

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

SHARON K. HEWITT,	)	CIVIL ACTION NO. 5:01CV00040
Plaintiff,	)	
	)	
v.	)	<u>MEMORANDUM OPINION</u>
	)	
JO ANNE B. BARNHART <sup>1</sup> ,	)	
Commissioner of Social Security,	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

This case comes before the court on the plaintiff's objections to the November 21, 2001 Report and Recommendation of the presiding United States Magistrate Judge. The Magistrate Judge recommended that the court affirm the final decision of the Commissioner denying benefits to the plaintiff. For the reasons set forth below, the plaintiff's objection shall be SUSTAINED in part and OVERRULED in part, the Magistrate Judge's Report and Recommendation shall be REJECTED, and the court will DISMISS the instant action for lack of subject matter jurisdiction.

I.

On August 12, 1996, plaintiff applied for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C.A. §§ 401-33 (West 1994 & Supp. 2002). After exhausting her administrative remedies, on November 8, 1999, plaintiff appealed to this court the Commissioner's final decision that the plaintiff is not disabled because "she was able to

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<sup>1</sup> Ms. Barnhart became Commissioner of Social Security effective November 9, 2001. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C.A. § 405(g) (West 1994 & Supp. 2002), she is automatically substituted as the defendant in this action.

make an adjustment to work that exists in significant numbers in the national economy.” (R. at 498.) On June 22, 2000, this court adopted a Report and Recommendation by the presiding United States Magistrate Judge in Civil Action No. 5:99CV00091 and remanded the case to the Commissioner for further proceedings. An Administrative Law Judge [“ALJ”] held supplemental administrative proceedings in plaintiff’s case. At the hearing, the ALJ heard testimony from the plaintiff, an impartial medical expert, and an impartial vocational expert. *Id.* On December 27, 2000, the ALJ issued another unfavorable decision for the plaintiff. In the notice of the decision, the ALJ informed the plaintiff that she had thirty (30) days from receiving the notice to file exceptions to the Appeals Council.<sup>2</sup> (R. at 495.)

After receiving the unfavorable ALJ decision, plaintiff requested review of the ALJ decision by the Appeals Council. On March 14, 2001, the Appeals Council declined to review plaintiff’s claim because her exceptions to the ALJ decision were not timely. (R. at 493.) Plaintiff filed the instant action on May 14, 2001, seeking review of the Appeals Council’s decision that her exceptions to the ALJ decision were not timely. Plaintiff argues that remand to the Appeals Council is proper because she was told by an employee of the Social Security Administration that the thirty day period within which she may seek review by the Appeals Council refers to thirty business days, and not simply to thirty days from receiving the ALJ’s notice. (Compl. at ¶ 4.)

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<sup>2</sup> Ordinarily, a claimant has sixty (60) days to request Appeals Council review of an ALJ decision. 20 C.F.R. § 404.968 (2001). However, when a federal court remands a case to the Commissioner, the claimant has thirty (30) days to seek review by the Appeals Council of an ALJ decision. 20 C.F.R. § 404.984(b)(1) (2001).

The matter was referred to the Magistrate Judge to set forth findings, conclusions, and recommendations for its disposition. 28 U.S.C.A. § 636(b)(1)(B) (West 1994 & Supp. 2002). On November 21, 2001, the Magistrate Judge filed his Report and Recommendation [R&R] in which he did not specifically address plaintiff's request that the court remand for reconsideration by the Appeals Council the determination that plaintiff's exceptions to the ALJ's decision were untimely. Instead, the Magistrate Judge treated the ALJ's decision as the final decision of the Commissioner, and performed a review on the merits. *See* 42 U.S.C.A. § 405(g), (h) (West 1994 & Supp. 2002) (giving federal courts jurisdiction to review only final decisions of the Commissioner of Social Security). The Magistrate Judge recommended that the court affirm the Commissioner's final decision.

Plaintiff filed a timely objection to the R&R on November 28, 2001. In the objection to the Magistrate's recommendation, plaintiff clarified that her only request on appeal was that the matter "be remanded for consideration by the Appeals Council" because she "was denied access to an Appeals Council review of her case because of her reliance upon inaccurate procedural information provided" by an employee of the Social Security Administration. (Obj. to Findings of Magistrate Judge at ¶¶ 1, 2.) Plaintiff also reasserts that her Complaint did not seek a review on the merits. *Id.*

The court reviews *de novo* those portions of the report or specified proposed findings or recommendations to which objection was made. *See* 28 U.S.C.A. § 636(b)(1) (West 1994 & Supp. 2002). For the reasons set forth below, the court sustains in part and overrules in

part plaintiff's objection, rejects the Magistrate's R&R, and dismisses the instant action for lack of subject matter jurisdiction.

## II.

It is not entirely clear, either from the Complaint, or from plaintiff's objection to the R&R, precisely what relief plaintiff seeks. For example, it is uncertain whether plaintiff requests the court to order the Appeals Council to reconsider its decision in light of the proffered reason why plaintiff filed untimely exceptions to the ALJ decision, or whether she asks the court to excuse her procedural default and order the Appeals Council to review the ALJ's decision. Regardless of the precise relief plaintiff prays for, at issue in this case is the court's ability to review the Appeals Council's refusal to review the ALJ's decision because plaintiff's exceptions were not filed in a timely manner.

Federal courts have jurisdiction to review only the final decisions of the Social Security Commissioner. *See* Title II of the Social Security Act, 42 U.S.C.A. § 405(g), (h) (West 1994 & Supp. 2002) ["Act"]. The Act does not define what qualifies as a "final decision," and the court must look to the applicable regulations to determine which agency action constitutes a final decision. *Bacon v. Sullivan*, 969 F.2d 1517, 1520 (3rd Cir. 1992).

### A.

A close look at regulatory authority reveals that dismissal of an untimely request for Appeals Council review is not a final decision by the Commissioner, and therefore, the court lacks jurisdiction to review the Appeals Council's decision. Regulations promulgated by the Social Security Administration warn claimants that the Appeals Council will dismiss requests

for review if the claimant does not file the request “within the stated period of time and the time for filing has not been extended.” 20 C.F.R. § 404.971 (2001). Significantly, the regulations also provide that “[t]he dismissal of a request for Appeals Council review is binding and not subject to further review.” 20 C.F.R. § 404.972 (2001).

Case law further confirms that federal courts lack jurisdiction to review the Appeals Council’s dismissal of an untimely request for review. In *Adams v. Heckler*, 799 F.2d 131 (4th Cir. 1986), the Court of Appeals for the Fourth Circuit joined the overwhelming majority of other federal Courts of Appeals and held that a “refusal to review for failure to file a timely request d[oes] not constitute a final decision by the Secretary [of the Social Security Administration].” *Adams*, 799 F.2d at 133. In *Adams*, the Fourth Circuit upheld the lower court’s decision that it lacked subject matter jurisdiction to review the Appeals Council’s decision not to review the plaintiff’s claim because it was not timely filed. *Id.* Specifically, the plaintiff claimed that she did not file a timely request for review because she relied on the incorrect advice of her counsel. Without inquiring into the reasons for the delay in filing the exceptions, the Fourth Circuit found “sound justification for finding no final decision in the dismissal of an appeal for failure to timely file.” *Id.*; see e.g., *Brandtner v. Apfel*, 150 F.3d 1306, 1307 (10th Cir. 1998) (“The dismissal as untimely is not a decision on the merits or a denial of a request for review by the Appeals Council, both of which constitute final decisions and can be reviewed by the federal district court.”); *Harper v. Bowen*, 813 F.2d 737, 739 (5th Cir. 1987) (“[T]he regulations provide for district court review only when the Appeals Council has reviewed or denied a request for review. However, if the Appeals Council

*dismisses* the request for it to review for untimeliness, such ‘dismissal . . . is binding and not subject to further review.’” (emphasis in original) (internal citations omitted); *Smith v. Heckler*, 761 F.2d 516 (8th Cir. 1985) (holding that a dismissal of a request for review that is not filed within the stated time “does not address the merits of the claim, and thus cannot be considered appealable, as can the Appeals Council’s decisions and denials of *timely* requests for review”) (emphasis in original).

However, the regulatory scheme interpreting the Act distinguishes between cases on remand from a federal court and claims proceeding through the administrative process for the first time. *See generally*, 20 C.F.R. §§ 404.900 - 404.984 (2001). Because the aforementioned regulations and cases discuss judicial review of the Appeals Council’s decision to reject an untimely request for review in cases proceeding through the administrative process for the first time, and because there is no regulatory or case-law authority addressing the same issue with regard to cases on remand from a federal court, the court must decide whether the administrative processes for initial claims and cases on remand are similar enough to conclude that the Appeals Council’s decision to dismiss an untimely request for review in a remand case also is not subject to judicial review.

## B.

An individual seeking social security benefits must exhaust all his administrative remedies before a federal court can review his claim. 20 C.F.R. § 404.900 (a)(5) (2001). Significantly, after an unfavorable decision by the Administration, the claimant must actively request a reconsideration, a hearing before an ALJ, and a review by the Appeals Council in

order to preserve his right to a judicial review. *See* 20 C.F.R. §§ 404.905, 404.909 (2001) (stating that an initial determination is binding unless claimant request a reconsideration within 60 days ); 20 C.F.R. §§ 404.929, 404.933 (providing 60 days for a dissatisfied claimant to request a hearing before an administrative law judge); 20 C.F.R. §§ 404.967, 404.969 (giving claimant 60 days to seek review of the ALJ’s decision by the Appeals Council). If a claimant fails to request review by the Appeals Council, or fails to request a timely review, then the claimant loses the right to judicial review. 20 C.F.R. § 404.900(a)(5); *Adams*, 799 F.2d at 133 (holding that because the Appeals Council’s refusal to review for failure to file a timely request is not a final decision by the Commissioner, the court does not have “jurisdiction for judicial review of the [claim’s] merits”).

For a claimant to preserve his right to judicial review in cases on remand from a federal court, the claimant may, but is not required, to request review by the Appeals Council. The regulations provide that for cases on remand, the decision of the ALJ becomes the final decision of the Commissioner *unless* the Appeals Council assumes jurisdiction over the case. 20 C.F.R. § 404.984(a) (2001). The Appeals Council may assume jurisdiction over the case on its own authority, or because the claimant files *timely* written exceptions to the ALJ’s decision. 20 C.F.R. § 404.984(b)(2). Therefore, even if the claimant fails to request review by the Appeals Council, he does not loose his right to judicial review on the merits. 20 C.F.R. § 404.984(d) (“If no exceptions are filed and the Appeals Council does not assume jurisdiction of your case, the decision of the administrative law judge becomes the final decision of the Commissioner after remand.”);

*see also* R. at 496 (agency notice informing the claimant that she may either appeal the ALJ's decision to the Appeals Council or file a civil action).

### C.

The fact that for cases on remand Appeals Council review is unnecessary to preserve judicial review, provides the court with a firm foundation for holding that the Appeals Council's dismissal of plaintiff's request for review on the basis of untimeliness is not a final decision of the Commissioner. If courts do not consider an Appeals Council's dismissal of an untimely request for review a "final decision by the Commissioner" when that finding results in the loss of judicial review on the merits as well, than there is simply no reason for the court to find that the Appeals Council made a final decision when the claimant may still obtain judicial review on the merits. Accordingly, the court is without jurisdiction to inquire into the reasons behind the Appeals Council's decision to dismiss plaintiff's request for review.

### III.

Perhaps partially motivated by the uncertainty of the relief requested in the Complaint, and because the Appeals Council did not assume jurisdiction over the plaintiff's claim, the Magistrate Judge performed a review on the merits. *See* 20 C.F.R. § 404.984(d) ("If no exceptions are filed and the Appeals Council does not assume jurisdiction of your case, the decision of the administrative law judge becomes the final decision of the Commissioner after remand."). Plaintiff's timely objection to the R&R clearly states, however, that she did not seek a review on the merits. Because the court does not review issues not raised by the

parties, the court will reject the Magistrate Judge's R&R insofar as it performs a review on the merits.

IV.

For the reasons stated above, the plaintiff's objections shall be SUSTAINED IN PART and OVERRULED in part, the Magistrate Judge's Report and Recommendation shall be REJECTED, and the court will DISMISS the instant action for lack of subject-matter jurisdiction.

An appropriate Order this day shall issue.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_  
Date

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF VIRGINIA  
HARRISONBURG DIVISION

SHARON K. HEWITT,	)	CIVIL ACT. NO. 5:01CV00040
	)	
Plaintiff,	)	
	)	
v.	)	<u>FINAL ORDER</u>
	)	
JOANNE B. BARNHART,***	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL,
JR.	)	

By order dated August 15, 2001, the court referred the above-captioned case to the presiding United States Magistrate Judge for proposed findings of fact and a recommended disposition. On November 21, 2001, the Magistrate Judge filed his Report and Recommendation, wherein he recommended that the court affirm the final decision of the Commissioner of Social Security. The plaintiff filed timely objections to the Report and Recommendation. The court must perform a *de novo* review of those portions of the proposed findings and recommendations of the Magistrate Judge to which objections were made. *See* 28 U.S.C. § 636(b)(1) (West 1993); Fed. R. Civ. P. 72(b).

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\*\*\* Ms. Barnhart became Acting Commissioner of Social Security, effective November 9, 2001. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C. § 405(g), Ms. Barnhart is automatically substituted as the defendant in this action.

Having thoroughly considered the Report and Recommendation, the plaintiff's objection thereto, the pleadings, applicable law, and documented record, and for the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. The decision recommended in the November 21, 2001 Report and Recommendation shall be, and hereby is, REJECTED, as explained in the accompanying Memorandum Opinion;
2. The plaintiff's November 28, 2001 Objection to the Report and Recommendation shall be, and hereby is, SUSTAINED in part and OVERRULED in part, as explained in the accompanying Memorandum Opinion;
3. The case shall be, and hereby is, DISMISSED for lack of subject-matter jurisdiction as explained in the accompanying Memorandum Opinion;
4. This case shall be, and hereby is, STRICKEN from the docket of the court.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED: \_\_\_\_\_  
Senior United States District Judge

\_\_\_\_\_

Date