

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

***E.E.P., by her next friend DEBRA
PALMER,***)
)

Plaintiff)

v.)

Docket No. 03-246-P-C

JO ANNE B. BARNHART,)
Commissioner of Social Security,)

Defendant)

REPORT AND RECOMMENDED DECISION¹

The plaintiff in this Supplemental Security Income (“SSI”) appeal contends that the commissioner should have reopened an earlier application from which she took an untimely appeal upon awarding benefits in response to her current application. The plaintiff states that the first application was filed on December 14, 2000, Itemized Statement of Errors, etc. (“Itemized Statement”) (Docket No. 8) at 2, and that “[t]he basis for the claim of disability is precisely the same in both applications,” Record at 11. At oral argument, counsel for the commissioner stipulated to these factual assertions. The only document included from the initial application is an order of dismissal dated December 11, 2001, which states that a notice of the initial

¹ This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks modification of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office. Oral argument was held before me on June 21, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page
(continued on next page)

determination on that application was sent to the plaintiff on March 14, 2001; that a prior application was filed on August 17, 1998; and that the request for hearing on the March 14, 2001 determination was untimely. *Id.* at 60-61. After the administrative law judge issued his decision, counsel for the plaintiff asked the administrative law judge and the appeals council to reopen the application denied on March 14, 2001 and find that the plaintiff had been disabled since December 14, 2000, rather than December 13, 2001, the date of filing of the current application. *Id.* at 9, 11-12, 20.

A decision by the commissioner may be reopened without 12 months of the date of the notice of the initial determination for any reason. 20 C.F.R. § 416.1488(a). The instant application was filed on December 13, 2001, Record at 16, less than 12 months after the notice of the initial determination on the earlier application was sent. However, the request to reopen the earlier application was apparently not made until February 26, 2003. *Id.* at 11. Reopening more than 12 months after the date of the notice and less than two years after the date of the notice is only available on a showing of good cause. 20 C.F.R. § 416.1488(b). “Good cause” is defined at 20 C.F.R. § 416.1489 as the furnishing of new and material evidence, the making of a clerical error or the fact that the evidence considered in making the determination clearly shows on its face that an error was made. The plaintiff makes no attempt to show that good cause exists in this case, and none is apparent from the record.

In order to avoid the “good cause” requirement, the plaintiff relies on the date on which she filed the instant application and a section of HALLEX. Itemized Statement at 2-3. “HALLEX” is the acronym for the Hearings, Appeals and Litigation Law Manual, an internal procedural document of the Social Security Administration. *Shave v. Apfel*, 238 F.3d 592, 596 (5th Cir. 2001). *See also Moore v. Apfel*, 216 F.3d

references to the administrative record.

864, 868 (9th Cir. 2000) (“HALLEX is strictly an internal guidance tool, providing policy and procedural guidelines to ALJs and other staff members.”) The section cited by the plaintiff provides, in relevant part:

If an ALJ is issuing a decision on a current application, and the record shows that in connection with the current application the claimant did not specifically request reopening and revision of the prior determination or decision, but did allege an onset date of disability within the previously adjudicated period, the ALJ must consider the claimant’s current application to be an implied request for reopening and revision of the determination or decision on the prior application. Under these circumstances, if the ALJ’s decision on the current application is unfavorable, the ALJ will not discuss or make any finding on the issues of reopening and revising the unfavorable determination or decision on the prior application. However, if the ALJ’s decision on the current application is favorable, the ALJ must include in the decision appropriate findings and rationale on the reopening and revision issues.

HALLEX I-2-9-1 (emphasis in original), available at www.ssa.gov/OP_Home/hallex/I-02/I-2-9-1.html.

The only circuit courts of appeals that have addressed the issue differ on whether the commissioner may be compelled to act in accordance with the terms of HALLEX. The Fifth Circuit “has expressed a strong preference for requiring the social security administration to follow its own internal procedures,” once the claimant shows that she was prejudiced by the agency’s failure to follow a particular rule set forth in HALLEX. *Shave*, 238 F.3d at 596-97. The Ninth Circuit, on the other hand, concludes that HALLEX “has no legal force and is not binding” and “does not prescribe substantive rules and therefore does not carry the force and effect of law.” *Bunnell v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003) (citation omitted) (refusing to require recusal of administrative law judge in accordance with HALLEX). *See also Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003) (HALLEX does not “impose[] judicially enforceable duties”).

The plaintiff in this case has been prejudiced by the commissioner’s failure to comply with the cited section of HALLEX; she has possibly been deprived of one year’s entitlement to benefits. The First Circuit

has not addressed the role of HALLEX in any reported decision. However, it has required the commissioner to comply with the Social Security Administration's Program Operations Manual System ("POMS"). *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 23-24 (1st Cir. 1986). The Ninth Circuit specifically notes that it treats POMS and HALLEX, both internal procedural manuals, alike. *Lowry*, 329 F.3d at 1023. By this logic, the First Circuit should be expected to hold the commissioner to the terms of HALLEX. *Avery* thus leads me to conclude that the First Circuit would be likely to agree with the Fifth Circuit rather than the Ninth on this point.

At oral argument, counsel for the commissioner contended that an implied request to reopen is not judicially reviewable absent a colorable constitutional claim, citing *Califano v. Sanders*, 430 U.S. 99 (1977). Neither the Fifth nor the Ninth Circuit opinions cited above mentions *Califano*; neither concerned a request to reopen a claim for benefits. The Supreme Court held in *Califano* that the Social Security Act "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits." 430 U.S. at 107-08. It noted that the opportunity to reopen final decisions and to have a hearing at which the propriety of such an action may be determined are provided only by the commissioner's regulations. *Id.* at 108. It is the duty of the courts, the Supreme Court said, to respect the statutory 60-day limit on judicial review of a final decision by the commissioner, which would be frustrated by allowing a claimant to obtain judicial review merely by filing a request to reopen a claim for which no timely request for judicial review had been made. *Id.* The only exception to this rule is a challenge to the denial of a request for reopening on constitutional grounds. *Id.* at 109. No constitutional claim was raised in the plaintiff's itemized statement and, when asked at oral argument to identify such a claim on behalf of his client, counsel for the plaintiff responded that he was "not sure that there is any." A claim of denial of due process, which I suggested to counsel for both parties at oral argument, if it is not to be

available in every case in which reopening is denied, must be accompanied by some concrete suggestion of the specific manner in which due process was denied — for example, that the claimant was unable to pursue her administrative remedies due to mental illness. Here, the plaintiff has not offered any such argument at any time.

I am concerned, as I stated at oral argument, that the commissioner's interpretation of *Califano* to deprive this court of jurisdiction over the plaintiff's asserted implied request to reopen her earlier claim allows the commissioner to ignore a single provision of HALLEX when First Circuit precedent suggests that the commissioner should be required to follow her own written internal policy, particularly where the claimant is injured by the commissioner's failure to abide by her own policy directive. However, I conclude that *Califano* has precisely that effect with respect to the single issue of reopening previously denied claims.

For the foregoing reasons, I recommend that the commissioner's decision refusing to reopen the plaintiff's application for which a notice of denial was issued on March 14, 2001 be **AFFIRMED**.

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 24th day of June, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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