

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SHEILA SANCHEZ for
CHILA SANCHEZ,

Plaintiff,

v.

ORDER

03-C-0537-C

JO ANNE B. BARNHART, Commissioner
of Social Security,

Defendant.

This is an action for judicial review of a final decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Sheila Sanchez brings this case on behalf of her minor daughter, Chila Sanchez, to challenge the commissioner's determination that Chila is not disabled under the Social Security Act.

Before the court is defendant's motion to dismiss plaintiff's case for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on the ground that plaintiff failed to file her complaint within sixty days after the commissioner's final decision, as required by 42 U.S.C. § 405(g). Defendant has submitted documents that show that her decision became final on June 20, 2003, when the Appeals Council denied Sanchez's request for review of the administrative law judge's decision denying her application for childhood benefits on Chila's

behalf. The Commissioner deems the claimant to have received notice of the Appeals Council's decision five days after the date of the Appeals Council's decision. 20 C.F.R. §§ 404.901, 416.1401. The Commissioner asserts that Sanchez would have had to have filed her complaint within 60 days from June 25, 2003, that is, by August 24, 2003, in order to meet the sixty-day deadline. Sanchez did not file this suit until October 9, 2003. In addition, defendant points out that Sanchez has not alleged in her complaint that she made any request to extend the filing deadline or that circumstances exist that would justify equitable tolling of the sixty-day limitation period.

Sanchez has filed a response to defendant's motion in which she concedes that she did not file her complaint by August 24, 2003. However, she alleges that on August 25 and 26, 2003, respectively, she sent by mail and facsimile a request to the Appeals Council for an extension of the time period for filing a civil suit. (Under 20 C.F.R. §§ 404.982 and 416.1482, a party may ask the Appeals Council for an extension of time within which to file a civil complaint, even if that deadline has already passed.) In addition, she alleges that she underwent various personal hardships during the time period that made her unable to file her complaint by August 24, 2003. Sanchez has submitted evidence to support these new allegations.

I construe Sanchez's response to defendant's motion to dismiss as a motion to amend the complaint to cure defects identified by defendant in the motion to dismiss. The motion

to amend will be granted. The operative pleading shall consist of Sanchez's most recent submission together with the complaint she filed on October 9, 2003. The amended complaint will be considered filed and served as of the date of this order.

ORDER

IT IS ORDERED that plaintiff's constructive motion to amend her complaint is GRANTED. Under Fed. R. Civ. P. 15(a), defendant has ten days from the date of this order within which to file a response to the amended complaint. In lieu of a new responsive pleading, defendant may advise the court and plaintiff that she intends to stand on her motion to dismiss as her response to the amended complaint.

Dated this 8th day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge