

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

SHEILA SANCHEZ
for CHILA SANCHEZ,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner
of Social Security,

Defendant.

OPINION AND ORDER

03-C-537-C

On October 9, 2003, Sheila Sanchez filed a complaint on behalf of her minor daughter, Chila Sanchez, in which she challenges the commissioner's determination that Chila is not disabled under the Social Security Act. On March 4, 2004, defendant filed a motion to dismiss the complaint as untimely. In response to the motion, Sanchez submitted documents that the court construed as a proposed amendment to the complaint. After permitting Sanchez's documents to be filed as an amendment to the complaint, the court advised defendant that she had 10 days in which to file a responsive pleading or to advise the court of her intent to stand on the motion to dismiss as her response to the amended complaint. Defendant has taken the later course, making it necessary to address defendant's contention that the complaint must be dismissed because it is untimely.

Defendant contends that the case must be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6) on the ground that Sanchez failed to file her complaint within sixty

days after the commissioner's final decision, as required by 42 U.S.C. § 405(g). Because Sanchez has alleged facts that could support a finding that her time limit for filing a civil complaint has not expired or that equitable circumstances exist for tolling the statute of limitations, the motion to dismiss must be denied.

ALLEGATIONS IN THE COMPLAINT

On December 17, 2002, an administrative law judge issued a decision finding that Chila Sanchez was not disabled or entitled to supplemental security income benefits. On June 20, 2003, the Appeals Council issued a written decision in which it denied Sanchez's request for review of the administrative law judge's decision. In its notice of decision, the Appeals Council informed Sanchez that she had 60 days from the date she received the letter in which to file a civil action or request an extension of time within which to do so from the Appeals Council. It explained that the council would assume that Sanchez had received the letter five days after the date on it unless Sanchez could show that she had not received it within that period.

The 60-day time period expired on August 24, 2003, which was a Sunday. The next day, Sanchez mailed a letter to the Appeals Council in which she requested an extension of her deadline for filing a civil suit. In the letter, Sanchez explained that she could not file a civil complaint on time because she had been ill, was out-of-state at the time the letter from the Appeals Council was delivered, no longer had representation and was in the process of

pursuing a new application for benefits on her daughter's behalf. The next day, on August 26, 2003, she faxed a copy of her letter to the Appeals Council. Apparently, Sanchez never heard back from the Appeals Council. She filed the instant lawsuit on October 9, 2003.

DISCUSSION

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). A motion to dismiss will be granted only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. Cook v. Winfrey, 141 F.3d 322, 327 (7th Cir. 1998) (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)); Gossmeyer v. McDonald, 128 F.3d 481, 489 (7th Cir. 1997). On a motion to dismiss, the moving party must show "beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." GATX Leasing Corp. v. National Union Fire Ins. Co., 64 F.3d 1112, 1114 (7th Cir. 1995) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court will accept plaintiff's factual allegations as true, drawing all reasonable inferences in plaintiff's favor. See Harrell v. Cook, 169 F.3d 428, 431 (7th Cir. 1999).

Defendant's motion to dismiss is brought on the basis of 42 U.S.C. § 405(g), which provides in relevant part:

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced

within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

Defendant contends that this court must dismiss Sanchez's complaint because she failed to file it within 60 days from June 25, 2003, that is, by August 24, 2003.

As defendant acknowledges, the 60-day requirement is not jurisdictional, but constitutes a period of limitations that may be tolled by the commissioner or the court if fairness demands. Bowen v. City of New York, 476 U.S. 467, 479-81 (1986). The commissioner, through the Appeals Council, may grant an extension where a suit was not timely filed because of illness, accident, destruction of records, or mistake; the claimant misunderstands the appeal process or is unable timely to collect necessary information; or the commissioner undertook action that "misled" the claimant concerning her right to review. 20 C.F.R. §§ 404.911, 416.1411 (2003). 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 her brief in support of her motion to dismiss, defendant concedes that the Appeals Council has the authority to extend the time for filing an action in federal court, but asserts that "[p]laintiff does not claim to have made such a request." However, the documents that this court permitted Sanchez to file as an amendment to her complaint are to the contrary. Although Sanchez has not submitted certified mail receipts or a fax confirmation to corroborate her allegations, such confirmation is unnecessary at this stage. Her allegations are sufficient to establish that she filed a request for an extension with the Appeals Council.

(Although defendant has submitted an affidavit from the person in charge of case preparation and review for the Appeals Council who states that she is not aware of any request for an extension in Chila Sanchez's case file, the Commissioner concedes that this document is not part of the pleadings. Accordingly, this court may not consider it on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). In any case, that document merely establishes that a dispute of fact exists concerning whether Sanchez sought an extension from the Appeals Council.)

Further, Sanchez's failure to produce any document from the Appeals Council confirming that it received her request for an extension is not fatal to her complaint. Viewing the complaint in the light most favorable to plaintiff, one could infer that the Appeals Council misplaced Sanchez's extension request or even that it has not responded to it yet. This court takes judicial notice of the fact that the Appeals Council grants extensions routinely and that it sometimes takes several months for it to respond to a claimant's request for an extension. In any case, there is nothing in the complaint to suggest that the Appeals Council *denied* any request by Sanchez for an extension. Assuming Sanchez filed a request for an extension with the Appeals Council to which the Appeals Council has never responded, I cannot conclude that Sanchez did not file her complaint "within such further time as the Commissioner of Social Security may allow." Alternatively, the Appeals Council's failure to respond in a timely fashion to Sanchez's request for an extension could

provide an equitable reason to toll the limitations period. Accordingly, the motion to dismiss must be denied.

ORDER

IT IS ORDERED that the motion of defendant to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) is DENIED.

Entered this 4th day of May, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge