

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WAYNE A. RITCHIE,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 98-226-B
)	
KENNETH S. APFEL, Commissioner)	
of Social Security,)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION ON DEFENDANT’S MOTION TO DISMISS

The defendant, the Commissioner of Social Security, has moved to dismiss this action, an appeal from the denial of the plaintiff’s claim for supplemental security income (“SSI”) payments, on the ground that this court lacks jurisdiction over the matter because the appeal was not filed within 60 days after receipt of notice of the denial of the plaintiff’s claim by the Appeals Council, as required by 42 U.S.C. § 405(g) and 20 C.F.R. § 422.210(c). I recommend that the court deny the motion.

I. Applicable Legal Standard

Although the motion to dismiss does not mention Fed. R. Civ. P. 12(b), or indeed any procedural basis for dismissal, it is rooted in substance upon a statute of limitations and therefore must be construed to invoke Rule 12(b)(6). *Monday v. United States*, 688 F. Supp. 788, 789 (D. Me. 1988). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-

pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). Because both parties have submitted materials outside the pleadings which I will consider, the defendant’s motion to dismiss will be treated as a motion for summary judgment. *Collier v. City of Chicopee*, 158 F.3d 601, 602-03 (1st Cir. 1998), *petition for cert. filed* Jan. 13, 1999.

II. Factual Background

On February 6, 1997 an administrative law judge issued a decision denying the plaintiff’s claim for supplemental security income benefits. Declaration of William R. Waxman (“Waxman Decl.”) (Docket No. 5) ¶ (3)(a). The plaintiff filed a timely notice of appeal. *Id.* While the matter was pending before the Appeals Council, the plaintiff notified the agency of three changes of address. *Id.*; Affidavit [of Wayne A. Ritchie] (“Plaintiff’s Aff.”), attached to Docket No. 1, ¶ 4. On August 7, 1998 the Appeals Council sent notice of its denial of the appeal by regular mail to the plaintiff at the second of the three addresses. Waxman Decl. ¶ (3)(a). This notice was forwarded to the plaintiff at the third address, where he received it on October 10, 1998. Plaintiff’s Aff. ¶ 5. The plaintiff’s action in this court was initiated on November 9, 1998. Docket No. 1.

III. Discussion

Judicial review following exhaustion of administrative remedies on a claim for social security

benefits is limited by 42 U.S.C. § 405(g), which provides in relevant part: “Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.” The commissioner has by regulation allowed certain further time.

(a) General. A claimant may obtain judicial review of a decision by an administrative law judge if the Appeals Council has denied the claimant’s request for review, or of a decision by the Appeals Council when that is the final decision of the Commissioner.

* * *

(c) Time for instituting civil action. Any civil action described in paragraph (a) of this section must be instituted 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, . . . except that this time may be extended by the Appeals Council upon a showing of good cause. For purposes of this section, the date of receipt of notice of denial of request for review of the administrative law judge’s decision or notice of the decision by the Appeals Council shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

20 C.F.R. § 422.210.

The commissioner argues that the plaintiff’s request for judicial review must be dismissed because it was initiated more than 65 days after the Appeals Council notice was sent to the plaintiff. He also argues that the plaintiff is required by the terms of 20 C.F.R. § 422.210(c) to seek leave from the Appeals Council before bringing any request for judicial review more than 65 days after notice was mailed to him, and that the plaintiff is not entitled under the circumstances of this case to invoke equitable tolling of the statute of limitations.

The plaintiff does not seek equitable tolling but merely contends that this action was filed within 60 days of his receipt of the notice and that he has made a reasonable showing that the 5-day

presumption does not apply under the circumstances. The commissioner's contention that leave must be sought from the Appeals Council whenever a request for judicial review is filed more than 65 days after the notice is mailed is not supported by the language of the regulation. For a claim like that of the plaintiff here, a request to the Appeals Council and a showing of good cause is required only when the claimant seeks judicial review more than 65 days after actual receipt of the notice, when he cannot make a reasonable showing that he did not receive the notice within the 5-day presumptive period through no fault of his own. *See Matsibekker v. Heckler*, 738 F.2d 79, 81 (2d Cir. 1984).

The unrebutted evidence in this case is that the plaintiff informed the commissioner of the change in his address from New Mexico to Maine but that the Appeals Council nonetheless sent the operative notice to the New Mexico address. The plaintiff's sworn statement that he did not actually receive the notice until October 10, 1998 is also unrebutted. *See, e.g., McCall v. Bowen*, 832 F.2d 862, 864 (5th Cir. 1987) (when plaintiff rebuts 5-day presumption, burden shifts to commissioner to show actual receipt of notice more than 60 days before filing). This action was filed within 60 days of that receipt. Nothing further is required under 20 C.F.R. § 422.210(c). *Chiappa v. Califano*, 480 F. Supp. 856, 857 (S.D.N.Y. 1979); *Vine v. Bowen*, 1988 WL 35595 (N.D.Ill. Apr. 8, 1988), at *1.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss, considered as a motion for summary judgment, be **DENIED**.

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 11th day of March, 1999.

*David M. Cohen
United States Magistrate Judge*