

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHELLE L. MCLAUGHLIN,)	
)	
Plaintiff,)	
)	
v.)	1:10-cv-00263-JAW
)	
SOCIAL SECURITY)	
ADMINISTRATION COMMISSIONER,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO DISMISS

Michelle McLaughlin requests judicial review of the Commissioner’s denial of her application for social security disability benefits. The Commissioner requests that the Court dismiss McLaughlin’s claim for want of subject matter jurisdiction, arguing that McLaughlin failed to file her claim for judicial review within the applicable statute of limitations. For reasons that follow, I recommend that the Court deny the motion.

Regulatory Background

This civil action arises under 42 U.S.C. § 405(g). Pursuant to regulations issued by the Social Security Administration, civil actions for judicial review are to be commenced “within 60 days after the Appeals Council’s notice of denial of request for review of the administrative law judge’s decision or notice of the decision by the Appeals Council is received by the individual.” 20 C.F.R. § 422.210(c). The regulations specify that a claimant’s receipt of notice “shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.” *Id.* The 60-day filing period is not jurisdictional, but rather amounts to a statute of limitations and compliance with it is a condition imposed on the United States’ waiver of sovereign immunity that must be strictly construed. Piscopo v. Sec’y of Health & Human Servs.,

No. 93-2326, 1994 WL 283919, *3, 1994 U.S. App. Lexis 16155, *10 (1st Cir. June 27, 1994) (unpublished opinion).

Facts

The Commissioner seeks dismissal of this action because the notice it mailed to McLaughlin is dated April 16, 2010, and McLaughlin did not file her civil action until June 28, 2010. Using the regulatory presumption, McLaughlin would be deemed to have received the notice on Wednesday, April 21, which would trigger a filing deadline of Monday, June 21, 2008, making McLaughlin's filing seven days late. However, if McLaughlin makes "a reasonable showing to the contrary," she may overcome the presumption that she received the notice on April 21. 20 C.F.R. § 422.210(c).

McLaughlin submitted an affidavit from Attorney Kerry Clark Jordan, McLaughlin's legal representative during administrative proceedings. Attorney Jordan attests in an affidavit that her firm checks its post office box every weekday morning and date stamps all incoming mail with the current date. She is confident that the copy of the Appeals Council notice sent to her office arrived April 30, 2010, because it bears a receipt date of April 30, 2010. (Jordan Aff., Doc. No. 8-2.) Concerned that McLaughlin had not made any showing as to when she, personally, received notice, I issued an order to show cause. (Order to Show Cause at 2, Doc. No. 10.) McLaughlin duly submitted her own affidavit, attesting that she did receive the notice, but that she did not recollect the date of receipt. Nevertheless, McLaughlin did recall speaking with Attorney Jordan on Monday or Tuesday, May 3 or May 4, and represented that she was confident the conversation "occurred within a few days" after McLaughlin received the notice. Neither party has requested an evidentiary hearing or limited jurisdictional discovery.

Discussion

In a prior recommended decision, I advised that the Court reject McLaughlin's showing because it did not "reliably" establish McLaughlin's actual receipt date, given the wording of McLaughlin's affidavit. In particular, there was a mistaken conclusion built into the recommendation that receipt of the notice on Tuesday, April 27, 2010, would have made McLaughlin's June 28, 2010, filing untimely. The Court accepted that recommendation and judgment of dismissal entered, but the Court of Appeals vacated the judgment on appeal, flagging the error in the time computation and a misapplication of the burden of proof. McLaughlin v. Astrue, 443 Fed. Appx. 571, 573-75 (1st Cir. Oct. 27, 2011) (unpublished opinion) (Doc. No. 24). The Court of Appeals additionally emphasized that a lack of diligence on the part of McLaughlin's instant counsel should not influence the Court's analysis. Id. at 574.

McLaughlin's burden is to make a reasonable showing that she did not receive notice within the five-day, presumptive period of receipt (five days after the date stamped on the notice by the Commissioner). If the presumption is rebutted, the burden shifts to the Commissioner to support his statute of limitation defense. Id. at 575.

The Commissioner submitted an affidavit from Marian Jones, Chief of Court Case Preparation and Review Branch 2 of the Office of Appellate Operations, Office of Disability Adjudication and Review, Social Security Administration. (Doc. No. 7-1.) Ms. Jones's affidavit indicates that, "to the best of [Jones's] knowledge and belief," McLaughlin's administrative file "shows that" the Appeals Council sent its notice to McLaughlin on April 16. (Jones Aff. ¶ 3(a), Doc. No. 7-1.) No further explanation or presentation concerning file contents, mail return receipts, or other corroborating evidence was offered. However, the Commissioner's evidentiary submission in the wake of the Court of Appeals mandate draws upon the administrative record to

justify a finding that McLaughlin has a poor memory and forgets a lot of things. (Def.'s Supp. Mem. at 3, Doc. No. 33.) The Commissioner also identifies that McLaughlin's town of residence is Hampden, whereas her counsel's office is in Orono.¹ The Commissioner also emphasizes that counsel uses a post office box. In the Commissioner's view, counsel's receipt date should not be regarded as a reliable indicator of McLaughlin's receipt date. (Id. at 4.) In addition to these supplemental arguments, the Commissioner finds fault with Attorney Jordan's affidavit for not indicating that staff are trained to date stamp the mail and that they reliably follow this training.² (Id. at 6-7.) The Commissioner also suggests that the 14-day gap between its date stamp and counsel's date stamp make counsel's date stamp dubious. (Id. at 7-8.)

I do not find fault with Attorney Jordan's affidavit and find reliable her representation that she "can affirmatively and unequivocally state that [the notice] was received in [her] office via US mail on April 30, 2010." (Doc. No. 8-2.) Ultimately, I find McLaughlin's showing to be a reasonable one and conclude that the presumption is rebutted. With Attorney Jordan's affidavit and her own affidavit, McLaughlin makes a reasonable showing that her receipt was outside of the presumptive period and the burden falls to the Commissioner to demonstrate McLaughlin's actual receipt date. As noted by the Court of Appeals, if McLaughlin received the notice on April 27 or later, then her complaint was filed within the limitation period. Ultimately, Marian Jones's affidavit does not persuade me that McLaughlin more likely than not received the notice prior to Tuesday, April 27, 2010.

Conclusion

For the reasons set out above, I RECOMMEND that the Court DENY Defendant's Motion to Dismiss.

¹ Although each town has its own post office, there is a common regional distribution center.

² Similar gaps can be identified in the Affidavit of Ms. Jones that the Commissioner submitted in support of his motion.

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 fourteen (14) days of being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) 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.

February 15, 2012

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

MCLAUGHLIN v. SOCIAL SECURITY
ADMINISTRATION COMMISSIONER
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAGISTRATE JUDGE MARGARET J.
KRAVCHUK
Cause: 42:405 Review of HHS Decision (DIWC)

Date Filed: 06/28/2010
Jury Demand: None
Nature of Suit: 863 Social Security:
DIWC/DIWW
Jurisdiction: U.S. Government
Defendant

Plaintiff

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