

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DIANE A. DUCKWORTH-BUBAR,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 04-177-B-W

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant, Jo Anne B. Barnhart, Commissioner of Social Security, moves to dismiss this action in which the plaintiff seeks judicial review of the commissioner’s dismissal of her request for an administrative hearing in connection with her application for disability benefits, contending that this court lacks subject matter jurisdiction. I recommend that the court grant the motion.

Specifically, the commissioner contends that her action in dismissing the plaintiff’s request for a hearing was based on the facts that the current application was barred by *res judicata* and that there was no good cause to reopen her previous application, which does not constitute a final decision made after hearing as required by 42 U.S.C. § 405(g) as a prerequisite for judicial review. Defendant’s Motion to Dismiss Plaintiff’s Complaint for Lack of Subject Matter Jurisdiction (“Motion”) (Docket No. 6).

A motion to dismiss for lack of subject-matter jurisdiction is governed by Fed. R. Civ. P. 12(b)(1). When a defendant moves to dismiss on this basis, 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). 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).

The statute cited by the commissioner, 42 U.S.C. § 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 denying a request to reopen an earlier adjudication. 20 C.F.R. §§ 404.903(j), 404.957; *see also Torres v. Secretary of Health & Human Servs.*, 845 F.2d 1136, 1138 (1st Cir. 1988).

Denial of a request to reopen a claim for benefits, whether or not couched in terms of application of the doctrine of *res judicata*, generally is not subject to judicial review absent a colorable constitutional claim. *Torres*, 845 F.2d at 1138. As a matter of constitutional due process, a Social Security claimant is entitled to judicial review of a decision on a successive claim for benefits to the extent it fairly can be said to be a “new” claim. *See, e.g., Matos v. Secretary of Health, Educ. & Welfare*, 581 F.2d 282, 286 n.6 (1st Cir. 1978) (“If a claimant were to raise a new and different claim, and the Secretary were to refuse to act based on *res judicata*, the claimant would be denied all opportunity for a hearing unless judicial review

were available. Such a result would contravene the provisions of the Act, whereby affected parties must be given ‘reasonable notice and opportunity for a hearing,’ 42 U.S.C. § 405(b), and of due process.”).

The plaintiff in this case filed an application for disability insurance benefits on May 1, 2000, alleging an onset date of March 15, 1995. Declaration of Robin M. Marquis, etc. (“Marquis Decl.”) (attached to Motion) ¶ (4)(a). That application was denied initially and upon reconsideration. *Id.* After a hearing as requested by the plaintiff, an administrative law judge issued a decision on October 25, 2001, finding that the plaintiff last met the insured status requirements on December 31, 1995 and that she was not under a disability prior to that date. *Id.* ¶ (4)(b). The plaintiff requested review of this decision and the Appeals Council denied the request by notice dated February 15, 2002. *Id.* The plaintiff sought judicial review of this decision in this court, which affirmed the decision of the Commissioner by order dated December 31, 2002. *Id.* ¶ (4)(c); *see also Duckworth-Bubar v. Barnhart*, 242 F.Supp.2d 30 (D. Me. 2002).

The plaintiff filed a second application for disability insurance benefits on January 22, 2003, alleging an onset date of March 19, 1995. Marquis Decl. ¶ (4)(d). This application was denied initially and on reconsideration. *Id.* The plaintiff filed a request for hearing by an administrative law judge dated November 20, 2003. *Id.* ¶ (4)(e) & Exh. 7 thereto. The request, signed by the plaintiff, left blank a block following the direction, “If you have additional evidence to submit check the following block and complete the statement:”. Exh. 7. By order dated May 28, 2004 an administrative law judge dismissed the request for a hearing on the grounds that the request involved the rights of the same claimant on the same facts and issues which were previously determined in the decision dated October 25, 2001. Marquis Decl. ¶ 4(e) and Exh. 8 thereto. The plaintiff filed a request for review of this action and by notice dated September 21, 2004 the Appeals Council denied the request for review. Marquis Decl. ¶ 4(e). The plaintiff filed this action, seeking review of that determination, on October 8, 2004. Docket & Complaint (Docket No. 1).

The plaintiff contends that she is entitled to an exception to the “finality” rule of section 405(g) because she has raised a “colorable” constitutional claim of a due process violation. Opposition to Defendant’s Motion to Dismiss Plaintiff’s Complaint, etc. (“Opposition”) (Docket No. 8) at 1-2. She asserts that application of the doctrine of *res judicata* without a hearing constitutes a violation of her due process rights. *Id.* at 3. She relies on Social Security Ruling 68-12a (“SSR 68-12a”) as support for her argument that *res judicata* may not be applied to defeat a new application when new evidence is offered after the date last insured and that whether new evidence is offered may only be determined at a hearing. *Id.* at 2, 3. She also contends that the Listing¹ applicable to her claim was changed on February 19, 2002, after the denial of her first application, in a manner so extensive as to entitle her to a new hearing and suggests that, “[b]ecause the record here fails to include the medical evidence from the prior claim, a new decision is required.” *Id.* at 3-4. Finally, she describes “further evidence” that she will introduce at a hearing before an administrative law judge. *Id.* at 4-5.

The plaintiff’s first argument is incorrect as a matter of law. The due process clause of the federal constitution does not require that the commissioner hold a hearing before applying the doctrine of *res judicata* to a claim for Social Security benefits. *See, e.g., Rogerson v. Secretary of Health & Human Servs.*, 872 F.2d 24, 29 (3d Cir. 1989); *Bullyan v. Heckler*, 787 F.2d 417, 420 (8th Cir. 1986); *Attia v. Barnhart*, 306 F.Supp.2d 895, 899-900 (D.S.D.), *aff’d* 108 Fed.Appx. 434, 2004 WL 2029940 (8th Cir. 2004); *Shelton v. Sullivan*, 1990 WL 193774 (D. Kan. Nov. 14, 1990), at *1,

¹ The “Listings” are found in Appendix 1 to 20 C.F.R. Part 404, Subpart P.

*2. So long as the claims are essentially the same, the application of *res judicata* does not offend due process.

To the extent that the plaintiff's argument may be construed to assert that she will offer new evidence that may render her claim essentially different, even though it presents the same alleged disability and asserts essentially the same onset date, the record shows that she has not yet submitted any such evidence; indeed, she clearly declined the opportunity to do so when filing her request for Appeals Council review of the denial of a hearing on her second claim. Contrary to her argument, the question whether additional evidence offered by the claimant is new may and should be determined before a hearing is held. Social Security regulations contemplate submission of new evidence before the hearing stage, *e.g.*, 20 C.F.R. §§ 404.913(a), 404.935, and no claimant should be able to obtain a hearing before an administrative law judge on a second application for the same alleged disability with the same alleged date of onset merely by failing to submit any new evidence with that application. From all that appears in the record of this case, the plaintiff has yet to submit any new evidence at all. Marquis Decl., Exhs. 7 & 8 at 3 ("No new evidence was submitted with this application for benefits.").

The plaintiff's reliance on SSR 68-12a is unavailing for a similar reason. That ruling concerns a case in which new and material evidence was submitted. Social Security Ruling 68-12a, reprinted in *West's Social Security Reporting Service Rulings 1960-1974*, at 538.

The plaintiff cites case law in support of her argument that she is entitled to a hearing because the record does not include medical evidence from her first application. As the defendant points out, Defendant's Response to Plaintiff's Opposition to Defendant's Motion to Dismiss, etc. ("Reply") (Docket No. 9) at 7, the administrative law judge who denied the plaintiff's request for a hearing on her current application stated that he reviewed the evidence supporting the prior decision before concluding that *res*

judicata applies to the current application. Marquis Decl., Exh. 8 at [3]. In *Hollis v. Massanari*, 2002 WL 500780 (N.D. Cal. Mar. 25, 2002), the administrative law judge “never obtained” the agency’s records of an earlier application, *id.* at *4, a fact which easily distinguishes that case from the one before this court. In *Harris v. Callahan*, 11 F.Supp.2d 880 (E.D. Tex. 1998), the other case cited by the plaintiff, the issue was whether the plaintiff had been given sufficient notice that his application might be denied on *res judicata* grounds, *id.* at 884-85, a claim that is not asserted by the plaintiff in this case. Where the only evidence is that the administrative law judge who denied the plaintiff a hearing on her second application did consider the evidence from her first application before concluding that the second application was barred by *res judicata*, it would serve no legal purpose for the court to remand the second application for a hearing merely because the entire record of the first application was not submitted to the court after the plaintiff sought judicial review of that decision. Due process only requires, at most, that the earlier evidence be considered by the agency that makes the *res judicata* decision.

Finally, the plaintiff relies on a section of the defendant’s Program Operations Manual System (“POMS”), an internal manual, in support of her contention that the change in the Listings for musculoskeletal impairments after her initial application was decided was so extensive that she is entitled to a hearing on her second application. Assuming *arguendo* that substantial changes in the potentially applicable Listings did so occur, the section of POMS cited by the plaintiff, when considered fully, does not support her position. The plaintiff cites the following language from Exhibit 2 to section DI 27516.010 of

POMS:

The musculoskeletal listings have been so extensively revised that, while they are not in general[] less restrictive, the “issues” are different and include the use of functional criteria to indicate listing level severity. Therefore, a new determination should be prepared for all subsequent claims involving a musculoskeletal impairment if the prior claim was denied before 02/19/02.

As the defendant points out, Reply at 4-5, section DI 27516.010 makes clear that the cited language does not apply when the prior determination was based on a finding that the claimant's impairments were not severe and Step 3 of the sequential evaluation process (whether the claimant's impairment meets or equals a Listing) was never reached. POMS DI 27516.010(B)(2) ("For not severe impairments: a. Apply res judicata to a subsequent claim involving a not severe impairment(s) filed after a prior denial through DLI . . ."). The commissioner's decision on the plaintiff's first application was based on a determination at Step 2 of the sequential review process that the plaintiff's claimed impairments were not severe. *Duckworth-Bubar*, 242 F.Supp.2d at 31-32.² Therefore, the cited section of POMS provides no basis for this court to exercise subject-matter jurisdiction.

Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss for lack of subject-matter jurisdiction 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 27th day of January, 2005.

/s/ David M. Cohen
David M. Cohen

² I fail to see how "Crohn's disease, ulcerative colitis and/or irritable bowel syndrome," 242 F.Supp.2d at 31, the impairments claimed by the plaintiff in her first application, constitute musculoskeletal impairments under sections 1.00, 1.01 and 101.01 of the Listings, but the defendant does not raise this issue.

United States Magistrate Judge

Plaintiff

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V.

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