UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

THOMAS R. BOOTHBY,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 95-370-P-H***
	)	
SHIRLEY S. CHATER,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") appeal seeks to challenge the Commissioner's determination, in connection with evaluating the plaintiff's 1993 request for benefits, that a previously denied application dating from 1992 should not be reopened. Because I agree with the Commissioner that the court is without jurisdiction to entertain such an appeal, I recommend that the Commissioner's decision be affirmed.

Following a hearing, the Administrative Law Judge found the plaintiff disabled, and therefore entitled to SSI benefits, as of September 8, 1993 -- the date of the plaintiff's pending application. Finding 10, Record p. 20; *id*. at 88. The Administrative Law Judge found the plaintiff's substance addiction disorder to be a factor material to the finding of disability. Finding 11, Record p. 21.

The plaintiff's 1993 application asserted that his disability began with a heart attack suffered

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[1] The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 9, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

in 1989. Record p. 89. This antedated a previously denied application for SSI benefits, filed in 1992 and alleging a disability onset of January 1, 1990. *Id*. at 51-56. Accordingly, at the hearing on the 1993 application, the plaintiff requested reopening of the prior determination.[2] *Id*. at 42. Finding a lack of good cause as required by 20 C.F.R. § 416.1488 (permitting reopening within two years in such circumstances), and finding that the established date of disability onset was after the date on which the 1992 application was denied, the Administrative Law Judge denied the request to reopen the 1992 application. Record p. 20. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the Commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

"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." *Torres v. Secretary of Health & Human Servs*., 845 F.2d 1136, 1138 (1st Cir. 1988), (citing *Califano v. Sanders*, 430 U.S. 99, 107-09 (1977); other citations omitted). Although the Administrative Law Judge made this decision after a hearing, it is apparent, by virtue of the reference in the decision to the "good cause" requirement set forth in the regulations, that the merits of the 1992 decision were not reconsidered. Accordingly, as to the 1992 application, the hearing was not a "hearing" within the meaning of 42 U.S.C. § 405(g) and judicial review is therefore foreclosed. *Torres*, 845 F.2d at 1138; *see also* 42 U.S.C. § 405(g) (authorizing review of "any final decision of the Commissioner of Social Security made after a hearing").

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[2] At oral argument, there was some dispute over whether the plaintiff adequately made this request. Asked at the hearing whether he was seeking a reopening, the plaintiff replied, through counsel, that he was so requesting, "[t]o the extent the Court thinks it's appropriate." Record p. 42. In any event, the Administrative Law Judge unquestionably treated the 1992 application as if it were the subject of a request for reopening.

The plaintiff's Statement of Errors also raises an issue concerning the Administrative Law Judge's finding, relative to the 1993 application, that the plaintiff's substance addiction disorder is a factor material to the finding of disability. However, the plaintiff made clear at oral argument that he does not seek judicial review of this finding. I therefore do not reach this issue.

Accordingly, I recommend that the decision of the Commissioner 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 16th day of December, 1996.

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David M. Cohen
United States Magistrate Judge