

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

Civil Action No. 16-cv-01946-REB

MARK A. JONES,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

Blackburn, J.

The matter before me is the Commissioner's **Motion To Dismiss** [#12],¹ filed September 27, 2016. Although afforded an opportunity to do so, plaintiff failed to file a timely response to the motion. (**See Minute Order** [#13], filed September 29, 2016.) Having reviewed the motion and the apposite arguments and authorities, I find and conclude that the Commissioner's decision to dismiss plaintiff's claims does not constitute a final decision reviewable under 42 U.S.C. § 405(g), and thus dismiss plaintiff's appeal for lack of jurisdiction.

Plaintiff filed a claim for disability insurance benefits in October 2015. That claim was denied on initial review on January 5, 2016. (**Def. Motion App.**, Hartt Decl. ¶ (3)(a))

¹ “[#12]” 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.

at 2.) Plaintiff filed a request for hearing on April 22, 2016. (*Id.*, Hartt Decl. ¶ (3)(b) at 2.)² An administrative law judge dismissed that request as untimely in May 25, 2016. (*Id.*, Hartt Decl. ¶ (3)(b) at 2-3 & Exh. 1.) Three days later, plaintiff filed a request for review. The Appeals Council denied his request on July 14, 2016. (**Def. Motion App.**, Hartt Decl. ¶ (3)(c) & Exh. 2.) This appeal followed.

The Commissioner now seeks to dismiss plaintiff’s appeal for lack of jurisdiction. Under 42 U.S.C. § 405(g), an aggrieved claimant 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.” Thus, “a ‘final decision’ is a statutorily specified jurisdictional prerequisite.” *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.* (citing 42 U.S.C. § 405(a)). “The statutory scheme is thus one in which the [Commissioner] may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration.” *Id.*

The Commissioner’s 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 of the administrative review process: initial determination, reconsideration, hearing before an administrative law judge, and Appeal Council review. 20 C.F.R. § 404.900(a)(5). Plaintiff had 60 days following the initial determination – or until March 7, 2016 – to request a hearing. 20 C.F.R. § 404.933(b)(1). Plaintiff’s request, filed well beyond that deadline, was untimely, and the

² Although not entirely clear from the limited record before the court, it appears plaintiff’s claim was selected to be part of a pilot program which dispenses with the intermediary step of reconsideration. **See** 20 C.F.R. § 404.906.

initial unfavorable determination thus became binding. **See** 20 C.F.R. § 405.905. More importantly, because a dismissal based on untimeliness does not constitute a “final decision” within the meaning of the regulations, the court lacks jurisdiction to consider plaintiff’s appeal. **See *Brandtner v. Department of Health and Human Services***, 150 F.3d 1306, 1307 (10th Cir. 1998).

Both before the agency and in this appeal, plaintiff has insisted he did not receive notice of the initial unfavorable determination until late March 2016. (**See Compl.** at 3, 6 & Exh. A; **Def. Motion App.**, Hartt Decl. Exh. 1 at 8 (ALJ’s Order of Dismissal at 1).) The ALJ considered plaintiff’s explanation for the untimely request for hearing, but found plaintiff failed to rebut the presumption that he received notice of the determination five days after the date of the notice. **See** 20 C.F.R. § 404.901. (**Def. Motion App.**, Hartt Decl., Exh. 1 at 8 (ALJ’s Order of Dismissal at 1).) Moreover, the ALJ determined plaintiff failed to make the showing of good cause necessary to justify an extension of the deadline. **See** 20 C.F.R. § 404.933(c). (**Def. Motion App.**, Hartt Decl., Exh. 1 at 8 (ALJ’s Order of Dismissal at 1).) “[W]hen an ALJ finds a claimant has not shown ‘good cause’ for an untimely request for hearing, ‘the district court would clearly lack jurisdiction to review either the good cause determination or the merits.’” ***Stevens v. Astrue***, 2010 WL 148363 at *11 (D. Kan. Jan. 13, 2010) (quoting ***White v. Schweiker***, 725 F.2d 91, 93 (10th Cir. 1984). Such is the case here. Dismissal thus is required.


THEREFORE IT IS ORDERED as follows:

1. That the Commissioner's **Motion To Dismiss** [#12], filed September 27, 2016, is granted; and

2. That this appeal is dismissed for lack of jurisdiction.

Dated October 28, 2016, at Denver, Colorado.

BY THE COURT:



Robert E. Blackburn
United States District Judge