



99 F.3d at 1210; *Hawes v. Club Ecuestre el Comandante*, 598 F.2d 698, 699 (1st Cir. 1979) (question of jurisdiction decided on basis of answers to interrogatories, deposition statements and an affidavit).

## II. Background

On March 27, 1995 the plaintiff, who last met the disability insured status requirements of the Social Security Act on December 31, 1991, filed an application for SSD benefits (the “First Application”) alleging a disability onset date of December 17, 1991. Declaration of William R. Waxman, etc. (“Waxman Decl.”) (Docket No. 4) ¶ 5(a).<sup>1</sup> The claim was denied at the initial level on April 28, 1995, whereupon the plaintiff had sixty days within which to request reconsideration. Social Security Notice dated April 28, 1995, attached as Exh. 1 to Waxman Decl. The claim was not further pursued. Waxman Decl. ¶ 5(a).

On February 3, 1997 the plaintiff filed another SSD application (the “Second Application”) alleging onset of disability on December 28, 1996. *Id.* ¶ 5(b). Inasmuch as the plaintiff’s date last insured had not changed, the claim was denied at the initial level for lack of insured status. *Id.* The plaintiff amended her alleged onset date to December 17, 1991. *Id.* ¶ 5(c). On April 28, 1997 the application was again denied upon reconsideration on the ground that the plaintiff had engaged in substantial gainful activity from May 1995 through December 1996 and, thus, no earlier onset date could be established. *Id.*

The plaintiff filed a request for a hearing before an administrative law judge, which was dismissed on April 30, 1999 on the basis of application of the doctrine of *res judicata*. *Id.* ¶ 5(d).

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<sup>1</sup> The plaintiff was seriously injured in a car accident in the United Kingdom on December 17, 1991. See Letter dated June 11, 1992 from Frances S. Mair to Doctor, attached as Exh. B to Affidavit [of Priscilla Leo] (“Leo Aff.”), attached to Plaintiff’s Opposition to the Defendant’s Motion To Dismiss the Complaint (“Opposition”) (Docket No. 5). She had a number of preexisting medical problems. *Id.*

Specifically, the administrative law judge found that “[t]he claimant’s current request for hearing involves the rights of the same claimant on the same facts and on the same issues which were decided in the final and binding determination dated April 28, 1995, made on the prior application.” Order of Dismissal dated April 30, 1999, attached as Exh. 4 to Waxman Decl., at 2.

The plaintiff requested review of the order of dismissal, which was denied by the Appeals Council on June 29, 2000. Waxman Decl. ¶ 5(e). The instant suit followed. *Id.* ¶ 5(f).

The plaintiff makes the following averments: (i) that throughout the sixty-day period following the initial denial of the First Application she was extremely depressed, Leo Aff. ¶ 3; (ii) that she was receiving Paxil medication for her depression but still could not cope with taking an appeal, *id.*; (iii) that she had no representative to take an appeal on her behalf, *id.*; (iv) that because of her depression and chronic pain she was not able to understand what she actually had to do to manage to take an appeal on her own without a lawyer, *id.* ¶ 4; (v) that she was so depressed that she could not even bring herself to call Social Security about the decision, *id.*; (vi) that she was so financially desperate during that time that she attempted to return to work in May 1995, *id.* ¶ 5; (vii) that although it was supposed to be a forty-hour-a-week job, she worked only 11.8 hours her first week and then just over twenty-three hours per week in June 1995, *id.*; (viii) that she was only able to manage that many hours because her friend helped her and covered for her when she was unable to function, *id.*; and (ix) that on at least four occasions between July 8, 1999 and September 21, 1999 she met with Frank Luongo, Ph.D., a clinical psychologist, *id.* ¶ 7.; Psychological Evaluation dated October 6, 1999 (“Luongo Report”), attached as Exh. A to Leo Aff., at 1.

In his evaluation report, Dr. Luongo noted:

Reflecting back to 1995, she indicates that because of her depression and her physical difficulties, she engaged in day-to-day activities on a minimal and restricted basis. She indicates that she only did what she had to do to get by, in order to take care of herself and her son. She was chronically fatigued, and her sleeping was significantly

impaired because of pain. She remembers having difficulty concentrating, and her overall report of her mental state was that she did not care about anything. She had frequent crying spells and a chronic sense of despair.

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Even though she recalls having read that she had the right to appeal her benefits, she perceived herself as too limited and incompetent to carry out this task. A pronounced sense of incompetency frequently becomes an associated correlary [sic] to severe depression such as that which she was experiencing. To pursue the bureaucratic requirements of an appeal felt overwhelming, if not impossible.

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Coincidentally, at the same time, Ms. Leo was presented with the opportunity to engage in a 20- to 25-hour-a-week job in tasks related to credit card processing at Sears Roebuck. She chose what seemed at the time the easiest way out, and that was to do the work, even though she was in continual pain.

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She describes the difficulty she had in walking from the parking lot to her station in the store, and notes that she missed work approximately 20% of the time. In detailing her job performance, she recalls that for the most part, she had the customers fill out the credit applications, whereas normally she, as the clerk, would have done so for them. She was in such a state of passivity and pain that she took the course of least resistance, as it were. She indicates that she believes her work performance was adequate nevertheless. She required others to assist her with any kind of lifting or moving, and she continually had constant pain and suffered prolonged crying spells. She states that she was able to hide her tears when in public.

Her position was eliminated a year and a half after she began employment. She was offered another position which would have been much more physically demanding, and which she consequently had to turn down.

In view of the above factors, it is the examiner's opinion that all of the circumstances outlined above made it virtually impossible for Priscilla Leo to have pursued her appeal rights at the time of her denial on 4/28/95. . . . Priscilla Leo was subject to multiple disabling circumstances, despite the appearance of having been marginally able to get by in a half-time position. It is noteworthy that she was absent from this position a significant portion of the time, and that she required a good deal of propping up from others in order to maintain even a partially satisfactory performance.

Luongo Report at 1-3.

Medical records submitted by the plaintiff include an office note of May 29, 1998 noting: “Patient is complaining of depression. She thinks that her depression has been worse over the past month or so. . . . Patient’s depression started after an MVA in 1992. She was started on Zoloft but was switched to Paxil, and she is unsure exactly why. At that point she saw a psychiatrist.” Progress Note of Thomas P. Mills, M.D., dated May 29, 1998 (“Mills Note”), attached as part of Exh. B to Leo Aff.

### **III. Discussion**

The commissioner rests his Motion on the principle that neither a dismissal on the ground of *res judicata* nor a declination to reopen a previous decision qualifies as a “final,” judicially reviewable decision pursuant to 42 U.S.C. § 405(g) absent a colorable constitutional claim. Motion at [3]-[11].

The plaintiff rejoins that she does assert such a colorable constitutional claim namely, denial of due process resulting from the combination of her lack of legal representation and her depression in the sixty days following initial denial of the First Application on April 28, 1995. *See generally* Opposition. The commissioner urges the court to find the plaintiff’s claim less than “colorable” given that (i) the Luongo Report “is based entirely on plaintiff’s own uncorroborated claims that five years before, she had difficulty concentrating and crying spells, and didn’t care for anything,” (ii) a treatment record dated March 22, 1995 shows only that she was prescribed medication for depression (first Prozac and then Paxil), “as are millions of working Americans,” and (iii) her “capacity to work and take [care] of her own affairs” is demonstrated by her return to part-time work at Sears from May 1995 (shortly after initial denial of the First Application) through early 1997, when the position was eliminated. Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion to Dismiss (“Reply”) (Docket No. 7) at 2-3.

There is no evidence that the plaintiff in this case alleged disability based even partly on mental impairment in either the First or Second application; however, there is authority for the proposition that a due-process claim may yet be made out if a claimant demonstrates that he or she was in fact suffering from a mental impairment that precluded him or her from understanding and/or pursuing rights to a Social Security appeal. *See, e.g., Canales v. Sullivan*, 936 F. 2d 755, 759 (2d Cir. 1991) (noting in case in which claimant did not seek benefits based on mental impairment, “because Canales’ affidavit avers that mental impairment prevented her from comprehending her right to judicial review, we conclude that the district court should have permitted her to attempt to prove this claim.”); *Parker v. Califano*, 644 F. 2d 1199, 1203 (6th Cir. 1981) (noting that later-submitted medical evidence raised “substantial question” whether claimant received due process in pressing initial claim for benefits not based on mental impairment). Such an approach makes particular sense in a case such as this, in which the plaintiff claims to have suffered disabling physical trauma prior to her date last insured and to have developed depression afterward in an apparent response to the traumatic physical event. *See* Opposition at 1-2; Mills Note.

The plaintiff offers no contemporaneous evidence that she suffered from depression during the pendency of the relevant appeals period (May and June 1995). However, the commissioner acknowledges that she was prescribed depression medication as of March 1995. *See* Reply at 2. The existence of a diagnosis of depression is further corroborated by the 1998 office note of Dr. Mills. On balance, the evidence, although thin, suffices to transform the plaintiff’s claim into something more than a mere generalized, self-serving allegation that she suffered from depression at the relevant time.

Of greater difficulty is the question whether the plaintiff makes out a colorable claim that the mental impairment from which she suffered rendered her incapable of understanding and/or pursuing

her Social Security appeal rights in May and June 1995.<sup>2</sup> As the commissioner underscores, the plaintiff commenced her Sears job precisely during this window of time and despite her troubles acknowledges that she was able to perform the job adequately. The parties do not cite, nor can I find, a case in which a person worked during the same period when allegedly precluded by mental impairment from pursuing a Social Security appeal. Nonetheless, and despite my misgivings that such a person in the final analysis could succeed in proving such incapacity, I find that the plaintiff makes out a “colorable” claim. She avers, and Dr. Luongo corroborates, that her depression impeded her from pursuing the steps necessary to request reconsideration of the initial denial of the First Application. Her claim accordingly is not patently frivolous. *See, e.g., Evans v. Chater*, 110 F.3d 1480, 1483 (9th Cir. 1997) (noting that “plaintiff whose challenge was not wholly insubstantial, immaterial, or frivolous stated a colorable constitutional claim”) (citation and internal quotation marks omitted); *Boock v. Shalala*, 48 F.3d 348, 353 (8th Cir.1995) (indicating that only those claims that were “patently frivolous” would “fail to confer jurisdiction upon the district court”).<sup>3</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

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<sup>2</sup> The Luongo Report indicates that the plaintiff recalled having read that she had the right to appeal the initial denial of the First Application. Luongo Report at 2. This raises a thorny question whether, to state a colorable claim of due-process denial, a Social Security claimant must allege 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.”).

<sup>3</sup> I note that the First Circuit cites these decisions with favor in construing the term “colorable” in the unreported *Boothby* decision. *See Boothby*, 1997 WL 727535 at \*1.

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, 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 27th day of October, 2000.*

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*David M. Cohen  
United States Magistrate Judge*

ADMIN

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

CIVIL DOCKET FOR CASE #: 00-CV-212

LEO v. SOCIAL SECURITY, COM  
Assigned to: JUDGE GENE CARTER

Filed: 07/19/00

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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