

the plaintiff's appeal presents a "colorable constitutional claim." *Torres v. Secretary of Health & Human Servs.*, 845 F.2d 1136, 1138 (1st Cir. 1988). The plaintiff contends that the refusal to reopen his 1995 and 1998 applications deprives him of due process of law because he was unable due to his disability to pursue those applications at the time. Statement of Errors at 5-6. Such a claim has been found to constitute a colorable constitutional claim. *E.g., Evans v. Chater*, 110 F.3d 1480, 1482-83 (9th Cir. 1997) (listing cases). The commissioner contends that the plaintiff has not raised a colorable constitutional claim in this case because the plaintiff was provided with a hearing at which he was allowed to present evidence to support his assertion that mental illness prevented him from pursuing his administrative remedies at the relevant time. Her finding that mental illness did not have that effect, she contends, is not judicially reviewable. However, once a colorable constitutional claim has been raised, neither *Califano* nor any of the cases discussed in *Evans* renders the commissioner's final decision on the substance of that constitutional claim immune from judicial review. A government agency is not an appropriate final arbiter of constitutional rights.

The administrative law judge rejected the plaintiff's argument that 42 U.S.C. § 1382c(a)(3)(J)² does not prevent a claimant from establishing that alcoholism prevented him from taking appropriate action in connection with earlier applications, Record at 20. Despite the vigorous and lengthy presentation of this argument by the plaintiff's attorney, Statement of Errors at 2-5, 8-9, it is not necessary to decide this issue because the administrative law judge's conclusion that the plaintiff failed to establish good cause for his procedural lapses in 1995 and 1998 even when his alcoholism was considered, Record at 20-26, is

² The statute provides: "[A]n individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 1382c(a)(3)(J).

supported by substantial evidence, 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996).

The governing regulation in this case provides in relevant part:

(a) In determining whether you have shown that you have good cause for missing a deadline to request review we consider —

* * *

(4) Whether you had any physical, mental, educational, or linguistic limitations . . . which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

20 C.F.R. § 416.1411(a)(4). Social Security Ruling 91-5p expands on this regulation.

When a claimant presents evidence that mental incapacity prevented him . . . from timely requesting review of an adverse determination, decision, dismissal, or review by a Federal district court, and the claimant had no one legally responsible for prosecuting the claim (e.g., a parent of a claimant who is a minor, legal guardian, attorney, or other legal representative) at the time of the prior administrative action, SSA will determine whether or not good cause exists for extending the time to request review. If the claimant satisfies the substantive criteria, the time limits in the reopening regulations do not apply; so that, regardless of how much time has passed since the prior administrative action, the claimant can establish good cause for extending the deadline to request review of that action.

The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he . . . lacked the mental capacity to understand the procedures for requesting review.

In determining whether a claimant lacked the mental capacity to understand the procedures for requesting review, the adjudicator must consider the following factors as they existed at the time of the prior administrative action:

- inability to read or write;
- lack of facility with the English language;
- limited education;
- any mental or physical condition which limits the claimant’s ability to do things for him/herself.

* * *

The adjudicator will resolve any reasonable doubt in favor of the claimant.

Social Security Ruling 91-5p (“SSR 91-5p”), reprinted in *West’s Social Security Reporting Service* Rulings 1983-1991 at 810-11. The parties agree that the plaintiff was not represented at the time of the administrative actions in 1996 or 1997 (when benefits paid under the 1995 application were terminated, Record at 47, 412) and 1998.

The administrative law judge presents a very persuasive analysis of reasons why the 1995 application could not be reopened, entirely independent of the plaintiff’s mental capacity at the time, Record at 26-27, but none of the records of that application are included in the administrative record, and the administrative law judge does not identify the source of the information on which she bases her analysis. Under these circumstances, there is no evidence in the record to support that analysis, and I will not consider those reasons further.

The plaintiff contends that five mental health conditions, each alone or in any combination, met the standard of 20 C.F.R. § 416.1411(a) and SSR 91-5p:³ borderline adult intellectual functioning, amnesic disorder, anti-social personality, affective/mood disorder and alcoholism. Statement of Errors at 5-9. With respect to the first and fourth listed conditions, the plaintiff offers no explanation of how or why they could have prevented him from understanding the need or procedures for requesting review in 1996, 1997 or 1998, and I will not consider those conditions further. With respect to the amnesic disorder, the only evidence cited concerns 1998, Statement of Errors at 6-7, and I will accordingly not consider that condition in connection with the 1995 application.

The testimony of Carlyle Voss, M.D., the medical expert called by the administrative law judge at the hearing, supports her findings on the remaining asserted conditions. Record at 24, 411-22. The plaintiff

³ Counsel for the plaintiff makes much of the fact that SSR 91-5p does not mention alcoholism. Statement of Errors at 4. (continued on next page)

contends that his anti-social personality (or characterological disorder), according to Dr. Voss, meant that he lacked the motivation to act in his own best interest and therefore was unable to pursue his remedy. Statement of Errors at 7. He describes the effect of his alcoholism as making his inability to follow rules worse. *Id* at 9. Dr. Voss testified that, as of January 1997, the plaintiff “could do a lot of things for himself,” that the plaintiff was capable of pursuing his remedies with respect to SSI but that he would likely not have done so and that his alcoholism contributed substantially to his not pursuing his remedies. Record at 412-22. He disagreed with the diagnosis of John L. Newcomb, M.D., the psychiatrist who saw the plaintiff once, at his attorney’s request, *id.* at 362, that the plaintiff met the criteria for amnesic disorder, *id.* at 413. He testified that the plaintiff had the capacity to appreciate the consequences of his actions or inactions. *Id.* at 416. Nothing more is required under section 416.1411(a) and SSR 91-5p. The fact that there may be other evidence in the record to the contrary makes no difference, so long as there is substantial evidence to support the administrative law judge’s conclusion. Dr. Voss provided such evidence. It is the role of the administrative law judge to resolve conflicts in the medical evidence. *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987).

Perhaps in an effort to avoid the application of this basic principle of Social Security law, the plaintiff contends that Dr. Voss’s testimony that the plaintiff’s “motivation would be lacking” is the equivalent of inability to pursue his remedy, and that Dr. Voss’s testimony that the plaintiff would be able to pursue a remedy “is really a legal conclusion inconsistent with applicable law.” Statement of Errors at 7. Dr. Voss’s testimony presents a very close and troubling question on this point. I conclude that he distinguished between ability to pursue a remedy and the motivation to do things in one’s own best interest. Record at

Since that ruling was issued in 1991, six years before 42 U.S.C. § 1382c(a)(3)(J) took effect, there was no reason for it to
(continued on next page)

416. He testified that the plaintiff was capable of pursuing his remedies. *Id.* at 418. The regulation and the ruling do not ask whether a claimant would have pursued his remedies but only whether he could have. This is precisely the sort of question that requires expert testimony; it is not a question of law. The plaintiff also argues that Dr. Voss's testimony was "self contradictory" and "illogical." Statement of Errors at 14-15. He bases this characterization on a perceived conflict between Dr. Voss's testimony that the plaintiff was capable of pursuing his remedies but not motivated to do so, on inconsistencies between Dr. Voss's testimony and Dr. Newcomb's report, and on a perceived conflict between Dr. Voss's testimony that the plaintiff met Listing 12.08 but that he was nonetheless capable of pursuing his remedies. *Id.* As I have already noted, the administrative law judge could choose to rely on Dr. Voss's testimony rather than Dr. Newcomb's report where the two differed. Counsel for the plaintiff was unable at oral argument to offer any authority in support of his assertion that the ability to do something and the motivation to do it are the same thing, a necessary underpinning of his argument, and it is Dr. Voss's testimony that they are not. Nothing in section 12.08 of the Listings (Personality Disorders) is necessarily inconsistent with an ability to understand and pursue one's remedies. 20 C.F.R. Part 404, Appendix 1, § 12.08.

The plaintiff points to several other alleged errors by the administrative law judge that he contends entitle him to remand. First, he asserts that the administrative law judge made factual errors "about what others have done for [him] and what he has done for himself." Statement of Errors at 10-14. Much of his discussion focuses on whether his sister, Dorothy Edwards, was his payee at relevant times. *Id.* That issue is irrelevant, given the testimony of Dr. Voss that the plaintiff was himself capable of pursuing his remedies at

mention alcoholism.

the relevant times. Whether or not the plaintiff relied on others to do things for him at the relevant times makes no difference to the outcome under the circumstances.

Second, the plaintiff contends that the administrative law judge “assumes that [he] could not have been so continuously intoxicated during the relevant times that he couldn’t pursue his remedy,” asserting that this assumption lacks factual support and “is the wrong legal standard.” *Id.* at 15. This argument is also precluded by Dr. Voss’s testimony, which took alcohol abuse into account. Record at 413-21. His testimony also took into account all of the asserted mental conditions for which the plaintiff provided evidence, which addresses the plaintiff’s next argument, that the administrative law judge “apparently” failed to consider the impairments in combination, Statement of Errors at 16.

The plaintiff also contends in conclusory fashion that the administrative law judge failed to give him the benefit of any reasonable doubt as required by SSR 91-5p. *Id.* at 16-17. To the extent that this argument is properly before the court, *see Graham v. United States*, 753 F. Supp. 994, 1000 (D.Me. 1990) (mere mention of issue, unaccompanied by developed argument, deemed waiver), giving a claimant the benefit of a reasonable doubt does not require the administrative law judge to ignore the testimony of a medical expert. If a claimant could establish reasonable doubt merely by presenting conflicting medical evidence, the administrative law judge could not carry out the task of resolving such conflicts. Ruling 91-5p cannot reasonably be interpreted to require the commissioner to award benefits to every claimant who presents any medical evidence in support of his or her claim, regardless of the existence of contradictory medical evidence in the record. That would be the practical outcome of the plaintiff’s argument.

Finally, the plaintiff mentions the failure of the defendant to produce the records of his 1995 application, contending that this entitles him to reopening of that application. Statement of Errors at 17.⁴ He cites no authority in support of this argument. He speculates that “[i]t is possible that [he] has an argument that he was not notified after being put on alcoholism benefits after his 1995 Application.” *Id.* At oral argument, counsel for the plaintiff stated that the plaintiff was in prison at the time the benefits awarded in 1995 were terminated. This is borne out by the “closing argument” submitted to the administrative law judge by counsel for the plaintiff, showing that the plaintiff “began his long prison sentence to the Maine State Prison” on May 15, 1996 and that his benefits were terminated in January 1997. Record at 90, 93. According to this document, the plaintiff was released from prison on September 29, 1998 and filed an application for benefits on November 5, 1998. *Id.* at 93. As the plaintiff admitted, *id.* at 92, he would not have been eligible for benefits while incarcerated, 42 U.S.C. § 1382(e)(1)(A), 20 C.F.R. § 416.211. Thus, he could not have been harmed by any possible lack of notification under the circumstances presented.⁵ He filed a new application shortly after his discharge from prison. In that application he alleged an onset date of June 1, 1969, Record at 100, which was well before the date on which he was released from prison. In addition, as noted by counsel for the commissioner at oral argument, reopening of the 1995 application was not available in any event because the plaintiff had been awarded benefits on that application and the benefits were only terminated due to a change in the statutory terms of eligibility. *See* SSR 91-5p at 810

⁴ The plaintiff also argues that the defendant may not assert *res judicata* as an affirmative defense when a previous claim file cannot be located. Statement of Errors at 18. The defendant is not asserting that defense in this case.

⁵ The regulations do provide for reconsideration of a termination and a request for continuation of benefits pending the reconsideration, 20 C.F.R. §§ 416.995, 416.996, if the request for reconsideration is made within 10 days after receipt of the notice of termination, 20 C.F.R. § 416.996(c)(1). However, the plaintiff would not have been eligible for benefits if he had requested reconsideration in January 1997. In addition, it is the claimant’s duty to inform the commissioner of a change of address, including one that occurs during incarceration, so that the fact that the plaintiff was in prison when the notice of termination would have been issued does not help his argument based on the assertion that he “might not have” received the notice, because he has made no showing that he informed the commissioner of his new address. *See Kim v. (continued on next page)*

(reopening available when claimant prevented from timely requesting review of adverse determination, decision, dismissal, or review by a Federal district court). The “remedy” available to the plaintiff under the circumstances was the filing of a new application, which he did.

The plaintiff also asserts that the 1995 file would demonstrate whether he actually had a payee at the time the benefits awarded in 1995 were terminated. Statement of Errors at 17. As I have already noted, this concern is irrelevant because Dr. Voss’s testimony establishes the plaintiff’s own capacity at the time independent of the existence of any designated payee.

For the foregoing reasons, I recommend that the commissioner’s decision 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

WALTER A EDWARDS

represented by **REMINGTON O. SCHMIDT**
P.O.BOX 6 DTS

Commissioner, Soc. Sec. Admin., 84 Fed.Appx. 812, 813-14, 2003 WL 22977072 (9th Cir. Dec. 16, 2003), at **1.

PORTLAND, ME 04112
207 773-1430

V.

Defendant

**SOCIAL SECURITY
ADMINISTRATION
COMMISSIONER**

represented by **ESKUNDER BOYD**
SOCIAL SECURITY
ADMINISTRATION
OFFICE OF GENERAL COUNSEL,
REGION I
625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: eskunder.boyd@ssa.gov