

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

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JASON P. WEBER,

Plaintiff,

v.

MICHAEL ASTRUE,  
Commissioner of Social Security,

Defendant.

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OPINION AND ORDER

12-cv-81-bbc

Plaintiff Jason P. Weber is seeking judicial review of an adverse decision by defendant Michael Astrue, Commissioner of Social Security, denying his application for disability benefits. Defendant has filed a motion to dismiss, arguing that judicial review is not available because plaintiff's complaint was untimely filed. Plaintiff has not filed a reply and his time to do so has expired. I assume that he does not contest the alleged untimeliness and I will grant defendant's motion.

Plaintiff alleged disability from fibromyalgia and celiac disease. The administrative law judge denied his claim for disability benefits on November 17, 2010. That decision became final on October 26, 2011, when the Appeals Council denied plaintiff's request for review. 20 C.F.R. § 404.981; Getch v. Astrue, 539 F.3d 473, 480 (7th Cir. 2008) (the Appeals Council's determination constitutes final decision of Commissioner of Social Security). On that same date, the Appeals Council gave written notice to plaintiff of the

adverse decision. Plaintiff had 60 days from the receipt that notice to file a civil action for judicial review in federal court. 42 U.S.C. § 405(g) (setting forth the 60-day time limitation for commencing a civil action). Unless there is “a reasonable showing to the contrary,” a plaintiff is presumed to receive notice of an adverse decision by the Appeals Council five days after the notice is issued. 20 C.F.R. § 422.210(c).

The Appeals Council advised plaintiff in the October 26, 2011 notice of adverse decision that he had 60 days from the date of that notice to file a civil action for judicial review in federal court. Notice of Appeals Council Action, Dkt. # 7, Ex. 2, at 2. It included in the notice advice to plaintiff about the steps required to request additional time if he needed it. Id. Plaintiff’s complaint in this case was filed on February 6, 2012, which was well outside the 60-day limit on seeking judicial review. Noting that plaintiff did not request an extension of the 60-day limitation found in 42 U.S.C. § 405(g), defendant argues that plaintiff’s request for judicial review must be dismissed as untimely filed.

The “60-day requirement [for seeking judicial review] 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). Under the doctrine of equitable tolling, a person’s failure to file a civil complaint within the time specified may be excused if he can show that (1) he was pursuing his rights diligently, and (2) that an extraordinary circumstance beyond his control stood in his way. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (citing Irwin v. Dept. of Veterans Affairs, 498 U.S. 89, 96 (1990)).

Plaintiff has not filed a response to defendant’s motion and nothing in his pleadings

suggests a reason for his failure to seek judicial review within the 60-day limitation. He did not include anything in the pleadings about any attempt he made to pursue his rights with due diligence but was prevented from doing so by any sort of extraordinary circumstance that would merit an equitable extension of the 60-day time limit on seeking judicial review. Lawrence v. Florida, 549 U.S. 327, 336-37 (2007). Accordingly, this case must be dismissed as time-barred.

ORDER

IT IS ORDERED that the motion filed by defendant Michael J. Astrue, Commissioner of the Social Security Administration, dkt. #6, is GRANTED and this case is DISMISSED with prejudice as untimely. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 12th day of February, 2013.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge