

Not Intended for Print Publication

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

SHARON GIBBS,)	
)	
Plaintiff,)	Case No. 2:04CV00056
)	
v.)	OPINION
)	
JO ANNE B. BARNHART,)	By: James P. Jones
COMMISSIONER OF SOCIAL)	Chief United States District Judge
SECURITY,)	
)	
Defendant.)	

Sue Ella Kobak, Pennington Gap, Virginia, for Plaintiff; Julie C. Dudley, Assistant United States Attorney, Roanoke, Virginia, for Defendant.

In this Social Security case, the Commissioner has moved to dismiss based on the statute of limitations. Because the plaintiff has not alleged any facts showing the proper application of equitable tolling, I will grant the motion and dismiss the action.

I

Sharon Gibbs filed this action challenging the final decision of the Commissioner of Social Security (“Commissioner”) denying her application for disability insurance benefits under the provisions of the Social Security Act, 42 U.S.C.A. §§ 401-433 (West 2003 & Supp. 2004). The final decision of the

Commissioner, acting through the Appeals Counsel, was communicated to the plaintiff by letter dated May 7, 2004. The plaintiff filed her Complaint on July 19, 2004, more than sixty-five days after the Commissioner's final decision. In response, the Commissioner filed the present Motion to Dismiss, asserting that the Complaint was not filed within the time permitted by the Act. The plaintiff has responded to the motion and it is ripe for decision.¹

The Act provides that civil actions seeking judicial review of a final decision of the Commissioner must be commenced within sixty days after the mailing of a notice of the decision. *See* 42 U.S.C.A. § 405(g).² This statute of limitations is not jurisdictional and is subject to equitable tolling. *See Bowen v. City of New York*, 476 U.S. 467, 478-80 (1986).

¹ I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

² This limitations period has been modified by the regulations so that it begins to run only upon receipt of the notice rather than upon its mailing. *See* 20 C.F.R. § 422.210(c) (2004). The regulations further provide that receipt is presumed to be five days after mailing, unless there is a "reasonable showing to the contrary." *Id.* If the plaintiff rebuts the five-day presumption, the Commissioner has the burden of showing that the plaintiff received actual notice within the time provided in the regulations. *See McCall v. Bowen*, 832 F.2d 862, 864 (5th Cir. 1987). Actual date of receipt is not an issue in this case, and it is thus presumed that the plaintiff received the notice five days after it was mailed. The Commissioner may extend the limitations period for good cause shown. *See* 42 U.S.C.A. § 405(g); 20 C.F.R. §§ 404.982, 422.210(c) (2004). However, no such extension was applied for or granted in this case.

In the present case, the Complaint is dated June 28, 2004, “at 4:04 p.m.” The Civil Cover Sheet submitted with the Complaint was dated by plaintiff’s counsel on June 29, 2004. The limitations period (including the presumed mailing notice period) ran on Monday, July 12, 2004.³ However, the Complaint was not received by the clerk’s office of this court until Friday, July 16, 2004.⁴ It was submitted with an application and affidavit by the plaintiff to proceed in forma pauperis, which application was granted by a magistrate judge of this court on Monday, July 19, 2004, and the Complaint filed that day. Thus, the Complaint was four days late.⁵

In the response to the Commissioner’s Motion to Dismiss filed by the plaintiff’s attorney, no explanation is given as to why the Complaint was submitted late, other than it was not the fault of the plaintiff herself.⁶ It appears that it was simply oversight by the attorney or her staff.

³ The sixty-fifth day actually occurred on July 11, but that was a Sunday, so that an extra day is allowed. *See* Fed. R. Civ. P. 6(a).

⁴ It was filed-stamped by the clerk’s office on that date.

⁵ This court has held that where a complaint is submitted with an application to proceed in forma pauperis, the time elapsed between that date and the date the application is acted upon is not counted against the Act’s statute of limitations. *See Bishop v. Apfel*, 91 F. Supp. 2d 893, 894 (W.D. Va. 2000); *see also Wells v. Apfel*, 103 F. Supp. 2d 893, 898-99 (W.D. Va. 2000) (holding that complaint is deemed filed as of date first received by clerk’s office, because absent local rule, payment of filing fee is not jurisdictional requirement).

⁶ Indeed, the affidavit to proceed in forma pauperis shows that it was signed by the plaintiff on May 28, 2004, a month before the Complaint was prepared.

Despite *Bowen* and the fact that the statute of limitations of § 405(g) is designed to be “unusually protective” of claimants, *Heckler v. Day*, 467 U.S. 104, 106 (1984), it has been held that an attorney’s mistake is not a ground for equitable estoppel. See *Davila v. Barnhart*, 225 F. Supp. 2d 337, 339 (S.D.N.Y. 2002) (stating that “attorney error or miscalculation is not one of the rare circumstances in which equitable tolling is permissible”). Although the court in *Davila* noted that strict application of the traditional principles of equitable tolling was particularly harsh because the plaintiff there filed her complaint only one day late, it explained that the limitations period under the Social Security Act is part of a waiver of sovereign immunity that must be strictly construed. *Id.*; see also *Price v. Shalala*, No. 93-6651-CIV-ZLOCH, 1994 WL 543030, at *3 (S.D. Fla. May 31, 1994) (holding that attorney’s mistake in failing to timely file action for review of Social Security decision does not support equitable tolling).

As stated by the Supreme Court in another context, “principles of equitable tolling . . . do not extend to what is at best a garden variety claim of excusable neglect.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (Title VII case).

The plaintiff bears the burden of establishing exceptional circumstances that warrant equitable tolling. See *Boos v. Runyon*, 201 F.3d 178, 185 (2d Cir. 2000). The

facts alleged by the plaintiff do not constitute a ground for excusing the failure to file in time, and accordingly I must grant the Motion to Dismiss.

III

For the foregoing reasons, the defendant's Motion to Dismiss will be granted and this action will be dismissed.

DATED: February 7, 2005

/s/ JAMES P. JONES
Chief United States District Judge