the plaintiff was both unrepresented during August and September 1997 (the sixty-day period following denial of Appeals Council review of the First ALJ Decision) and, per the October 1997 report of Dr. Butler, suffering at approximately the same time from mental impairments that affected his ability to process information. The plaintiff avers that these mental impairments, in combination with his multiple sclerosis, rendered him unable to pursue an appeal in federal court. This evidence suffices to raise a colorable claim of denial of his right to due process. *See, e.g., Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (“Secretary’s refusal to reopen violates due process where claimant’s mental illness prevented him from understanding and pursuing administrative remedies”) (citation and internal quotation marks omitted); *Parker v.*

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<sup>3</sup> Confusingly, the notice also contained standardized language advising a claimant of the right to seek review in federal court. Record at 5-5A.

*Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981) (“The alleged defect in notification does not concern the content of the standard notices, which were admittedly mailed and received, but relates to the ability of the claimant to understand and act upon them. Parker’s contention is that, because she did not have the mental ability to understand and comply with the notice of further administrative procedures, she did not receive meaningful notice and an opportunity to be heard.”).<sup>4</sup>

In turn, the raising of a colorable constitutional claim suffices to confer subject-matter jurisdiction in this case. *See, e.g., Califano v. Sanders*, 430 U.S. 99, 109 (1977) (dictum that, even in cases in which Social Security commissioner declined to reopen previous claim, court would retain jurisdiction to address constitutional questions, which “obviously are unsuited to resolution in administrative hearing procedures”).

### III. Conclusion

For the foregoing reasons, I recommend that the Motion be **DENIED**.

### 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,***

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<sup>4</sup> The record also demonstrates that the plaintiff, who was represented or assisted by counsel through the date of denial of Appeals Council review, understood the basic fact that he had a right to appeal its adverse decision in federal district court. This raises a thorny question whether, to state a colorable claim of due-process denial, a Social Security claimant must demonstrate that mental impairment rendered it impossible to comprehend even that fundamental fact. My research discloses some support for this notion. *See, e.g., Stieberger v. Apfel*, 134 F.3d 37, 40 (2d Cir. 1997) (phrasing issue as “whether notice of denial of disability benefits to an unrepresented claimant who cannot comprehend it because of mental impairment is constitutionally deficient”). However, I take comfort that the First Circuit in an unreported decision has suggested that the test is broader, encompassing ability to comprehend the steps entailed in an appeal or even to pursue the appeal itself. *See Boothby v. Social Sec. Admin. Comm’r*, 1997 WL 727535 at \*1 (1st Cir. 1997) (argument that unrepresented claimant’s “mental impairments prevented him from understanding and pursuing his administrative remedies . . . when factually supported, has gained a favorable judicial reception.”).

*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 5th day of October, 2000.*

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*David M. Cohen  
United States Magistrate Judge*

ADMIN

U.S. District Court  
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-92

LEACH v. SOCIAL SECURITY, COM

Filed: 05/08/00

Assigned to: Judge GEORGE Z. SINGAL

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000

Nature of Suit: 863

Lead Docket: None

Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 42:405 Review of HHS Decision (DIWC)

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