

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

GARY R. KUPKA,

Plaintiff,

ORDER

v.

03-C-617-C

TERRY L. MILLER, PETER C. ERICKSON,
and JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendants.

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). This action commenced on October 31, 2003, when plaintiff Gary R. Kupka filed his complaint and paid the filing fee.

In what appears to have been an oversight, the court did not acknowledge receipt of plaintiff's complaint or filing fee until January 7, 2004. In a letter from the court on that date, plaintiff was advised that it was his responsibility to serve defendants with his complaint. The court mailed to plaintiff conformed copies of the complaint and summons forms, along with a copy of Rule 4 of the Federal Rules of Civil Procedure.

Fed. R. Civ. P. 4(m) provides that if service is not effected within 120 days of the date plaintiff files his complaint with the court, and if the plaintiff cannot show good case why service was not made within that period, the action against the defendant is to be dismissed

without prejudice. Time that elapsed between the time plaintiff filed his complaint on October 31, 2003 and the time the court mailed summons forms to plaintiff on January 7, 2004 will not be counted against plaintiff because that delay was the result of an oversight by the court. Accordingly, under Rule 4(m), I will deem the 120-day period for service to have commenced on January 8, 2004. It will expire on May 6, 2004.

Plaintiff has not filed proof of service of his complaint or communicated with the court in any other way about his lawsuit. Thus, this court does not know whether plaintiff is having a difficult time accomplishing service or whether still is interested in prosecuting this action.

Rule 4 describes the process by which a plaintiff must notify a defendant that the plaintiff has begun a federal suit. Plaintiff is challenging an order of an officer of the United States. Therefore, under Fed. R. Civ. P. 4(i)(2)(A), he must do the following:

1. Serve the United States in the manner prescribed by Rule 4(i)(1). To do that, he must deliver a copy of the summons and complaint to J.B. Van Hollen, the United States Attorney for the Western District of Wisconsin. Alternatively, he can send a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk of the office of the United States Attorney, P.O. Box 1585, Madison, WI 53701-1585. In addition, plaintiff must

2. Send a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at the Department of Justice in Washington, District of Columbia, 20530; AND

3. Send of a copy of the summons and complaint by registered or certified mail to the Commissioner of Social Security, Jo Anne B. Barnhart, 6401 Security Blvd., Baltimore, MD, 21235.

It is not necessary for plaintiff to serve Terry Miller or Peter Erickson. In his complaint, plaintiff alleges that Miller is an acting administrative appeals judge and Erickson is an administrative law judge for the Social Security Administration. I infer that each of these individuals made decisions that were adverse to plaintiff in his quest for disability insurance benefits. However, these decisions are generally treated as decisions of the Commissioner of Social Security in cases reviewed under 42 U.S.C. § 405(g). Therefore, Jo Anne B. Barnhart, the Commissioner of Social Security, is the only proper defendant in this lawsuit.

ORDER

IT IS ORDERED that plaintiff has until May 6, 2004, in which to file proof of service of the summons and complaint upon the defendant in accordance with Fed. R. Civ. P. 4. If, by May 6, 2004, plaintiff has not filed proof of service of his complaint as required, or shown good cause for his failure to do so, the court will enter an order dismissing this case, without prejudice, for plaintiff's failure to prosecute.

Dated this 21st day of April, 2004.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge