UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

R. CRAIG JOHNSON,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Docket No. 04-63-P-C***
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The commissioner of Social Security moves to dismiss the complaint in this action pursuant to Federal Rule of Civil Procedure 12(b)(1) on the ground that the court lacks subject-matter jurisdiction to review an administrative law judge's dismissal of a hearing request. *See* Defendant's Motion To Dismiss This Action for Lack of Subject Matter Jurisdiction ("Motion") (Docket No. 4); Memorandum in Support of Motion To Dismiss This Action for Lack of Subject Matter Jurisdiction ("Memorandum") (Docket No. 4) at [2]-[4]. For the reasons that follow, I recommend that the Motion be granted.

I. Applicable Legal Standard

When a defendant moves to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of demonstrating that subject-matter jurisdiction exists. *Lundquist v. Precision Valley Aviation, Inc.*, 946 F.2d 8, 10 (1st Cir. 1991); *Lord v. Casco Bay Weekly, Inc.*, 789 F. Supp. 32, 33 (D. Me. 1992). Both parties may rely on extra-pleading materials. 5A Charles Alan Wright & Arthur R. Miller, *Federal*

Practice and Procedure § 1350 at 213 (2d ed. 1990); *see also 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). In this case the plaintiff, who is represented by counsel, withdrew a motion to extend time to respond to the Motion and has filed no response. *See* Docket (entry of June 29, 2004).

II. Background

The plaintiff was informed by letter dated July 1, 2000 that he had received an overpayment of Social Security Disability ("SSD") benefits. *See* Claimant's Request for Revision/Re-opening of the Reconsideration Determination of May 30, 2001 ("Reopening Request"), Attachment #3 to Motion, at 1. Upon reconsideration, by letter dated May 30, 2001, the commissioner affirmed the initial overpayment determination. *See* Attachment #2 to Motion at 1. The reconsideration letter stated, in relevant part: "If you believe that the reconsideration determination is not correct, you may request a hearing before an administrative law judge of the Office of Hearings and Appeals. If you want a hearing you must request it not later than 60 days from the date you receive this notice." *Id*.

On or about January 2, 2003 Jane Eden, counsel for the plaintiff, submitted a request for a hearing before an administrative law judge. *See* Request for Hearing by Administrative Law Judge, Attachment #3 to Motion. She also sought reopening and revision of the reconsideration determination pursuant to 20 C.F.R. §§ 404.987-88. *See generally* Reopening Request. On or about July 25, 2003 administrative law judge Katherine Morgan entered an order dismissing the plaintiff's request for hearing. *See generally* Attachment #4 to Motion. The order provided, *inter alia*, as follows:

> The regulations . . . provide that a request for hearing may be dismissed where the claimant has failed to file the request within the specified time and the time for filing such request has not been extended for good cause shown (20 CFR § 404.957(c)(3)).
>
> The claimant failed to meet the 60 day requirement in which to file the Request for Hearing [i]neffectively filing his Request for Hearing two years later in January of 2003.
>
> Accordingly, there is no good cause to extend the time for filing. Therefore, the claimant's request for hearing is hereby DISMISSED. The reconsidered determination dated May 30, 2001 remains in effect[.]

Order of Dismissal, Attachment #4 to Motion. On or about September 23, 2003 the plaintiff, represented by new counsel James R. Bushell, filed a request for Appeals Council review of Judge Morgan's order of dismissal. *See generally* Attachment #5. Bushell argued, *inter alia*, that as a result of error on the commissioner's part Judge Morgan was not provided with, and did not have the benefit of, a separate letter dated December 5, 2002 in which Eden had expressly sought an extension of the hearing-request deadline and detailed reasons why in her view good cause existed to grant that request. *See generally id*. By letter dated January 2004 the Appeals Council declined to review Judge Morgan's order of dismissal. *See* Attachment #6 to Motion.[1] The instant suit was filed on March 31, 2004. *See* Docket No. 1.

III. Discussion

The commissioner rests her Motion on two basic principles: (i) that 42 U.S.C. § 405(g) empowers the federal courts to review only "final" decisions of the commissioner, and (ii) that a discretionary dismissal of a hearing request does not qualify as a "final," judicially reviewable decision. *See* Memorandum at [2]-[4].

She is correct. Section 405(g) provides that "any final decision of the Commissioner of Social Security made after a hearing" is judicially reviewable in the district court. 42 U.S.C. § 405(g); *see also,*

e.g., *Califano v. Sanders*, 430 U.S. 99, 108 (1977) (Congress "clearly limit[ed] judicial review to a particular type of agency action, 'a final decision of the [commissioner] made after a hearing.'"). In turn, "the meaning of the term 'final decision' has been left to the [commissioner] to flesh out by regulations." *Brittingham v. Barnhart*, 92 Soc. Sec. Rep. Serv. 301, 304 (D. Del. 2003) (citation and internal quotation marks omitted). Relevant Social Security regulations define administrative actions that are "not subject to judicial review" to include "[d]enying your request to extend the time period for requesting review of a determination or a decision[.]" 20 C.F.R. § 404.903(j)[2]; *see also, e.g.*, *Torres v. Secretary of Health & Human Servs.*, 845 F.2d 1136, 1138 (1st Cir. 1988) ("Absent a colorable constitutional claim not present here, a district court does not have jurisdiction to review the [commissioner's] discretionary decision not to reopen an earlier adjudication."); *Harper v. Bowen*, 813 F.2d 737, 742 (5th Cir. 1987) (aligning with majority of circuit courts of appeals in holding that "*Sanders* precludes judicial review of an administrative decision not to extend the time limit."); *Brittingham*, 92 Soc. Sec. Rep. Serv. at 304 (court lacked jurisdiction to entertain plaintiff's appeal of order dismissing request for hearing on timeliness grounds).

The plaintiff, who bears the burden of demonstrating the existence of subject-matter jurisdiction, makes no argument that he has a colorable constitutional claim that would render his complaint judicially reviewable.

IV. Conclusion

For the foregoing reasons, I recommend that the Motion be **GRANTED.**

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[1] The precise date is unclear from the face of the letter and, in any event, immaterial.

[2] In SSD cases, administrative law judges possess discretion to dismiss hearing requests pursuant to 20 C.F.R. § 404.957 ("An administrative law judge may dismiss a request for a hearing under [certain enumerated] conditions[.]").

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 13th day of July, 2004.

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

Plaintiff

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V.

Defendant

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