

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

OLLIE D. CARVER-THOMAS,

Plaintiff,

v.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

ORDER

11-cv-797-bbc

On November 29, 2011, plaintiff Ollie D. Carver-Thomas, appearing pro se, filed this civil action for judicial review of an adverse decision by the Commissioner of Social Security. After her request for leave to proceed in forma pauperis was denied, plaintiff paid the \$350 filing fee and served the complaint on defendant. On March 8, 2012, defendant filed a motion to dismiss the case on the ground that it was filed four days too late. Although plaintiff was notified that she had until March 30, 2012 to respond to the motion, she failed to respond or otherwise inform the court of an inability to do so. Accordingly, the motion to dismiss is now before me for the court's decision. Absent any opposition from plaintiff, I conclude that the motion must be granted.

As defendant points out in his motion, under the Social Security statutes and regulations, plaintiff had 60 days after the mailing of the Appeals Council's decision in which to file her civil complaint in this court. 42 U.S.C. § 405(g); 20 C.F.R. § 404.981. These laws interpret the term "mailing" to mean the date the individual receives notice of the Appeals Council's denial of request for review. 20 C.F.R. § 404.981. 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. 20 C.F.R. § 404.901.

In this case, the notice from the Appeals Council informing plaintiff that it was denying her request for review is dated September 21, 2011. Notice of Appeals Council Action, Sept. 21, 2011, attached to complaint, dkt. #1, at Exh. 1. Under the regulations, plaintiff is presumed to have received that notice five days later, on September 26, 2011. Her time period for filing a civil action in federal court began to run that day and it expired 60 days later, on November 25, 2011. Plaintiff filed her civil action four days later, on November 29, 2011. Cpt., dkt. #1.

Although plaintiff could have asked the Appeals Council for more time to file a civil action, the evidence shows that she did not do so. Alternatively, this court might be able to excuse plaintiff's late filing under the doctrine of equitable tolling, which permits a court to toll a statute of limitations if the plaintiff can show that extraordinary circumstances existed that prevented her from filing her complaint on time. Pace v. DiGuglielmo, 544 U.S. 408,

418 (2005); Bowen v. New York, 476 U.S. 467, 480-81 (1986). However, because plaintiff has not responded to the motion to dismiss, I have no basis on which to find that equitable tolling applies in this case. Accord Williams v. Buss, 538 F.3d 683 (7th Cir. 2008) (fact that plaintiff was appearing pro se and petition was filed only 13 days late insufficient to support application of equitable tolling).

Accordingly, because it is undisputed that plaintiff did not file her complaint within the 60-day time period prescribed by 42 U.S.C. § 405(g) or seek an extension from the Appeals Council, and she has failed to present facts that might support a finding of equitable tolling, the motion to dismiss must be granted.

ORDER

IT IS ORDERED that the motion of defendant Michael Astrue to dismiss the complaint, dkt. #10, is GRANTED. The clerk of court shall enter judgment for defendant and close this case.

Entered this 27th day of April, 2012.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge