

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RONNIE T. SHELTON,)	
Plaintiff,)	Civil Action No. 5:15-cv-00027
)	
v.)	
)	<u>REPORT & RECOMMENDATION</u>
CAROLYN COLVIN,)	
COMMISSIONER OF THE SOCIAL)	
SECURITY ADMINISTRATION,)	By: Joel C. Hoppe
Defendant.)	United States Magistrate Judge

This matter is before the Court for a report and recommendation on the Defendant’s Motion to Dismiss the Plaintiff’s Complaint for lack of subject-matter jurisdiction. ECF No. 7. After carefully reviewing the parties’ briefs, exhibits, and the applicable law, I find that this Court does not have subject-matter jurisdiction in this case. Therefore, I **RECOMMEND** that the Court **GRANT** the Defendant’s Motion to Dismiss, ECF No. 7, and **DISMISS** this case **WITHOUT PREJUDICE** from the Court’s active docket.

I. Background

In 1990 Plaintiff Ronnie T. Shelton filed applications for Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act. The applications were denied initially on September 19, 1990, and on reconsideration on March 25, 1991. Administrative Law Judge’s Written Opinion (“ALJ Op.”), Ex. 1, at 1, ECF No. 8-1; Notice of Appeals Council Action, Ex. 3, at 2, ECF No. 8-1. Shelton did not appeal the reconsideration determination by requesting a hearing before an administrative law judge (“ALJ”); thus, the reconsideration determination became the agency’s final determination. *Id.* Shelton filed a second application in 2001 that was denied on *res judicata* grounds at the administrative level. ALJ Op. 1. Shelton did not appeal. In 2004 he filed a third

application that also was denied on *res judicata* grounds. *Id.* Shelton pursued his administrative appeals and ultimately filed a complaint in this Court. *Id.* In a memorandum opinion, United States District Judge Glen Conrad determined that Shelton's case was barred by *res judicata*. Mem. Op. 3, 5, *Shelton v. Barnhart*, 5:05cv60, ECF No. 21. In making this finding, Judge Conrad noted,

[i]t is the court's understanding of the law that plaintiff may now file a new application, and assert his mental incompetence as of 1990 in an effort to overcome the Commissioner's reliance on administrative res judicata. Should he make out a prima facie case, Mr. Shelton would be entitled to a hearing, and an appropriate adjudication of these limited factual issues.

Id. at 5.

Shelton filed a fourth application in 2007. After the application was twice denied at the agency level on *res judicata* grounds, Shelton requested a hearing before an ALJ. ALJ Op. 2. Shelton submitted evidence about his mental impairments and competency to appeal the denial of his 1990 disability claims from his first applications. *Id.* The ALJ determined that Shelton was competent to appeal his first applications and dismissed his request for a hearing on *res judicata* grounds. *Id.* Shelton appealed that decision to the Appeals Council and then to this Court. *Id.*

In addition to contesting the denial of his disability application, Shelton raised various other claims in his complaint before this Court. *See* Compl., *Shelton v. Astrue*, 5:12cv9, ECF No. 1. The Commissioner moved to dismiss all of the claims, except that he also moved for a limited remand of Shelton's request for review of his disability claim. United States District Judge Michael Urbanski granted the Defendants' motions to dismiss and remanded the case for the limited purpose of allowing the Commissioner to conduct an evidentiary hearing to determine whether Shelton was competent to exercise his right to appeal the denial of his 1990 disability claims. Order 3-4, *Shelton v. Astrue*, 5:12cv9, ECF No. 54.

On remand, the ALJ held an evidentiary hearing on March 19, 2014. ALJ Op. 1. Shelton testified and submitted statements from his daughter and a friend. *Id.* at 5. The ALJ also considered medical records and opinions about Shelton’s mental condition. *Id.* at 6–8. In reviewing the administrative record, the ALJ noted that Shelton was represented by an attorney after he filed his application in July 1990. *Id.* at 6. The ALJ found that Shelton was not mentally incompetent and affirmed the dismissal of his 1990 application. *Id.* at 7–8. The ALJ also considered Shelton’s application on the merits and determined that he was not disabled.

Shelton asked the Appeals Council to review the ALJ’s decision. He submitted a letter from his former counsel, David L. Wallace (“Wallace”), who represented Shelton during his 1990 application. Ex. 4, at 3–4, ECF No. 8-1. Wallace described Shelton’s mental state during his representation, and he explained that he had lost contact with Shelton at the time to request a hearing before an ALJ. *Id.*

The Appeals Council vacated the ALJ’s decision, but upheld his determination that Shelton was competent at the time that he could have requested a hearing. It also found that he was represented by counsel during his first application. Ex. 5, at 5, ECF No. 8-1. Accordingly, the Appeals Council found that the decision denying reconsideration was the Commissioner’s final decision, and Shelton’s subsequent filings were barred by *res judicata*. *Id.* at 5–6.

In proceedings before this Court, the Commissioner has moved to dismiss Shelton’s appeal, arguing that the Appeals Council’s *res judicata* determination is not a judicially-reviewable final judgment, and Shelton has responded in opposition.

II. Discussion

The Social Security Act (the “Act”) authorizes federal courts to review “any final decision of the Commissioner of Social Security made after a hearing” to which the plaintiff was

a party.¹ 42 U.S.C. §§ 405(g), 1383(c)(3). This language “clearly limits judicial review to a particular type of agency action,” and it precludes federal-court review where agency proceedings end without a hearing. *Califano v. Sanders*, 430 U.S. 99, 108 (1977). The Act does not define the phrase “final decision . . . made after a hearing.” *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). Rather, its meaning was left to the Commissioner to flesh out by regulation. *Id.*

The Act’s regulations set out a four-step process that will produce a “final decision” on the merits of the applicant’s disability claim. *See* 20 C.F.R. §§ 404.900(a), 416.1400(a). Requesting a hearing before an ALJ is the third step in the administrative process. *See id.* §§ 404.900(a)(3), 416.1400(a)(3). An applicant who fails to timely request review at any step generally will “lose [his] right to further administrative review and [his] right to judicial review” under the statute. *Id.* §§ 404.900(b), 416.1400(b); *see also Salfi*, 422 U.S. at 757 (noting that § 405(g) precludes judicial review where the applicant does not exhaust administrative remedies).

Where an application for social security benefits is dismissed on *res judicata* grounds—as Shelton’s 2007 application was—the rule in *Califano v. Sanders*, 430 U.S. 99, ordinarily precludes judicial review. *Shrader v. Harris*, 631 F.2d 297, 300 (4th Cir. 1980). Adjudication of a constitutional question, however, is an exception to this bar. *Id.* (quoting *Sanders*, 430 U.S. at 109). In *Shrader*, the Court of Appeals for the Fourth Circuit identified one such exception, framing the issue as follows:

[W]hen mental illness precluded a pro se claimant from understanding how to obtain an evidentiary hearing after ex parte denial of his application for benefits, does the summary dismissal on *res judicata* grounds of his motion for a hearing with respect to a subsequent application deprive that claimant of property without due process of law?

¹ Section 405 provides the exclusive statutory grant of subject-matter jurisdiction in DIB and SSI cases. *See* 42 U.S.C. § 405(h) (ruling out jurisdiction under 28 U.S.C. §§ 1331, 1346); *Califano v. Sanders*, 430 U.S. 99, 107 (1977) (ruling out jurisdiction under the Administrative Procedure Act).

Id. at 301. The court answered the question affirmatively, finding that Congress would not have intended to deprive a mentally incompetent *pro se* claimant of a hearing. *Id.* at 301–02. In such a case, the Commissioner may not invoke *res judicata*,

when a claimant presents prima facie proof that mental illness prevented him from understanding the procedure necessary to obtain an evidentiary hearing after the denial of his prior *pro se* claim. Instead, the [Commissioner] will be obliged to conduct an evidentiary hearing to determine the claimant’s mental competency. Only if the claimant is found incompetent need the [Commissioner] afford him an evidentiary hearing on the merits of his claim.

Id. at 302.

The Fourth Circuit emphasized that the constitutional issue was “narrow” and “applies solely to claimants afflicted by mental illness whose initial claims, presented *pro se*, were denied *ex parte*.” *Id.* at 301, 302. In subsequent decisions, the Fourth Circuit reiterated that the holding in *Shrader* was narrow, and it premised application of the exception on the claimant being *pro se* and mentally incompetent at the time to request an evidentiary hearing. *See, e.g., Culbertson v. Sec’y of Health and Human Servs.*, 859 F.2d 319, 323 (4th Cir. 1988) (“Our decision in *Shrader* prohibits the Secretary from binding a claimant to an adverse ruling when that individual lacked both the mental competence and legal assistance necessary to contest the initial determination.”); *Brown v. Harris*, 669 F.2d 911, 913 (4th Cir. 1981) (“In *Shrader*, we held that when mental illness precludes a *pro se* applicant for disability benefits from understanding how to obtain an evidentiary hearing after an *ex parte* denial of his application for benefits, a summary dismissal on *res judicata* grounds of the claimant’s motion for a hearing on a subsequent application violates the claimant’s due process rights. Our decision in *Shrader* was very narrow.”); *see also* SSAR 90-4(4) (July 16, 1990), https://www.ssa.gov/OP_Home/rulings/ar/04/AR90-04-ar-04.html; SSR 91-5p, 1995 WL 259487 (Apr. 26, 1995). Thus, the rule in *Shrader* exists to protect a claimant’s due process rights in circumstances where the claimant himself is unable to

understand the procedure for prosecuting his disability claim and he is not represented by an attorney, who presumably does understand that procedure and must protect his client's interests, regardless of the client's competence.

The Court has not found a case applying, or even discussing, the rule in *Shrader* where a claimant was represented by an attorney at the time of the missed filing. The closest analogy that can be drawn from any published opinion is to the situation in *Culbertson v. Secretary of Health and Human Services*, 859 F.2d 319. In that case, the Fourth Circuit considered whether the Secretary could rely on the mental competence of a claimant's father to pursue his daughter's administrative remedies. *Id.* at 324. Culbertson, a mentally impaired, but fully emancipated adult, was assisted by her father in filing an application. *Id.* She missed the deadline to appeal an adverse reconsideration determination. The Fourth Circuit found that Culbertson's father had no legal authority over or responsibility to act for his daughter, but was simply a "willing volunteer." *Id.* As such, her right to disability benefits could not be forfeited by the acts of "a third party who owes no enforceable duty to a claimant." *Id.* The court's analysis reinforces that *Shrader* does not apply where a third party, such as an attorney, has an enforceable duty or responsibility to act for a claimant

Before this Court and the Appeals Council, Shelton faults his former counsel for not pursuing an appeal of his 1990 application. In the letter submitted to the Appeals Council, Wallace wrote that he was unable to contact Shelton about filing a request for a hearing because Shelton had left town. This break in communications does not change the fact that Shelton was represented by an attorney, who had the duty to advocate and pursue Shelton's interests. Moreover, nothing in the record before the Appeals Council or this Court shows that Wallace performed so ineffectively as to deny Shelton the assistance of counsel.

Because Shelton was not acting *pro se* on his 1990 application at the time to request a hearing before an ALJ, the Court finds that he cannot establish under the rule in *Shrader* that his missed request for a hearing must be excused or that the Commissioner's dismissal of his subsequent 2007 application on *res judicata* grounds violated due process.

IV. Conclusion

For the foregoing reasons, the Court finds that it does not have subject-matter jurisdiction over the Commissioner's decision to dismiss Shelton's 2007 application on *res judicata* grounds. Therefore, I **RECOMMEND** that the District Court **GRANT** the Defendant's Motion to Dismiss the Complaint, ECF No. 7, and **DISMISS** this case **WITHOUT PREJUDICE** from the Court's active docket.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Michael F. Urbanski, United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record.

ENTER: May 2, 2016

Joel C. Hoppe

Joel C. Hoppe
United States Magistrate Judge