

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

MICHAEL ROY HALEY,

Plaintiff,

OPINION and ORDER

v.

10-cv-463-wmc

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

This is a civil action brought by Michael Roy Haley to challenge a decision by the Commissioner of Social Security. Defendant Michael J. Astrue has moved to dismiss Haley's complaint as untimely because Haley had until May 14, 2010 in which to pursue his claim in this court but did not do so until August 16, 2010. Haley responds that he was told by a social security employee that he had been granted a further extension of time to file his civil action. This pedestrian, even dubious, response is insufficient to excuse the untimely filing of his complaint and it will be dismissed.

On October 6, 2001, Haley filed a motion for an extension of time together with a motion by Attorney Frederick Daley to allow him to appear in this case to review plaintiff's documents. Unfortunately, the court is not convinced that any further review of the case will change the outcome. Therefore, these motions will be denied.

Under the Social Security Act and its implementing regulations, a person who wishes to obtain judicial review of an adverse decision of the commissioner is required to file a civil complaint within 60 days after the Appeals Council denies review. 42 U.S.C. § 405(g); 20 C.F.R. § 422.210(c). This requirement is not jurisdictional, but rather constitutes a period of limitations," which is subject to equitable tolling. *Bowen v. City of New York*, 476 U.S. 467, 478, 480-81 (1986) (citations omitted). Under the doctrine of equitable tolling, a person's

failure to file a civil complaint within the time specified may be excused if he or she can show that he was prevented from filing by extraordinary circumstances beyond his control. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005).

In this case, the Appeals Council denied Haley's request for review on December 11, 2009. The date of receipt of the notice of the Council's action is presumed to be five days after the date of such notice, unless a reasonable showing to the contrary is made to the Appeals Council. 20 CFR. §§ 404.091, 416.1401, 422.210(c). On February 23, 2010, Haley was granted an extension of time of 30 days from the receipt of the notice to file his civil action. On April 9, 2010, Haley was granted a second, 30-day extension of time from the date of the receipt of the notice -- May 14, 2010. He does not appear to have requested, and certainly was not granted, any further extensions of time. Because Haley did not file his complaint in this court until August 16, 2010, it is unquestionably untimely unless excused under the doctrine of equitable tolling.

In his response, Haley states as follows:

Social Security Office "Disability Adjudication and Review" employee "Daryl" (who would not reveal his last name) granted me an extension, told me as of August 2010 that the case was "open for appeal."

Haley, however, obviously knew that is not how the procedure worked, having filed two previous requests for extensions of time to file this civil action. He knew or should have known, therefore, that a telephone conversation was not the proper method for receiving an extension of time. Further, he knew or should have known that his second request for extension of time was granted only until May 14, 2010.

Haley's explanation does not approach the sort of "extraordinary circumstances" that would merit equitable tolling. *See, e.g., Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007) (confusion and counsel error in calculating the limitations period falls "far short of showing extraordinary circumstances necessary to support equitable tolling"); *Arrieta v. Battaglia*, 461 F.3d 861, 867 (7th Cir. 2006) (lack of legal expertise no basis for equitable tolling); *Wilson v. Battles*, 302 F.3d 745, 748 (7th Cir. 2002) (litigant's or attorney's mistake or confusion is not extraordinary circumstance). Haley knew how to request an extension of time and failed to do so. Thus, his complaint was untimely. Because Haley is not entitled to equitable tolling in this case, defendant Astrue's motion to dismiss Haley's complaint as untimely will be granted.

ORDER

IT IS ORDERED that the motion of defendant Michael Astrue, Commissioner of Social Security, to dismiss the Michael Roy Haley's complaint as untimely is GRANTED. The clerk of court is directed to enter judgment for defendant and close this case.

IT IS FURTHER ORDERED that plaintiff's motion for an extension of time, dkt. #16, and Attorney Frederick Daley's motion for limited appearance and extension of time, dkt. #16, are DENIED.

Entered this 21st day of October, 2011.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge