

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

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ROBERT FEINER,

Plaintiff,

OPINION AND ORDER

v.

06-C-0671-C

MICHAEL J. ASTRUE, Commissioner of  
Social Security,

Defendant.

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On October 23, 2006, Robert Feiner filed a pro se complaint in the Circuit Court for Eau Claire County, Wisconsin alleging that defendant deprived him of his Social Security disability insurance benefits following his incarceration on November 15, 2002 in violation of 42 U.S.C. § 407 and constitutional law. Plaintiff's complaint names Lynn Marten, an individual employee of the Social Security Administration, as the defendant. The proper defendant in this action is the Commissioner of Social Security. Michael J. Astrue was sworn in as Commissioner of Social Security on February 12, 2007, and I have changed the case caption to reflect the new defendant. Defendant filed a notice of removal in this court on November 15, 2006.

Before the court is defendant's motion to dismiss plaintiff's complaint on the ground that plaintiff failed to exhaust his administrative appeal remedies. Pursuant to the briefing schedule set by the court and mailed to the parties, plaintiff had until January 25, 2007 to respond. Plaintiff missed that deadline. On February 12, 2007, he requested a 60-day

extension. Magistrate Judge Crocker granted plaintiff's request, allowing him until March 9, 2007 to file and serve his response with no further extensions. Dkt. #10. Plaintiff missed the deadline and filed an untimely brief on March 21, 2007. Dkt. #12.

Because plaintiff did not oppose defendant's motion within the time granted by the court, plaintiff is deemed to have conceded that he failed to exhaust his administrative remedies and that this court lacks subject matter jurisdiction over the claim raised in his complaint. However, even if plaintiff had filed his opposition brief on time, he has not made allegations in his complaint or raised arguments in his opposition brief that could support a finding that he exhausted his administrative remedies. Hefferman v. Bass, 467 F.3d 596, 598 (7th Cir. 2006) ("No claim should be dismissed unless 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" (citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Accordingly, defendant's motion is granted.

I find the following facts from plaintiff's complaint and the affidavit of Patrick Herbst, which was submitted by defendant.

## FACTS

In a hearing decision dated May 26, 1992, an administrative law judge found that plaintiff had been disabled under the Social Security Act since May 29, 1990. Dkt. #8, Exh.

1. Plaintiff received Social Security disability insurance benefits in the amount of \$1,250

a month. Dkt. #4, Complaint, ¶ 6. Plaintiff was first incarcerated on November 15, 2002 and has been confined at the Jackson County Correctional Institution since that time. Id. at ¶¶ 2 and 5. Plaintiff's Social Security disability insurance benefits were suspended in November 2002 because of his confinement to a correctional facility. Id. at ¶¶ 8-9; dkt. #8, Exh. 2. Plaintiff continued to receive benefit payments until January 2003, resulting in his being overpaid by two months. Dkt. #8, Exh. 2.

The Social Security field office in Eau Claire, Wisconsin completed a "Report of Contact" dated June 16, 2003 and reported the following information: Plaintiff submitted a signed request for a waiver of the overpayment on April 22, 2003, and a decision was made that plaintiff could not be found to be without fault. Plaintiff's folder was requested for "a possible personal conference." Because of plaintiff's incarceration, a personal conference was not possible. Plaintiff indicated that his wife, Karen Feiner, was his power of attorney and may hold this conference in his place. An appointment of representative form (SSA-1696) was sent to plaintiff for him and his wife to sign. Plaintiff's folder was then referred to the district office in Wausau, Wisconsin because Karen Feiner lived in that office's service area. Dkt. #8, Exh. 2. Plaintiff's Social Security claim file does not show that plaintiff received a reconsideration determination, hearing decision or Appeals Council review of the suspension of his benefits. Dkt. #8, ¶ 3(c).

## OPINION

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

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.

Under 42 U.S.C. § 405(h), judicial review is permitted only in accordance with § 405(g): “No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.” Defendant contends that this court must dismiss the complaint because plaintiff did not receive a final decision of the commissioner after a hearing and therefore cannot obtain judicial review.

The Social Security Act “does not define ‘final decision,’ instead leaving it to the [Social Security Administration] to give meaning to that term through regulations.” Sims v. Apfel, 530 U.S. 103, 106 (2000) (citing 42 U.S.C. § 405(a); Weinberger v. Salfi, 422 U.S. 749, 766 (1975)). Under the regulations, to obtain a final decision, a plaintiff must exhaust all of the following steps in the administrative review process: 1) receive an initial determination; 2) request reconsideration of the initial determination; 3) request and obtain a hearing decision by an administrative law judge; and 4) request Appeals Council review of the administrative law judge's decision. 20 C.F.R. § 404.900(a)(1)-(6) (2006); Salfi, 422 U.S. at 766.

Social Security benefits are not payable to a claimant who is confined in a correctional facility for conviction of a felony. 42 U.S.C. § 402(x); 20 C.F.R. § 404.468. A determination about nonpayment of benefits because of a claimant's confinement in a correctional facility is considered an initial determination. 20 C.F.R. 404.902(t). Plaintiff has not alleged in his complaint or argued in his opposition brief that he challenged this initial determination decision. Instead, plaintiff alleges that he gave the Social Security Administration time to reimburse him and he "has no other adequate remedy at law to redress this deprivation other than to initiate litigation." Cpt., dkt. #4, ¶¶ 16 and 19. There is some indication in the Eau Claire field office report that plaintiff may have tried to challenge the overpayment of his benefits by requesting a waiver, dkt. #8, Exh. 2, but there is no record that plaintiff or his wife as his personal representative completed a waiver request or the required reconsideration, hearing or appeal stages.

In his complaint and untimely filed opposition brief, plaintiff argues that defendant is violating the due process and supremacy clauses of the United States Constitution by suspending his benefits because of his incarceration. In certain cases where a Social Security claimant raises a constitutional question, judicial review may be available despite the claimant's failure to exhaust administrative remedies. Heckler v. Ringer, 466 U.S. 602, 617-18 (1984). The commissioner may waive the exhaustion requirement himself when he deems further exhaustion futile. Id. (citing Mathews v. Diaz, 426 U.S. 67, 76-7 (1976); Salfi, 422 U.S. at 766-67). Additionally, the court may waive the exhaustion requirement

where the claimant raises a claim “that is wholly collateral to his claim for benefits” under the Social Security Act and makes “a colorable showing that his injury could not be remedied by the retroactive payment of benefits after exhaustion of his administrative remedies.” Id. at 618 (citing Mathews v. Eldridge, 424 U.S. 330-32 (1976)). Neither of these exceptions to exhaustion apply in this case. The commissioner has not waived the exhaustion requirement and plaintiff’s constitutional challenges are not wholly collateral to his claim for reinstatement of benefits. The Social Security Act provides both the standing and substantive basis for plaintiff’s constitutional contentions. Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 11 (2000) (citing Salfi, 422 U.S. at 760-61). Further, if plaintiff had exhausted his administrative remedies, his alleged injury could have been remedied by the retroactive payment of benefits, the very relief that he requests in his complaint.

Given that plaintiff is deemed to have conceded that he exhausted his administrative remedies and there are no facts to show otherwise, this court does not have subject matter jurisdiction over plaintiff’s claims. Plaintiff’s complaint will be dismissed.

ORDER

IT IS ORDERED that defendant Michael J. Astrue's motion to dismiss plaintiff Robert Feiner's complaint for lack of subject matter jurisdiction is GRANTED. The clerk is directed to close this case.

Entered this 12th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge