

Motion to Dismiss, etc. (“Objection”) (Docket No. 7), ¶ 2. These claims were denied on May 14, 1992. *Id.* ¶ 3. The plaintiff filed a request for reconsideration on both claims. *Id.* ¶ 4. On or about May 24, 1992 the plaintiff’s request for reconsideration of her claim for disability benefits was denied. *Id.* ¶ 5. On or about July 9, 1992 the plaintiff’s application for supplemental security income benefits was approved. *Id.* ¶ 6. The notice of denial of the request for reconsideration on the plaintiff’s application for disability benefits included a statement that a request for a hearing on the claim must be filed within 60 days. Timlin Dec. ¶ 3(a). The plaintiff filed a request for a hearing on April 19, 2001. Order of Dismissal, In the Case of Melanie R. Eastman, Exhibit 1 to Timlin Dec.

An administrative law judge issued an order of dismissal of the request for hearing on June 15, 2001 on the ground that no good cause had been shown for extending the 60-day filing period. *Id.* On August 15, 2001 the plaintiff filed a request for review of the hearing order. Timlin Dec. ¶ 3(b). The Appeals Council denied the request for review on November 2, 2001. *Id.* The plaintiff filed the instant action on January 2, 2002. Docket. The Social Security Administration subsequently located a letter from counsel for the plaintiff dated October 24, 2001, arguing that there was good cause for the late filing. Timlin Dec. ¶ 3(c). The Appeals Council responded to the letter on February 8, 2002, concluding that there was no basis for disturbing the administrative law judge’s order. *Id.* ¶ 3(d).

II. Discussion

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 Social Security Administration will provide a hearing before an administrative law judge to an applicant whose request for reconsideration of its denial of her application for benefits has been denied if the applicant files a written request for such a hearing within 60 days after receiving notice of the determination. 20 C.F.R. §§ 404.930, 404.933. An applicant who does not file a timely request for a hearing may request an extension of time by filing a written request showing good cause for missing the deadline. 20 C.F.R. § 404.933(c). In determining whether good cause exists, the Social Security Administration will consider the circumstances that kept the applicant from making a timely request, whether its own action misled the applicant, whether the applicant did not understand the requirements of the Social Security Act and whether any physical, mental, educational or linguistic limitations prevented the applicant from making a timely request. 20 C.F.R. § 404.911(a). Here, the applicant apparently relies on the first and second of these considerations; she contends that, on some unspecified date after receiving notice that her application for disability benefits had been denied after reconsideration, she contacted the local office of the Social Security Administration and the “Social Security Administration via its [sic] toll free telephone number” and told the individuals with whom she spoke that she wanted to appeal. Plaintiff’s Aff. ¶ 7. She states that she was told on these occasions that she was “not eligible” for disability insurance benefits and that “it would not do [her] any good to appeal.” *Id.*

The plaintiff’s affidavit is significant for what it does not say. She does not state whether the telephone conversations she reports occurred during the 60-day appeal period. She does not say that that individuals with whom she spoke told her that she could not appeal. She does “concede that she

was given notice of her right to appeal” the decision in question. Objection at [7]. For all that appears in the record, the statements of employees of the Social Security Administration were correct.

In *Califano v. Sanders*, 430 U.S. 99 (1977), the Supreme Court held that the Social Security Administration’s dismissal of a request to reopen a claim for benefits, made almost seven years after an initial denial that the claimant pressed to the level of the Appeals Council within the Social Security Administration but not to judicial review, was not a final decision of the agency subject to judicial review under 42 U.S.C. § 405(g). *Id.* at 102-03, 108-09.

[A]n interpretation that would allow a claimant judicial review simply by filing — and being denied — a petition to reopen his claim would frustrate the congressional purpose, plainly evidence in § 202(g), to impose a 60-day limitation upon judicial review of the [agency’s] final decision on the initial claim for benefits. Congress’ determination so to limit judicial review to the original decision denying benefits is a policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims. Our duty, of course, is to respect that choice.

Id. at 108 (citation omitted).

The plaintiff relies on *Bellantoni v. Schweiker*, 566 F. Supp. 313 (E.D. N.Y. 1983), to support her contention that a decision by the agency denying an application for benefits “solely on the basis of a procedural default,” *id.* at 315, is a final decision reviewable by the courts under section 405(g). However, that decision is in the distinct minority of reported decisions by federal courts that have considered similar factual situations. *Waters v. Massanari*, 184 F.Supp.2d 1333, 1339 (N.D. Ga. 2001) (“The Eleventh Circuit is [the] only federal circuit which grants judicial review of the Appeals Council’s dismissal of an untimely request for review.”) The refusal of the Social Security Administration to consider an untimely request for review was held not to be a final decision on the merits subject to judicial review in *Adams v. Heckler*, 799 F.2d 131, 133 (4th Cir. 1986) (citing cases). *See also Boock v. Shalala*, 48 F.3d 348, 351-52 (8th Cir. 1995); *Banks v. Chater*, 949 F. Supp. 264, 268 (D. N.J. 1996). Most instructive for the purposes of this court are the opinions of the

First Circuit in *Doe v. Secretary of Health & Human Servs.*, 744 F.2d 3 (1st Cir. 1984), and *Rios v. Secretary of Health, Educ. & Welfare*, 614 F.2d 25 (1st Cir. 1980). In *Doe*, the applicant's case was dismissed after he failed to appear for a hearing on his application for benefits and failed to submit an explanation for his absence deemed adequate by the administrative law judge. 744 F.2d at 4. The First Circuit held that this decision was not "the type of final decision Congress intended routinely to subject to judicial review." *Id.* It upheld dismissal of the court action for lack of jurisdiction. *Id.* at 5. In *Rios*, the administrative law judge dismissed the applicant's claim after a hearing on the ground of *res judicata*, specifically, a denial of a claim filed earlier. 614 F.2d at 26. The First Circuit held that the final decision of the agency to which section 405(g) refers is "the initial substantive decision of the [commissioner] on the benefits claim." *Id.* It concluded that the district court lacked jurisdiction over the plaintiff's appeal. *Id.* at 27.

These decisions of the First Circuit would require this court to reject the reasoning of the *Bellantoni* court, even if the majority of the case law on point were not also to the contrary. The decision of the defendant that the plaintiff did not make a showing of good cause for her failure to file a timely request for a hearing in 1992 is not a final decision subject to judicial review.

The plaintiff argues in the alternative that she has nonetheless presented a constitutional claim entitling her to proceed in this court. Objection at [7]-[8]. She identifies this as a due process claim arising under the Fifth Amendment to the Constitution, contending that "[f]airness and equity required that the Social Security Administration treat [her] verbal requests as a Request for Hearing in accordance with 20 C.F.R. § 404.933." *Id.* In *Califano*, the Supreme Court warned that such arguments face a high hurdle:

This is not one of those rare instances where the [agency's] denial of a petition to reopen is challenged on constitutional grounds. Respondent seeks only an additional opportunity to establish that he satisfies the Social

Security Act's eligibility standards for disability benefits. Therefore, § 205(g) does not afford subject-matter jurisdiction in this case.

430 U.S. at 109. In the instant case, the plaintiff seeks only the same additional opportunity. In *Doe*, the First Circuit rejected a similar claim.

Nor does claimant come within the exception recognized for claims of constitutional dimension. Claimant claims a denial of due process inhering in his indigency and having been requested to furnish a medical certificate. We see none.

* * *

This case falls considerably short of the demonstration of the presence of a constitutional issue in *Penner v. Schweiker*, 701 F.2d 256 (3d Cir. 1983) (faulty notice of adverse determination by Secretary).

744 F.2d at 5 (citation omitted). The same is true of the factual circumstances set forth by the plaintiff in this case.

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 12th day of June, 2002.

David M. Cohen
United States Magistrate Judge

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