

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

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BOBBY T. RIDDLE,

Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHART,  
COMMISSIONER OF SOCIAL SECURITY,

06-C-342-S

Defendant.

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Plaintiff Bobby T. Riddle brings this action pursuant to 42 U.S.C. § 405(g) for review of the defendant Commissioner's final decision denying him Disability Insurance Benefits (DIB). On September 26, 2006 defendant moved to dismiss for lack of subject matter jurisdiction and failure to state a claim for relief upon which relief can be granted. Pursuant to this Court's August 9, 2006 status conference order plaintiff's response was to be filed not later than October 26, 2006 and it was filed on October 31, 2006. No further briefing is required.

FACTS

On October 13, 2004 an Administrative Law Judge issued a decision denying plaintiff's claim for benefits. Plaintiff requested review of this decision. On March 28, 2005 the Appeal Council sent plaintiff and his representative notice of its action denying his request for review. This notice advised plaintiff of

his right to commence a civil action within sixty days from the date of receipt.

In his complaint plaintiff alleges that he did not receive the notice until May 26, 2006. He does not allege that he filed a request for an extension of time.

#### MEMORANDUM

Defendant argues that plaintiff's complaint should be dismissed for lack of subject matter jurisdiction because it is not timely filed. Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g) sets forth the time limitation for commencing a civil action. The action must be commenced within sixty days after the mailing of notice of the decision or within such further time as the Commissioner may allow. The Commissioner has interpreted mailing as the date an individual receives notice of the decision, See 20 C.F.R. §§ 404.981, 422.120(c). The date of receipt 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. See Id. §§ 404.901, 422.210(c).

The notice of the Appeals Council decision was mailed to plaintiff on March 28, 2006. According to the regulation it is presumed that plaintiff received it five days later. Accordingly, plaintiff had 65 days or until June 1, 2006 to file his civil

action. Plaintiff did not file this action until June 29, 2006 which makes it untimely.

In his complaint plaintiff alleges that he did not receive the notice until May 25, 2006 but he has submitted no documentation to support this allegation. Plaintiff's counsel has now submitted an affidavit that he did not receive the notice until May 25, 2006. Neither plaintiff nor his counsel has shown that they made a reasonable showing to the Appeals Council that they received the notice nearly 60 days after the date of the notice. Further, neither plaintiff nor his counsel allege that they requested an extension of time from the Appeals Council to file this civil action.

Accordingly, this Court lacks jurisdiction of the above entitled matter because it is barred by the time limitations specified in section 205(g) of the Act. Defendant's motion to dismiss the above entitled matter for lack of subject matter jurisdiction will be granted.

ORDER

IT IS ORDERED that defendant's motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that the above entitled action is DISMISSED for lack of subject matter jurisdiction.

Entered this 1<sup>st</sup> day of November, 2006.

BY THE COURT:

s/  
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JOHN C. SHABAZ  
District Judge