

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LINDA M. WATSON,)	
)	
Plaintiff)	
)	
v.)	Docket No. 00-240-B
)	
LARRY G. MASSANARI,)	
Acting Commissioner of Social Security,)	
)	
Defendant)	

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant, the commissioner of Social Security, seeks dismissal of this action for review of his decision to deny the plaintiff’s claim for child’s insurance benefits.¹ The commissioner contends that this court lacks jurisdiction over this appeal because the plaintiff failed to exhaust her administrative remedies, citing 42 U.S.C. § 405(g). The plaintiff, who appears *pro se*, filed no opposition to this motion. I recommend that the court grant the motion.

On November 18, 1996 the plaintiff filed an application for child’s insurance benefits as a survivor of her deceased father. Decision [of Administrative Law Judge] (“Decision”), part of Exhibit 2 to Declaration of Bill Cho, etc. (“Cho Dec.”), attached to Defendant’s Motion to Dismiss Plaintiff’s Complaint, etc. (Docket No. 12), at 1 & List of Exhibits attached thereto. After

¹ The motion to dismiss was filed on September 25, 2001. Docket No. 12. On October 9, 2001 the plaintiff filed a motion for default judgment, alleging that the defendant had failed to file a timely answer. Motion for Court to Grant the Law Suit Complaint to the Plaintiff and to Grant a Default Judgment, etc. (Docket No. 13) at 1-2. Because I recommend dismissal of this action due to the court’s lack of jurisdiction it is not necessary to reach this motion, but I note that the motion to dismiss was filed well before the November 21, 2001 deadline established by this court’s order for the filing of an answer or other response by the defendant. Order to Answer (Docket No. 11).

administrative denials of the claim, the plaintiff requested a hearing, which was held on February 26, 1998. Decision at 1.

The administrative law judge found, in an opinion dated April 18, 1998, that the plaintiff was married at the time she filed her application and accordingly did not qualify for child's insurance benefits under 20 C.F.R. § 404.350 and 42 U.S.C. § 202(d)(1)(B). *Id.* A notice of decision dated April 18, 1998 and mailed to the plaintiff with the administrative law judge's opinion informed the plaintiff, *inter alia*, that if she wished to appeal the decision to the Appeals Council of the Social Security Administration she must do so within 60 days and included instructions for perfecting such an appeal. Notice of Decision, part of Exhibit 2 to Cho Dec., at 1-2. The notice includes the following statement: "If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review." *Id.* at 2. The plaintiff filed this action on November 24, 2000. Docket No. 1. The defendant has no record of any request for review of the administrative law judge's decision being filed by the plaintiff. Cho Dec. ¶ 3(g).²

Judicial review of the commissioner's decision is governed by 42 U.S.C. § 405(g), which provides for such review only when the commissioner's decision is a final decision. If an application for benefits is denied by an administrative law judge following a hearing, the applicant must request a review of the decision within 60 days from the date of receipt of the notice of the decision. 20 C.F.R. § 404.968(a)(1). In the absence of Appeals Council review, the decision of the administrative law judge is final and binding. 20 C.F.R. § 404.955. Only after a timely request for Appeals Council review has been made and the Appeals Council either denies review or makes a decision is there a "final decision" of which judicial review is possible. 20 C.F.R. § 404.981.

² In her unsworn complaint the plaintiff alleges that she "has appealed her case as far as she could with Social Security, being the appeals counsel [sic]," Complaint (Docket No. 1) at 1 [reverse], but she has failed to respond to the motion to dismiss and has not presented any material of evidentiary quality that would allow the court to discount the Cho affidavit.

A failure to exhaust administrative remedies by timely seeking Appeals Council review makes judicial review unavailable. *Lejeune v. Matthews*, 526 F.2d 950, 952 (5th Cir. 1976); *Goodreau v. Bowen*, 647 F. Supp. 1409, 1409 (W.D. Pa. 1986). *See also Wilson v. Secretary of Health & Human Servs.*, 671 F.2d 673, 677 (1st Cir. 1982) (no jurisdiction in district court where administrative remedies not exhausted). The record before the court establishes that the plaintiff did not seek Appeals Council review of the denial of her claim by the administrative law judge. Accordingly, this court lacks jurisdiction over her appeal and the defendant is entitled to dismissal.

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 5th day of November, 2001.

David M. Cohen
United States Magistrate Judge

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