IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 16-cv-00290-REB

CLEOPHUS MORRIS,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Blackburn, J.

The matter is before me is **Defendant's Motion To Dismiss** [#22],[1] filed April 26, 2016. Exercising my prerogative under D.C.COLO.LCivR 7.1(d) to consider the motion without awaiting a response,[2] I grant the motion and dismiss plaintiff's appeal for lack of jurisdiction.

I. JURISDICTION

Jurisdiction to review a final decision of the Commissioner arises under 42 U.S.C. § 405(g). Even though I ultimately determine that such jurisdiction is lacking, the district court always retains jurisdiction to determine its own jurisdiction. ***Dennis Garberg & Associates, Inc. v. Pack-Tech International Corp***., 115 F.3d 767, 773 (10th Cir. 1997).

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[1] "[#22]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

[2] I therefore vacate my **Minute Order** [#23], filed April 27, 2016, relieving plaintiff of the requirement to respond to the motion.

II. STANDARD OF REVIEW

An aggrieved claimant for social security benefits may appeal to the federal district court "any final decision of the Commissioner of Social Security made after a hearing to which he was a party." 42 U.S.C. § 405(g). Thus, "a 'final decision' is a statutorily specified jurisdictional prerequisite" to a right of appeal to the district court. ***Weinberger v. Salfi***, 422 U.S. 749, 766, 95 S.Ct. 2457, 2467, 45 L.Ed.2d 522 (1975). What constitutes a "final decision" is left to the Commissioner to determine pursuant to regulation. ***Id.*** "The statutory scheme is thus one in which the [Commissioner] may specify such requirements for exhaustion as [she] deems serve [her] own interests in effective and efficient administration." ***Id.***

The apposite regulations provide that a "final decision" reviewable by a federal district court results only after the claimant has proceeded *seriatim* through each of four steps: initial determination, reconsideration, hearing before an administrative law judge, and Appeal Council review. 20 C.F.R. § 404.900(a)(5).[3] Accordingly, absent a colorable constitutional claim, a decision issued without a hearing, although binding on the parties, is not a final decision subject to review by a federal district court. ***See Califano v. Sanders***, 430 U.S. 99, 108, 97 S.Ct. 980, 985, 51 L.Ed.2d 192 (1977); ***Hilmes v. Secretary of Health & Human Services***, 983 F.2d 67, 69 (6th Cir. 1993). It is apparently this line of authority on which the Commissioner seeks to rely here.[4]

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[3] At each of these steps, if the claimant is dissatisfied with the Commissioner's decision, he may request review within a specified time. ***See*** 20 C.F.R. §§ 404.904, 404.909(a), 404.920, 404.933(b), 404.955. At any step in the process, if the claimant fails to seek review within the specified time, the Commissioner's decision becomes binding on all parties. ***See id.*** §§ 404.905, 404.921, 404.955, 404.981.

[4] I say "apparently" because the Commissioner has neither articulated this theory specifically nor discussed the apposite line of authority in her brief. Instead, the Commissioner seems to argue that dismissal is appropriate because plaintiff filed his notice of appeal while the Appeals Council was still holding the record open for submission of additional evidence and had not issued a final decision.

III. ANALYSIS

Plaintiff filed a claim for supplemental security income benefits under Title XVI of the Social Security Act on September 12, 2012. The claim was denied initially on May 7, 2013. Plaintiff requested a hearing before an administrative law judge, and a hearing was scheduled for May 23, 2014. Plaintiff requested a postponement, but that request was denied, and the hearing was held as originally scheduled. Plaintiff failed to appear at the hearing personally or through his appointed representative. Nevertheless, an attorney, Ms. Jennifer Jancicka, did appear on plaintiff's behalf at the hearing and was allowed to participate. Thereafter, the ALJ considered the evidence of record and issued an unfavorable decision on July 21, 2014. (**Motion**, Decl. of Kathie Hartt, Exh. 4 at pages 30-45 of 58.)

Plaintiff then filed a timely request for review with the Appeals Council, arguing that the record the ALJ considered was incomplete. (***Id.***, Exh. 5 at page 50 of 58.) By letter dated February 1, 2016, the Appeals Council notified plaintiff of its intent to dismiss his original request for hearing, concluding the ALJ should have done so pursuant to 20 C.F.R. § 416.1457 and Social Security Administration's Office of Hearings and Appeals, Litigation Law Manual ("HALLEX")[5] I-2-4-25.A.1 and C.3.a., based plaintiff's failure to appear.[6] The Council nevertheless offered plaintiff the opportunity to submit more evidence or a statement of facts and law in support of his

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However, the argument I address herein is the only possible way in which the Commissioner's request to dismiss for lack of jurisdiction makes sense.

[5] HALLEX is an internal agency directive that "defines procedures for carrying out policy and provides guidance for processing claims at the Hearing, Appeals Council, and Civil Actions levels." HALLEX I-1-01.

[6] The Appeals Council noted that plaintiff's appointed representative of record failed to appear. It further found no evidence that plaintiff agreed to representation by Ms. Jancicka.

claim for benefits within 30 days. (***Id.***, Exh. 6 at pages 52-55 of 58.) When plaintiff failed to respond within the time specified, the Appeals Council dismissed the original request for hearing, essentially nullifying the ALJ's disability decision.[7] (***Id.***, Exh. 7 at pages 56-58 of 58.)

The Appeals Council's decision retroactively to dismiss the request for hearing indisputably is not a final decision subject to review by this court. ***See Matos-Cruz v. Commissioner of Social Security***, 1998 WL 1085788 at *1 (1st Cir. Oct. 7, 1998) (per curiam); ***Brandyburg v. Sullivan***, 959 F.2d 555, 558-62 (5th Cir.1992). A final decision is one issued, *inter alia*, after a hearing. The Appeals Council's decision to dismiss the request for a hearing effectively rendered the hearing that did take place a nullity. "[E]ven if the ALJ makes a determination on the merits, and the Appeals Council *grants* review and decides that the request for hearing should have been dismissed . . . federal courts lack jurisdiction to review the dismissal." ***Brandyburg***, 959 F.2d at 562 (emphasis in original). ***See also White v. Schweiker***, 725 F.2d 91, 94 (10th Cir. 1984) ("[A]ny matter committed to the absolute discretion of the [Social Security Administration], the Appeals Council may substitute its judgment for that of the ALJ and the federal courts have no jurisdiction to review that action;" finding that Council properly could determine, contrary to finding of ALJ, that good cause for failure to appear at hearing did not exist, and thus ALJ's decision on merits was not reviewable).

[7] The Appeals Council found that plaintiff received proper notice of the hearing, ***see*** 20 C.F.R. § 416.1457(b)(1)(i), a conclusion which is borne out by the evidence before me. Not only was a Notice of Hearing sent to plaintiff and his representative (***see* Motion**, Decl. of Kathie Hartt, Exh. 3 at pages 6-28 of 58), but based on his request for a postponement of the hearing (***see id.***, Exh. 4 at 33 of 58) and the reasons cited in his request for review of the ALJ's decision (Exh. 5 at 50 of 58), there is no doubt that plaintiff had actual notice of the time and date of the hearing. In those circumstances, the Commissioner was not required to consider whether good cause existed for plaintiff's failure to appear. ***See*** HALLEX I-2-4-25.C.3.a.

In the absence of a final decision of the Commissioner, this court lacks jurisdiction to consider plaintiff's appeal.

Although plaintiff's complaint suggests the alleged delay in the administrative process constituted cruel and unusual punishment (**Compl.** ¶ 5 at 2 [#1], filed February 5, 2016), the Eighth Amendment plainly has no application in this context. ***See Whitley v. Albers***, 475 U.S. 312, 327, 106 S. Ct. 1078, 1088, 89 L. Ed. 2d 251 (1986) (Eighth Amendment is "specifically concerned with the unnecessary and wanton infliction of pain in penal institutions"); ***Ingraham v. Wright***, 430 U.S. 651, 666, 97 S. Ct. 1401, 1410, 51 L. Ed. 2d 711 (1977) ("[E]very decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth . . . Amendment[] has dealt with a criminal punishment."). Nor are there any other patent constitutional concerns implicated by enforcement of the well-established precedents in this instance.

IV. ORDERS

Accordingly, I find and conclude that this appeal must be dismissed for lack of jurisdiction.

THEREFORE, IT IS ORDERED as follows:

1. That **Defendant's Motion To Dismiss** [#22], filed April 26, 2016, is granted;
2. That this appeal is dismissed for lack of jurisdiction;
3. That all other pending motions, including but not limited to plaintiff's **Motion for Appointment of Counsel** [#24], filed April 27, 2016, are denied;
4. That all deadlines herein are vacated; and
5. That this case is closed.

Dated May 2, 2016, at Denver, Colorado.

BY THE COURT:

Robert E. Blackburn
United States District Judge