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Materials: ***Prepared by Attorneys Carol Avard,***

Avard Law Offices, P.A., Cape Coral, Florida

Bypassing The Administrative Agency-Exhaustion Issues

Introduction

"It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803).

Professor Kenneth C. Davis concluded: "...The law embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not. No court requires exhaustion when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction; probably every court requires exhaustion when the question presented is one within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief. In between these extremes is a vast array of problems on which judicial action is variable and difficult or impossible to predict." (See 3 Davis, Administrative Law Treatise §20.01 (1958)).

Exhaustion Purposes

Exhaustion protects agency authority and autonomy. Authority is based on judicial deference to the congressional delegation that agencies, not courts, should have primary responsibility over the programs they administer. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). The doctrine helps give agencies a chance to correct their mistakes. *McKart v. U.S.*, 395 U.S. 185, 195 (1969). It also promotes judicial efficiency. *McKart* at 195.

Exceptions

In *McCarthy v. Madigan*, 503 U.S.140, 145 (1992), the court identified balancing the interests of the individual "in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion". (See also *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims,* 93 N.Y.U.L.Rev.1235.). *McCarthy* listed individual interests that would outweigh institutional interests, creating equitable exceptions to the exhaustion rule: (1) exhaustion would "occasion undue prejudice to subsequent assertion of a court action"; (2) the agency's power to provide effective relief is questionable, either because "it lacks institutional competence to resolve particular type of issues", e.g., constitutionality of a statute, or "the challenge is to the adequacy of the agency procedure itself", or the agency "lacks authority to grant the type of relief requested"; or (3) the agency is biased or has predetermined the issue such that exhaustion would be futile.

When the Rule May Not Apply

The dominant view is that exhaustion of administrative remedies is the "rule", with "exceptions". The rule may be excused and/or waived in certain circumstances. (See Robert C. Power, *Help is Sometimes Close at Hand: the Exhaustion Problem and the Ripeness Solution,* 1987 U.Ill.L.Rev.547,551)

We start with 42 U.S.C. § 405(g) of the Social Security Act and 28 U.S.C. § 1331, the federal question statute, to begin the journey into addressing when social security disability claimants may bypass the administrative agency.

The Statute is initially considered when bypassing the agency

42 U.S.C.§ 405(g) – Judicial Review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, ... may obtain a review of such decision by a civil action commenced within 60 days.

42 U.S.C. § 405(h) – Finality of Decision

The findings and decision ... after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner... shall be reviewed by any...tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under § 1331 ... to recover on any claim arising under this subchapter.

28 U.S.C. § 1331 – Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws... of the United States.

42 U.S.C. § 405(b)(1) – Notice and Opportunity for a Hearing.

All eligible claimants seeking benefits shall be given notice and opportunity for a hearing with respect to such decision.

What is a "final" decision? What is a "claim"? What is an "opportunity for a hearing"? When can exhaustion be excused and/or waived?

Final Decision. Although §405(g) requires that court review be obtained after a **final decision** of the Secretary made after a hearing, the word "final" is not defined in the Act. Therefore, its meaning can be flushed out by the Commissioner. Either the Commissioner or the Courts can waive exhaustion requirements provided a claim exists (see *Weinberger v. Salfi*, 422 U.S. 749 (1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976)). A Court will waive exhaustion where there is a need to promptly resolve the claim. The Commissioner will waive exhaustion by not asserting it as an affirmative defense (see *Weinberger v. Salfi*, 422 U.S. 749 (1975)), and by stipulation, or acknowledging the only issue is one he lacks the power to decide (see *Mathews v. Diaz*, 426 U.S. 67 (1976) e.g., a constitutional one or determining the legality of the statute; or, by system-wide decision making which is contrary to law (see *Jones v. Califano*, 576 F.2d 12 (2nd Cir. 1978) and *Johnson v. Shalala*, 2 F.3d 918 (8th Cir. 1993)). To obtain waiver, the claim should be **collateral** to the claim for benefits and there should be a showing of **futility** as well as **non-recompensable injury** (See *Eldridge* at 330).

Claim. The nonexistence of a **claim** can never be waived as it is a jurisdictional requirement that a claim be presented to the agency before judicial review can be sought (see *Shalala v. Illinois Long Term Care, Inc.*, 529 U.S. 1 (2000)). While the lack of a claim cannot be waived, the word "claim" has been interpreted to mean different things. In *Eldridge*, the Court held a claim could be a claimant's answers to a medical cessation questionnaire or a letter to the State Agency stating benefits should not be terminated. In *Mathews v. Diaz*, 426 U.S. 67, 75 (1976), the Court was satisfied a claim had been filed even though it was not filed until after the Complaint was filed in Court. In *Diaz*, the Secretary stipulated that the post-complaint claim would be denied. The Court also implied that a supplemental amended complaint containing allegations a complaint had been filed would have satisfied the jurisdictional issues, even if the Secretary had not stipulated that the claim had been filed. Finally, in *Ellison v. Califano*, 546 F.2d 1162 (11th Cir. 1977), the court found that reporting that a spouse had left the home constituted a claim for SSI purposes since it should be treated as a request for higher benefits.

Excusing Exhaustion. Waiving Exhaustion.

Futility, as defined by the courts has a variety of meanings. Futility has excused exhaustion where administrative redress was *"highly unlikely"* that the Commission would change its position, *Athlone Indus. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C. Cir. 1982); "practically unlikely": *Dow Chem., USA v. Consumer Prod. Safety Comm'n.*, 459 F.Supp. 378, 388 (W.D. La. 1978) where agency correction of action is *"practically unlikely"*; and futile because success within agency is "improbable", , *Diapulse Corp. of Am. v. FDA*, 500 F.2d 75, 78 n.1 (2d Cir. 1974). Futility has also been found where an agency has taken the same position in numerous prior cases, *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 621 F.2d 369, 370-71 (10th Cir. 1990). And, futility has been found because precedent in state court deprived agency of authority to grant relief, *Montana Nat'l Bank v. Yellowstone County*, 276 U.S. 499, 505 (1928). Contrariwise, exhaustion was "in no sense futile" because the challenged ruling was not binding on Administrative Law Judges (see *Heckler v. Ringer*, 466 U.S. 602, 618 (1984). And, when futility is tied to bias or some other agency malfeasance, exhaustion may be excused (see *U.S. v. Litton Indus.*, 462 F.2d 14, 17 (9th Cir. 1971)(exception applicable "[o]nly in the 'exceptional' case where the court is presented with undisputed allegations of fundamental administrative prejudice")). Additionally, courts have excused exhaustion because agencies are neither authorized nor competent to

resolve constitutional questions. *Califano v. Sanders*, 430 U.S. 99 (1977)"constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." Exhaustion is also futile on issues involving constitutionality of statutes administered by the agency.

Constitutional issues. An administrative agency that lacks authority to make a decision, for example on a constitutional issue, can develop a factual record without deciding the case. (See *Elgin v. Dep't of the Treasury,* 567 U.S. 1 (2012).) Exhaustion may be desirable when it serves exhaustion purposes, so that adversely resolving one issue, even a constitutional one, does not necessarily justify immediate judicial review. For example, resolution of other issues might moot the constitutional issue if the plaintiff prevails within the agency on other grounds, and success serves agency autonomy and judicial economy when it disposes of the controversy (see *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 772 (1947)(resolution of non-constitutional issues may dispose of controversy)). Also, if a constitutional issue is dependent on development of facts, exhaustion should not be excused (see *Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), cert. denied, 431 U.S. 908 (1977)) where the issue was government entanglement in religious affairs, and it could "only be measured against a factual record" best determined through "...operation of the exhaustion doctrine." *Id.* at 8. But if the legal issues are central to judicial functions and not within agency expertise or discretion, exhaustion may be excused. *Andrade v. Lauer*, 729 F.2d 1475 (D.C.Cir. 1984): resolution of constitutional questions is ...one of the traditional, core functions of the judicial system" *Id.* at 1491-92, and administrative decision-makers have neither the qualifications nor the expertise to articulate and develop [separation of powers] principles. *Andrade*, 729 F.2d at 1491. If the sole issue is constitutionality of a statute, judicial review is inevitable, and no factual development would aid the court. A weighing of the policies supporting exhaustion (agency autonomy, agency expertise, judicial economy) against the hardship of denying review may resolve exhaustion in constitutional issues. *McGrath v. Weinberger*, 541 F.2d 249, 252-53 (10th Cir. 1976)(weighing of exhaustion interest against loss of due process challenge resulting from requiring exhaustion).

Notice and Opportunity for a Hearing. Some kind of hearing is required at some time before a person is finally deprived of his property interests. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). In *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1950), Justice Frankfurter said: " No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss **notice** of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done," *Id.* at 172. In *Goldberg v. Kelly, 397 U.S. 254 (1970)*, the court held prior to termination of welfare benefits, only a fair prior evidentiary hearing satisfied due process requirements, although it must be tailored to the capacities and circumstances of those who are to be heard. Terminating welfare benefits must permit the recipient to appeal personally with or without counsel. It would not be enough to present the case in writing or through a caseworker. And, in this setting due process requires an opportunity to confront and cross examine adverse witnesses. Thus, where the government action seriously injures an individual, and reasonableness of the action depends on fact findings, testimony must be disclosed in order to show it untrue. (See Henry J. Friendly, who argues in "Some Kind of

Hearing", Univ. of PA Law Rev., Vol. 123:1267 (197, see footnote 14, quoting Professor Davis, that some circumstances do not require oral hearings but rather hearings on written materials only, §7(d) of the Administrative Procedure Act, 5 U.S.C. §556(d)(1970), e.g., applications for initial licenses, determining claims for money or benefits. Hearings have to be "meaningful". If the result affects the person, a full hearing with oral testimony may be required. But, if the person is not affected, see *Interstate Commerce Commission v. Louisville & Nashville RR Co.* 227 U.S. 88 (1913), the court can decide a case without considering any evidence presented by parties at a hearing, e.g., it was decided RR's rates were unreasonable. *Id* at 90; and, see *Greene v. McElroy*, 360 U.S. 474 (1959) where Defense Dept. fired Greene based on confidential reports and Greene did not see the evidence saying he was a communist agent. *Id.* at 478. Because the action seriously injured Greene and the action depended on "fact findings", Greene must have "an opportunity to show that the findings were untrue". *Id* at 496.

In *Mathews v. Eldridge*, 424 U.S. at 326, the court stated there is a difference between welfare which depends on financial need and disability. *Id* at 343-44 (quoting *Goldberg*, 397 U.S. at 269) since disability depends on a medical fact which an agency can reliably determine without the benefit of a hearing. Therefore, in *Mathews* the plaintiffs received a meaningful opportunity to present their case after termination . In *Califano v. Yamasaki*, 442 U.S. 682 (1979), the Court held when SSA seeks to recover overpayments, recipients are entitled to challenge whether they were at "fault" . In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, the court held when a school district believes its employees had lied on their employment forms, it still must give them a hearing before firing them. In *Panthers v. Harris*, 1980 U.S. App. LEXIS 12882, DC Circuit Court of Appeals, Oct 24, 1980, the court held while the statute was not unconstitutional, nothing in it restricted the Secretary's power to require procedures, less formal and less expensive, that would accommodate both due process and concerns for economy, where an oral hearing was not provided in disputes of the Medicare Act of sums under $100. In *Mitchell v. W.T.Grant Co.*, 416 U.S. 600 (1974), the Supreme Court held where property rights are concerned, i.e., an ex-parte sequestration of personal property without prior notice involving an installment sale of goods to the buyer, it is sufficient that at some stage an opportunity for a hearing take place although not necessarily prior to the sequestration.

Friendly argues in "Some Kind of Hearing", *Id* at 1281, that hearings should not universally call for "oral" hearings. "It should depend on the susceptibility of the particular subject matter to written presentation, on the ability of the complainant to understand the case against him and to present his arguments effectively in written form, and on the administrative costs." For example, where the value of observing demeanor is not important, a full hearing may not be necessary.

Counsel. The *Goldberg* opinion quotes the statement in *Powell v. Alabama*, 287 U.S. 45 (1932) that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel". *Id* at 68-69.

Federal Question. While **28 U.S.C. §1331** gives District Courts original jurisdiction of civil actions arising under the Constitution, and laws of the United States, the third sentence of §405(h) of the Social Security Act bars such jurisdiction by providing that no action against the United States, the Commissioner, or any officer or employee shall be brought under §1331 to recover on any claim arising

under Title II of the Social Security Act. Therefore, if the question presented to the court does not arise under the Act, there can be federal question jurisdiction. However, if a claim arises under both the Constitution and the Act and the claimant has bypassed the agency, Courts have found there is no federal question jurisdiction (see *Weinberger v. Salfi*, 422 U.S. 749 (1975). §405(h) would not apply to preclude judicial review if the issue could not be channeled through the agency for resolution (see *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986)). Therefore, §405(h) does not foreclose federal question review of constitutional or substantial statutory challenges. A challenge to the method used to determine benefit amounts would not be precluded from review. Anticipatory challenges to a policy, regulation, or statute that might in the future bar recovery or in the future impose a penalty, are actions to recover on a claim arising under the Act, and therefore no advisory-type decisions will be made by the Courts (see *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000), holding federal question jurisdiction is precluded where an anticipatory challenge is made and no claim was brought). In *Illinois Council*, the court did not decide whether federal question jurisdiction would exist if a claim could not be effectively channeled through the agency.

Irreparable Injury. Courts look at the hardship of denying judicial review when deciding to excuse exhaustion. If irreparable injury will be suffered, regardless of extent to which further administrative proceedings would serve the exhaustion policies, exhaustion may be excused. There is a balancing test. See *McKart v. United States*, 395 U.S. 185 (1969) and *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976) (irreparable injury from denial of pre-deprivation hearing), *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)(noting absence of showing of colorable irremediable injury) and *Bowen v. City of NY*, 106 S.Ct. 2022, 2032 (1986) (burdens and medical hazards would result from reentering the administrative process is an irreparable injury). The traditional notion that plaintiffs must establish irreparable injury before a court of equity will grant an injunction doesn't necessarily mean it is an element to be considered in excusing exhaustion. Irreparable injury can be a narrow exception to the exhaustion requirement. They are likely injuries that are unique and incapable of later redress. The key word is "irreparable", e.g., environmental harms, i.e., *Amoco Prod. Co. v. Village of Gambell*, 107 S.Ct. 1396, 1404 (1987)(effect of Alaskan oil and gas production); *Greene v. Bowen*, 639 F. Supp. 554, 563-64 (E.D.Cal.1986)(physician's suspension from Medicare practice will irreparably harm his professional reputation); or *United Church of the Medical Center v. Medical Center Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982)("a given piece of property is considered to be unique, and its loss is always an irreparable injury"). Permanence of the harm is important.

In the Social Security context, the individual hardship is more sympathetic. Most cases discuss individual economic harm. Harm of losing benefits. Cases characterize the temporary loss of funds as a sufficiently serious hardship to justify excusing exhaustion (see *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976) where exhaustion was excused because of claimant's physical condition and dependency on disability benefits). Other types of personal harm include irreparable injury to medical conditions caused by loss of benefits, *Bowen v. City of NY*, 106 S.Ct. 2022, 2032 (1986). *Mental Health Ass'n v. Heckler*, 720 F.2d 965 (8th Cir.1983), denying or terminating benefits caused irreparable harms such as deterioration of medical conditions, disruption of physician-patient relationships, inability to pay for medications, agitation, extreme anxiety, noting the injuries could not be redressed through a retroactive

award of benefits, 720 F.2d at 970, quoting from *Mental Health Ass'n v. Schweiker*, 554 F.Supp. 157, 166 (D.Minn.1982). And, see *Polaski v. Heckler*, 585 F.Supp. 1004, 1013 (D. Minn. 1984) where claimants who lose or are denied benefits face foreclosure proceedings on their homes, suffer utility cutoff and find it difficult to purchase food. And, they go without medication and doctor's care; they lose their medical insurance; they become increasingly anxious, depressed, despairing – all aggravating their medical conditions.

Successful claims of irreparable injury usually relate to hardships that are unusual, severe, and sufficiently collateral to the administrative litigation to avoid creating an unduly broad exception.

Collateral issues. *Weinberger v. Salfi*, 422 U.S. 749(1975) and *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Salfi* involved a constitutional challenge to the Social Security Act that denied benefits to survivors of wage earners. There was no final decision of the Secretary made after a hearing, as required by section §405(g), although the court concluded exhaustion was not required where the *only* disputed issue was the constitutionality of a statute. However, the case was decided based on the agency's failure to challenge Salfi's complaint on exhaustion grounds as it represented either a determination by the Secretary that the denial was "final" or a waiver of the exhaustion required. *Eldridge* involved terminating social security disability benefits, after receiving notice of termination, instead of following administrative procedures for reconsideration. *Eldridge* challenged the constitutionality of the agency's termination procedures. Government declined to waive the final decision requirement, and filed a motion to dismiss Eldridge's complaint. The Court refused, concluding the courts may waive the exhaustion requirement "where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment is inappropriate". The court used the collateral order doctrine, permitting appeals of certain interlocutory trial court rulings, the court permitted judicial review because the "constitutional challenge [was] entirely collateral" to the disability claim and he made a "colorable" claim of irreparable injury.

Types of Actions involving Bypassing Administrative Agencies

- **Restraining Orders, Injunctions, Declaratory Orders– see the pleadings in Christensen vs. Apfel, attached as Ex. A**
- **Mandamus - see the pleadings in the Dunnells v. Comm. of Social Security, attached as Ex B, and see pleadings in the McDevitt vs. Comm. of Social Security, attached as Ex. C**
- **Motion for Temporary Restraining Order & Mandamus. See pleadings in Craig v. Colvin, attached as Ex. D**

Temporary Restraining Orders (TROs), Injunctions, Declaratory Orders. Local Rules dealing with Temporary Restraining Orders (TROs) stem from Fed.R.Civ.P. Rule 65(b). TROs can be issued without notice for 14 days in emergency cases to maintain the *status quo* until requisite notice may be given and

opportunity afforded to opposing parties to respond to application for Preliminary Injunction . (See *Brown v. Callahan*, 979 F.Supp. 1357 (D. Kan. 1997)("The issuance of a temporary restraining order or other preliminary injunctive relief is within the sound discretion of the district court")(citing *Kansas Hospital Association v. Whiteman*, 835 F.Supp.1548, 1551 (D.Kan. 1993)). In order to obtain a Preliminary Injunction, *Brown* must show: "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) proof that the threatened harm outweighs any damage the injunction may cause to the party opposing it; and (4) that the injunction, if issued, will not be adverse to the public interest." *Id.* Other facts courts consider on a Preliminary Injunction are: (1) whether the plaintiff has an adequate remedy at law or will be irreparably harmed if the injunction is not granted; and (2) whether plaintiff has a reasonable likelihood of success on the merits. (See *Wong v. Astrue,* 2008 U.S.Dist.LEXIS 118698 (N.D.Cal., May 13, 2008)). Under the sliding scale theory, a party seeking an injunction "need not demonstrate that he will succeed on the merits, but must at least show that his cause presents serious questions of law worthy of litigation." *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993), cert. denied, 511 U.S. 1030, 190 (1994). While a preliminary injunction will not be issued without security by the applicant under Fed.R.Civ.Proc. 65(c), a district court has wide discretion in setting the amount of a bond, and the bond amount may be zero if there is no evidence the party will suffer damages from the injunction. See *Connecticut Gen.Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003). See also *Brown v. Callahan*, 979 F.Supp. 1357 (D.Kan. 1997) for waiver of security where there is no likelihood of harm to SSA.

Generally, the procedures involve filing a Motion for the TRO, supported by allegations of specific facts shown in verified complaint or affidavits, that the party is threatened with irreparable injury, so imminent that notice and a hearing is impractical if not impossible. Fed. R. Civ.P.65(b). Accompany this with a proposed Order and supporting legal memorandum. When the Order issues, movant must serve the Order, and all papers filed, on the defendant. Hearings are scheduled within 14 days. If denied, it may transform into a Motion for Preliminary Injunction with the 14 day notice prior to the hearing. A TRO or Preliminary Injunction may be very cautiously used in cases where you have asked for disqualification and/or recusal of an ALJ who refused to recuse; or where benefits have been improperly terminated, or an inadvertent overpayment was made. (See *Beattie v. Barnhart*, 663 F.Supp. 2d 5 (D.D.C. 2009)).

Mandamus. Authority: 28 U.S.C. §1361, District Courts. The District Courts shall have original jurisdiction of any action in the nature of mandamus. Mandamus is an action to compel an officer (or an agency or an employee) of the U.S. to perform his duty. (See also Federal Rules of Appellate Procedures, Rule 21, Writs of Mandamus & Prohibition & Other Extraordinary Writs; authority of courts of appeals to issue extraordinary writs is derived from 28 U.S.C. §1651). Requirements for Writ: (1) exhaust all other avenues of relief, all administrative remedies, except where excused; (2)defendant must owe plaintiff a clear nondiscretionary duty. Plaintiff should have a clear right to requested relief and there should be no other adequate remedy. See *Califano v. Sanders*, 430 U.S. 99 (1977) (no jurisdiction to review refusal to reopen; *Hinton v. Astrue*, 919 F.Supp. 2d 999 (S.D. Iowa, 2013): mandamus not barred by 42 U.S.C. §405(h); jurisdiction challenging procedures unrelated to merits of benefits claim; not barred by sovereign immunity; appropriate to have Commissioner conduct a hearing

under 20 C.F.R. §404.929, where claimant had a clear right to relief sought, and Commissioner had a nondiscretionary duty under the statute to honor that right. (See also, *Buchanan v. Apfel*, 249 F.3d 485 (6th Cir. 2001) ("we do have [mandamus] jurisdiction to consider whether the Commissioner has failed to comply with his own regulations); and see *Belles v. Schweiker*, the 8th Cir. found that the exclusivity provision in §405(h) does not present an obstacle to mandamus jurisdiction where the claims at issue are procedural in nature). In *Belles v. Schweiker*, 720 F.2d 509, 512 (8th Cir. 1983)(citing *Weinberger v. Salfi*, 422 U.S. 749, 756-57 (1975), the court held that §405(h) requires claims for benefits to be asserted only through §405(g) but noting that §405(h) is "not controlling" where a decision favorable to the plaintiff would entitle her only to certain procedural considerations and not to benefits). In *Wolcott v. Sebelius*, 635 F.3d 757, 766 (5th Cir. 2011), the court held that "mandamus jurisdiction exists if the action is an attempt to compel an officer or employee of the U.S. or its agencies to perform an allegedly nondiscretionary duty owed to plaintiff. In *Ganem v. Heckler*, 746 F.2d 844, 850, 241 U.S. App.D.C. 111 (D.C. Cir. 1984), the court stated "[W]e...join the consensus of the Courts of Appeals by holding that mandamus jurisdiction is not precluded by the [Social Security]Act.". (See also *Ellis v. Blum*, 643 F.2d 68,78 (2nd Cir. 1981)(collecting cases and finding that "[a]n impressive array of cases in this and other circuits has established that §1361 jurisdiction will lie to review procedures employed in administering social security benefits").) In *Hennings v. Heckler*, 601 F.Supp.919, 923 – 24 (N.D. Ill.1985)("as Judge Posner has noted, '... there is a powerful argument that the mandamus statute remains available to social security claimants notwithstanding [§405(h)].' Indeed, every court of which we are aware which has explicitly decided the issue has found that, 'under circumstances where the writ [of mandamus] properly would issue,' . . . 1361 'provides jurisdiction to review otherwise unreviewable procedural issues not related to the merits of a claim for benefits' ", and see *Burnett v. Bowen*, 830 F.2d 731 (7th Cir. 1987)(mandamus available to require the Agency to rule on request to reopen); Cf. *Cash v. Barnhart*, 327 F.3d 1262 (11th Cir. 2003) (no mandamus to adjudicate an application that was not reopened); *Dietsch v. Schweiker*, 700 F.2d 865 (2d Cir. 1983)("plaintiff... seeks to compel the Appeals Council to perform its duty with respect to a timely request for review, and either deny the request or review his case. He has no other avenue for relief. His procedural dispute is unrelated to the merits of his claim for benefits...[T]he district court had mandamus jurisdiction").

Method: It is permissible to file a petition for mandamus as one count of the complaint or as a separate civil action. Commissioner's answer typically will include a motion to dismiss under Rule 12(b) and plaintiff will need to respond to the motion to dismiss.

Types of cases where mandamus was available include: (1) challenging failure to rule on a claim. *Dietsch v. Schweiker*, 700 F.2d 865 (3rd Cir. 1983); (2) challenging a determination that a hearing request was untimely, *Burns v. Heckler*, 619 F.Supp. 355 (N.D. Ill. 1985); (3) challenging untimely appeals as in *Greene v. Bowen*, 877 F.2d 204 (2d Cir. 1989); (4) compelling agency to issue a decision after a three-year wait, as in *Grisso v. Apfel*, 219 F.3d 791, 793 (8th Cir. 2000), cert. denied, 121 S.Ct. 1497, 149 L.Ed. 2d 382 (U.S. 2001); (5) challenging arbitrary fee cap imposed by Commissioner, in *Buchanan v. Apfel*, 249 F.3d 485 (6thCir. 2001); and (6) compelling agency to comply with a remand order, in *Smith v. Halter*, 246 F.3d 1120, 1122 (8th Cir. 2001).

Conclusion: mandamus is known as "the rare writ", but if your grievance is strong enough, it ought to be strong enough to persuade the U.S. Attorney to force the issue.

Summary of the Pleadings Contained in the Attachments A-F.

In *Christensen v. Apfel,* 1999 U.S. Dist. LEXIS 23268 (M.D. Fla., Ft Myers Div. Oct.14, 1999), (See Ex. A, attached), Christensen filed a **Motion to Restrain** defendant from terminating benefits and requested an Order that the ALJ provide proper Notice of Hearing, and waiver of injunction bond. Issues were: due process and lack of notice. There were concurrent applications, with an onset of May 16, 1994. Plaintiff was awarded benefits at Reconsideration. Onset awarded was April 22, 1996, not the requested May 16, 1994. Plaintiff began receiving benefits. Plaintiff appealed the onset date. The Notice of Hearing did not state the ALJ could overturn the award of benefits. The ALJ however proceeded to overturn the award. Plaintiff did not appeal to the Appeals Council and went directly to federal court on the constitutional due process issue of lack of notice. The court concluded plaintiff's constitutional challenge was entirely collateral to the substantive claim and that irreparable injury not recompensable through retroactive relief would be caused to plaintiff by an erroneous determination, and deference to the Secretary's decision not to waive the exhaustion requirement was inappropriate. The court stated "[p]rocedural due process imposes constraints on governmental decision which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process clauses of the fifth or fourteenth amendment, ... *Mathews v. Eldridge*, 424 U.S. at 332...an individual has a 'property' interest in the continued receipt of social security benefits which is protected right under the fifth amendment." *Id.* The court further stated: due process is "more than mere notice; rather 'meaningful notice' is required before a hearing..." citing *Harris v. Callahan*, 11 F.Supp.2d 880, 884 (E.D. Tex., 1998). The notice must contain an explanation of the issues to be covered at the hearing. Id. "The purpose of the notice of hearing is to allow the plaintiff to adequately prepare to litigate the issues at the hearing.[citation omitted]", citing *Benko v. Schweiker*, 551 F.Supp.698, 703 (D.N.H., 1982). The ALJ was required to send a Notice of Hearing that complied with the requirements of §404.938. The court also held it did not find it significant that plaintiff's attorney failed to object at the hearing regarding the ALJ's statement that he would reconsider the award of benefits since failure to comply with the regulations deprived plaintiff of procedural due process rights.

In *Dunnells v. Commissioner of Social Security*, U.S.D.C., M.D. Fla., Ocala Div., April 22, 2013, plaintiff filed a **Writ of Mandamus**. Defendant filed a Motion to Dismiss the Writ because Plaintiff failed to exhaust her administrative remedies (see pleadings at Ex B). The court denied the government's Motion to Dismiss.

Plaintiff complained the ALJ terminated her benefits without proper notice. Plaintiff was awarded benefits initially in May 2011. She was found disabled as of November 9, 2010. No appeal was taken. Plaintiff filed a prior application in February 2007. The application was denied through the ALJ level and plaintiff appealed to the Appeals Council. The Appeals Council remanded the case for consideration of the impairments. The Remand Order was dated only 2 days before the Plaintiff was found entitled to benefits on her subsequent application. In connection with the Remand Order, the ALJ scheduled a hearing on the 2007 application for June 6, 2012. The Plaintiff was sent a Notice of Hearing on March

14, 2012 advising the plaintiff that the only issue for hearing "concerns your application of February 14, 2007". The Notice did not address the subsequent 2011 application where she was awarded benefits. In the ALJ unfavorable decision of July 30, 2012, the ALJ (over objections by counsel) failed to limit his review to the specific issues in the Notice of Hearing and overturned the defendant's previously favorable decision, thus placing in immediate jeopardy the plaintiff's monthly income and Medicare benefits and resulting in an overpayment of all benefits previously paid to the plaintiff. Rather than seek full administrative review of the ALJ decision, plaintiff filed a mandamus action in the District Court.

Defendant's Motion to Dismiss argued the court lacked subject matter based on Rule 12(b)(1). Attacks on subject matter jurisdiction may be in the form of "facial attack" or "factual attack". *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). In a facial attack, the court assumes the allegations are true and determines whether plaintiff alleged a basis of subject matter jurisdiction. *Id* at 1529. In factual attacks, it is a challenge to the existence of subject matter jurisdiction, irrespective of the pleadings. Commissioner argued the court had no authority . This was a factual attack to subject matter jurisdiction, and thus, materials outside the pleadings, including the Declaration of Patrick J. Herbst and portions of the administrative record, can be considered. Defendant argued plaintiff failed to exhaust her remedies under 42 U.S.C. §405(g) of the Social Security Act. The court looked to *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976). The court in *Dunnells* found that in *Mathews*, a reviewing court may find a waiver of exhaustion if a constitutional claim is wholly collateral to the substantive claim of entitlement, and there is a showing of irreparable injury not recompensable through retroactive payments. *Mathews* at 330-31 & n.11. *Dunnells* held: "An individual has a statutorily created "property" interest in the continued receipt of social security benefits which is protected by the Fifth Amendment". In *Dunnells*, the court reiterated the deficiency in the Notice of Hearing wherein it specifically stated the "hearing concerns your application of February 14, 2007" and it failed to mention that the ALJ would consider the 2011 application. The *Dunnells* decision also points out the Commissioner's regulations clearly state that notice of hearing "will contain a statement of the specific issues to be decided" and the purpose of the notice is to allow the plaintiff to adequately prepare to litigate the issues at the hearing (citing *Benko v. Schweiker*, 551 F. Supp. 698, 703 (D.N.H. 1982). The *Dunnells* Court, held in Plaintiff's favor, specifically that the issue of notice was purely collateral and a constitutional violation, since plaintiff suffered irreparable harm as she must reimburse any overpayment of previously paid SSD benefits, and with termination of benefits, plaintiff will become ineligible for Medicare. The court stated that the loss of medical care is an irreparable injury for which no amount of benefits may retroactively correct.

Plaintiff argued this was an illegal termination as due process requires notice of the issues and the violation left claimant and her family without funds to live on. Plaintiff had no other remedy at law, suffered and will continue to suffer immediate and irreparable injury, loss and damage, and therefore asked the Court to intervene to thwart the unconstitutional act against her. Notably, plaintiff was claiming entirely constitutional argument which were wholly collateral to defendant's decision.

The court noted it did not need to find jurisdiction under 28 U.S.C. §1361 because it based jurisdiction under §405(g) of the Social Security Act.

In *McDevitt v. Commissioner of Social Security*, Case #: 6:13-cv-1985-Orl-KRS (see Ex. C, attached), plaintiff filed a **Motion for Preliminary Injunction and Mandamus.** The issues also involved lack of notice and an opportunity to be heard before termination of benefits. Counsel relied on the cases cited hereinabove. Following the filing of the plaintiff's Motions, counsel for the Commissioner eventually agreed to reinstate the plaintiff's benefits back to the date they were terminated.

In *Craig v. Colvin*, 2016 U.S.Dist.LEXIS 62274 (M.D.Fla., Ft. Myers Div., May 11, 2016) (see Ex. D, attached) , plaintiff filed a Motion for Temporary Restraining Order and Mandamus. The issues involved whether plaintiff was entitled to the constitutional right to a neutral ALJ. The allegation in this case was that the particular ALJ had filed a civil action against the Social Security Administration, complaining that he did not need to follow the rules, regulations, and policy concerning the use of interpreters at hearings. Plaintiff requested the court to enjoin the ALJ from holding plaintiff's hearing and to reassign the case to another ALJ. The District Court held that it lacked subject matter jurisdiction because the plaintiff had not exhausted her rights by requesting the Appeals Council to determine whether the ALJ should be disqualified from hearing her case pursuant to 20 CFR §404.940. When this case was finally heard, a different ALJ was assigned to the case.

Additional Options: HALLEX I-4-9-40, HALLEX I-4-3-10, and 20 CFR 404.923-928 and 416.1423-1428.

HALLEX I-4-9-40, I-4-3-10, and 20 CFR §404.923-928 and §416.1423-1428 allow claimants, after a determination or decision, to seek judicial review without completing the administrative review process in certain circumstances. After a determination at the reconsideration level or decision level, and before the Appeals Council's final action, a party may go straight to the district court, if the sole issue is a constitutional issue. The request must be filed within the timeframes set forth in 20 CFR §404.925(a) and §416.1425(a).

EX A

*1999 U.S. Dist. LEXIS 23268, **

MICHAEL CHRISTENSEN, Plaintiff, vs. KENNETH S. APFEL, Commissioner of Social Security, Defendant.

CASE NO. 98-324-CIV-FTM-21D

UNITED STATES **DISTRICT** COURT FOR THE **MIDDLE DISTRICT** OF **FLORIDA,** FORT MYERS DIVISION

1999 U.S. Dist. LEXIS 23268

October 14, 1999, Decided
October 14, 1999, Filed

SUBSEQUENT HISTORY: Motion granted by Christensen v. Apfel, 2000 U.S. Dist. LEXIS 22369 (M.D. **Fla.**, Mar. 10, 2000)

PRIOR HISTORY: Christensen v. Apfel, 1999 U.S. Dist. LEXIS 23267 (M.D. **Fla.**, Feb. 25, 1999)

DISPOSITION: **[*1]** Magistrate recommends that this Commissioner's Motion to Dismiss be denied.

CORE TERMS: notice, administrative law, disability, administrative remedies, new issues, impairment, disability benefits, irreparable injury, final decision, recommendations, collateral, disabled, process rights, constitutional claim, disability insurance, notice of hearing, notify, onset, prior to filing, general issue, recompensable, reconsidered, retroactive, earnings, failure to exhaust, constitutional issue, judicial district, judicial review, place of business, failed to notify

COUNSEL: For MICHAEL CHRISTENSEN, plaintiff: Carol Ann Avard, Avard Law Offices, P.A., Cape Coral, **FL.**

For MICHAEL CHRISTENSEN, plaintiff: Douglas D. Mohney, Avard Law Offices, Cape Coral, **FL.**

For COMMISSIONER OF SOCIAL SECURITY, defendant: Jacqueline H. Robinson, U.S. Attorney's Office, **Middle District** of **Florida,** Ft. Myers, **FL** USA.

For COMMISSIONER OF SOCIAL SECURITY, defendant: Roberta M. Klosiewicz, Susan R. Waldron, U.S. Attorney's Office, **Middle District** of **Florida,** Tampa, **FL** USA.

EX A1

JUDGES: GEORGE T. SWARTZ, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: GEORGE T. SWARTZ

OPINION

REPORT AND RECOMMENDATION

This Cause is before the Court on the Commission of Social Security's (hereinafter "Commissioner") Motion to Dismiss (Doc. 10). The Court held a hearing on this Motion on August 5, 1999. The Court has carefully considered the arguments and the submissions of the parties. In the Motion to Dismiss, the Commissioner argues that this Court lacks jurisdiction based upon the Plaintiff's failure to exhaust his administrative remedies prior to filing this action. The Plaintiff argues that he was deprived of his procedural **[*2]** due process rights which is a constitutional issue over which this Court has jurisdiction.

Procedural History [1]

FOOTNOTES

1 At the hearing and in the papers filed, the parties did not dispute the procedural history of this case. However, the Court will assume the facts in the First Amended Complaint (Doc. 3) are true for the purposes of the Motion to Dismiss only.

The Plaintiff filed concurrent applications for Disability Insurance Benefits and for Supplemental Security Income on April 12, 1996, alleging an onset date of May 16, 1994. (Comp. [2] PIII) The Plaintiff was awarded benefits at the Reconsideration Level in a determination dated April 28, 1997. (Comp. PIV) The onset date of this award was April 22, 1996, not the requested date of May 16, 1994. (Comp. PIV) The Plaintiff began receiving disability benefits payments as of April 28, 1997. (Comp. PV) i

FOOTNOTES

2 "Comp." refers to the First Amended Complaint (Doc. 3).

[*3] The Plaintiff appealed this decision contesting only the onset date. (Comp. PVI.) The Plaintiff stated in his request for a hearing before an administrative law judge that he "[disagreed] with the state agency determination that I was not disabled prior to May 16, 1994. I disagree with the onset date of 4/22/96." (Doc. 12, Exh. 1) The Plaintiff was sent a Notice of Hearing from the Administrative Law Judge which advised the Plaintiff of the issues that would be considered at the hearing on the appeal. (Comp. PVII)

The Notice of Hearing (which is attached as Exhibit A-1 to the First Amended Complaint) provides that the following issues will be considered:

> The general issue is whether you are entitled to a period of disability and disability insurance benefits under Section 216(i) and 223, respectively, and whether you are entitled to Supplemental Security Income disability benefits under Section 1614(a), of the Social Security Act prior to April 22, 1996.
>
> The specific issue is whether you were under "disability" within the meaning of the Act at any time from May 16, 1994, the date you alleged that your disability began,

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> until April 22, 1996, the date it was previously **[*4]** determined that your disability began. This will be decided on the basis of whether, prior to April 22, 1996 you had enough Social Security earnings to be insured for disability, and, if so, as of what date; the nature and extent of your impairment; whether your impairment lasted or could have been expected to last for at least 12 months, or could have been expected to result in death; your ability to engage in substantial gainful activity since your impairment began; and (5) whether your disability continued.

In a decision dated June 17, 1998, the Administrative Law Judge Ruben Rivera, Jr. overturned the Commissioner's previously favorable decision. (Comp. PVIII) The Plaintiff's monthly income and Medicare Benefits were terminated and all of the Plaintiff's previous benefits were considered an overpayment to the Plaintiff. (Comp. PVIII) On August 14, 1998, the Plaintiff filed this action in federal court.

Analysis

The Commissioner argues that pursuant to 42 U.S.C. § 405(g) of the Social Security Act, the Plaintiff must exhaust his administrative remedies prior to bringing an action in federal court. 42 U.S.C. § 405(g) provides **[*5]** in part as follows:

> Any individual, after any final decision of the Commissioner of Social Security to made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the **district** court of the United States for the judicial **district** in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial **district**, in the United States **District** Court for the **District** of Columbia. . . . The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

According to § 405(g), a party must obtain a final decision prior to filing a case in **district** court. The parties do not dispute that the Plaintiff failed to exhaust his administrative remedies by **[*6]** failing to file an appeal with the Appeals Council prior to filing this action and that the Commissioner did not waive the finality requirement. However, the Plaintiff claims that because he is raising the constitutional issue of due process, he can bring an action in the **district** court without exhausting his administrative remedies and first obtaining a final decision.

"On its face § 405(g) [] bars judicial review of any denial of a claim of disability benefits until after a 'final decision' by the Secretary after a 'hearing.'" *Mathews v. Eldridge*, 424 U.S. 319, 327, 96 S. Ct. 893, 899, 47 L. Ed. 2d 18 (1976) However, the Supreme Court determined certain conditions must be satisfied to obtain judicial review under § 405 and these conditions contain two elements: one is "purely 'jurisdictional'" in that it cannot be waived, and the other his claim to the Commissioner. *Id.* The element that cannot be waived is that a plaintiff must present his claim to the Commissioner. *Id.* "The waivable element is the requirement that the administrative remedies prescribed by the Secretary be exhausted." *Id.* The Supreme Court found that some decision by the Commissioner **[*7]** was required by the statute, however the decision need not be final. *Id.* "The Court concluded that because the plaintiff's constitutional challenge was entirely collateral to his substantive claim of entitlement, and of the type that irreparable injury not recompensable through retroactive relief could be caused to plaintiff by an erroneous determination, deference to the Secretary's decision not to waive the exhaustion requirement was inappropriate. The Court thus held that § 405(g) of the Act conferred jurisdiction despite plaintiff's failure to exhaust the Act's administrative remedies." *Darby v. Schweiker*, 555 F. Supp. 285, 288 (E.D. Pa., 1983) (explaining the decision in *Mathews*).

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The Plaintiff in the instant case clearly presented his claim to the Commissioner thereby fulfilling the non-waivable requirement. Like *Mathews*, the Plaintiff here has not exhausted his administrative remedies nor obtained a waiver from the Commissioner. The Court therefore, must consider whether Plaintiff raises a constitutional claim which is collateral to his claim for entitlement of benefits, and has the potential for irreparable injury not recompensable through retroactive **[*8]** relief. *See, Darby*, 555 F. Supp. at 288.

The Plaintiff argues that the Notice of Hearing he received for the hearing before the Administrative Law Judge was insufficient to notify him of the issues that were raised at the hearing. Specifically, the Plaintiff argues that his procedural due process rights were violated when the Administrative Law Judge did not notify him prior to the hearing that he would consider any disability of the Plaintiff after April 22, 1996, which was the date that the Plaintiff was previously determined to be disabled and was receiving benefits from that date forward. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. at 332, 96 S. Ct. at 901. An individual has a "property" interest in the continued receipt of social security benefits which is a protected right under the Fifth Amendment. *Id.*

The due process requirement is "more than mere notice; rather 'meaningful notice' is required before a hearing will comport to the requirements **[*9]** of due process." *Harris v. Callahan*, 11 F. Supp.2d 880, 884 (E.D. Tex., 1998) The notice must contain an explanation of the issues to be covered at the hearing. *Id.* "The purpose of the notice of hearing is to allow the plaintiff to adequately prepare to litigate the issues at the hearing. [citation omitted]" *Benko v. Schweiker*, 551 F. Supp. 698, 703 (D. N.H., 1982)

The rules governing the Notice of Hearing are found in 20 C.F.R. 404.938, which provides in part as follows: "the notice of hearing will be mailed or served at least 20 days before the hearing. The notice of hearing will contain a statement of the specific issues to be decided and tell you that you may designate a person to represent you during the proceedings." If the Administrative Law Judge decides to consider new issues which were not listed in a plaintiff's Request for Hearing, then the Administrative Law Judge must follow 20 C.F.R. § 404.943(b) which provides in part as follows:

> (1) *General.* The administrative law judge may consider a new issue at the hearing if he or she notifies you and all the parties about **[*10]** the new issue any time after receiving the hearing request and before mailing notice of the hearing decision. The administrative law judge or any party may raise a new issue; an issue may be raised even though it arose after the request for a hearing and even though it has not been considered in an initial or reconsidered determination. However, it may not be raised if it involves a claim that is within the jurisdiction of a State agency under a Federal-State agreement concerning the determination disability.
>
> (2) *Notice of a new issue.* The administrative law judge shall notify you and any other party if he or she will consider any new issue. Notice of the time and place of the hearing on any new issues will be given in the manner described in § 404.938, unless you have indicated in writing that you do not wish to receive the notice.

If the notice of hearing fails to inform the plaintiff of material factors which could lead to an adverse decision, then the notice is not adequate and the plaintiff's procedural due process rights are violated. *Harris*, 11 F. Supp. at 884. "The regulations contemplate an applicant will receive notice and a hearing on any **[*11]** issues affecting the evaluation of their application. *Id.*

In the instant case, the Administrative Law Judge sent a Notice of Hearing which listed the following as the issues to be heard at the hearing:

> The general issue is whether you are entitled to a period of disability and disability insurance benefits under Section 216(i)and 223, respectively, and whether you are entitled to Supplemental Security Income disability benefits under Section 1614(a), of

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the Social Security Act prior to April 22, 1996.

> The specific issue is whether you were under "disability" within the meaning of the Act at any time from May 16, 1994, the date you alleged that your disability began, until April 22, 1996, the date it was previously determined that your disability began. This will be decided on the basis of whether, prior to April 22, 1996 you had enough Social Security earnings to be insured for disability, and, if so, as of what date; the nature and extent of your impairment; whether your impairment lasted or could have been expected to last for at least 12 months, or could have been expected to result in death; your ability to engage in substantial gainful activity since your impairment **[*12]** began; and (5) whether your disability continued.

Accordingly under the general issue, the Administrative Law Judge was able to consider whether the Plaintiff was entitled to disability insurance benefits prior to April 22, 1996. Under the specific issue, the Administrative Law Judge was able to consider whether at any time from May 16, 1994, through April 22, 1996, whether the Plaintiff had sufficient Social Security earnings, the nature and extent of his impairment, whether his impairment would be expected to last for at least 12 months, his ability to engage in substantial activity, and whether his disability continued. At the beginning of the hearing, however, the Administrative Law Judge stated,

> After I've heard your testimony and I'll wait ten more days and hopefully get more medical records in, I'm going to decide whether you are disabled or not. I'll decide whether you're disabled as of April 22, 1996. I'll decided whether you're disabled back -- as far back as May of '94. So, different possible decisions I could make. And once I make my decision, I'll write it and send a copy to your home in Naples with a copy to Mr. Mohney's office. Does that sound fair to **[*13]** you?

(Doc. 12, Exh. 3, p.2) In the Notice of Hearing, the Administrative Law Judge failed to notify the Plaintiff that he was reconsidering the previously awarded benefits and would consider the Plaintiff's disability after the date he was awarded benefits which was April 22, 1996. The Administrative Law Judge is permitted to raise new issues at the hearing, however, pursuant to 20 C.F.R. §§ 404.943(b)(2), the Administrative Law Judge must send a Notice of Hearing which complies with the requirements of § 404.938. The Administrative Law Judge failed to notify the Plaintiff in the Notice of Hearing that his disability benefits would be reconsidered and possibly terminated. If the Plaintiff were clearly notified in the Notice of Hearing, the Plaintiff may have reconsidered whether he wanted a hearing and may have decided to withdraw his request or may have prepared differently for the hearing. The Court does not find it significant that the Plaintiff's attorney failed to object at the hearing regarding the Admistrative Law Judge's statements that he would reconsider the Plaintiff's disability benefits in that the Administrative Law Judge did not follow **[*14]** the regulations as were required and thereby deprived the Plaintiff of his procedural due process rights.

Having found that a constitutional violation exists, the Court must now consider whether the Plaintiff's constitutional claim is collateral to the relief sought, and whether the Plaintiff suffered irreparable injury not recompensable through retroactive relief. Regarding whether the constitutional claim is collateral, the Court finds that the issue of whether the Plaintiff received a proper Notice of Hearing is collateral to the issue of whether or not he should receive benefits. If a proper Notice of Hearing were given, the Plaintiff would have been able to properly prepare for the hearing or make the decision to withdraw his Request for Hearing. Regarding the second issue of whether the Plaintiff suffered irreparable injury, the Commissioner argues that if the Plaintiff would have allowed the Appeals Council to render a decision, the Appeals Council may have awarded the Plaintiff benefits and therefore, the Plaintiff has no irreparable injury. However, even though the Appeals Council may have been able to give the Plaintiff his benefits, the Plaintiff is irreparably harmed by **[*15]** the loss of his Medicare Benefits which also resulted from the Administrative Law Judge's decision in that the Plaintiff was no longer able to receive medical care without payment. The loss of medical care is an irreparable injury which no amount of benefits may repair.

Conclusion

The Court finds that the Plaintiff has presented a constitutional claim for the depravation of procedural due process rights, which allows the Plaintiff to proceed with his case without first exhausting his administrative remedies and receiving a final decision by the Commissioner. Therefore, it is respectfully recommended that the Commissioner's Motion to Dismiss (Doc. 10) be denied.

Dated: Oct. 14th 1999

GEORGE T. SWARTZ

UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

Title 28, U.S.C., 636 and Local Rule 6.02(a) of this Court permits any party to object to these proposed findings, recommendations or report within ten (10) days after being served with a copy thereof. Any objections shall be in writing and shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections.

[*16] Any objection shall be filed with the Clerk of the Court and copies served on the magistrate and all other parties. Any party may respond to another party's objections within ten (10) days after being served with a copy thereof. Failure to object to this Report and Recommendation prior to the **District** Court's acceptance and adoption of the Report and Recommendation limits the scope of appellate review of factual findings. *U.S. v. Warren*, 687 F.2d 347 (11th Cir. 1982); *Nettles v. Wainwright*, 656 F.2d 986 (5th Cir. 1981).

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL CHRISTENSEN,
Plaintiff

vs. Case No. 98-324-Civ-Ftm-24D

KENNETH S. APFEL,
Commissioner of
Social Security
Defendant
_____/

PLAINTIFF'S MOTION TO RESTRAIN DEFENDANT FROM TERMINATING BENEFITS, TO REVERSE UNDER SENTENCE 4 THE DECISION OF THE ADMINISTRATIVE LAW JUDGE, TO ORDER ISSUANCE OF PROPER NOTICE OF HEARING, TO ORDER A HEARING BE HELD AFTER PROPER NOTICE, AND TO WAIVE INJUNCTION BOND

Comes now the plaintiff Michael Christensen who moves this Court to restrain defendant from terminating benefits and to reverse the June 17, 1998 decision of the Administrative Law Judge in order to continue his disability and disability insurance benefits as well as supplemental security income awarded him on June 19, 1997. Plaintiff also asks this court to order defendant to provide proper notice of hearing and to schedule a hearing on the merits. In addition, plaintiff requests that any bond for issuance of an injunction be waived. The grounds for this motion are set forth in plaintiff's Memorandum of Law below.

MEMORANDUM OF LAW

On August 14, 1998, the plaintiff filed with this court a Complaint that he stands to suffer immediate and irreparable injury, loss and damage as a result of the illegal action of Administrative Law Judge (ALJ) Ruben Rivera, Jr. who terminated plaintiff's benefits with complete disregard of plaintiff's due process rights and disregard of the Commissioner's regulations requiring proper notice of the issues at the hearing on his claim (Doc.3).

Plaintiff requests the Court to restrain the Administrative Law Judge (ALJ) from terminating his benefits and restore the initial award of disability and disability insurance and supplemental security income benefits and reverse the decision of the ALJ. In addition, a proper notice of hearing should be ordered along with an order to schedule a hearing after proper notice.

Plaintiff was awarded Title II and Title XVI benefits based on an onset date of April 22, 1996 (Tr 90-94). Because plaintiff had been disabled long before that date on May 16, 1994, he appealed only that part of the decision relating to his onset date of disability (Tr 76).

Upon receipt of a Notice of Hearing on his appeal, which contained the issues to be addressed at the hearing, plaintiff was deliberately misinformed by the Administrative Law Judge to the extent that the Notice of Hearing stated that the general issue was whether plaintiff was entitled to benefits prior to April 22, 1996, and the specific issue was whether plaintiff was under a disability at any time from May 16, 1994, the date of alleged onset, until April 22, 1996, the date it was previously determined his disability began. (Tr 24). Contrary to this notice, at the claimant's hearing the ALJ announced for the first time that "I'll decide whether you're

disabled as of April 22, 1996" (Tr 30). Presumably, the ALJ thought this type of notice given at the time of the hearing and not 20 days before as required under the regulations was sufficient to take away the benefits previously awarded the claimant based on the onset date of April 22, 1996. As a result of the award of benefits based on the onset of April 22, 1996, the claimant had been receiving monthly cash benefits in the amount of $798.70 (plus cost of living increases) since October 1996 (Tr 91). The date of the hearing was April 6, 1998 (Tr 27). At the hearing, the ALJ proceeded to find the claimant had never been disabled as of April 22, 1996, thereby wiping out his prior award. Pursuant to this illegal ALJ decision, the plaintiff will have to pay back all the benefits he has received and he stands to lose his medical insurance, monthly income for the necessaries of life such as food, clothing, and shelter. His health will deteriorate as he will not be able to afford his medication and health care treatments..

The action of the ALJ was an egregious violation of plaintiff's constitutional due process rights since the notice of hearing deliberately misled the plaintiff as to what the real issues were and the notice failed to comply with the Commissioner's regulation 20 C.F.R.404.938 which requires that the notice of hearing state the issues, be mailed or served at least 20 days before the hearing and, that the notice contain a statement of all of the specific issues. This action was wanton and vexatious and designed to serve as a scare tactic and was an unsanctioned edict to the claimant that he should not appeal his onset date. As explained below, this was not the first time this type of action was taken by ALJ Rivera or the Commissioner but rather it has become a

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frequent practice, which is not authorized in the regulations. In addition, 20 C.F.R. 404.943(b) provides that where an ALJ intends to consider new issues not listed in the Request for Hearing, the Judge must follow the Commissioner's procedures as clearly set forth in the regulations:

> (1) General. The administrative law judge may consider a new issue at the hearing if he or she notifies you and all the parties about the new issue any time after receiving the hearing request and before mailing notice of the hearing decision. The administrative law judge or any party may raise a new issue; an issue may be raised even though it arose after the request for a hearing and even though it has not been considered in an initial or reconsidered determination. ...
> (2) Notice of a new issue. The administrative law judge shall notify you and any other party if he or she will consider any new issue. Notice of the time and place of the hearing on any new issues will be given in the manner described in 404.938, unless you have indicated in writing that you do not wish to receive the notice.
>
> ...The notice will be mailed or served at least 20 days before the hearing. (See 20 C.F.R.404.938)

The record clearly showed the ALJ never provided the plaintiff notice that he would be raising the new issue of whether claimant's award of disability could be rescinded. This left the plaintiff unprepared for his hearing, with no reasonable time to make an intelligent decision as to whether he should proceed with the hearing. The effect of the ALJ's acts were chilling, leaving the plaintiff with the feeling that he had been ambushed and unprepared for his hearing. He had already waited one year to obtain this hearing (Tr 1, 27). In spite of the unconscionable deficiencies in the notice of hearing, stripping the plaintiff of the most basic and fundamental constitutional rights, the ALJ's decision stated

> ... It is the decision of the Administrative Law Judge that, based upon the applications filed on March 29, 1996, the claimant is

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> not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.
>
> The record reveals that the claimant was awarded disability benefits at the reconsideration level. The undersigned directs that the appropriate component undertake any necessary development to terminate benefits.
>
> Ruben Rivera Jr.
> Administrative Law Judge
> June 17, 1998.
> (See Tr at 19)

The decision to terminate benefits not only meant claimant would lose his monthly cash benefits but in addition he would also lose his medicare benefits, thereby depriving him of the right to receive necessary health treatment and medication. The decision also meant that the claimant would have an overpayment action pending for the collection of all funds paid out to him by the Social Security Administration. The ALJ's decision was neither substantially justified nor reasonable. It was not even marginally justifiable and it should be fairly characterized as outrageous and irresponsible, at best since there is virtually no legal authority in the Act or the regulations authorizing this action. This type of action is typically classified as constituting bad faith (see Hyatt v. Sullivan, 6 F.3rd 250(4th Cir. 1993) and 711 F.Supp. 833 (W.D. N.C. 1989) holding the Secretary's refusal to acquiesce to the Fourth Circuit's pain standard constituted bad faith. Similarly, in Brown v. Sullivan, 7224 F. Supp. 76 (W.D.N.Y. 1989) bad faith was found when the government failed to apply the second circuit's treating physician rule. 28 U.S.C. 2412(b) also provides for an award of "bad faith" attorney fees with

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an award of an hourly rate not limited to the rate pursuant to the Equal Access to Justice Act:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, ..., to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

This "bad faith" provision is a punitive measure and is justified in the instant case as the actions of the ALJ show a policy of discouraging claimants from appealing their onset dates by employing a secretive policy not identified in any of the Commissioner's regulations. The same illegal actions were taken by the same Administrative Law Judge in the case of Rice v. Apfel, Case No. 99-31-CIV-FTM-19D, U.S. Dist. Ct., Middle District of Florida, Ft.Myers Division, 1999, wherein this court also found an unconstitutional due process violation and a disregard for the Commissioner's regulations governing providing proper notice of hearing to claimants. Similar actions have been taken by other ALJs, one resulted after this U.S. District Court remanded the case to the ALJ for reconsideration (see case RWT, claim number 262-72-2923 and S.D. Case No. 97-528-CIV-FTM-26D, ALJ Decision on claim 262-72-2923, April 9, 1999).

After plaintiff filed his complaint with this court, the defendant filed a Motion to Dismiss for lack of jurisdiction on the basis that plaintiff had failed to exhaust his administrative remedies (Doc.10) . Defendant erroneously alleged plaintiff had not appealed the ALJ decision.

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Contrariwise, Exhibits A & B attached show plaintiff did appeal, but the Office of Hearings and Appeals had not acted on the appeal before plaintiff filed his complaint in this court. [1] However, it is not necessary that plaintiff exhaust his administrative rights when a constitutional due process violation has occurred that is collateral to the merits of the case since the issue is collateral and is not inextricably intertwined with the merits of the case (see Mathews v. Eldridge, 96 S.Ct.893,424 U.S. 319, 47 L.Ed.2d 18 (1976). This court agreed with the plaintiff in its Report and Recommendation (R& R) which issued on October 14, 1999, denying the defendant's motion to dismiss. An Order adopting the R & R was made on October 14, 1999, when this court found there was jurisdiction to hear plaintiff's complaint and there was evidence that plaintiff was deprived of his procedural due process rights and in such a case he was not

[1] Plaintiff notified the ALJ that he disagreed with the decision and would be appealing (see Exhibits A & B). 20 C.F.R. 404.968(1)(2) only requires that a notice of appeal be filed within 60 days of the ALJ's decision at any office of the Social Security Administration. A notice of appeal filed with the ALJ's office therefore would constitute a sufficient appeal. Only a written request to appeal is required. No special language is required.

> 404.968(a)..You may request Appeals Council review by filing a written request... . You may file your request – ... withinn 60 days after the date you receive notice of the hearing decision... . At one of our offices. ...
> HALLEX I-3-060... claimant may request... review in writing... by ...submitting a letter... claimant may specifically ask for a review or may imply that he is requesting review. Implied request for review occurs when the claimant expresses disagreement... with the ALJ's action or an intent to pursue appeal rights. ... A claimant must file the request for review ...at a hearing office... .(see Ex.C,attached).

required to exhaust his administrative remedies by receiving a final decision. In the R & R, this court also agreed with the plaintiff that the notice of hearing sent by the ALJ to the plaintiff was constitutionally deficient as it did not notify him of the issues to be raised at the hearing and this violated his procedural due process rights which imposed constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the due process clause of the fifth or fourteenth amendment". Mathews v. Eldridge, 424 U.S. at 332, 96 S.Ct. at 901.

This Court held that Christensen, having presented his claim to the Commissioner, would subsequently suffer a depravation of his constitutional rights as the notice of hearing did not comply with due process provisions and this issue was collateral to the issue of whether he should receive benefits. The Court further held that there was potential for irreparable injury resulting from the loss of medicare benefits since the loss of medical care is an irreparable injury which no amount of benefits may repair (see Darby v. Schweiker, 555 F. Supp.285,288 (E.D. Pa., 1983, interpreting Mathews v. Eldridge, 424 U.S. 319,327, 96 S.Ct.893, 899 , 47 L.Ed.2d 18 (1976)).

The R & R of October 14, 1999, and Court Order of November 5, 1999, adopting the R & R hold that the plaintiff has satisfied all the requirements for obtaining jurisdiction and for waiver of exhaustion of administrative remedies. The Eleventh Circuit held in Thomas v. Heckler, 602 F. Supp. 925,927 (D.C.Ala., 1984) held that when the Secretary violates the law by improperly

terminating benefits the proper remedy is injunction and restoration of benefits. The Thomas court held

> ...The Secretary refused to apply the medical improvement standard except when directed to do so by a federal court.... in refusing to follow the law.... the Secretary has acted and is acting outside the law, flouting both the statutory and constitutional law of this land... .
> ..the plaintiffs....are now unable to pay for medicine, clothing, shelter, food and transportation because of the termination of their benefits. As a result, many have lost or are in danger of losing major possessions, many now suffer from anxiety, depression and a substantial decline in health, and some have even died.
> ...The court's temporary restoration of benefits pending application of the Act is justified...based on...the Secretary violated the law.

Plaintiff now respectfully requests this Court enjoin the Commissioner from terminating plaintiff's benefits by reversing the erroneous decision of the ALJ and continuing his initial award of disability and disability insurance, medicare, and supplemental security income benefits based on the applications filed concurrently on March 29, 1996. Plaintiff also requests this court make a finding that the Commissioner's ALJ has acted in bad faith by failing to follow his own regulations and by denying plaintiff his due process rights.

In order to obtain an injunction, plaintiff must show: (I) that there is a substantial likelihood of success on the merits; (2) that without the relief the party seeking the injunction will suffer irreparable harm, (3) that the threatened injury to the party seeking relief outweighs the threatened injury to the party opposed, and (4) that the public interest will not be disserved by granting the injunctive relief (see Thomas v. Heckler, 598 F. Supp 492 (D.C. Ala., 1984) citing

Shatel Corp. V. Mao Ta Lumber and Yacht Corp., 697 F.2d 1352, 1354-55 (11th Cir. 1983).

1. Substantial Likelihood of Success on the Merits.

The plaintiff has already established that he has succeeded on the merits since the Commissioner has determined that he is disabled (Tr 90–91) and but for the illegal action of the ALJ in wrongfully terminated his benefits without proper notice, the claimant would not have to face loss of income and loss of heath care benefits under the medicare program. Plaintiff is only asking this court to enjoin the Commissioner from terminating his benefits as well as to reverse or vacate the ALJ's illegal decision for failure to follow the Commissioner regulations and hold a hearing after proper notice.

In the R & R this court also determined that the ALJ's actions were illegal.

> ...In the Notice of Hearing, the Administrative Law Judge failed to notify the plaintiff that he was reconsidering the previously awarded benefits and would consider the plaintiff's disability after the date he was awarded benefits which was April 22, 1996. The Administrative Law Judge is permitted to raise new issues at the hearing, however, pursuant 20 C.F.R.404.943(b)(2) (he) must send a Notice of Hearing which complies with the requirements of 404.938. (He) failed to notify the plaintiff in the Notice of Hearing that his disability benefits would be reconsider and possibly terminated if the plaintiff were clearly notified..(he) may have reconsidered whether he wanted a hearing and may have decided to withdraw his request or may have prepared differently for the hearing....the Administrative Law Judge did not follow the regulations as were required and thereby deprived the plaintiff of his procedural due process rights.
>
> ...Regarding....irreparable injury,...even though the Appeals Council may have been able to give the plaintiff his benefits, the plaintiff is irreparably harmed by the loss of his Medicare Benefits which also resulted from the (ALJ's) decision...The loss of medical care is an irreparable injury which no amount of

benefits may repair (see R & R, October 14, 1999).

Plaintiff is only asking the court to restore the status quo prior to the illegal termination of benefits. That is, plaintiff is asking the Commissioner to vacate the decision of the ALJ and enjoin the Commissioner from terminating his benefits until it has been decided after proper notice and hearing is afforded the plaintiff.

II. **Irreparable Injury will be suffered unless the injunction issues.**

The danger of losing major possessions, clothing, shelter, as well as food and medicine, which may result in decline in health and death, is an irreparable injury and cannot be adequately restored (see Thomas v. Heckler, 598 F.Supp 492, (D.C. Ala. 1984) citing, Lopez v. Heckler, 725 F.2d 1489, 1497 (9th Cir. 1984); Hyatt v. Heckler, 579 F. Supp 9985, 995 (D.N.C. 1984).

III. **The threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party.**

As the ninth circuit, faced with a case similar to the instant case stated,

> Plaintiffs do not attempt to match in dollars and cents the monetary harms that will allegedly be suffered by the government. Yet the physical and emotional suffering shown by plaintiffs in the record before us is far more compelling that the possibility of some administrative inconvenience or monetary loss to the government
>
> ....Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiff's favor. (see Lopez v. Heckler, 713 F.2d 1421, 1427 (9th Cir. 1983)

IV. **Public Interest**

The public interest commands that this court take all necessary and appropriate steps to assure that the Commissioner fully meets her obligations under Titles II. Obviously, the paramount

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obligation under this Title is compliance with the law.

Furthermore,

> Society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges....It would be tragic, not only from the standpoint of the individuals involved but also from the standpoint of society, were poor, elderly, disabled people to be wrongfully deprived of essential benefits for any period of time (see Thomas v. Heckler, 598 F. Supp 492,497 (D.C. Ala. 1984) citing Lopez v. Heckler, 713 F.2d 1421,1437 (9th Cir. 1983).

V. **WAIVER OF BOND**

This court has wide discretion in the matter of requiring security bond from a party to whom preliminary injunction is granted. Where the only source of income is being terminated by the defendant, the court is justified in waiving the bond for the plaintiff (see Brown v. Callahan 979 F. Supp 1357)(D.Kan. 1997).

VI. **HEARING**

Plaintiff asserts that no hearing is necessary with regard to plaintiff's request for an injunction to the extent that the record evidence clearly establishes that the defendant has failed to follow the Commissioner's regulations when he wrongfully terminated plaintiff's benefits. (see McDonald's Corp v. Robertson, United States Court of Appeals, Eleventh Circuit, No 907-3308, July 28, 1998).

Wherefore, for the above stated reasons, plaintiff respectfully requests that this Court enjoin the Commissioner from terminating plaintiff's benefits, vacate and or reverse the decision of the Administrative Law Judge, order the Commissioner to ensure that a proper notice of hearing is

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provided to the plaintiff, and after proper notice, schedule a hearing to determine the issue of disability. Finally, plaintiff requests that this Court find that the actions of the Administrative Law Judge constitute bad faith.

MICHAEL CHRISTENSEN,
By his Attorneys,

Carol Avard-Hicks,Fl.Bar 0834221
Douglas Dale Mohney
Associates and Avard Law Offices, P.A.
P. O. Box 101110
Cape Coral, FL 33910
(941) 945-0808

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Plaintiff's Motion to Restrain Defendant from Terminating Benefits, to Reverse Under Sentence 4 of the Decision of the Administrative Law Judge, to order issuance of proper notice of hearing, to order that a hearing be held after property notice of hearing and waive injunction bond, has been furnished by regular U.S. Mail on this 18th day of January, 2000, to the following:

ROBERTA M. BAHNSEN, ESQ.
United States Attorney's Office
400 N. Tampa Street, Suite 3200
Tampa, FL 33602

Carol Avard-Hicks
Post Office Box 101110
Cape Coral, FL 33910
(941) 945-0808
FL Bar No. 0834221

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICHAEL CHRISTENSEN,
Plaintiff

vs. Case No. 98-324-Civ-FTM-24D

KENNETH S. APFEL,
Commissioner of
Social Security
Defendant

_____/

ORDER

THIS CAUSE having come on before the Court upon Plaintiff's Motion to Restrain Defendant from Terminating Benefits, to Reverse Under Sentence 4 the Decision of the Administrative Law Judge, to order issuance of proper notice of hearing, to order a hearing be held after proper notice and waive injunction bond, and the Court being fully advised in the premises, it is,

ORDERED and ADJUDGED:

That the Commissioner is (1) restrained from terminating plaintiff's Title II and Title XVI benefits; (2) The decision of the ALJ is reversed pursuant to Sentence 4; Commissioner is ordered to issue a proper notice of hearing and to schedule a hearing on the merits; (3) to waive injunction bond; and (4) the Commissioner's actions are found to have constituted bad faith.

DONE and ORDERED in Chambers, Ft. Myers, Florida, on this _____ day of _____, 00.

_____
United States Magistrate Judge

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EX. B

DEBRA LYNNE DUNNELLS, Plaintiff,
v.
COMMISSIONER OF SOCIAL SECURITY[1], Defendant.

Case No. 5:12-CV-484-Oc-18PRL

United States District Court, M.D. Florida, Ocala Division.

April 22, 2013.

REPORT AND RECOMMENDATION[2]

PHILIP R. LAMMENS, Magistrate Judge.

This matter is before the court on Defendant's Motion to Dismiss Plaintiff's Complaint for Writ of Mandamus (Doc. 14), filed January 10, 2013. Plaintiff filed a response in opposition (Doc.15) and the Court heard oral argument on April 16, 2013. For the reasons discussed below, it is respectfully RECOMMENDED that Defendant's Motion to Dismiss (Doc. 14) be DENIED.

I. BACKGROUND

On February 2, 2007, Plaintiff filed an application for a period of disability and disability insurance benefits (the "2007 application"). (Doc. 14-1, p. 2). On January 26, 2011, Plaintiff filed a second application for a period of disability and disability insurance benefits (Doc. 14-1 p. 19) as well as an application for Supplemental Security Income (Doc. 14-1, pp. 19-20) (collectively the "2011 application").

On April 14, 2009, an Administrative Law Judge ("ALJ") issued an unfavorable decision as to Plaintiff's 2007 application. (Doc. 14-1, pp. 8-13). On May 17, 2011, the Appeals Council granted Plaintiff's request for review and remanded the matter to an ALJ directing that the claim files for the 2007 application and the 2011 application be associated and that a new decision on the associated claims be issued. (Doc. 14-1, pp. 15-17). Two days later — on May 19, 2011—the Commissioner made a decision on Plaintiff's 2011 application finding that Plaintiff was disabled as of November 9, 2010. (Doc. 14-1, p. 3).

On March 14, 2012, the Commissioner issued a Notice of Hearing advising Plaintiff that an administrative hearing would take place on June 6, 2012. (Doc. 15-1). The Notice of Hearing specifically advised that:

> The hearing concerns your application of February 14, 2007, for a Period of Disability and Disability Insurance Benefits under sections 216(i) and 223(a) of the Social Security Act (the Act.)

The Notice of Hearing did not mention Plaintiff's 2011 application.

The ALJ nonetheless reconsidered the Commissioner's decision on the 2011 application and on July 30, 2012, issued an unfavorable decision finding that Plaintiff was not disabled from January 12, 2007 through the date of the ALJ's decision. (Doc. 14-1, pp. 25, 46).

Rather than seeking full administrative review of the ALJ's decision, on August 31, 2012, Plaintiff filed this action. (Doc. 1). [3] The Commissioner then filed the instant motion to dismiss arguing that the Court lacks subject matter jurisdiction to consider the allegations in Plaintiff's Complaint.

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II. STANDARD OF REVIEW

Attacks on subject matter jurisdiction based on Rule 12(b)(1) of the Federal Rules of Civil Procedure may be in the form of either a facial attack or a factual attack. *Lawrence v. Dunbar*, 919 F.2d 1525, 1528-29 (11th Cir. 1990). When considering a facial attack, the court assumes that the allegations in the complaint are true and determines whether the plaintiff has alleged a basis of subject matter jurisdiction. *Id.* at 1529. In contrast, factual attacks challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings. *Id.* Here, the Commissioner argues the Court is without authority to consider Plaintiff's complaint. This is a factual attack to the Court's subject matter jurisdiction, and thus, materials outside the pleadings, including the Declaration of Patrick J. Herbst and portions of the administrative record (Docs. 14-1, 15-1, 15-2, 15-3), may be considered. *Id.*

III. DISCUSSION

The Commissioner argues that pursuant to 42 U.S.C. §405(g) of the Social Security Act, Plaintiff must exhaust her administrative remedies prior to bringing an action in federal court. On its face, Section 405(g) bars judicial review of any denial of a claim of disability benefits until after a "final decision" by the Commissioner after a "hearing." *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 18 (1976)

In *Mathews v. Eldridge*, the Supreme Court held that the "final decision of the [Commissioner] made after a hearing" consists of two elements: — (1) the jurisdictional, non-waivable requirement that a claim for benefits has been presented to the Commissioner; and (2) the waivable requirement that the administrative remedies prescribed by the Commissioner have been exhausted. *Mathews*, 424 U.S. 328-30.

Here, there is no dispute that Plaintiff presented her claims to the Commissioner, thus fulfilling the non-waivable requirement. There is also no question that Plaintiff has neither exhausted her administrative remedies nor obtained a waiver of the exhaustion requirement. Thus, the Court must determine whether the exhaustion requirement should be waived. In *Mathews v. Eldridge*, the Supreme Court held that a reviewing court may find a waiver of the exhaustion requirement if a constitutional claim is wholly collateral to the substantive claim of entitlement, and there is a showing of irreparable injury not recompensable through retroactive payments. *Mathews*, 424 U.S. at 330-31 & n. 11; *see also Rice v. Apfel*, No. 99-31-CIV-FTM-18D, 1999 WL 33597094, at *3 (M.D. Fla. Oct. 14, 1999) (*citing Darby v. Schweiker*, 555 F.Supp. 285, 288 (E.D. Pa. 1983)).

Plaintiff argues that the ALJ's decision to reconsider her 2011 application and overturn the Commissioner's prior determination that Plaintiff was disabled without notice violated her procedural due process rights. "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Rice*, 1999 WL 33597094, at *3 (*quoting Mathews*, 424 U.S. at 332). An individual has a statutorily created "property" interest in the continued receipt of social security benefits which is a protected by the Fifth Amendment. *Id.*

As discussed above, the Notice of Hearing stated that the "hearing concerns your application of February 14, 2007." There was no mention in the Notice of Hearing that the ALJ also would consider Plaintiff's 2011 application. At the hearing, Plaintiff objected to the ALJ considering the 2011 application. Nonetheless, in his July 30, 2012 decision, the ALJ considered the 2011 application and overturned the Commissioner's prior determination that Plaintiff was disabled as of November 9, 2010. The Commissioner's own regulations clearly state that the notice of hearing "will contain a statement of the specific issues to be decided" and must be mailed or served at least 20 days before the hearing. 20 C.F.R. §404.938. "The purpose of the notice of hearing is to allow the plaintiff to adequately prepare to litigate the issues at the hearing." *Rice*, 1999 WL 33597094, at *3 (citing *Benko v. Schweiker*, 551 F.Supp. 698, 703 (D.N.H. 1982). Plaintiff contends that if a

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proper Notice of Hearing had been given, she would have been able to properly prepare for the hearing or reconsider whether she wanted to proceed with the hearing.

The Commissioner contends that Plaintiff, nevertheless, received proper notice because the Remand Order from the Appeals Council directed the ALJ to consolidate Plaintiff's claims from the 2007 and 2011 applications. However, approximately fourteen months after the Appeals Council issued its Remand Order, the ALJ sent the Notice of Hearing confirming that he was only considering the 2007 application. Under these circumstances, it was reasonable for Plaintiff to rely on the Notice of Hearing.

Based on the finding that a constitutional violation exists, the undersigned must now determine whether the constitutional claim is collateral to the substantive claim of entitlement and whether Plaintiff suffered irreparable injury not recompensable through retroactive payments.

The Court has no trouble concluding that Plaintiff's procedural due process claim is collateral. Whether Plaintiff received a proper Notice of Hearing is collateral to the issue of whether or not she should receive benefits. *Rice*, 1999 WL 33597094, at *4. Likewise, as a result of the constitutional violation, Plaintiff has suffered irreparable harm because she must reimburse any overpayment of previously paid Social Security disability benefits and, with the termination of Social Security disability benefits, Plaintiff will become ineligible for Medicare.[4] The loss of medical care is an irreparable injury for which no amount of benefits may retroactively correct. *Id.* at 5.

IV. CONCLUSION

Because Plaintiff's constitutional claim is wholly collateral to the substantive claim of entitlement, and there is a showing of irreparable injury not recompensable through retroactive payments, the undersigned finds that Section 405(g) confers jurisdiction despite Plaintiff's failure to exhaust her administrative remedies.[5] Accordingly, it is respectfully RECOMMENDED that the Commissioner's Motion to Dismiss (Dooc. 14) should be DENIED.

[1] Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013.

[2] Errort Main Document Only.Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen (14) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

[3] Plaintiff subsequently filed a request for review with the Appeals Council on December 13, 2012. (Doc. 15, p. 3 n.3; Doc. 15-2).

[4] At the hearing, Plaintiff's counsel stated that although Plaintiff's benefits should have cut off based on the ALJ's decision, she is still receiving benefits. Counsel explained that once the error is corrected, Plaintiff will be presented with a bill for overpayment of benefits. Likewise, she will also become ineligible for Medicare benefits, which essentially provides insurance for medical care.

[5] Based on the undersigned's conclusion that jurisdiction is proper under §405(g), the Court need not consider Plaintiff's alternative argument that the Court has mandamus jurisdiction under 28 U.S.C. §1361.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA LYNNE DUNNELLS,
Plaintiff

vs.

5:12-CV-484-OC-18PRL

MICHAEL J. ASTRUE,
Commissioner of
Social Security,
Defendant

/

COMPLAINT FOR MANDAMUS

The above-named plaintiff makes the following representations to this court for the purpose of having the Court issue a mandamus order:

I.

The Court's jurisdiction of this cause is predicated on a violation of the Due Process Clause of the Fifth Amendment, by an Administrative Law Judge (ALJ) in the Office of Disability Adjudication and review.

II.

The ALJ terminated the Plaintiff's Title II and XVI benefits without proper notice.

III.

Plaintiff, is a resident of Hernando, Florida.

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IV.

The Plaintiff was awarded benefits at the initial level by the Defendant in a determination dated May 19, 2011. Plaintiff was found disabled as of November 9, 2010. Neither the Plaintiff, nor the Defendant appealed this determination.

V.

The Plaintiff, as a result of this determination has been collecting disability benefits under Titles II and XVI since May 19, 2011.

VI.

Plaintiff had filed a prior application for Title II and XVI benefits on February 2, 2007. This application was denied all the way through the ALJ level and Plaintiff appealed the unfavorable decision to the Defendant's Appeals Council.

VII.

The Appeals Council agreed with the Plaintiff and in an Order dated May 17, 2011; the Appeals Council remanded the case for further consideration of the Plaintiff's impairments. It should be noted that this Remand Order is dated only 2 days before the Plaintiff was found entitled to benefits on her subsequent application.

VIII.

In connection with the Remand Order, the ALJ scheduled a hearing on the 2007 application for June 6, 2012. The Plaintiff was sent a Notice of Hearing (See Exhibit A, attached hereto), on March 14, 2012 which advised the Plaintiff that the only issue for the hearing "concerns your application of February 14, 2007, for a Period of Disability and

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Disability Insurance Benefits under sections 219(i) and 223(a) of the Social Security Act (the Act)." This Notice did not address any issues concerning the subsequent 2011 Application.

IX.

In his Decision dated July 30, 2012, ALJ Donald G. Smith, failed (over objections by the Plaintiff's counsel) to limit his review to the specific issue outline in the Notice of Hearing and overturned the Defendant's previously favorable decision, thus placing in immediate jeopardy the Plaintiff's monthly income and Medicare Benefits and resulting in an overpayment of all benefits previously paid to the Plaintiff.

X.

The Plaintiff's benefits have been illegally terminated as the Due Process notice requirements were not complied with and thus the claimant and her family have no funds to live on.

XI.

Plaintiff has no other remedy at law, and the Plaintiff has suffered and will continue to suffer immediate and irreparable injury, loss and damage if this Court does not intervene to thwart this unconstitutional act against the Plaintiff by the Defendant.

XII.

The United States District Court has jurisdiction to review constitutional due process arguments. It should be noted that Plaintiff is claiming a purely constitutional

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argument in the instant case which is wholly collateral to the Defendant's decision and review provisions.

XIII.

The ALJ was required to give Plaintiff Notice, prior to the hearing conducted on June 6, 2012, that explicitly defines the scope of the issues to be reviewed at that hearing, and the scope of permissible ALJ review is governed by the scope of that notice (20 C.F.R. 404.946(a), (b) and (b) (2); (HALLEX I-2-201 and I-2-210); **Nazzaro v. Callahan**, 978 F. Supp. 452, 458 (W.D.N.Y. 1997); 42 U.S.C.A. 423 (d) (1) & (2); 404.152 (a) & (b); 416.1446 (a); **Mathews v. Eldridge**, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976); **Richardson v. Perales**, 402 U.S. 389, 402, 91 S. Ct. 1420, 1427, 28 L.Ed.2d 842 (1971).

XIV.

But for the constitutional defects in the Commissioner's actions, The Plaintiff would not have had her benefits unjustly taken away.

XV.

Plaintiff was in payment status and her cognizable property interest in benefits has been infringed by the unconstitutional actions of the ALJ.

XVI.

The procedure used by the Defendant threaten to erroneously deprive Plaintiff of her constitutional rights.

XVII.

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Plaintiff has a sufficient claim of entitlement to Social Security Disability Benefits to trigger a protected property interest and thereby invoke the due process clause of the Fifth Amendment of the United States Constitution.

WHEREFORE, Plaintiff prays that the decision of the Defendant be reviewed and set aside, thereby restoring Plaintiff's benefits and entitlement and her claim for a period of disability and disability insurance benefits be reinstated based on the onset date of November 9, 2010; that the Court award attorney's fees and costs to Plaintiff's counsel pursuant to the Equal Access to Justice Act, 5 U.S.C. Section 504, as amended, and grant her such other and further relief as the Court deems just and equitable under the law.

Dated this 28th of August, 2012

Douglas D. Mohney
Attorneys for Plaintiff
AVARD LAW OFFICES, P.A.
P. O. Box 101110
Cape Coral, FL 33910
239.945.0808 Tel.
239.945.3332 Fax
FL Bar No. 0997500
E-mail:dmohney@avardlaw.com

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA L. DUNNELLS,

Plaintiff,
v.

MICHAEL J. ASTRUE,
Commissioner of Social Security;

Defendant.

Case No. 5:12-CV-484-ORL-10PRL

DEFENDANT'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT FOR WRIT OF MANDAMUS

Introduction

Defendant, the Commissioner of Social Security (Commissioner), hereby moves this Court to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiff failed to show this Court has subject-matter jurisdiction. On August 31, 2012, Plaintiff filed a complaint in this Court alleging the Commissioner terminated her disability insurance benefits (DIB) and Supplemental Security Income (SSI) without proper notice and in violation of her due process rights. Doc. 1, Compl. for Mandamus (Compl.). Plaintiff, however, failed to exhaust her administrative appeal remedies with respect to any issues regarding her eligibility for DIB and SSI and has not received a "final decision . . . made after a hearing" from the Commissioner as required to obtain judicial review under the Social Security Act. Therefore, this Court should dismiss Plaintiff's complaint

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because this Court does not have subject-matter jurisdiction to review the allegations raised in Plaintiff's complaint.

STATEMENT OF THE ISSUES

I. WHETHER PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE BECAUSE PLAINTIFF FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES.

II. WHETHER PLAINTIFF FAILED TO DEMONSTRATE THAT THIS COURT HAS JURISDICTION UNDER THE MANDAMUS ACT.

Statement of the Case

(i) Procedural History

Plaintiff applied for DIB in February 2007 alleging she became disabled on January 12, 2007. Decl. of Pat Herbst (Herbst Decl.) ¶ 3(a) (attached); Ex. 1 (attached to Herbst Decl.). On April 14, 2009, an administrative law judge (ALJ) issued an unfavorable hearing decision finding Plaintiff not disabled. Herbst Decl. ¶ 3(a); Ex. 1. The Appeals Council, however, granted Plaintiff's request for review on May 17, 2011, vacated the ALJ's decision, and remanded Plaintiff's DIB application to an ALJ for further proceedings. Herbst Decl. ¶ 3(a); Ex. 2. The Appeals Council also ordered the ALJ to consolidate the case with Plaintiff's subsequent applications for DIB and SSI filed in January 2011 and issue a new decision on the associated claims. Herbst Decl. ¶ 3(a); Ex. 2, p. 3. On May 19, 2011, the state agency issued a favorable determination finding Plaintiff disabled beginning November 9, 2010, based on her January 2011 applications. Herbst Decl. ¶ 3(a); Ex. 3. Plaintiff appeared at a hearing on June 6, 2012, where the ALJ

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considered her 2007 and 2011 applications, as ordered by the Appeals Council. Herbst Decl. Ex. 4 pp. 1-2. On July 30, 2012, the ALJ issued an unfavorable hearing decision finding Plaintiff not disabled, based upon her 2007 and 2011 applications. Herbst Decl. ¶ 3(b); Ex. 4. The ALJ's decision advised Plaintiff that she had sixty (60) days to request review of the decision from the Appeals Council. Herbst Decl. ¶ 3(b); Ex. 4. A copy of the ALJ's decision was mailed to Plaintiff and her representative. Herbst Decl. ¶ 3(b); Ex. 4. On August 31, 2012, Plaintiff filed her complaint in this Court. Doc. 1 Compl. As of October 5, 2012, the Appeals Council had not received a request for review of the ALJ's decision from Plaintiff. Herbst Decl. ¶ 3(c).

(ii) Standard of Review

A party may attack subject-matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure by either a facial attack or a factual attack. Lawrence v. Dundar, 919 F.2d 1525, 1528-29 (11th Cir. 1990). "'Facial attacks' on the complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject-matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." Id. at 1529 (quotations and brackets omitted). "'Factual attacks,' on the other hand, challenge the existence of subject-matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." Id. (quotations and brackets omitted). Courts distinguished these two types of attacks as follows:

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> On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion–the court must consider the allegations of the complaint to be true. But when the attack is factual, the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction–its very power to hear the case–there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Id. (citations and indentions omitted). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

ARGUMENT

I. PLAINTIFF'S ACTION SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE BECAUSE SHE FAILED TO DEMONSTRATE THAT SHE EXHAUSTED HER ADMINISTRATIVE REMEDIES.

Plaintiff seeks judicial review of administrative actions of the Commissioner regarding her applications for DIB and SSI under Titles II and XVI, respectively, of the Social Security Act (Act). Plaintiff, however, failed to exhaust her administrative remedies, and, therefore, this Court does not have subject-matter jurisdiction to consider the allegations in her complaint. Any claim Plaintiff has regarding her entitlement to DIB or SSI necessarily arises under the Act. See 42 U.S.C. §§ 423,

1382. Judicial review of claims arising under the Act is permitted only in accordance with 42 U.S.C. § 405(g).[1] 42 U.S.C. § 405(g) states in pertinent part:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

In addition, 42 U.S.C. § 405(h) specifically limits judicial review of a final decision by the Commissioner as outlined in 42 U.S.C. § 405(g), stating:

> No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

The Supreme Court has held that 42 U.S.C. § 405(g), to the exclusion of the federal jurisdiction statute, is the sole avenue for judicial review of claims arising under the Act. See Heckler v. Ringer, 466 U.S. 602, 614-15, 627, 104 S.Ct. 2013, 2021-22 (1984); Mathews v. Eldridge, 424 U.S. 319, 327, 96 S.Ct. 893, 899 (1976). Further, under the doctrine of sovereign immunity, all requirements for judicial review as set forth in the statute must be satisfied. See United States v. Dalm, 494 U.S. 596, 608, 110 S.Ct. 1361, 1368 (1990).[2] Accordingly, 42 U.S.C. § 405(g) is the exclusive jurisdictional basis for judicial review of cases arising under the Act.

[1] 42 U.S.C. § 405(g) applies to SSI under 42 U.S.C. § 1383(c)(3).

[2] It is well settled that, "[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 475, 114 S.Ct. 996, 1000 (1994). Further, "the 'terms of the [United States']

A. 42 U.S.C. § 405(g) Authorizes Judicial Review Only After a Claimant Exhausts her Administrative Appeal Remedies.

Here, Plaintiff cannot establish subject-matter jurisdiction under 42 U.S.C. § 405(g) because she has not received a "final decision . . . made after a hearing" from the Commissioner that would be subject to judicial review. See Califano v. Sanders, 430 U.S. 99, 108, 97 S.Ct. 980, 985-86 (1977). The Act does not define "final decision," instead leaving it to the Commissioner to give meaning to that term through regulations. See 42 U.S.C. § 405(a); Sims v. Apfel, 530 U.S. 103, 106, 120 S.Ct. 2080, 2083 (2000); Weinberger v. Salfi, 422 U.S. 749, 766, 95 S.Ct. 2457, 2467 (1975). Under the Act, the authority to determine what constitutes a "final decision" ordinarily rests with the Commissioner. See Mathews, 424 U.S. at 330. "The statutory scheme is thus one in which the [Commissioner] may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." Salfi, 422 U.S. at 766.

In accordance with the Act, the Commissioner has established a multi-tiered administrative review system generally consisting of an initial determination, a reconsideration determination, a hearing decision by an administrative law judge (ALJ), and discretionary review by the Appeals Council. See 20 C.F.R. §§ 404.900(a)(1)-(5), 416.1400(a)(1)-(5) (2012).[3] A claimant dissatisfied with a

consent to be sued in any court define that court's jurisdiction to entertain the suit.'" Id. (quoting United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769-70 (1941)). Where a right, such as the right to sue, is a creature of statute, and the statute provides a special remedy, that remedy is exclusive. See United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 465 (1919).

[3] All references to 20 C.F.R., below, are to the 2012 version unless otherwise noted.

determination or decision must request administrative review within a set period and in order. See 20 C.F.R. §§ 404.900(a)(1)-(5), 416.1400(a)(1)-(5). If a claimant does not pursue her administrative appeal rights through this process, the last administrative determination or decision becomes binding. See 20 C.F.R. §§ 404.905, 404.921, 404.955, 404.981, 416.1405, 416.1421, 416.1455, 416.1481.

Plaintiff cannot establish subject-matter jurisdiction under § 405(g) because she did not complete the administrative appeal process. Plaintiff specifically contests the ALJ's July 12, 2012, decision that she was not entitled to DIB or SSI based on her 2007 or 2011 applications. Doc. 1, Compl. The ALJ considered Plaintiff's 2007 and 2011 applications based on the Appeals Council's remand order dated May 17, 2011. Herbst Decl. ¶ 3(a), (b); Exs. 2, 4. Although the state agency issued a favorable determination on May 19, 2011, finding Plaintiff disabled beginning November 9, 2010, based on her 2011 applications, the ALJ, pursuant to the Appeals Council's remand order, consolidated Plaintiff's 2007 and 2011 applications and held a hearing. Herbst Decl. ¶ 3(a), (b); Exs. 3, 4. On July 30, 2012, the ALJ issued an unfavorable hearing decision, finding Plaintiff not disabled under either her 2007 or 2011 applications. Herbst Decl. ¶ 3(b); Ex. 4. The ALJ's decision advised Plaintiff that she had sixty (60) days to request review of the decision from the Appeals Council. Herbst Decl. ¶ 3(b); Ex. 4. Plaintiff, however, did not request review of the ALJ's decision and instead filed her complaint in this Court. Doc. 1 Compl.; Herbst Decl. ¶ 3(c).

Accordingly, Plaintiff did not complete the administrative appeal process because she did not request Appeals Council review of the ALJ's hearing decision and did not provide any explanation for her failure to do so. See Herbst Decl. ¶ 3(c). Consequently, Plaintiff did not receive a "final decision . . . made after a hearing" as required for judicial review under 42 U.S.C. § 405(g). See Sims, 530 U.S. at 106-07 ("If a claimant fails to request review from the [Appeals] Council, there is no final decision and, as a result, no judicial review in most cases."). Thus, Plaintiff has not received a final decision, as the regulations define that term, and has failed to establish the statutory prerequisites for judicial review.

Also, the Act and controlling case law bar judicial review of the Commissioner's determinations or decisions involving Social Security benefits absent exhaustion of administrative remedies even if the individual challenges the Commissioner's denial on evidentiary, rule-related, statutory, constitutional, or other legal grounds. See 42 U.S.C. § 405(g), (h); Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 10, 120 S.Ct. 1084, 1091-92 (2000); Salfi, 422 U.S. at 762; Cochran v. U.S. Health Care Fin. Admin., 291 F.3d 775, 779-80 (11th Cir. 2002). As the Supreme Court has explained, a primary purpose of the rule requiring administrative exhaustion is:

> the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statue in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.

McKart v. United States, 395 U.S. 185, 193-94, 89 S.Ct. 1657, 1662-1663 (1969). The failure to exhaust administrative remedies may hinder judicial review when the individual failed to allow the agency to make a factual record, exercise its discretion, or apply its expertise. Id. at 194. Allowing an agency the opportunity to review an individual's claim through the administrative process also permits the agency the opportunity to discover and correct its own errors and may eliminate the need for judicial involvement altogether. Id. at 195.

The Supreme Court also has recognized that 42 U.S.C. § 405(g) is more than a codification of the judicially developed doctrine of exhaustion. See Salfi, 422 U.S. at 766. As discussed above, 42 U.S.C. § 405(g) expressly allows judicial review only of a "final decision . . . after a hearing," and Congress has left it to the Commissioner to flesh out the meaning of that term. See 42 U.S.C. § 405(a); Sims, 530 U.S. at 106; Salfi, 422 U.S. at 766. Because Congress authorized judicial review only of a "final decision," as defined by the Commissioner, and Plaintiff failed to exhaust her administrative appeal remedies as required to obtain a "final decision," Plaintiff's case must be dismissed. Ringer, 466 U.S. at 618-19 (holding dismissal appropriate because of failure to exhaust administrative remedies); Mantz v. Soc. Sec. Admin., No. 12-10198, 2012 WL 3324226, at *1 (11th Cir. Aug. 15, 2012) ("Because [claimant] failed to exhaust her remedies and she does not raise a constitutional claim, the district court properly concluded that it lacked jurisdiction to hear her appeal."); Crayton v. Callahan, 120 F.3d 1217, 1220-22 (11th Cir. 1997) (dismissing claimants' class action for failure to exhaust administrative remedies).

Additionally, Plaintiff did not allege any basis for waiver of the exhaustion requirement. Courts may excuse a claimant from exhausting administrative remedies in certain special cases, such as where the claimant raises a challenge wholly collateral to her claim for benefits and makes a colorable showing that her injury could not be remedied by the retroactive payment of benefits after exhaustion of her administrative remedies. See Ringer, 466 U.S. at 618; but see Schweiker v. Chilicky, 487 U.S. 412, 424 (1988) (holding that constitutional claims arising under the Act are subject to administrative exhaustion). Plaintiff has not alleged any sustainable basis for the Court to excuse exhaustion. Doc. 1, Compl. Accordingly, Plaintiff's case is not a special case in which the failure to exhaust may be excused. Therefore, because Congress has authorized judicial review only of a "final decision" as defined by the Commissioner and Plaintiff has not exhausted his administrative appeal remedies as required to obtain a "final decision," this Court lacks subject-matter jurisdiction and should dismiss Plaintiff's complaint. See Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

B. The Commissioner Provided Plaintiff with Proper Hearing Notice and Her Due Process Rights Were Not Violated.

Plaintiff also alleges the ALJ failed to provide proper notice that the scope of the June 2012 hearing would include her 2007 and 2011 applications and that her due process rights were violated following the ALJ's denial of her applications. Doc. 1, Compl. Plaintiff, however, failed to provide any basis for her due process allegation. The mere allegation of a substantive due process violation is not

sufficient to raise a "colorable" constitutional claim to provide subject matter jurisdiction. "[I]f the mere allegation of a denial of due process can suffice to establish subject-matter jurisdiction, then every decision of the . . . [Commissioner] would be [judicially] reviewable by the inclusion of the [magic] words" "arbitrary" or "capricious." Hoye v. Sullivan, 985 F.2d 990, 992 (9th Cir. 1992) (quoting Robertson v. Bowen, 803 F.2d 808, 810 (5th Cir. 1986). "Every disappointed claimant could raise such a due process claim, thereby undermining a statutory scheme designed to limit judicial review." Hoye, 985 F.2d at 992 (quoting Holloway v. Schweiker, 724 F.2d 1102, 1105 (4th Cir. 1984); see also Holland v. Heckler, 764 F.2d 1560, 1562 (11th Cir. 1985) (holding plaintiff's allegation that she lacked counsel did not raise a constitutional claim). Where a constitutional claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial or frivolous," the claim may be dismissed for lack of jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89, 118 S.Ct. 1003, 1010 (1998) (quoting Bell v. Hood, 327 U.S. 678, 682-683, 66 S.Ct. 773, 776 (1946)).

Here, Plaintiff alleges the Notice of Hearing stated only her 2007 application would be addressed at the hearing and the ALJ erred in considering her 2011 applications in his July 2012 hearing decision. Doc. 1, Compl. However, as the ALJ correctly noted, the Appeals Council's order of remand noted Plaintiff's 2011 applications and directed the ALJ to "associate the claim files" and issue a new

decision on the "associated claims."[4] Herbst Decl. ¶ 3(a); Ex. 2, p. 3; Ex. 4. The Appeals Council also ordered the ALJ to offer Plaintiff the opportunity for a new hearing, address the evidence that was submitted with the request for review, and take further action as needed to complete the record and issue a new decision. Herbst Decl. Ex. 2, p.3.

The record demonstrates that the ALJ considered Plaintiff's objection to the scope of the hearing and denied her request to limit the scope of the hearing to her 2007 application, in accordance with the regulations. Herbst Decl. Ex. 4. See 20 C.F.R. 404.939, 416.1439. The ALJ further found Plaintiff received notice that her 2007 and 2011 applications would be heard pursuant to the Appeals Council's order. Herbst Decl. Ex. 4. Accordingly, Plaintiff received adequate notice regarding the scope of the hearing and her due process rights were not violated. As such, Plaintiff failed to demonstrate that this Court has subject-matter jurisdiction, and any allegation of a violation of a constitutional right is without merit.

II PLAINTIFF FAILED TO DEMONSTRATE THAT THIS COURT HAS JURISDICTION UNDER THE MANDAMUS ACT.

Plaintiff titled her complaint a "Compliant for Mandamus" and requested that the Court issue a mandamus order. Doc. 1, Compl. To the extent that the Court construes Plaintiff's complaint as an action under the Mandamus Act, 28 U.S.C. § 1361, Plaintiff failed to demonstrate the Court has jurisdiction under the Mandamus Act or that she would be entitled to mandamus relief if the court had

[4] See Hearings, Appeals, and Litigation Law Manual (HALLEX) I-4-2-101 II C 1 a, 2005 WL 2542608 (Consideration of Subsequent Applications When Processing New Court Cases).

such jurisdiction. As explained in detail above, Congress made 42 U.S.C. § 405(g) the sole avenue for court review of DIB and SSI matters. See 42 U.S.C. § 405(g), (h); Ringer, 466 U.S. at 614-15, 627, 104 S.Ct. at 2021-22; Eldridge, 424 U.S. at 327, 96 S.Ct. at 899. Consequently, it is the Commissioner's position that mandamus jurisdiction does not extend to DIB or SSI matters.[5] Nevertheless, even if mandamus were to apply, Plaintiff does not satisfy the narrow requirements for mandamus jurisdiction. A district court has original jurisdiction under the Mandamus Act over "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. "Mandamus is an extraordinary remedy which should be utilized only in the clearest and most compelling of cases." Cash v. Barnhart, 327 F.3d 1252, 1257 (11th Cir. 2003) (quoting Carter v. Seaman's, 411 F.2d 767, 773 (5th Cir. 1969) (quotations and bracket omitted)).

> The test for jurisdiction is whether mandamus would be an appropriate means of relief. Mandamus relief is only appropriate when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available. Put another way, a writ of mandamus is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty. In resolving whether section 1361 jurisdiction is present, allegations of the complaint, unless patently frivolous, are taken as true to avoid tackling the merits under the ruse of assessing jurisdiction.

[5] The Supreme Court and the Eleventh Circuit have not decided whether mandamus jurisdiction barred by 42 U.S.C. § 405(g) and (h). See Ringer, 466 U.S. at 616, 104 S. Ct. at 2022; Lifestar Ambulance Serv., Inc. v. United States, 365 F.3d 1293, 1295 n.3 (11th Cir. 2004).

Cash, 327 F.3d at 1258 (quoting Jones v. Alexander, 609 F.2d 778, 781 (5th Cir.1980), and Ringer, 466 U.S. at 616 (quotations and brackets omitted)).

Plaintiff failed to establish the requirements necessary to obtain relief under the Mandamus Act. Plaintiff failed to show she has a clear right to the relief requested. An ALJ properly reviewed and denied Plaintiff's applications, and she failed to show she has a "clear right" to DIB or SSI. Plaintiff also failed to show that the Commissioner has a clear nondiscretionary duty to act or that the Commissioner acted in manner not consistent with the Act and the implementing regulations. The Commissioner properly notified Plaintiff of the procedure for requesting review of the ALJ's decision and she did not avail herself of these procedures.

Plaintiff also failed to show that no other adequate remedy is available and that she exhausted all other avenues of relief. As discussed above, Plaintiff failed to exhaust her administrative remedies. The administrative process provides an adequate remedy to address Plaintiff's allegations, and if Plaintiff was dissatisfied with the ALJ's decision, she could have sought Appeals Council review. Plaintiff failed to provide any legitimate basis for abandoning the administrative process. Plaintiff, therefore, failed to show that this Court has jurisdiction under the Mandamus Act and she would not be entitled to relief under the Mandamus Act, even if the Mandamus Act applied to DIB or SSI claims.

CONCLUSION

The Commissioner respectfully requests that the Court dismiss this case with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiff failed to show that this Court has subject-matter jurisdiction.

Respectfully submitted,
ROBERT E. O'NEILL
United States Attorney

By: *s/John F. Rudy, III*
JOHN F. RUDY, III
Assistant United States Attorney
Florida Bar No. 0136700
400 North Tampa Street Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6057
Facsimile: (813) 301-3103
E-mail: John.Rudy@usdoj.gov

Of Counsel for the Defendant:

Mary Ann Sloan, Regional Chief Counsel, Atlanta
Dennis R. Williams, Deputy Regional Chief Counsel
Susan Kelm Story, Branch Chief
Natalie K. Jemison, Assistant Regional Counsel
Social Security Administration
Office of the General Counsel, Region IV
61 Forsyth Street S.W., Suite 20T45
Atlanta, Georgia 30303
Natalie.Jemison@ssa.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 10, 2013, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Douglas M. Mahoney, Esquire
P.O. Box 101110
Cape Coral, FL 33910

s/John F. Rudy, III
JOHN F. RUDY, III
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA L. DUNNELS,
Plaintiff

vs. Case No. 5:12-CV-484-ORL-10PRL

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW the Plaintiff, who objects to Defendant's Motion to Dismiss Plaintiff's Complaint for Writ of Mandamus (Doc. No. 1). Central to Defendant's argument is that this Court has no jurisdiction because the Plaintiff failed to exhaust administrative remedies. Defendant's argument lacks merit for the reasons discussed below.

Factual and Procedural Background

On February 2, 2007, the Plaintiff filed her first application for a period of disability and disability insurance benefits (Doc. No. 14-1, pp. 2, 8). On January 26, 2011, the Plaintiff filed her second application for a period of disability and disability insurance benefits (Doc. No. 14-1, p. 19). On the same date, she also filed an application for Supplemental Security Income (Doc. No. 14-1, p. 19-20). On May 17, 2011, while the Plaintiff's second application was still pending, the Appeals Council remanded the Plaintiff's first claim (Doc. No. 14-1, p. 14).

Two days later, on May 19, 2011, the Commissioner reached a decision on the Plaintiff's second application finding the Plaintiff was disabled as of November 9, 2010 (Doc. No. 14-1, p.

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3). Commissioner granted the Plaintiff's second application based on the opinion of the Plaintiff's ophthalmologist, Daniel Pope, M.D. (Exhibit C; Doc. No. 14, pp. 10-11). According to Commissioner, this impairment is unrelated to the Plaintiff's first application because it contained no significant evidence of visual loss (Exhibit C; Doc. No. 14, pp. 10-11). Rather, the Commissioner based his decision in the Plaintiff's first application on the Plaintiff's bipolar disorder and asthma (Doc. No. 14-1, pp. 10-11).

On March 14, 2012, the Commissioner issued Notice of Hearing notifying the Plaintiff that an administrative hearing will take place on June 6, 2012 (Exhibit A-1). The Notice of Hearing also informed the Plaintiff that only her application of February 14, 2007, will be considered. (Exhibit A-3).[1] The Notice of Hearing made no mention whatsoever that the Plaintiff's application, dated January 26, 2011, which was approved based on an unrelated impairment, would also be considered (Exhibit A; Doc. No. 14-1, p. 3).

In spite of his statement in the Notice of Hearing that the hearing will be limited to consideration of February, 2007 application, and over the Plaintiff's objection, the ALJ without proper notice[2] decided to reconsider the Commissioner's decision on the Plaintiff's second application as well (Doc. No. 14-1, p. 25). On July 30, 2012, the ALJ issued an unfavorable decision, finding that the Plaintiff was not disabled from January 12, 2007 through the date of the

[1] Relevant portion of the Notice of Hearing stated: "The hearing concerns your application of February 14, 2007, for a Period of Disability and Disability Insurance Benefits under sections 216(i) and 223(a) of the Social Security Act (the Act). The ALJ will consider whether you are disabled under sections 216(i) and 223(a) of the Act." (Exhibit A-3).

[2] It is mandatory that the Notice of hearing include the specific issues to be decided and be given to the claimant within 20 days of the administrative hearing. 20 C.F.R. § 404.938(a)-(b).

ALJ's decision (Doc. No. 14-1, p. 46). On August 31, 2012, the Plaintiff filed her complaint with this Court (Doc. No. 1).[3]

I. This Court has jurisdiction because in her Complaint the Plaintiff raises a collateral constitutional claim—the Commissioner's Notice of Hearing did not inform the Plaintiff that the ALJ will be reconsidering the Commissioner's decision on the Plaintiff's second application; in addition, the Plaintiff has the potential for irreparable injury—loss of Medicare benefits which are not recompensable through retroactive relief.

In *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976), United States Supreme Court held that even though the Plaintiff did not exhaust her administrative remedies, federal court had jurisdiction conferred by 42 U.S.C. § 405(g) because the Plaintiff's claim was collateral to her claim for entitlement to benefits due to its constitutional nature and reveals the potential for irreparable injury not recompensable through retroactive relief.

This Court has previously applied the holding in Eldridge in *Christensen v. Apfel*, No. 98-324-CIV-FTM-21D, 1999 U.S. Dist. LEXIS 23268, at *8-9 (M.D. Fla. Oct. 14, 1999) and *Rice v. Apfel*, 2:99-CV-31-FTM-22D, 2000 WL33595519 (M.D. Fla. June 20, 2000). In *Christensen v. Apfel*, No. 98-324-CIV-FTM-21D, 1999 U.S. Dist. LEXIS 23268, at *8-9 (M.D. Fla. Oct. 14, 1999), held that the Court had jurisdiction under circumstances very similar to the present case. In *Christensen*, the plaintiff was awarded benefits, but nevertheless, appealed the Commissioner's decision contesting the disability onset date. *Id.* at *3. The Administrative Law Judge then overturned the Commissioner's previously favorable decision. *Id.* at *4. However, in the Notice of Hearing, the Administrative Law Judge failed to notify the plaintiff that he was reconsidering the previously awarded benefits and that he plans to consider at the hearing the

[3] The Plaintiff did not seek review with the Appeals Council before filing the Complaint in this case. Nevertheless, due to the constitutional due process claim that the Commissioner did not give the Plaintiff proper notice, this Court has jurisdiction based on *Mathews v. Eldridge*, 424 U.S. 319 (1976) and/or based on mandamus (28 U.S.C. § 1331). The Plaintiff did file a request for review with the Appeals Council on December 13, 2012 (Exhibit B).

Plaintiff's disability after the date he was awarded benefits. *Id.* at *13. As a result, the plaintiff's monthly income and Medicare benefits were terminated and all of the Plaintiff's previous benefits were considered an overpayment to the plaintiff. *Id.* at *4. The Court held that it had jurisdiction. *Id.* at *14-15. The Court explained that the plaintiff's constitutional rights were violated because the plaintiff was not able to properly prepare for the hearing. *Id.* at 14. As a result of the constitutional violation, the plaintiff suffered irreparable harm because with losing disability, the plaintiff lost Medicare benefits "which no amount of benefits may repair." *Id.* at *15. The Court also made an identical ruling in *Rice v. Apfel*, 2:99-CV-31-FTM-22D, 2000 WL33595519 (M.D. Fla. June 20, 2000).

Similarly, in the present case, the Notice of Hearing stated that the "hearing concerns your application of February 14, 2007" (Exhibit A, p. 3). There was no mention in the Notice of Hearing that the Administrative Law Judge ("ALJ") would consider the Plaintiff's subsequent application on which the Plaintiff was granted benefits (Exhibit A). This is despite the fact that Regulations in no uncertain words state that "[t]he notice of hearing will contain a statement of the specific issues to be decided." 20 C.F.R. § 404.938(b). The regulations also require the notice to be within 20 days of the hearing. 20 C.F.R. § 404.938(a).

The ALJ's decision to consider the Commissioner's decision on the Plaintiff's second application without notifying the Plaintiff is particularly worrying because "[t]he purpose of the notice of hearing is to allow the plaintiff to adequately prepare to litigate the issues at the hearing." *Id.* (citing *Benko v. Schweiker*, 551 F. Supp. 698, 703 (D.N.H. 1982)). In fact, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

objections." *Butland v. Bowen*, 673 F. Supp. 638, 641 (D. Ma. 1987). Federal courts have accorded due process rights to various recipients of government benefits, including Social Security Disability benefits. *See, e.g., Rooney v. Shalala*, 879 F. Supp. 252 (E.D.N.Y. 1995) (applicant for Social Security benefits); *Butland v. Bowen*, 673 F. Supp. at 641 (applicant for Social Security benefits); *Dealy v. Heckler*, 616 F. Supp. 880, 884-86 (W.D. Mo. 1984) (applicant for Social Security disability benefits); *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for federal rent subsidies); *Kelly v. Railroad Retirement Board*, 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity under Railroad Retirement Act); *Wright v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (applicants for social security benefits); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973) (applicant for driver's license).

As in *Christensen*, Commissioner's Notice of Hearing which clearly and unequivocally stated will concern the Plaintiff's 2007 application, (Exhibit A, p. 3), precluded the Plaintiff from being able to adequately prepare for the hearing which featured a surprise statement from the ALJ that he will consider both applications. Likewise, the Plaintiff suffered an irreparable injury because termination of Plaintiff's disability precludes her from receiving Medicare benefits. 42 U.S.C. § 426(b). In fact, "no amount of [disability] benefits may repair" the loss of Medicare benefits. *Christensen v. Apfel*, 1999 U.S. Dist. LEXIS 23268, at *15. Indeed, with current backlog it could be years before the Commissioner finally approves the Plaintiff's case, and it would then be impossible for the Plaintiff to travel back in time and obtain access to treatment that she would have otherwise had with Medicare. Therefore, this Court has jurisdiction under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The Commissioner argues that the Plaintiff nevertheless received a proper notice because the Appeals Council's remand order included language directing the Administrative Law Judge

to consolidate claims from both Plaintiff's applications (Doc. No., pp. 10-12). However, fourteen months after the remand order, the ALJ sent the Plaintiff Notice of Hearing where the ALJ directed the Plaintiff that he was not considering the 2011 application and only 2007 application (see Exhibit A, p. 3). Thus, the AC remand order is not relevant.

Furthermore, the Plaintiff's second application was approved based on new evidence from Dr. Pope about Plaintiff's visual loss—impairment which was not alleged on the Plaintiff's first application. Plaintiff's visual loss was not even found to be severe in the first application (Ex. C; Doc. No. 14, pp. 10-11).[4] Given that (1) the ALJ stated that he will consider only the Plaintiff's first application in the Notice of Hearing, and given that (2) the Plaintiff's second application was approved on the impairment largely deemed unrelated to the first application by the Commissioner, it was entirely reasonable for the Plaintiff to construe the Notice of Hearing to say exactly what it had said—that the ALJ would be considering only the Plaintiff's first application.

Furthermore, HALLEX, section I-5-3-17,[5] which applies to non-duplicative claims, states that where the Appeals Council is aware of a decision on the subsequent application and agrees with it, it should leave the determination on the other application undisturbed. Because the Plaintiff's second application involved a new impairment, vision loss, based on which Disability Determination Services found the Plaintiff disabled, the Plaintiff's second application was not duplicative. In addition, 20 C.F.R. § 404.976(b), HALLEX I-3-5-20[6] and I-3-3-6[7] as well as

[4] State agency approved the Plaintiff's second application based on the opinion of ophthalmologist, Daniel Pope, M.D. (Exhibit C). The Plaintiff's first application, however, was largely based on bipolar disorder and asthma (Doc. No. 14-1, pp. 10-11).
[5] http://ssa.gov/OP_Home/hallex/I-05/I-5-3-18.html
[6] http://www.ssa.gov/OP_Home/hallex/I-03/I-3-5-20.html
[7] http://www.ssa.gov/OP_Home/hallex/I-03/I-3-3-6.html

Program Operations Manual System ("POMS") GN 03104.370[8] state that the Appeals Council would not consider evidence which is not relevant to the disability period. In this case, the evidence regarding the Plaintiff's vision loss was only relevant to her second application because it suggested a disability onset date just before the Plaintiff's second application was filed (Exhibit C; Doc. No. 14, pp. 10-11). Thus, HALLEX sections I-5-3-17, I-3-5-20, I-3-3-6, and POMS GN 03104.370 suggest that the ALJ should have left the second decision undisturbed.

Moreover, the ALJ did not have authority to consolidate the claims. HALLEX I-2-1-65 states that the ALJ may consolidate claims when: (a) "[r]equests for hearing are **pending** on more than one claim under any Social Security Administration administered law" or (b) "[a] request for hearing is pending on one claim and another claim involving one or more of the same issues (common issues) is also **pending** at another level in SSA." In this case, the ALJ did not have the authority to consolidate the two claims because the decision on the Plaintiff's second application was no longer "pending". Instead, the Plaintiff's second application was approved (Doc. No. 14-1, p. 3), and as such, no longer "pending". In fact, the second application was approved two days after the Appeals Council's remand order (Doc. No. 14-1, pp. 3, 14). Therefore, the ALJ had no authority to consolidate the Plaintiff's second application with her first application.

In sum, the Commissioner informed the Plaintiff that the ALJ will only consider the Plaintiff's first application at the hearing (Exhibit A, p. 3). However, at the hearing the ALJ considered both applications contrary to his statement in the Notice of Hearing. The Plaintiff's due process rights were, therefore violated. As a result of this violation, the Plaintiff suffered irreparable harm because, with the termination of Social Disability Benefits, the Plaintiff had

[8] https://secure.ssa.gov/poms.nsf/lnx/0203104370

become ineligible for Medicare, which would have provided the Plaintiff with crucial access to treatment. 42 U.S.C. § 426(b); *Christensen v. Apfel*, 1999 U.S. Dist. LEXIS 23268, at *15. As such, the Commissioner violated the Plaintiff's due process rights and this Court has jurisdiction. *Eldridge*, 424 U.S. at 330-31.

II. This Court has mandamus jurisdiction because the Plaintiff proved a "clear right" to receive benefits based on the Defendant's determination that she is disabled; the Defendant violated his own clear and non-discretional duty to provide the Plaintiff with due process of law by issuing an improper notice; and there is no adequate administrative remedy available to the Plaintiff because this Court, and not the Appeals Council, must be considering constitutional issues.

The district court has original jurisdiction over a mandamus action "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. "Mandamus is only appropriate when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) 'no other adequate remedy [is] available.'" *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 1258). Nevertheless, writ of mandamus is "is largely controlled by equitable principles and its issuance is a matter of judicial discretion." *Id.* (citing *Carter v. Seamans*, 411 F.2d 767, 773 (5th Cir. 1969)). "In resolving whether section 1361 jurisdiction is present, allegations of the complaint, unless patently frivolous, are taken as true to avoid tackling the merits under the ruse of assessing jurisdiction." *Id.*

The Commissioner conclusively argues that the Plaintiff has not established that "she has a 'clear right to' DIB or SSI." (Doc. No. 14, p. 13). However, the Commissioner does not provide any explanation why the Plaintiff has not established such a right. Furthermore, the Plaintiff did establish the "clear right" to benefits since the Commissioner did in fact find the Plaintiff disabled (Doc. No. 14-1, p. 3). It was not until the ALJ violated the Plaintiff's

constitutional right to due process that the Commissioner unconstitutionally found that the Plaintiff is not disabled.

The Commissioner had a clear and nondiscretionary duty to act and to send the Plaintiff the Notice of Hearing "contain[ing] a statement of the **specific issues** to be decided." 20 C.F.R. § 404.938 (emphasis added). The Commissioner had done just the opposite by informing the Plaintiff that only the Plaintiff's first application will be considered at the hearing (Exhibit A, p. 3).

Finally, there is no other adequate remedy available to the Plaintiff. The Commissioner argues that the Plaintiff has appropriate relief from the Appeals Council. However, the present case involves a constitutional due process issue based on lack of notice. The Appeals Council should not discuss constitutional issues. Constitutional issues are within the original jurisdiction of this Court. 28 U.S.C. § 1331.

In short, the Plaintiff has established a "clear right" to benefits as the Commissioner found her disabled before the ALJ decided, on his own initiative and without telling the Plaintiff, to reconsider the Commissioner's decision. The Commissioner had a clear and nondiscretionary duty to send the Plaintiff a notice outlining the issues to be considered at the administrative hearing. 20 C.F.R. § 404.938; *Butland*, 673 F. Supp. at 640. The Plaintiff has no other adequate remedy because the Appeals Council is not suited to consider constitutional issues and this Court has original jurisdiction over such issues. 28 U.S.C. § 1331. This Court has discretion to grant jurisdiction in a mandamus action based on equitable principles, and the Plaintiff respectfully requests that this Court do so in her case.

Conclusion

For the foregoing reasons, this Court should deny the Defendant's motion to dismiss the Plaintiff's complaint under Rule 12(b)(1) of the Federal Rules of Civil Procedure and assume subject matter jurisdiction based on *Mathews v. Eldridge*, 424 U.S. 319 and/or 28 U.S.C. § 1361.

Respectfully submitted,

s/Carol Avard
CAROL AVARD
Attorney for Plaintiff
FL Bar No. 0834221
Post Office Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808
Facsimile: (239) 945-3332
Email: cavard@avardlaw.com

/s Douglas D. Mohney
DOUGLAS D. MOHNEY
Attorney for Plaintiff
FL Bar No. 997500
Avard Law Offices, PA
PO Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808
Fax: 239-945-3332
Email: dmohney@avardlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 22nd, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

JOHN F. RUDY, III, Assistant US Attorney
Unites States Attorney's Office
400 N. Tampa Street, Suite 3200
Tampa, FL 33602

s/ Carol Avard
Carol Avard, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 0834221
(239) 945-0808

/s Douglas D. Mohney
DOUGLAS D. MOHNEY
Attorney for Plaintiff
FL Bar No. 997500
Avard Law Offices, PA
PO Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA LYNNE DUNNELLS,

Plaintiff,

v. **Case No: 5:12-cv-484-Oc-18PRL**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER

The case was referred to the United States Magistrate Judge for report and recommendation on Defendant's Motion to Dismiss (Doc. No. 14). The Court having reviewed the report and recommendation of the magistrate judge, and there being no objections to the report filed by the parties, it is hereby

ORDERED that the report and recommendation of the magistrate judge is hereby **APPROVED**. The Motion to Dismiss filed by the Defendant on January 10, 2013 is **DENIED**.

DONE AND ORDERED at Orlando, Florida, this 8 day of May, 2013.

G. KENDALL SHARP
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of Record
Unrepresented Parties

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA L. DUNNELS,
Plaintiff

vs. Case No. 5:12-CV-484-ORL-10PRL

CAROLYN W. COLVIN[1],
Commissioner of Social Security,
Defendant
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REMAND AND REQUEST TO REINSTATE AND AWARD THE PLAINTIFF HER BENEFITS

COMES NOW the Plaintiff, and responds to the Defendant's Motion to Remand filed over the Plaintiff's objection. The Plaintiff objects to the Commissioner's Motion to Remand because in the original complaint the Plaintiff asked the Court to set the Commissioner's decision aside and to reinstate the Plaintiff's benefits (Doc. No. 1). The Plaintiff respectfully requests that the Court remand the Commissioner's decision instructing the Commissioner to re-award benefits to the Plaintiff. Plaintiff's request is supported on the following grounds:

[1] Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Carolyn W. Colvin should therefore be substituted for Commissioner, Michael J. Astrue, as Defendant in this suit. For simplicity, Plaintiff will refer to the Acting Commissioner as the Commissioner.

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I. **The Court should remand the present case instructing the Commissioner's to re-award the Plaintiff benefits based on the abundant legal authority which supports such action on the grounds that the Commissioner is not entitled to improperly or negligently deny the Plaintiff's case *ad infinitum* and because the record establishes that the Commissioner negligently issued the Appeals Council's remand order two days prior to approval of the Plaintiff's benefits[1] and negligently and neglectfully took away the Plaintiff's benefits without notice and due process of law.[2]**

A decision whether to order immediate award of benefits is a matter within the Court's discretion. *See Lamb v. Bowen*, 847 F.2d 698, 704 (11th Cir. 1989); *Ragland v. Shalala*, 992 F.2d 1056, 1060 (10th Cir. 1993); *Richardson v. Apfel*, 44 F. Supp. 2d 1264 (M.D. Fla. 1998). A remand for an immediate award of benefits may be appropriate because of multiple reviews of a plaintiff's claim due to **negligence, obduracy, or bad faith** of the Commissioner. *Donahue v. Halter*, 166 F. Supp. 2d 1143 (E.D. Mich. 2001). Another relevant factor that may serve as the basis for the Court's immediate award of benefits is the length of time the case has been pending. *Sisco v. United States Dep't of Health & Human Servs.*, 10 F.3d 739, 746 (10th Cir. 1993). Furthermore, the Commissioner is not entitled to remand "*ad infinitum* until it correctly applies the proper legal standard and gathers evidence to support its conclusion." *Sanders v. Secretary of Health & Human Services*, 649 F. Supp. 71, 73 (N.D.Ala. 1986). *See also Thaete v. Shalala*, 826 F. Supp. 1250, 1252 (D. Colo. 1983).

In *Walden v. Schweiker*, 672 F.2d 835, 840 (11th Cir. 1982), Court of Appeals for this Circuit reversed and rendered the decision of the Commissioner because of perfunctory manner

[1] The Appeals Council must fax the field office a claim flag if it is remanding the case and there is a subsequent claim pending at lower administrative level. *See* Hearings, Appeals and Litigation Law Manual ("HALLEX") I-5-3-17, *available at* http://www.ssa.gov/OP_Home/hallex/I-05/I-5-3-17.html. *See also* POMS DI 12045.027 § F1, *available at* https://secure.ssa.gov/poms.nsf/lnx/0412045027.

[2] The ALJ had informed the Plaintiff that he will only consider her prior application in the notice of hearing, but at the hearing itself, the ALJ informed the Plaintiff that he will readjudicate the Plainitff's second application as well (Doc. No. 15-1, p.3). This court agreed with the Plaintiff that the Commissioner violated the Plaintiff's right to due process (Doc. No. 20, p. 5).

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of the hearing, the quality and quantity of errors on the part of ALJ, and lack of substantial evidence to support the ALJ's decision.

In *Sisco*, 10 F.3d at 746, Plaintiff's case has been evaluated ten times over the course of several years at various levels. Plaintiff supplied ample evidence for proving her disability. *Id.* The ALJ resented Plaintiff's persistence and refused to take her decease seriously, at times treating her with indifference or disrespect. *Id.* On this basis, the Court reversed and remanded the case for an award of benefits indicating that the Secretary is not entitled to remand the case *ad infinitum* until it applies the proper standard. *Id.*

In *Sanders v. Secretary of Health & Human Servs.*, 649 F. Supp. 71, 73 (N.D. Ala. 1986), the claimant's application for disability benefits has been pending for over three years. The Appeals Council twice considered the claimant's application and denied benefits. *Id.* When before the district court, the Appeals Council once again asked for a reconsideration of the claimant's application, conceding that it erred in denying benefits based on the medical evidence before it. *Id.* The court refused and reversed and remanded the case for an award of benefits, noting that Appeals Council is not entitled to continue to have the case remanded *ad infinitum*, until it applies the proper standards. *Id.*

In the present case, the Plaintiff filed for disability in 2007 (Doc No. 14-1, p. 2). This case was denied at the state agency and at the hearing level by the ALJ in July, 2009 (Doc No. 14-1, pp. 13, 24). The Plaintiff's case was then remanded by the Appeals Council in May, 2011 (Doc. No. 14-1, p. 14-18). The Plaintiff then had to wait for another 13 months in order to get a hearing with the judge (Doc. No. 14-1, p. 24). In the meantime, the Plaintiff filed a new application in January, 2011, which was approved in May, 2011, only to be taken away one year

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later *without due process* by the Commissioner (Doc No. 14-1, pp. 19-27; Doc. No. 20, p 5 – R&R).

The Commissioner was further negligent when the Commissioner issued two different and conflicting decisions in the space of two days. The Appeals Council remanded the case ordering the ALJ to consolidate both of the Plaintiff's applications; however, two days later the Commissioner approved the Plaintiff's second application for benefits (Doc No. 14-1, p. 3). These two decisions clearly indicate lack of the intra-agency communication and Commissioner's negligence at the Plaintiff's expense. The Appeals Council is required to inform the Office of Hearings and Appeals by fax of its decision if there is a subsequent claim pending at the reconsideration level. *See* HALLEX I-5-3-17[3] ("IF the AC remands the prior claim to an ALJ ... AND ... a subsequent claim is pending at the initial or reconsideration level ... THEN ... the Appeals Assistant will FAX the OHA SUBSEQUENT CLAIM FLAG with a copy of the AC's decision or remand order to the [Field Office]. This will enable the FO to determine what issues, if any, remain to be resolved with respect to the subsequent claim.") (capitalizations in original). The AC must also notify the state agency to stop development on the subsequent claim if the Appeals Council remands the case. See also POMS DI 12045.027 § F1.

The Commissioner's negligence did not stop there. In March and June, 2012, the Commissioner violated the Plaintiff's due process rights by misinforming the Plaintiff as to the issues to be considered at the hearing. In the Notice of Hearing, dated March 14, 2012, the ALJ informed the Plaintiff that he will only consider the first application at the hearing (Doc. No. 15-1, p.3). However, at the hearing on June 6, 2012, in violation of the due process of law principles the ALJ informed the Plaintiff that he will adjudicate both of the Plaintiff's

[3] http://www.ssa.gov/OP_Home/hallex/I-05/I-5-3-17.html

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applications (Doc. No. 14-1, pp. 24-25). Notice and opportunity for hearing appropriate to the nature of the case are the hallmarks of the due process. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 656-57 (1950). In addition, the regulations require the Commissioner to notify the claimant of the specific issues to be decided at the hearing at least 20 days before the hearing. 20 C.F.R. § 404.938(a)-(b). This court had agreed that the Commissioner violated the Plaintiff's due process rights by failing to do so (Doc. No. 20, p. 5).

Plaintiff notes that the Appeals Council in the present case ordered the ALJ to consolidate applications (Doc. No. 14-1, p. 17). However, there is a difference between consolidating claims (applications) and consolidating hearings. Regulations give the ALJ the discretion to consolidate the hearings if the ALJ deems it necessary. See 20 C.F.R. §§ 404.952(a), 416.1452(a)("A consolidated hearing may be held if ... (ii) One or more of the issues to be considered at the hearing **you requested** are the same issues that are involved in another claim you have pending before us.") (emphasis added). In the present case, the Plaintiff never requested a hearing on the second application. Furthermore, the ALJ is not required to hold a hearing in cases where the ALJ is issuing a favorable decision based on the evidence in the record. HALLEX I-2-1-65. Similarly, the Commissioner's policy states that "[b]oth claims will not be considered at the hearing level if the [ALJ] does not agree that there is a common issue or that the claim should be joined, or if the claimant objects to joining the claims." POMS DI 12045.010. *See also Gibson v. Comm'r of Soc. Sec.*, 07 Civ. 2845 (RMB)(KNF), 2008 U.S. Dist. LEXIS 57896 (S.D.N.Y. July 15, 2008).

In this case, while the Appeals Council ordered the ALJ to consolidate Plaintiff's two claims (Doc. No. 14-1, pp. 16-17); however, the ALJ was still free to hold a hearing only on **one** of these applications as permitted by the authority described above. If anything, the ALJ's

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statement that the hearing will only concern the Plaintiff's first application coupled with the State agency's approval of the Plaintiff's second application misled the Plaintiff into believing that the ALJ will affirm the state Agency's decision to approve the second (2011) application based on the evidence in the record and only would hold the hearing with regards to the Plaintiff's first (2007) application.

In short, the Commissioner's due process violation and repeated negligence prejudiced the Plaintiff. The Commissioner's first denied the Plaintiff's first application without substantial evidence. The Commissioner was then negligent due to issuing two, nearly simultaneous and conflicting decisions at different administrative levels on the Plaintiff's second application. Finally, this Court concluded that the Commissioner took away the Plaintiff's benefits without due process of law (Doc. No. 20, p. 5). Therefore, the Court should deny the Commissioner's motion to remand the present case for further proceedings. Instead, this Court should remand the case with the instruction to re-award the Plaintiff's benefits on both applications.

CONCLUSION

For all of the foregoing reasons, the Plaintiff requests that this Court set the Commissioner's decision below aside and award and reinstate the Plaintiff's benefits.

Respectfully submitted,

s/Carol Avard
CAROL AVARD
Attorney for Plaintiff
FL Bar No. 0834221
Post Office Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808
Facsimile: (239) 945-3332
Email: cavard@avardlaw.com

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/s Douglas D. Mohney
DOUGLAS D. MOHNEY
Attorney for Plaintiff
FL Bar No. 997500
Avard Law Offices, PA
PO Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808
Fax: 239-945-3332
Email: dmohney@avardlaw.com

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2013, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

JOHN F. RUDY, III, Assistant US Attorney
Unites States Attorney's Office
400 N. Tampa Street, Suite 3200
Tampa, FL 33602

s/ Carol Avard
Carol Avard, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 0834221
(239) 945-0808

/s Douglas D. Mohney
DOUGLAS D. MOHNEY
Attorney for Plaintiff
FL Bar No. 997500
Avard Law Offices, PA
PO Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA L. DUNNELS,
Plaintiff,

v.

CAROLYN W. COLVIN[1],
Acting Commissioner
of Social Security,

Defendant.

Civil Act No. 5:12-CV-484-18PRL

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REMAND

COMES NOW, the defendant, Carolyn W. Colvin, the Acting Commissioner of Social Security (Defendant), by and through the undersigned Assistant United States Attorney, and responds as follows to Plaintiff's Response to Defendant's Motion to Remand and Request to Reinstate and Award Plaintiff Benefits (Response). Doc. 25.

Introduction

On August 31, 2012, Plaintiff filed a complaint in this Court alleging the Defendant terminated her disability insurance benefits (DIB) and Supplemental Security Income (SSI) without proper notice and in violation of her due process rights. Doc. 1, Compl. for Mandamus (Complaint). On January 10, 2013, Defendant filed her Motion to Dismiss Plaintiff's Complaint (Motion to Dismiss) for lack of subject matter jurisdiction. Doc. 14. On April 22, 2013, United States Magistrate

[1] Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Acting Commissioner Carolyn W. Colvin should be substituted for Commissioner Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

Judge, Philip Lammens, issued a Report and Recommendation, recommending Defendant's Motion to Dismiss be denied. Doc. 20. On May 3, 2013, Defendant filed her Opposed Motion for Entry of Judgment With Remand (Motion to Remand), requesting reversal and remand of the present case under sentence four of 42 U.S.C. § 405(g) and § 1383(c)(3). Doc. 21. Defendant requested remand to allow the Appeals Council to take further action needed to develop the case and allow Plaintiff to receive proper notification of the issues. Doc. 21. On May 8, 2013, this Court entered an Order adopting the Report and Recommendation and denied Defendant's Motion to Dismiss. Doc. 22. On May 30, 2013, Plaintiff filed her Response. Doc. 25. Plaintiff specifically requests the Court remand the present case, with instructions to re-award benefits based upon her 2007 and 2011 applications. Doc. 25. As discussed below, Plaintiff's Response should be denied.

Memorandum of Law

As an initial matter, the Defendant agrees to reinstate Plaintiff's May 2011, favorable determination finding her disabled as of November 9, 2010, based upon her January 2011, application, without foreclosing the Defendant's right to reopen. Doc. 14-1, pp. 19-20. See 20 C.F.R. §§ 404.987, 404.988, 416.1487, 416.1488. In support of her Motion to Remand, the Defendant relies upon and reasserts the arguments made in her Motion to Dismiss regarding Plaintiff's failure to show this Court has subject-matter jurisdiction, failure to exhaust her administrative remedies, failure to demonstrate the Court has jurisdiction under the Mandamus Act, or that

she would be entitled to mandamus relief if the court had such jurisdiction. Doc. 14.

As previously discussed, Plaintiff applied for DIB in February 2007 alleging she became disabled on January 12, 2007. Doc. 14-1. On April 14, 2009, an administrative law judge (ALJ) issued an unfavorable hearing decision finding Plaintiff not disabled. Doc. 14-1, pp. 5-13. The Appeals Council, however, granted Plaintiff's request for review on May 17, 2011, vacated the ALJ's decision, and remanded Plaintiff's DIB application to an ALJ for further proceedings. Doc. 14-1, pp. 14-18. The Appeals Council also ordered the ALJ to consolidate the case with Plaintiff's subsequent applications for DIB and SSI filed in January 2011, and issue a new decision on the associated claims. Doc. 14-1, p. 17. On May 19, 2011, the state agency issued a favorable determination finding Plaintiff disabled beginning November 9, 2010, based on her January 2011 applications. Doc. 14-1, pp. 19-20. Plaintiff appeared at a hearing on June 6, 2012, where the ALJ considered her 2007 and 2011 applications, as ordered by the Appeals Council. Doc. 14-1, pp. 21-47. On July 30, 2012, the ALJ issued an unfavorable hearing decision finding Plaintiff not disabled, based upon her 2007 and 2011 applications. Doc. 14-1, pp. 21-47. On September 24, 2012, Plaintiff requested Appeals Council review of the ALJ's July 2012 decision.

Plaintiff cannot establish subject-matter jurisdiction under § 405(g)[2] because

[2] 42 U.S.C. § 405(g) applies to SSI under 42 U.S.C. § 1383(c)(3).

she did not complete the administrative appeal process. Plaintiff contested the ALJ's 2012 decision that she was not entitled to DIB or SSI based on her 2007 or 2011 applications. Doc. 1. However, Plaintiff requested review of this decision in September 2012, and the Appeals Council has not yet acted upon this request. Accordingly Plaintiff did has not received a "final decision . . . made after a hearing" as required for judicial review under 42 U.S.C. § 405(g). Also, the Act and controlling case law bar judicial review of the Commissioner's determinations or decisions involving Social Security benefits absent exhaustion of administrative remedies even if the individual challenges the Commissioner's denial on evidentiary, rule-related, statutory, constitutional, or other legal grounds. See 42 U.S.C. § 405(g), (h); Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 10, 120 S.Ct. 1084, 1091-92 (2000); Salfi, 422 U.S. at 762; Cochran v. U.S. Health Care Fin. Admin., 291 F.3d 775, 779-80 (11th Cir. 2002). Because Congress authorized judicial review only of a "final decision," as defined by the Commissioner, and Plaintiff failed to exhaust her administrative appeal remedies as required to obtain a "final decision," remand of the present case is appropriate. See 42 U.S.C. § 405(g).

Contrary to Plaintiff's assertions, the Defendant did not act with negligence, obduracy, or bad faith and granting the Motion to Remand will not violate her due process rights. Doc. 25. Notably, the mere allegation of a substantive due process violation is not sufficient to raise a "colorable" constitutional claim to provide subject

matter jurisdiction. "[I]f the mere allegation of a denial of due process can suffice to establish subject-matter jurisdiction, then every decision of the . . . [Commissioner] would be [judicially] reviewable by the inclusion of the [magic] words" "arbitrary" or "capricious." Hoye v. Sullivan, 985 F.2d 990, 992 (9th Cir. 1992) (quoting Robertson v. Bowen, 803 F.2d 808, 810 (5th Cir. 1986). "Every disappointed claimant could raise such a due process claim, thereby undermining a statutory scheme designed to limit judicial review." Hoye, 985 F.2d at 992 (quoting Holloway v. Schweiker, 724 F.2d 1102, 1105 (4th Cir. 1984); see also Holland v. Heckler, 764 F.2d 1560, 1562 (11th Cir. 1985) (holding plaintiff's allegation that she lacked counsel did not raise a constitutional claim). Where a constitutional claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial or frivolous," the claim may be dismissed for lack of jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89, 118 S.Ct. 1003, 1010 (1998) (quoting Bell v. Hood, 327 U.S. 678, 682-683, 66 S.Ct. 773, 776 (1946)).

Citing the Defendant's alleged negligence, Plaintiff requests remand with instructions to re-award benefits based upon her 2007 and 2011 applications. Doc. 25. However, the Defendant agreed to reinstate Plaintiff's May 2011 favorable determination finding her disabled as of November 9, 2010. Doc. 14-1, pp. 19-20. See 20 C.F.R. §§ 404.987, 404.988, 416.1487, 416.1488. Therefore, the relief sought by Plaintiff is merely based on her speculative supposition that at some future point the Commissioner may not follow the Court's order. Accordingly,

Plaintiff failed to demonstrate that this Court has subject-matter jurisdiction, and any allegation of a violation of a constitutional right is without merit. As such, remand of the present case is appropriate.

Moreover, Plaintiff's unfounded fears about possible future events do not give rise to a case or controversy. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473, 102 S.Ct. 752, 759 (1982) ("The exercise of judicial power, which can so profoundly affect the lives, liberty and property of those to whom it extends, is therefore restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate."); Hardwick v. Bowers, 760 F.2d 1202, at 1204 (11th Cir. 1985), rev'd on other grounds, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) ("A federal court may not hear a legal claim unless it arises from a genuine case or controversy. A case or controversy requires a plaintiff with a personal stake in the outcome sufficient to assure an adversarial presentation of the case. Hence, a plaintiff must demonstrate that he or she has suffered an actual or threatened injury caused by the challenged conduct of the defendant."). Here, the Defendant agreed to reinstate Plaintiff's May 2011 favorable determination finding her disabled as of November 9, 2010. Doc. 14-1, pp. 19-20. See 20 C.F.R. §§ 404.987, 404.988, 416.1487, 416.1488. Therefore, no actual or threatened injury will result from the Defendant's Motion to Remand. As such, remand of the present case is appropriate.

Plaintiff also failed to establish the requirements necessary to obtain relief under the Mandamus Act. See 28 U.S.C. § 1361. As discussed above, Plaintiff failed to exhaust her administrative remedies. The administrative process provides an adequate remedy to address Plaintiff's allegations. Plaintiff requested review of the ALJ's 2012 decision, and the Appeals Council has not yet acted upon her request. Plaintiff failed to provide any legitimate basis for abandoning the administrative process, failed to show that this Court has jurisdiction under the Mandamus Act, and she would not be entitled to relief under the Mandamus Act, even if the Mandamus Act applied to DIB or SSI claims. As such, remand of the present case is appropriate.

CONCLUSION

For the reasons discussed above, the Defendant respectfully requests that this Court deny Plaintiff's Response and grant Defendant's Motion to Remand.

Respectfully submitted,

ROBERT E. O'NEILL

United States Attorney

By: s/John F. Rudy, III
JOHN F. RUDY, III
Assistant United States Attorney
Florida Bar No. 0136700
400 N. Tampa Street, Suite 3200
Tampa, FL 33602
Telephone: (813) 274-6180
Facsimile: (813) 274-6200
E-Mail: John.Rudy@usdoj.gov

Of Counsel for the Defendant:

Mary Ann Sloan, Regional Chief Counsel
Dennis R. Williams, Regional Deputy Chief Counsel
Susan Story, Branch Chief
Natalie K. Jemison, Assistant Regional Counsel
Social Security Administration
Office of the General Counsel, Region IV
Atlanta Federal Center
61 Forsyth Street, S.W., Suite 20T45
Atlanta, Georgia 30303-8920
(404) 562-1573

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 1, 2013, I electronically filed the

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foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Carol Avard, Esq.

s/John F. Rudy, III
JOHN F. RUDY, III
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA L. DUNNELS,
Plaintiff

vs. Case No. 5:12-CV-484-ORL-10PRL

CAROLYN W. COLVIN[1],
Commissioner of Social Security,
Defendant
_____/

TO
PLAINTIFF'S REPLY DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REMAND

COMES NOW the Plaintiff, and replies to the Defendant's Reply to Plaintiff's Response to Defendant's Motion to Remand. The Plaintiff's replies as follows below.

Argument

1. Plaintiff reiterates her request that this Court remands the case instructing the Commissioner to award Plaintiff benefits on both of her applications.

The Plaintiff reiterates her request to remand the present case for an immediate award of benefits on both February, 2007, and January, 2011, applications. Commissioner did not provide any direct response to the Plaintiff's argument that Commissioner acted with negligence, obduracy, and/or bad faith. Commissioner only conclusively stated that she did not act with negligence (Doc. No. 29, p. 4).

[1] Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Carolyn W. Colvin should therefore be substituted for Commissioner, Michael J. Astrue, as Defendant in this suit. For simplicity, Plaintiff will refer to the Acting Commissioner as the Commissioner.

The court may reverse a case outright when it finds that the claimant has suffered an injustice. *Walden v. Schweiker*, 672 F.2d 835, 840 (11th Cir. 1982). The Plaintiff seeks the relief requested based on the fact that the case has been already pending for over 6 years due to the Commissioner's mistakes as well as negligence, obduracy, and/or bad faith. The Commissioner's determination was already remanded by the Appeals Council once and the Commissioner now seeks to remand the case again to correct the constitutional violations and other mistakes by the Administrative Law Judge. As the Plaintiff mentioned in her Response (Doc. No. 25) to the Defendant's Motion to Remand (Doc No. 21), the Commissioner is not entitled to be able to correct mistakes *ad infinitum*, especially given the amount of negligence, obduracy, and/or bad faith that transpired in the present case. *See Donahue v. Halter*, 166 F. Supp. 2d 1143 (E.D. Mich. 2001); *Sanders v. Secretary of Health & Human Services*, 649 F. Supp. 71, 73 (N.D.Ala. 1986); *Thaete v. Shalala*, 826 F. Supp. 1250, 1252 (D. Colo. 1983).

II. In the alternative, if this Court chooses to remand the case for further proceedings, the Plaintiff asks that this Court order Commissioner to leave her decision to reinstate Plaintiff's benefits based on the second application undisturbed on the remand and only consider the Plaintiff's entitlement to benefits prior to November 9, 2010.

In her Reply, the Commissioner states that she agrees to reinstate the favorable determination on the Plaintiff's January, 2011, application, finding her disabled as of November 9, 2010, without foreclosing the Defendant's right to reopen (Doc. No. 29, p. 2). The Commissioner offered to reinstate Plaintiff's benefits. While the Plaintiff agrees with and applauds the Commissioner's offer to reinstate the Plaintiff's benefits, the Plaintiff asks that this Court order the Commissioner to leave this decision undisturbed on the remand. Stated differently, the Plaintiff asks that this Court order the Commissioner only to consider the February, 2007, application on the remand and leave the favorable determination finding the Plaintiff disabled as of November 9, 2010, undisturbed.

Federal district court has the power to enter upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security. 42 U.S.C. § 405(g). This rule gives this Court the authority to order the Commissioner to approve Plaintiff's benefits on the remand **without rehearing**. *See Ingram v. Comm'r of SSA*, 496 F.3d 1253, 1261 (11th Cir. 2007) ("The fourth sentence of § 405(g) provides the federal court power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.").

In addition, the Court has previously emphasized its authority to require the Commissioner to follow its remand orders. *See Jones v. Astrue*, No. 8:06-CV-2170-T-MAP, 2008 U.S. Dist. LEXIS 5715, *7 (M.D. Fla. Jan. 25, 2008) (remanding the case where "the ALJ, despite the Court's specific instructions on remand, failed to address the Plaintiff's mental limitations or otherwise discount them in his decision."); *Martin v. Astrue*, No. 07-0361-M, 2008 U.S. Dist. LEXIS 5129 (S.D. Ala. Jan. 24, 2008) ("the Appeals Council is **DIRECTED** to remand this action to a different ALJ for further consideration.") (emphasis in original).

The Commissioner now offers to reinstate the Plaintiff's benefits, but still essentially wants to reserve her right to review this decision *de novo* on the remand. The Commissioner states that "the relief sought by Plaintiff is merely based on her speculative supposition that at some future point the Commissioner may not follow the Court's order" (Doc. No. 29, p. 5). That is not the issue of the Plaintiff's concern. The Plaintiff's concern is that if the Court remands the case for further proceedings without any restrictions upon the Commissioner, the Plaintiff will, once again, necessarily have to go through the painful experience of knowing that her benefits

might be taken away from her on the remand. In addition, the Plaintiff's concern is not that it will happen at "some future point," but that it will happen on the imminent remand.

As the Plaintiff emphasized above and in her Response to the Commissioner's motion to remand (Doc Nos. 21, 25), the Plaintiff had suffered an injustice due to the long history of Commissioner's mistakes and violation of her constitutional rights, which gives the Plaintiff grounds to seek an outright approval of benefits from the district court. *Walden*, 672 F.2d at 840. If this Court has the power to instruct the Commissioner to approve her benefits on the remand without a rehearing, 42 U.S.C. § 405(g); *Ingram*, 496 F.3d at 1261, it also has the power to instruct the Commissioner not to disturb these same benefits on the remand. The Plaintiff therefore seeks the relief requested based on the long history of mistakes and the constitutional violation by the Commissioner.

III. Commissioner's subject-matter jurisdiction argument

Commissioner rehashes her argument originally raised in the Motion to Dismiss that the mere allegation of due process is insufficient to establish subject-matter jurisdiction (Doc. No. 29, p. 5; Doc. No. 14, p. 10-11). The Commissioner raises the same arguments and cites the same cases as in the Motion to Dismiss (Doc. No. 14, p. 10-11; Doc. No. 29, p. 5). This issue has already been considered by this Court, which concluded that the Plaintiff's constitutional claim is valid and the Court has subject-matter jurisdiction based on *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976) (Doc. No 20, pp. 3-6).

CONCLUSION

For all of the foregoing reasons, the Plaintiff requests that this Court remand the present case for an immediate award of benefits on both February, 2007, and January, 2011,

applications. In the alternative, the Court should instruct the Commissioner to only consider the Plaintiff's entitlement to benefits prior to November 9, 2010, on the remand, and therefore, leave the approval of the Plaintiff January, 2011, application undisturbed.

Respectfully submitted,

s/Carol Avard
CAROL AVARD
Attorney for Plaintiff
FL Bar No. 0834221
Post Office Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808
Facsimile: (239) 945-3332
Email: cavard@avardlaw.com

/s Douglas D. Mohney
DOUGLAS D. MOHNEY
Attorney for Plaintiff
FL Bar No. 997500
Avard Law Offices, PA
PO Box 101110
Cape Coral, FL 33910
Telephone: (239) 945-0808
Fax: 239-945-3332
Email: dmohney@avardlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 22, 2013, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

JOHN F. RUDY, III, ESQ.
United States Attorney's Office
400 N. Tampa Street, Suite 3200
Tampa, FL 33602

s/Carol Avard
Carol Avard
P.O. Box 101110
Cape Coral, FL 33910
FL Bar No. 0834221
(239) 945-0808

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA L. DUNNELLS,
Plaintiff,

v. Case No.: 5:12-CV-484-OC-10PRL

CAROLYN W. COLVIN,
Acting Commissioner
of Social Security,

Defendant.

DEFENDANT'S REPLY TO PLAINTIFF'S SURREPLY TO DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO REMAND

COMES NOW, the defendant, Carolyn W. Colvin, Acting Commissioner of Social Security (Defendant), by and through the undersigned Assistant United States Attorney, and responds as follows to Plaintiff's Surreply to Defendant's Reply to Plaintiff's Response to Defendant's Motion to Remand (Surreply). Doc. 32.

Introduction

On August 31, 2012, Plaintiff filed a complaint in this Court alleging the Defendant terminated her disability insurance benefits (DIB) and Supplemental Security Income (SSI) without proper notice and in violation of her due process rights. Doc. 1, Compl. for Mandamus (Complaint). On January 10, 2013, Defendant filed her Motion to Dismiss Plaintiff's Complaint (Motion to Dismiss) forlack of subject matter jurisdiction. Doc. 14. On April 22, 2013, United States Magistrate Judge, Philip Lammens, issued a Report and Recommendation, recommending

Defendant's Motion to Dismiss be denied. Doc. 20. On May 3, 2013, Defendant filed her Opposed Motion for Entry of Judgment With Remand (Motion to Remand), requesting reversal and remand of the present case under sentence four of 42 U.S.C. § 405(g) and § 1383(c)(3). Doc. 21. Defendant requested remand to allow the Appeals Council to take further action needed to develop the case and allow Plaintiff to receive proper notification of the issues. Doc. 21. On May 8, 2013, this Court entered an Order adopting the Report and Recommendation and denied Defendant's Motion to Dismiss. Doc. 22. On May 30, 2013, Plaintiff filed her Response. Doc. 25. Plaintiff specifically requested the Court remand the present case, with instructions to re-award benefits based upon her 2007 and 2011 applications. Doc. 25. On May 31, 2013, this Court ordered Defendant to reply to Plaintiff's Response. Doc. 26. On July 1, 2013, Defendant filed her Reply to Plaintiff's Response. Doc. 29. On July 11, 2013, Plaintiff requested leave from this Court to file a Surreply to Defendant's Reply. Doc. 30. On July 12, 2013, this Court granted Plaintiff leave to file her Surreply. Doc. 31. Defendant now requests leave of the Court to file her Reply to Plaintiff's Surreply. As discussed below, Plaintiff's Response and Surreply should be denied.

Memorandum of Law

As Defendant stated her Reply, Defendant agrees to reinstate Plaintiff's May 2011, favorable determination finding her disabled as of November 9, 2010, based

upon her January 2011, application, without foreclosing the Defendant's right to reopen. Doc. 29. See 20 C.F.R. §§ 404.987, 404.988, 416.1487, 416.1488. In support of her Motion to Remand and in response to Plaintiff's latest filing, Defendant relies upon and reasserts the arguments made in her Motion to Dismiss and Reply regarding Plaintiff's failure to demonstrate that this Court has subject-matter jurisdiction, failure to exhaust her administrative remedies, failure to demonstrate the Court has jurisdiction under the Mandamus Act, or that she would be entitled to mandamus relief if the court had such jurisdiction. Docs. 14, 21, 29. Defendant respectfully requests that this Court deny Plaintiff's Response and Surreply and grant Defendant's Motion to Remand.

CONCLUSION

For the reasons discussed above, the Defendant respectfully requests that this Court deny Plaintiff's Response and Surreply and grant Defendant's Motion to Remand.

Respectfully submitted,

ROBERT E. O'NEILL
United States Attorney

By: s/John F. Rudy, III
JOHN F. RUDY, III
Assistant United States Attorney
Florida Bar No. 0136700
400 N. Tampa Street, Suite 3200
Tampa, FL 33602
Telephone: (813) 274-6180
Facsimile: (813) 274-6200
E-Mail: John.Rudy@usdoj.gov

Of Counsel for the Defendant:

Mary Ann Sloan, Regional Chief Counsel
Dennis R. Williams, Regional Deputy Chief Counsel
Susan Story, Branch Chief
Natalie K. Jemison, Assistant Regional Counsel
Social Security Administration
Office of the General Counsel, Region IV
Atlanta Federal Center
61 Forsyth Street, S.W., Suite 20T45
Atlanta, Georgia 30303-8920
(404) 562-1573
natalie.jemison@ssa.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 19, 2013, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Carol Avard, Esquire

s/John F. Rudy, III
JOHN F. RUDY, III
Assistant United States Attorney

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA L. DUNNELS,
Plaintiff

vs. Case No. 5:12-CV-484-ORL-10PRL

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant
_____/

AFFIDAVIT

AFTER BEING DULY SWORN AND DEPOSED, I SAY AS FOLLOWS:

1. I am over the age of 18 and otherwise *sui generis*. I have personal knowledge of the following facts.

2. My name is Douglas D. Mohney and I am an attorney employed full time with Avard Law Offices, P.A..

3. Our office has represented DEBRA LYNN DUNNELLS in connection with her claim for Social Security Disability Benefits since approximately January 1, 2011.

4. On or about June 14, 2013, counsel for the Defendant contacted the undersigned by telephone to request our consent to a 30 day extension of time to file a Reply to Plaintiff's Objections to Defendant's Motion to Remand.

5. The undersigned advised that we could not consent due to the fact that the Defendant had stopped Plaintiff's benefits in direct violation of the Court's Order.

6. Defendant further advised they would confer with the "agency" regarding this matter and would get back to the undersigned.

7. Defendant never contacted the undersigned but instead filed "Defendant's Reply to Plaintiff's Response to Defendant's Motion to Remand" on July 1, 2013 representing to the Court that Plaintiff's benefits were not in jeopardy.

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8. The Defendant knew at the time it filed its Motion For Remand that it (Defendant) had already stopped Plaintiff's monthly benefits and Medicare Benefits as of June 1, 2013.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY, THIS 2nd DAY OF September, 2013

Douglas D. Mohney

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 23, 2013, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

JOHN F. RUDY, III, ESQ.
United States Attorney's Office
400 N. Tampa Street, Suite 3200
Tampa, FL 33602

s/Douglas D. Mohney
Douglas D. Mohney
P.O. Box 101110
Cape Coral, FL 33910
FL Bar No. 0997500
(239) 945-0808
E-mail: dmohney@avardlaw.com

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA LYNNE DUNNELLS,

Plaintiff,

v. **Case No: 5:12-cv-484-Oc-PRL**

COMMISSIONER OF SOCIAL SECURITY

Defendant.

ORDER

This matter is before the Court on the Commissioner's Opposed Motion for Entry of Judgment with Remand. (Doc. 21).

I. BACKGROUND

A. Administrative Background

On February 2, 2007, Plaintiff filed an application for a period of disability and disability insurance benefits (the "2007 application"). (Doc. 14-1, p. 2). On January 26, 2011, Plaintiff filed a second application for a period of disability and disability insurance benefits (Doc. 14-1 p. 19), as well as an application for Supplemental Security Income (Doc. 14-1, pp. 19-20) (collectively the "2011 application").

On April 14, 2009, an Administrative Law Judge ("ALJ") issued an unfavorable decision as to Plaintiff's 2007 application. (Doc. 14-1, pp. 8-13). On May 17, 2011, the Appeals Council granted Plaintiff's request for review and remanded the matter to an ALJ directing that the claim files for the 2007 application and the 2011 application be associated and that a new decision on the associated claims be issued. (Doc. 14-1, pp. 15-17). Two days later – on May 19, 2011 – the

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Commissioner made a decision on Plaintiff's 2011 application, finding that Plaintiff was disabled as of November 9, 2010. (Doc. 14-1, p. 19).

On March 14, 2012, the Commissioner issued a Notice of Hearing advising Plaintiff that an administrative hearing would take place on June 6, 2012. (Doc. 15-1). The Notice of Hearing specifically advised that: "The hearing concerns your application of February 14, 2007, for a Period of Disability and Disability Insurance Benefits under sections 216(i) and 223(a) of the Social Security Act (the Act)." The Notice of Hearing did not mention Plaintiff's 2011 application. At the hearing, Plaintiff objected to the ALJ considering the 2011 application. The ALJ nonetheless reconsidered the Commissioner's decision on the 2011 application and on July 30, 2012, issued an unfavorable decision, finding that Plaintiff was not disabled from January 12, 2007 through the date of the ALJ's decision. (Doc. 14-1, pp. 25, 46).

B. The Instant Action

On August 31, 2012, without first seeking full administrative review of the ALJ's decision, Plaintiff filed this action. (Doc. 1). Plaintiff argued that the ALJ's decision to reconsider her 2011 application and overturn the Commissioner's prior determination that Plaintiff was disabled without notice violated her procedural due process rights. Plaintiff contends that if a proper Notice of Hearing had been given, she would have been able to properly prepare for the hearing or reconsider whether she wanted a hearing. On December 13, 2012, Plaintiff filed a request for review with the Appeals Council of the ALJ's unfavorable decision. (Doc. 15, p. 3 n.3; Doc. 15-2).

In response to Plaintiff's Complaint here, the Commissioner filed a motion to dismiss arguing that this Court lacks subject matter jurisdiction to consider the allegations in Plaintiff's Complaint because Plaintiff failed to exhaust her administrative remedies. On April 22, 2013,

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the undersigned issued a report recommending that the Commissioner's motion to dismiss be denied. (Doc. 20). The undersigned concluded that Section 405(g) confers jurisdiction despite Plaintiff's failure to exhaust her administrative remedies because she alleged a constitutional claim wholly collateral to the substantive claim of entitlement to benefits (i.e., procedural due process), and there is a showing of irreparable injury not recompensable through retroactive payments (i.e., obligation to reimburse overpayment of previously paid disability benefits and ineligibility for Medicare). (Doc. 20). On May 8, 2013, the District Judge adopted the Report and Recommendation. (Doc. 22).

In the meantime, the Commissioner filed an opposed motion to remand this matter to the Commissioner "to allow the Appeals council to take further action needed to develop the case and to allow claimant to receive proper notification of the issues." (Doc. 21). Plaintiff agreed that the instant case should be remanded -- but that it should be remanded with instructions to re-award benefits based upon her 2007 and 2011 applications. (Doc. 25). The parties subsequently filed reply briefs. (Docs. 29, 32, 36). Notably, at the time of the June 6, 2012 ALJ hearing, which was only properly noticed as to the denied 2007 application, Plaintiff had been awarded benefits under her 2011 application, which she did not expect to be re-considered at the ALJ hearing, as no notice was provided for such a review. Despite the lack of notice, the ALJ reconsidered the 2011 application and determined the Plaintiff was not disabled, thus denying her benefits under the 2011 application.

On September 23, 2013, the undersigned conducted a hearing on this matter and directed the parties to file a status report regarding the status of Plaintiff's social security benefits and

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whether they were able to resolve this matter. (Doc. 42).[1] In response, the parties advised that Plaintiff's benefits have been suspended since June 1, 2013, that they were unable to resolve the issues, and requested that the Court take further action. (Docs. 45, 46, 48). The parties further stated that on August 16, 2013, the Social Security Administration issued a statement to Plaintiff requesting payment of an overpayment (apparently, despite ultimately denying her 2011 application at the un-noticed hearing, the SSA continued to issue payments to Plaintiff, presumably because her 2011 application was initially approved), but that the overpayment action was suspended pending resolution of the case on review. In addition, and importantly, they advised that on October 24, 2013, the Appeals Council vacated the July 30, 2012 decision finding Plaintiff not disabled and remanded the case to the hearing office and directed the ALJ to offer Plaintiff a supplemental hearing, obtain additional evidence, and issue a new decision.

In light of the parties' report, it appears now that the Plaintiff will receive a properly noticed hearing as to her applications. However, the SSA neglected to say what was being done about the critical fact that prior to the un-noticed hearing, Plaintiff had been awarded benefits under the 2011 application. To put the Plaintiff back to where she was before the ALJ Hearing, and especially since the decision finding her not disabled was vacated, Plaintiff should be receiving benefits under her initially approved 2011 application, unless and until the SSA properly finds otherwise.

II. DISCUSSION

As discussed above, there is no dispute that the Commissioner terminated Plaintiff's disability benefits without providing proper notice. The Appeals Counsel has vacated the July 30, 2012 decision and remanded the case to the hearing office for further proceedings. However,

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[1] Following the hearing, the parties consented to the jurisdiction of the undersigned. (Docs. 41, 43).

the vacating of that decision does not fully correct the constitutional deprivation. The July 30, 2012 decision effectively undid the Commissioner's May 19, 2011 finding that Plaintiff was disabled as of November 9, 2011; and as a result, Plaintiff's disability benefits were terminated on June 1, 2013, she became ineligible for Medicare, and an overpayment action was initiated against her by the Commissioner.

Accordingly, the undersigned concludes that the Commissioner's Opposed Motion for Entry of Judgment with Remand should be **GRANTED** to the extent that:

1. This case is **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. § 405(g);

2. The Commissioner's May 19, 2011 decision finding Plaintiff disabled as of November 9, 2010 **SHALL BE REINSTATED** immediately and Plaintiff shall be compensated for back benefits owed since June 1, 2013;[2]

3. The Clerk shall enter judgment in favor of Plaintiff, close the file, and terminate all pending motions.

DONE and **ORDERED** in Ocala, Florida on November 6, 2013.

PHILIP R. LAMMENS
United States Magistrate Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties

[2] The Court is not providing any further direction as to how the Commissioner should resolve Plaintiff's claims for benefits.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

DEBRA LYNNE DUNNELLS,

Plaintiff,

v. **Case No: 5:12-cv-484-Oc-PRL**

COMMISSIONER OF SOCIAL SECURITY

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the decision of the Commissioner is REVERSED pursuant to sentence four of 42 U.S.C. § 405(g) and this case is REMANDED back to the Commissioner for further proceedings.

SHERYL L. LOESCH, CLERK

s/*M. Taylor*, Deputy Clerk

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 EX. C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOHN M. McDEVITT,

Plaintiff,

vs. **CASE NUMBER:** 6:13-cv-1985-Orl-18KRS

COMMISSIONER OF SOCIAL SECURITY,

Defendant,

COMPLAINT

Plaintiff, John M. McDevitt, by and through his undersigned counsel, files his complaint against the Defendant and states:

1. This action arises under 42 U.S.C. Section 405(g) and Section 1383(c)(3) to review a final decision of the Commissioner of Social Security denying Social Security Disability benefits and Supplemental Security Income payments to Plaintiff.

2. Plaintiff resides in Volusia, Florida. His residence is within the jurisdiction of the United States District Court for the Middle District of Florida.

3. Jurisdiction over the Defendant is conferred on this Court by 42 U.S.C. Section 405(g) and Section 1383(c)(3), which provide for a private right of action in the United States District Court where the Plaintiff resides after final adverse administrative action on the Plaintiff's applications for Social Security Disability benefits and Supplemental Security Income payments. Jurisdiction is also conferred by 28 U.S.C. Section 1361.

4. Plaintiff filed the present claim under Social Security Account number XXX-XX-6207 with the Social Security Administration for Social Security Disability benefits on January 22, 2002,

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alleging that he became disabled on December 1, 2001.

5. Plaintiff was determined to be disabled as of November 1, 2007 and has been receiving Supplemental Security Income benefits. Pursuant to the Commissioner's Order, the period to be adjudicated for the disability insurance benefits claim was December 1, 2001 through December 31, 2003, the expiration of his date last insured; and for his Supplemental Security Income claim, January 8, 2002 through November 1, 2007, the day he was found to be disabled and became eligible for Supplemental Security Income payments.

6. Plaintiff has exhausted all administrative remedies available to him. On October 22, 2013 the Commissioner of the Social Security Administration, acting by and through the Administrative Law Judge, found that Plaintiff was not disabled prior to November 1, 2007. That decision became final sixty days later when the Appeals Council decided not to exercise its right to review. The Administrative Law Judge's decision confirmed that Plaintiff had 121 days within which to file an appeal in Federal District Court.

7. The Commissioner's officers and employees have a duty to grant a claimant's request for an in person hearing at the Office of Disability Adjudication and Review nearest the claimant's residence.

8. Plaintiff requested an in person hearing at the Office of Disability Adjudication and Review closest to his residence in Orlando, Florida because he is homeless and does not own a car.

9. There is public transportation from Volusia County to Orlando but not to Jacksonville.

10. The Commissioner's employees required Plaintiff to attend a video hearing.

11. Pursuant to 42 U.S.C. Section 405(g), Section 1383(c)(3) and 28 U.S.C. Section 1361, Plaintiff files this action to seek judicial review of Defendant's decision and asks this Court to reverse said decision or, in the alternative, to remand this case for an in person rehearing de novo at

the Office of Disability Adjudication and Review nearest her residence on the following grounds:

(A) The proof of Plaintiff's disability adequately satisfies the requirements of law;

(B) There is no substantial competent evidence in the record to support the legal conclusion that Plaintiff is not disabled within the meaning of relevant statutory and regulatory provisions;

(C) The Commissioner's Administrative Law Judge did not fully and fairly develop the record, and failed to properly state the weight given to each item of evidence;

(D) The decision of the Commissioner denying Social Security Disability benefits and Supplemental Security Income payments to Plaintiff was arbitrary, capricious, and an abuse of discretion; and

(E) The decision of the Commissioner denying Social Security Disability benefits to Plaintiff was not in accordance with law.

(F) The Commissioner's employees had a clear non-discretionary duty to schedule an in person hearing at the Office of Disability Adjudication and Review nearest Plaintiff's residence.

WHEREFORE, Plaintiff prays:

(A) That Commissioner of Social Security, Defendant herein, be required to answer this Complaint and to file a certified copy of the transcript of record, including the evidence on which the findings and decisions are based;

(B) That this Court reverse and set aside the decision of Defendant denying Plaintiff's claim for Social Security Disability benefits and Supplemental Security Income payments;

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(C) In the alternative, that this Court remand the case for a rehearing de novo; and order the Commissioner to schedule an in person hearing at the Office of Disability Adjudication and Review nearest the Plaintiff's residence.

(D) That this Court reserve jurisdiction to consider Plaintiff's attorney's entitlement to charge a reasonable attorney's fee in any judgment of reversal and remand; and

(E) That the Court award such additional and further relief as the Court deems just and proper.

DATED this **27th** day of **December, 2013.**

Respectfully submitted,

By: _____

Richard A. Culbertson, Esquire
3200 Corrine Drive
Orlando, Florida 32803
(407)894-0888
(407)898-2737(FAX)
E-mail: CulbertsonLaw@msn.com
Florida Bar No: 0876577

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOHN M. MCDEVITT

Plaintiff,

vs. **Case No. 6:13-cv-1985-Orl-18KRS**

COMMISSIONER OF SOCIAL SECURITY

Defendant.

_____/

JOINT MOTION TO REMAND

COMES NOW the undersigned counsel for the parties, and respectfully requests that this Court remand this case, and in support thereof would show:

1. This action arises under 42 U.S.C. § 405(g), 42 U.S.C. § 1383(c)(3), and 28 U.S.C. § 1361. (Doc. 1).

2. On December 27, 2013, Plaintiff filed a complaint in this case and on January 24, 2014, Plaintiff filed a Motion for Preliminary Injunction requesting a preliminary injunction in the form a writ of mandamus ordering the Commissioner of Social Security to reinstate his Supplemental Security Income Benefits retroactively back to the date these benefits were terminated, December 1, 2013. (Doc. 10).

3. Pursuant to the Order dated January 24, 2014, the parties counsel for the parties have conferred and mutually agreed to a resolution of this case.

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4. The parties file this joint request that this case be remanded to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) to allow the Commissioner to carry out the terms of the settlement which include:

A. The Commissioner will reinstate her final decision finding Plaintiff disabled as of November 1, 2007;

B. The Commissioner will reinstate Plaintiff's Supplemental Security Income Benefits back to the date they were terminated, December 1, 2013;

C. The Commissioner's Appeals Council will review the remaining issues raised in this appeal, and give Plaintiff the opportunity to present arguments on those issues.

D. This case would be closed once remanded;

E. The court would retain jurisdiction to determine attorney fees.

WHEREFORE, the parties pray the Court enter an Order remanding this case to the Commissioner.

Respectfully Submitted,

/s/ RICHARD A. CULBERTSON
Richard A. Culbertson
Florida Bar No. 0876577
3200 Corrine Drive
Orlando, Florida 32803
Telephone: (407) 894-0888
Fax: (407) 898-2737
Email: culbertsonlaw@msn.com
Attorney for Plaintiff

/s/ JOHN F. RUDY, III
John F. Rudy, III
Assistant United States Attorney
400 N. Tampa Street, Suite 3200

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Tampa, FL 33602

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 3rd day of February, 2014, I electronically filed the foregoing document with the Clerk of the United States District Court for the Middle District of Florida in the Orlando Division by using the CM/ECF system, which will send a Notice of Electronic Filing to: John F. Rudy III, Assistant United States Attorney, 400 North Tampa Street, Suite 3200, Tampa, Florida 33602.

/s/ RICHARD A. CULBERTSON
RICHARD A. CULBERTSON

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOHN M. McDEVITT,

Plaintiff,

vs. **CASE NUMBER: 6:13-cv-1985-Orl-KRS**

COMMISSIONER OF SOCIAL SECURITY,

Defendant,
_____/

MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

The Commissioner of Social Security acting through his Administrative Law Judge (ALJ) made a final decision on July 29, 2010 that Plaintiff, John M. McDevitt is disabled and eligible to receive Supplemental Security Income disability benefits and Medicaid. Plaintiff has the right to notice and an opportunity to be heard before those benefits may be terminated. The Commissioner's own rules and regulations provide that the opportunity to be heard means an in person administrative hearing at the hearing office nearest the claimant's home. The Commissioner has terminated Plaintiff's Supplemental Security Income disability benefits and Medicaid effective December 1, 2013 without providing him with adequate notice or an in person hearing. Plaintiff is asking this Court to Order the Commissioner of Social Security to reinstate his Supplemental Security

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Income disability benefits and Medicaid coverage pending a full resolution of his rights under the appeal filed pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3).

I. Jurisdiction

The district court has original jurisdiction over a mandamus action "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. "Mandamus is only appropriate when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) 'no other adequate remedy [is] available.'" *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003). Local Rules 4.05(b)(4) and 4.06(b)(1) require this memorandum to address: (i) the likelihood that the moving party will ultimately prevail on the merits of the claim; (ii) the irreparable nature of the threatened injury; (iii) the potential harm that might be caused to the opposing parties or others if the order is issued; and (iv) the public interest. This Court also has jurisdiction under 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3).

II. Clear right to the relief requested.

Due process requires that a disability benefits recipient be given notice and an opportunity to be heard before his entitlement to benefits may be terminated. *Mathews v. Eldridge*, 424 U.S. 319, 332-333, 348-349, 96

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S.Ct. 893, 901-902, 909-910, 47 L.Ed.2d 18 (1976). Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required. *Service v. Dulles*, 354 U.S. 363, 388, 77 S.Ct. 1152, 1165, 1 L.Ed.2d 1403 (1957); *Vitarelli v. Seaton*, 359 U.S. 535, 539-540, 79 S.Ct. 968, 972-973, 3 L.Ed.2d 1012 (1959); See also *Rowe v. U.S. Attorney General*, __ Fed.Appx. __, 2013 WL 6052734 (C.A. 11, 2013) (Copy attached as Appendix 1). Agency deviation from its own regulations and procedures may justify judicial relief in a case otherwise properly before the court. *Jean v. Nelson*, 727 F.2d 957, 976 (11th Cir. 1984).

A final decision was made by an ALJ on July 29, 2010 that Mr. McDevitt has been disabled since November 1, 2007. He was awarded ongoing Supplemental Security Income disability benefits and Medicaid coverage based on that final administrative decision. Mr. McDevitt has not received any notice that his ongoing Supplemental Security Income disability benefits and Medicaid would be terminated. Mr. McDevitt has not had the opportunity to present his case on the issue of continued eligibility at an in person hearing held at the hearing office nearest his residence. Nevertheless, the Commissioner has terminated Mr. McDevitt's

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Supplemental Security Income disability benefits and Medicaid effective December 1, 2013. After he did not receive his December 2013 check, Mr. McDevitt contacted the Social Security office and was told his benefits were terminated based on an ALJ decision dated October 22, 2013 that Mr. McDevitt "is not disabled." Mr. McDevitt did not receive notice that the ALJ was going to address the issue of his ongoing eligibility. In fact the Appeals Council and the ALJ both told him the hearing was limited to the issue of whether he was disabled prior to November 1, 2007 (Appendix 2, pages 2 and 3, and Appendix 3).

Whenever a claimant has been found to be disabled, and the Commissioner intends to review the issue of ongoing disability, 20 C.F.R. § 416.989 provides in pertinent part:

> . . . we will notify you that we are reviewing your eligibility for payments, why we are reviewing your eligibility, that in medical reviews the medical improvement review standard will apply, that our review could result in the termination of your payments, and that you have the right to submit medical and other evidence for our consideration during the continuing disability review. In doing a medical review, we will develop a complete medical history of at least the preceding 12 months in any case in which a determination is made that you are no longer under a disability. If this review shows that we should stop your payments, we will notify you in writing and give you an opportunity to appeal.

The Commissioner has sent no such notice before terminating Mr. McDevitt's ongoing Supplemental Security Income disability benefits. This

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Court has previously determined: "If the notice of hearing fails to inform the plaintiff of material factors which could lead to an adverse decision, then the notice is not adequate and the plaintiff's procedural due process rights are violated." *Rice v. Apfel*, 1999 WL 33597094 (M.D. Fla.) (Appendix 4). See also *Dunnells v. Commissioner of Social Sec.*, 2013 WL 1909590 (M.D. Fla.) (Appendix 5A) and 2013 WL 1909605 (M.D. Fla.) (Appendix 5B). and *Christensen v. Apfel*, 1999 WL 33595519 (M.D. Fla.) (Appendix 6).

In addition, 20 C.F.R. § 416.996 provides in pertinent part:

> If we determine that you are not eligible for disability or blindness benefits because the physical or mental impairment(s) on the basis of which such benefits were payable is found to have ceased, not to have existed, or to no longer be disabling, and you appeal that determination, you may choose to have your disability or blindness benefits, including special cash benefits or special SSI eligibility status under §§ 416.261 and 416.264, continued pending reconsideration and/or a hearing before an administrative law judge on the disability/blindness cessation determination.

Mr. McDevitt has not had the opportunity to have his benefits continued pending "a hearing before an administrative law judge" on the issue of whether his disability ceased. In fact, the Commissioner's ALJ did not comply with her own rules and regulations when she denied Mr. McDevitt's request for an in person hearing at the hearing office nearest his home. The Commissioner did not comply with 20 C.F.R. § 404.936(e) which provides in pertinent part: "If you have been scheduled to appear for your

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hearing by video teleconferencing and you notify us as provided in paragraph (d) of this section that you object to appearing in that way, the administrative law judge will find your wish not to appear by video teleconferencing to be a good reason for changing the time or place of your scheduled hearing and we will reschedule your hearing for a time and place at which you may make your appearance before the administrative law judge in person." The Commissioner did not comply with 20 C.F.R. § 404.936(f) which lists "You live closer to another hearing site." as an example of good cause for changing the time and place of a hearing. The Commissioner did not comply with her own Hearing, Appeals, and Litigation Law Manual[1] (Hallex) which provides in pertinent part: HALLEX I-2-3-10: "The objective is to hold a hearing as soon as possible after request for hearing (RH) is filed, at a site convenient to the claimant" (Appendix 9). HALLEX I-2-3-10(A): "A claimant should not be required to travel a significant distance to the hearing office (HO) or another hearing site if a closer hearing site exists . . ." HALLEX I-2-3-10(E)(2): "Examples of other circumstances a claimant may give for requesting a change in the time or place of a scheduled hearing include, but are not limited to, the following: . . . (f) the claimant lives closer to another hearing site." HALLEX I-2-0-70:

[1] The HALLEX is binding on all Social Security ALJs. See Social Security Ruling 96-1p (Appendix 7) and directive from Chief Administrative Law Judge Debra Rice dated January 13, 2013 (Appendix 8).

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"Examples of circumstances that could warrant a change to the place of hearing may include: . . . The claimant lives closer to another hearing office." (Appendix 10).

On January 10, 2013, the chief administrator in the Orlando hearing office, who is not an ALJ, refused to process the transfer of another case from Jacksonville after an ALJ determined the claimant had good cause to request a change of venue from Jacksonville to Orlando. The reason for the denial was: "We believe that if we take this case it will open the door for future requests of the same nature." (Appendix 11). No determination was made by the administrator as to whether or not the claimant had good cause to request a change of venue. The ALJ made no effort to enforce his good cause determination in that case and proceeded with the administrative hearing without the claimant being present. It appears, the Commissioner, through her chief ALJ's, then directed all ALJ's in the Jacksonville hearing office to disregard her own rules and regulations regarding good cause determinations. According to the ALJ in Mr. McDevitt's case and others, the ALJ's were told to deny all requests for a change of venue based on good cause and order all residents of Volusia County to travel to Jacksonville if they want an in person hearing. It is believed no change of venue has been authorized by any ALJ in the Jacksonville hearing office since January 10,

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2013. The issue raised in this case has already been raised by another claimant in United Stated District Court Middle District of Florida Case Number 6:13-cv-601-Orl-TBS. This Court remanded that case to the Commissioner with a recommendation that a hearing be scheduled in the Orlando hearing office. On remand, the Commissioner has disregarded the Court's recommendation and assigned the case to an ALJ in the Jacksonville hearing office.

In Mr. McDevitt's case, the ALJ stated on the record at the administrative hearing that he was told that he did not have the authority to make a good cause determination and that he was bound by directions from the Commissioner or chief judge to require claimants residing in Volusia County who want an in person hearing to travel to Jacksonville – regardless of the hardship, impossibility of attending, or any other good cause. The Commissioner has already ordered her ALJ's to disregard any district court decision which may conflict with SSA's interpretation of the Social Security Act or regulations unless specifically ordered otherwise. Social Security Ruling 96-1p (Appendix 7 See also Appendix 8). Apparently, she has now ordered them to disregard the duly promulgated regulations and procedural rules set forth in the HALLEX. Under those rules and regulations, the ALJ has the discretion to determine the claimant has good cause for a change of

venue for an in person hearing. The ALJ's failure to exercise that discretion based on unpromulgated verbal directions from someone in the bureaucracy is a violation of procedural due process. *Accardi v. Shaughnessy*, 347 U.S. 260, 268, 74 S.Ct. 499, 98 L.Ed. 681 (1954).

It is clear that the Commissioner violated Mr. McDevitt's right to due process, and she did not follow her own rules and regulations by terminating Mr. McDevitt's ongoing benefits without adequate notice and an opportunity for an in person hearing at the hearing office closest to his home.

III. The irreparable nature of the threatened injury.

The Commissioner has already found Mr. McDevitt to be disabled. As a result, he was receiving $710.00 per month in Supplemental Security Income disability benefits and Medicaid coverage. As a result of the violation of Mr. McDevitt's procedural due process rights, his disability benefits were cut off effective December 1, 2013, and his Medicaid coverage has been, or soon will be, terminated. Mr. McDevitt is a homeless, fifty nine year old man with no income who cannot afford any medical care to treat his disabling conditions. This Court has previously determined: "The loss of medical care is an irreparable injury which no amount of benefits may repair." *Rice v. Apfel*, 1999 WL 33597094 (M.D. Fla.) (Appendix 4). See also *Dunnells v. Commissioner of Social Sec.*, 2013 WL 1909590 (M.D.

Fla.) Appendix 5A) and 2013 WL 1909605 (M.D. Fla.) (Appendix 5B), and *Christensen v. Apfel*, 1999 WL 33595519 (M.D. Fla.) (Appendix 6).

IV. Potential harm to the Commissioner of Social Security.

The Commissioner of Social Security has already determined that Mr. McDevitt has been disabled since November 1, 2007. The Commissioner already has staff in place to send the notices required by her regulations. An ALJ has already conducted an administrative hearing on the issue of whether Mr. McDevitt has been disabled and determined that he has. The Appeals Council has already affirmed that decision (Appendix 3).

The Commissioner has a hearing office in Orlando that is fully staffed with sixteen administrative law judges and necessary support staff. Providing Mr. McDevitt with an in person hearing in the hearing office nearest his residence to determine his eligibility, as required by the Commissioner's own rules and regulations, will not add any cost to the government. In fact it will save money. The hearing office is required by the Commissioner's own rules to pay mileage to claimants, attorneys, and witnesses if they must travel more than seventy five miles to attend a hearing. Hallex I-2-0-70 (Appendix 10). Mr. McDevitt provided documentation to the ALJ that the Orlando Office of Disability Adjudication and Review is only 47.76 miles from his residence. Therefore, the

government would not have to pay mileage if they complied with their own rules and regulations and allowed Mr. McDevitt to attend a hearing in Orlando. On the other hand, mileage would have to be paid if an in person hearing is scheduled in Jacksonville because the hearing office is 97.68 miles from Mr. McDevitt's residence. This applies to all residents of Volusia County which is the only county in the Jacksonville ODAR geographic jurisdiction which is more than seventy five miles from the hearing office. Social Security confirmed that mileage in the amount of $40,048.82 had been paid from January 1, 2013 through July 24, 2013 (Appendix 12). Mr. McDevitt is unable to travel from Volusia County to Jacksonville. Scheduling his hearing in Orlando would not cost the government any additional expense. In fact, the Commissioner would save more than $40,000.00 each year by complying with her own rules and regulations.

V. Public interest.

Congress passed the Supplemental Security Income and Medicaid programs to provide disability benefits and medical care to disabled people. The Commissioner has promulgated rules and regulations to protect people from wrongful termination of those benefits and to provide in person hearings to claimants who request them. Procedural due process mandates

that the Commissioner follow his own rules and regulations. The public has an interest in the rule of law. That rule of law protects the public from arbitrary termination of duly authorized benefits without proper notice and an opportunity to be heard. The public has an interest in having the Commissioner of Social Security make some attempt to accommodate the needs of the homeless and disabled in the community. Making sick and homeless people travel hundreds of miles more than they need to have an in person hearing is not in the public interest. Especially since the public has to pay more than $40,000.00 for such an unnecessary inconvenience to the neediest in our community.

It is respectfully suggested that Ordering the Commissioner to reinstate Mr. McDevitt's Supplemental Security Income until this Court has had the opportunity to review the appeal under 42 U.S.C. 405(g) is in the public interest.

VI. Exhaustion of administrative remedies.

Under the circumstances of this case, Mr. McDevitt was not required to exhaust all administrative remedies. See *Dunnells v. Commissioner of Social Security*, 2013 WL 1909590 (M.D. Fla.) (Appendix 5A and 5B). Even so, Mr. McDevitt has exhausted his administrative remedies. The action challenged was taken after a video administrative hearing. After the action

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was taken, Mr. McDevitt's attorney sent a letter to the ALJ asking him to take corrective action (Appendix 13). After more than a month, a second follow up letter, and calls to his office, the ALJ has refused to revise his decision. Meanwhile, Mr. McDevitt has no income and no medical coverage, and he is unable to work because he is disabled. Mr. McDevitt presented a detailed letter to the Social Security office, and asked them to take corrective action (Appendix 14). He was told he would have to file an appeal of the ALJ's decision. Since this case was previously remanded from federal court, the Commissioner's Appeals Council had the right to review the ALJ's decision within sixty days. They did not do so. In addition, the Appeals Council is bound by Social Security Ruling 96-1p ordering her ALJ's to disregard any district court decision which may conflict with SSA's interpretation of the Social Security Act or regulations unless specifically ordered otherwise (Appendix 7). Presumably, this would include all the due process court cases set forth above. 20 C.F.R. § 404.984(a) provides that the ALJ decision will become the final decision of the Commissioner which is appealable to the district court in any remand case whenever the Appeals Council does not assume jurisdiction within sixty days.

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SUMMARY

In summary, the Commissioner has wrongfully terminated Mr. McDevitt's Supplemental Security Income disability benefits and Medicaid coverage without providing him with advance notice and an in person administrative hearing as required by the Commissioner's own rules and regulations. As a result, Mr. McDevitt is suffering irreparable injury. Under the circumstances set forth above, it is respectfully suggested that this Court has jurisdiction to enter a preliminary injunction in the form of a writ of mandamus ordering the Commissioner to reinstate Mr. McDevitt's Supplemental Security Income disability benefits and Medicaid pending a full resolution of the issues before the Court.

Respectfully submitted,

s/Richard A. Culbertson
RICHARD A. CULBERTSON
3200 Corrine Drive
Orlando, FL 32803
(407) 894-0888 FAX: 407-898-2737
Florida Bar Number: 0876577
Email: CulbertsonLaw@msn.com

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 23rd day of January, 2014, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system. I further certify that I hand delivered an accurate copy with all appendices to the Office of the U.S. Attorney at 400 West Washington Street, Suite 300, Orlando, FL 32801; emailed a copy with all appendices to John F. Rudy, III, Assistant United States Attorney, at john.rudy@usdoj.gov; and mailed a copy with all appendices certified return receipt to:

Office of the Attorney General
Department of Justice
Room B-103
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

And

Office of Regional Chief Counsel, Region 4
Social Security Administration
Atlanta Federal Center
61 Forsyth Street, S.W., Suite 20T45
Atlanta, GA 30303-8920

s/Richard A. Culbertson
Richard A. Culbertson

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JOHN M. MCDEVITT,

Plaintiff,

v. **Case No: 6:13-cv-1985-Orl-KRS**

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER
(And Direction to the Clerk of Court)

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION: **MOTION TO REMAND TO AGENCY (Doc. No. 15)**

FILED: **February 3, 2014**

THEREON it is **ORDERED** that the motion is **GRANTED**.

MOTION: **VERIFIED MOTION FOR PRELIMINARY INJUNCTION (Doc. No. 10)**

FILED: **January 23, 2014**

THEREON it is **ORDERED** that the motion is **DENIED as moot**.

Pursuant to the settlement reached by the parties, it is **ORDERED** as follows:

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1. The Commissioner will reinstate her final decision finding Plaintiff disabled as of November 1, 2007;
2. The Commissioner will reinstate Plaintiff's Supplemental Security Income Benefits back to the date they were terminated, December 1, 2013;
3. The Appeals Council will review the remaining issues raised in this appeal and give Plaintiff the opportunity to present arguments on those issues;
4. The case is **REMANDED** pursuant to sentence four of § 405(g) for further proceedings consistent with the parties' undertaking; and,
5. The Clerk of Court is directed to issue a Judgment consistent with this Order and, thereafter, to close the file.

DONE and **ORDERED** in Orlando, Florida on February 4, 2014.

Karla R. Spaulding
KARLA R. SPAULDING
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

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EX. D

Craig v. Colvin, 2016 U.S. Dist. LEXIS 62274

Copy Citation

United States District Court for the Middle District of Florida, Fort Myers Division

May 11, 2016, Decided; May 11, 2016, Filed

Case No: 2:16-cv-351-FtM-99CM

Reporter
2016 U.S. Dist. LEXIS 62274 *

MARY CRAIG, Plaintiff, v. CAROLYN COLVIN, Acting Commissioner of Social Security, Defendant.

Core Terms

temporary restraining order, subject-matter

Counsel: **[*1]** For Mary Craig, Plaintiff: Carol Ann Avard, Douglas D. Mohney, Mark V. Zakhvatayev, Michael G. Sexton, LEAD ATTORNEYS, Avard Law Offices, PA, Cape Coral, FL.

Judges: JOHN E. STEELE, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN E. STEELE

Opinion

OPINION AND ORDER

This matter comes before the Court on review of plaintiff's Verified Complaint (Doc. #1) and Motion for Temporary Restraining Order (Doc. #3) filed on May 10, 2016. Plaintiff seeks to preclude Administrative Law Judge (ALJ) Larry J. Butler from hearing plaintiff's case scheduled for May 11, 2016, due to his bias, and to protect plaintiff's constitutional right to a full and fair hearing. (Doc. #1, ¶ 1.) For the reasons set forth below, the Verified Complaint is dismissed for lack of subject-matter jurisdiction, and the Motion for a temporary restraining order will be denied as moot.

A complaint must set forth "a short and plain statement of the grounds for the court's jurisdiction". Fed. R. Civ. P. 8(a)(1). The Court "should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings. Indeed, it is well settled that a federal court is obligated to inquire into

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subject matter jurisdiction *sua sponte* whenever it may be lacking." **[*2]** Univ. of S. Alabama v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999) (collecting cases). If the Court determines "at any time" that it lacks subject-matter jurisdiction, the Court must dismiss the case. Fed. R. Civ. P. 12(h)(3).

The Verified Complaint (Doc. #1) provides that it is an action for a temporary restraining order pursuant to Local Rule 4.05. Plaintiff asserts jurisdiction pursuant to 28 U.S.C. § 1361, for mandamus relief, and § 1331, because plaintiff asserts a violation of due process. Plaintiff also asserts jurisdiction pursuant to 42 U.S.C. § 405(g) "because this case involves a constitutional claim wholly collateral to the substantive claim of entitlement to disability benefits." (Doc. #1, ¶ 2.) Plaintiff, through counsel, requested that ALJ Butler recuse himself from the case however he declined to do so without a stated reasons or written explanation. (Doc. #1, ¶¶ 5, 7, 8.) Plaintiff sought a recusal alleging bias, an inability to follow Commissioner's rules and policies based on public statements, Butler's pending lawsuit against the Commissioner, and the Commissioner's complaint against Butler. Plaintiff contacted the Hearing Office Chief ALJ, the Acting Regional Chief ALJ, and the Division of Quality Services about the request to withdraw but no relief was afforded with regard to the refusal to provide a stated **[*3]** reason for denying recusal. (Id., ¶ 8.) Plaintiff alleges that administrative remedies were exhausted and no other adequate remedy is available. (Id., ¶ 9.) Plaintiff seeks injunctive relief to prevent Butler from presiding over the hearing and plaintiff's case.

"First, judicial review under the federal-question statute, 28 U.S.C. § 1331, is precluded by 42 U.S.C. § 405 (h)." Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449, 456, 119 S. Ct. 930, 142 L. Ed. 2d 919 (1999). See also 42 U.S.C. § 405(h) ("No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."). Middle District of Florida Local Rule 4.05, which addresses motions for temporary restraining orders, also does not provide a basis for subject-matter jurisdiction because only Congress can create federal subject-matter jurisdiction. Kontrick v. Ryan, 540 U.S. 443, 452, 454, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). See also Fed. R. Civ. P. 82 ("These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.").

Plaintiff also appears to allege jurisdiction and a claim directly under the Due Process Clause of the Fifth Amendment, and that no other means are available to vindicate her rights. As discussed below, plaintiff does have other avenues and a due process claim as a basis for jurisdiction cannot stand when Congress has provided **[*4]** for relief, and no special factors cause hesitation in the absence of affirmative action by Congress. Davis v. Passman, 442 U.S. 228, 245, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979); Butz v. Economou, 438 U.S. 478, 503, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971); Bell v. Hood, 327 U.S. 678, 682, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

"The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." Heckler v. Ringer, 466 U.S. 602, 616, 104 S. Ct. 2013, 80 L. Ed. 2d 622 (1984). To the extent that plaintiff may be asserting a procedural due process claim as a basis for jurisdiction, such a claim is frivolous on its face. The administrative review process provides procedures if an ALJ does not withdraw upon objection or a request for disqualification, and clearly state that "you may, **after the hearing**, present your objections to the Appeals Council as reasons why the hearing decision should be revised or a new hearing held before another administrative law judge." 20 C.F.R. § 404.940 (emphasis added). Additionally, a district court's review of the final decision of the Commissioner can include the failure to recuse an ALJ. E.g., Jarrett v. Comm'r of Soc. Sec., 422 F. App'x 869, 874 (11th Cir. 2011). Since plaintiff as not exhausted all other avenues of relief, mandamus relief is not appropriate. Additionally, no final decision has been rendered so as to provide a basis for judicial review under 42 U.S.C. 405(g).

Accordingly, it is hereby **[*5]**

ORDERED:

1. The Verified Complaint (Doc. #1) is **dismissed** without prejudice for lack of subject-matter jurisdiction.
2. Plaintiff's Motion for Temporary Restraining Order (Doc. #2) is **DENIED as moot**.
3. The Motion to Proceed In Forma Pauperis (Doc. #3) is **DENIED**.

D2

4. The Clerk shall close the case.

DONE and ORDERED at Fort Myers, Florida, this 11th day of May, 2016.

/s/ John E. Steele

JOHN E. STEELE

SENIOR UNITED STATES DISTRICT JUDGE

D7

May 2016

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MARY CRAIG,
Plaintiff,

vs.

CAROLYN COLVIN,
Acting Commissioner of
Social Security,
Defendant.
_____/

CASE NO:

PLAINTIFF'S VERIFIED COMPLAINT

The above-named plaintiff makes the following representations to this court for the purpose of having the court issue a temporary restraining order:

1. This is an action for a Temporary Restraining Order, pursuant to Local Rule 4.05 ordering the Commissioner of Social Security to preclude Administrative Law Judge ("ALJ") Larry Butler from hearing Plaintiff's Social Security Disability case, currently scheduled for May 11, 2016 at 2:45 p.m., due to ALJ Butler's bias, and to protect Plaintiff's constitutional right to full and fair hearing.

2. The district court has jurisdiction pursuant to 28 U.S.C. § 1361 "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff". The court has jurisdiction based on 28 U.S.C. § 1331(a) because the Plaintiff files the present action to prevent violation of her constitutional right to a full and fair hearing. The court also has jurisdiction based on 42 U.S.C. § 405(g) because this case involves a constitutional claim wholly collateral to the substantive claim of entitlement to disability benefits.

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D4

3. The Commissioner of Social Security must comply with the clearly, plainly defined, nondiscretionary duties as set forth in the Social Security Regulations 20 C.F.R. §§ 404.940, 416.1440 stating that "An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision."

4. Plaintiff is a U.S. Citizen, a resident of Cape Coral, Florida, County of Lee, in the judicial district of this Court.

5. On April 5, 2016, Plaintiff through his counsel requested Administrative Law Judge, Larry J. Butler to recuse himself from hearing the case (see Ex A, attached), with hearing currently scheduled for on May 11, 2016 at 2:45 p.m., on the grounds of bias and his inability to follow Commissioner's rules and policies as evidenced by his public statements, his involvement in a lawsuit against the Commissioner, and the Commissioner's Merits System Protection Board complaint against ALJ Butler. (See Ex. A, attached).

6. If ALJ Butler is permitted to hear Plaintiff's case, Plaintiff will suffer an irreparable injury, including her constitutional right to a full and fair hearing because ALJ Butler is biased and/or there is a probability he is biased and unable to make an impartial decision.

7. Without written explanation prior to the hearing of the specific reasons, ALJ Butler decided he would not disqualify himself and he would proceed to hearing (see Exhibits A-D). ALJ Butler's actions do not comply with 20 C.F.R. §404.940 and 416.1440), as well as the policies and procedures that the defendant mandates with regard to requests for disqualification of an ALJ. That is, ALJ Butler failed to provide a formal written response prior to the hearing and failed to explain the reasons for his failure to disqualify himself, as required pursuant to Hearings, Appeals, and Litigation Law Manual ("HALLEX") I-2-1-60C which mandates prior to the hearing that the ALJ to "set forth the reasons in writing" .... ALJ Butler's failure to set forth written reasons for not withdrawing violates the claimant's constitutional procedural due process rights, under the fifth amendment. The administrative case should not proceed without the ALJ setting forth in writing his reasons for not withdrawing.

8. In addition to requesting withdrawal from ALJ Butler, Plaintiff's counsel has contacted the Hearing Office Chief ALJ Duane D. Young, Acting Regional Chief ALJ Sherry Thompson, and the Division of Quality Services (DQS), about this request to withdraw (Exhibits A-D). No relief has been forthcoming and the plaintiff's hearing is scheduled to take place on May 11, 2016. In addition, no relief is afforded as there is no appeal of a decision to refuse to give notice of written reasons for denying a recusal request.

9. Plaintiff has exhausted all options and is left with no choice, but to present the current action against the Commissioner. Given the inaction on the part of the Commissioner, unless this Court will take action, Plaintiff's case will be heard by a biased judge.

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1) That this Court issue a injunction against the Defendant and prevent ALJ from holding the Plaintiff's hearing on May 11, 2016, and to reassign this case to another ALJ.

2

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2) For costs of suit incurred herein and Equal Access to Justice Act attorney fees.

3) For such other relief as the court deems just and proper.

DATED this ____ day of May, 2016.

s/Douglas D. Mohney
DOUGLAS D. MOHNEY
Attorney for Plaintiff
P.O. Box 101110, Cape Coral, FL 33910
(239) 945-0808
FL Bar No. 0997500
dmohney@avardlaw.com

s/ Carol Avard
Carol Avard, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 0834221
(239) 945-0808
Email: cavard@avardlaw.com

/s Mark Zakhvatayev
Mark Zakhvatayev, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 0086609
Telephone: (239) 945-0808
Email: mvzesq@avardlaw.com

/s Michael Sexton
Michael Sexton, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 83407
Telephone: (239) 945-0808
Email: msexton@avardlaw.com

FILED

2016 MAY 10 PM 4:01

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MARY CRAIG,
Plaintiff,

vs.

CAROLYN COLVIN,
Acting Commissioner of
Social Security,
Respondent.
_____/

CASE NO:
2:16-CV-351-FtM-99CM

MOTION FOR TEMPORARY RESTRAINING ORDER

The Plaintiff moves this Court for a Temporary Restraining Order, pursuant to the Local Rule 4.05 and Fed. R. Civ. P. 65(b), asking that the Court order the Commissioner of Social Security to preclude Administrative Law Judge ("ALJ"), Larry J. Butler from hearing the Plaintiff's Social Security Disability case, currently scheduled for May 11, 2016, at 2:45 p.m, on the grounds of ALJ Butler's bias, his inability to provide the Plaintiff with a full and fair hearing, and Commissioner's inability to afford the Plaintiff her due process right. In support of the present motion, the Plaintiff states the following:

A. Jurisdiction and Applicable Principles

The district court has jurisdiction pursuant to 28 U.S.C. § 1361 "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff".

The court has jurisdiction based on 28 U.S.C. § 1331(a) because the Plaintiff files the present action to prevent violation of her constitutional right to a full and fair hearing. Under the more strict standards for ensuring due process compliance in Social Security hearings, the claimant files this action to prevent violation of his constitutional right to a full and fair hearing

under the due process clause of the Constitution. *Robinson v. Comm'r of Soc. Sec'y*, No. 07-3455 (JAG), 2009 U.S. Dist. LEXIS 26332, at *21 (D.N.J. Mar. 30, 2009) (holding "due process requirement of impartial decision maker is applied more strictly in administrative proceeding than in court proceedings because of the absence of procedural safeguards normally available in judicial proceedings."). *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) and it is "axiomatic that '[trial before 'an unbiased judge' is essential to due process.'" (*citing Hummel v. Heckler*, 736 F.2d 91, 93 (3rd Cir.1984)(quoting *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971)).

The court has jurisdiction based on 42 U.S.C. § 405(g) because this case involves a constitutional claim wholly collateral to the Plaintiff's substantive claim for entitlement to disability benefits. *Matthews v. Eldridge*, 424 U.S. 319, 330-32 (1976); *Dunnells v. Comm'r of Soc. Sec'y*, No. 5:12-CV-484, 2013 WL 5944183, at *1-3 (M.D. Fla. Nov. 6, 2013).

A temporary restraining order may be granted without notice only if: (1) "it clearly appears from specific facts . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition," and (2) the applicant "certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required." Local Rule 4.05. Furthermore, this Memorandum is required to address: (i) the likelihood that the moving party will ultimately prevail on the merits of the claim; (ii) the irreparable nature of the threatened injury; (iii) the potential harm that might be caused to the opposing parties or others if the order is issued; and (iv) the public interest. Local Rule 4.05; *see also Parker v. State Bd. of Pardons and Paroles*, 275 F. 3d 1032, 1034-35 (11th Cir. 2001).

A. Factual Background

The Plaintiff is a claimant who filed an application for a period of disability and Disability Insurance Benefits before the Social Security Administration. The Plaintiff has an administrative hearing on the merits scheduled to take place on Wednesday, May 11, 2016, at 2:45 p. m, before ALJ Butler.

On April 5, 2016, the Plaintiff attorney's office submitted a written request that ALJ Butler recuse himself from hearing Plaintiff's case on the grounds of bias (Exhibit A). On April 13, 2016, the Plaintiff attorney's office followed up on the request (Exhibit B). On April 19, 2016, the Plaintiff attorney's office had a conversation with "Tony" at ALJ Butler's office and then sent a fax to the ALJ to confirm to confirm the telephone conversation with "Tony" that Judge Butler has decided that he will not recuse himself and the hearing will go as planned (Exhibit C). On April 22, 2016, Plaintiff attorney's office sent a letter to "Tony" confirming this telephone conversation (Exhibit D). Noteably, there were no reasons given for Butler's decision.

Contrary to the Hearing office policies and procedures, requiring an ALJ to respond before the hearing, in writing with the reasons why a recusal or withdrawal has not been issued, HALLEX I-2-1-60C, the Plaintiff obtained no written direct response from ALJ Butler prior to the hearing. On April 19, 2016. Chief Administrative Law Judge at the Fort Myers hearing office, Duane D. Young, issued a general letter stating that "it is incumbent upon that ALJ to recuse himself or herself from a particular case if they feel they cannot adjudicate the case fairly." (Exhibit E). The law does not provide for any appeal of an ALJ's failure to provide written reasons for denying a recusal request prior to a hearing. In spite of plaintiff's written and oral requests to recuse and/or withdraw, to-date the Plaintiff has not received any written response to her request for the ALJ Butler to recuse himself. With the hearing only days away, Plaintiff is faced with no choice, but to bring the present action to avoid unfair and biased

adjudication by ALJ Butler. ALJ Butler is aware that he must provide Notice of the reasons for denying recusal requests to the plaintiff prior to the hearing.

A. Substantial likelihood exists that the Plaintiff will prevail in her claim to preclude ALJ Butler from hearing her case because ALJ Butler has made extrajudicial comments to the Oversight Committee indicating personal bias against the parties which provide evidence in disability hearings and is convinced that Social Security disability administrative hearings should be adversarial proceedings with taxpayers' representatives opposing claimants who apply for disability.

Social Security Act and Administrative Procedure Act implicitly guarantee impartial decisions of benefit applicants' claims. *Kendrick v. Sullivan*, 784 F. Supp. 94, 103 (S.D.N.Y. 1992) (citing 42 U.S.C. §§ 405(b)(1), 1383(c)(1); 5 U.S.C. §§ 4301(2)(D), 5372, 7521(a)). Trial before 'an unbiased judge' is essential to due process." *Miles v. Chater*, 84 F.3d 1397, 1401 (11th Cir. 1996); *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S. Ct. 1778, 1780, 29 L. Ed. 2d 423, 427 (1971). A claimant is entitled to a hearing that is both full and fair. *Clark v. Schweiker*, 652 F.2d 399, 404 (5th Cir. 1981).

Furthermore, applicable regulations state that "[a]n administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party or has any interest in the matter pending for decision." 20 C.F.R. § 404.940, 416.1440. *See also* The Hearing, Appeals, Litigation, and Law ("HALLEX")[1] I-2-1-60. Moreover, the Supreme Court noted that "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Therefore, a finding of actual bias is not required for the Court to take action and the probability of bias maybe sufficient. *See id.*

[1] "The Hearings, Appeals and Litigation Law (HALLEX) manual communicates Office of Disability Adjudication and Review (ODAR) guiding principles and procedures to ODAR adjudicators, i.e., administrative law judges (ALJ), attorney advisors, administrative appeals judges (AAJ), and appeals officers (AO), and to their support staff." See HALLEX I-1-0-3, *available at* http://ssa.gov/OP_Home/hallex/I-01/I-1-0-3.html

Extrajudicial comments may properly be grounds for judicial disqualification. In *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), the Court reversed a refusal to disqualify a judge where the defendants were protestants to abortion and a trial judge appeared on public television with a statement that "these people are breaking the law". In the part of the decision relevant to the present case, Court of Appeals stated:

> Two messages were conveyed by the judge's appearance on national television in the midst of these events. One message consisted of the words actually spoken regarding the protesters' apparent plan to bar access to the clinics, and the judge's resolve to see his order prohibiting such actions enforced. The other was the judge's expressive conduct in deliberately making the choice to appear in such a forum at a sensitive time to deliver strong views on matters which were likely to be ongoing before him. Together, these messages unmistakenly conveyed an uncommon interest and degree of personal involvement in the subject matter. It was an unusual thing for a judge to do, and it unavoidably created the appearance that the judge had become an active participant in bringing law and order to bear on the protesters, rather than remaining as a detached adjudicator.

Id. at 995.

In this case, ALJ Butler engaged in extrajudicial comments publicly declaring at an House Committee hearing his belief that doctors, hospitals, clinics, claimants, their attorneys, their non-attorney representatives, Medicare and Medicaid providers, and other parties are "stakeholders" interested in seeing the claim paid (Exhibit F, p. 14; Exhibit E, p. 2). Specifically, in his testimony before House Committee, unsanctioned by the Commissioner, ALJ Butler stated:

> [W]e are talking about payment after two years on Medicare, or earlier than that on Medicaid with the SSI, Supplemental Security Income, program. Those monies go to doctors, they go to hospitals, they go to clinics, and all these third parties are interested in seeing that claim paid.

ALJ Butler's testimony before House Committee, June 27, 2013 (Exhibit F, pp. 1, 14). Similarly, in his written materials he submitted to the Committee, ALJ Butler stated:

> All of the 'stakeholders' identified above (claimants, attorneys, non-attorney representatives, Medicare and Medicaid providers, and others) have a stake in seeing a disability applicant paid. None of these 'stakeholders' will object if an individual capable of employment is erroneously awarded disability benefits.

(Exhibit E, p. 2). ALJ Butler also believes that medical providers receive tertiary from approved disability claims (Exhibit K, p. 2).

ALJ Butler's statements with regards to the medical providers indicate that he would be unable to properly follow the rules dealing with evaluating opinions of physicians who treated the Plaintiff or evaluated the Plaintiff at her request, i.e. the treating physician rule, which requires the ALJ to give substantial or considerable weight to the favorable opinions of claimants' treating physicians unless the ALJ can clearly articulate a "good cause" to the contrary. *Lewis v. Callahan*, 125 F.3d 1436, 1440 (11 Cir. 1997). ALJ Butler's belief that all medical providers are "stakeholders" interested in getting the claim paid suggest that he would be presumptive in addressing treating physicians' opinions. The ALJ may not assume that all physicians are bought and paid for. *Tavarez v. Commissioner of Social Sec'y*, ___ Fed. Appx. ___, 2016 WL 75424, at *5 (11th Cir. Jan. 7, 2016) ("the mere fact that a medical report is provided at the request of counsel or, more broadly, the purpose for which an opinion is provided, is not a legitimate basis for evaluating the reliability of the report"); *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998) (ALJ's general comment showing skepticism of a treating physician's credibility because "it was the job of the treating physician to be compassionate and supportive of the patient... . flies in the face of clear [Ninth Circuit] precedent."); *Lester v. Chater*, 81 F.3d 821, 823 (9th Cir. 1996) (The ALJ "may not assume that doctors routinely lie in order to help their patients collect disability benefits.").

ALJ Butler even goes as far as stating that disability programs is a "cash cow" for all these "stakeholders (Exhibit E, p. 3). ALJ Butler's unfair presumption that attorneys, clinics, doctors, hospitals, social workers, attorneys, all medical providers, pharmaceutical companies, etc., are stakeholders interested in having the claim paid deprives the Plaintiff and other claimants of a fair adjudication of their claims, especially in light of the fact that the burden to show disability is on the claimant. *Ellison v. Barnhart*, 355 F. 3d 1272, 1276 (11th Cir. 2003) ("[C]laimant bears the burden of proving that he is disabled, and, consequently, he is responsible for producing evidence in support of his claim.").

Furthermore, ALJ Butler believes that the disability adjudication process needs to be adversarial and should include a representative who represents the interests of tax payers (Exhibit F, p. 14). He believes that having a taxpayer representative in the disability adjudication process will "stop some of these paid out billion dollar judges" from paying thousands of cases (Exhibit F, p.14). Such ALJ Butler statements suggest the significant risk that he would act as counsel representing tax payers at disability hearings rather than as a judge who makes a neutral, impartial decision.

Such a "advocate-judge-multiple-hat" role is very inappropriate for an ALJ adjudicating disability hearing. In *Richardson v. Perales*, 402 U.S. 389, 410 (1971), the Court commented on the type of the approach proposed by ALJ Butler as follows:

> Neither are we persuaded by the advocate-judge-multiple-hat suggestion. It assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity. The social security hearing examiner, furthermore, does not act as counsel. He acts as an examiner charged with developing the facts. The 44.2% reversal rate for all federal disability hearings in cases where the state agency does not grant benefits, M. Rock, An Evaluation of the SSA Appeals Process, Report No. 7, U.S. Department of HEW, p. 9 (1970), attests to the fairness of the system and refutes the implication of impropriety.

Id. at 410. ALJ Butler's behavior and statements create too much of a risk that he would assume such an improper role at his administrative hearings. ALJ Butler's position also suggests that he would not be able to fulfill his duties as an ALJ which requires the ALJ to develop arguments both for and against granting benefits. *Sims v. Apfel*, 530 U.S. 103, 110-11 (2000) (stating that "Social Security proceedings are inquisitorial rather than adversarial" and ALJ has the duty "to investigate the facts and develop the arguments both for and against granting benefits.").

In sum, ALJ Butler publically expressed his views against parties which produce evidence in disability hearings and has advocated a radical change against claimants in Social Security disability system before the House Committee. ALJ Butler's statements and behavior strongly suggest that he would not be capable to fulfill his impartial, inquisitorial duties and to adjudicate Plaintiff's case in a fair manner. As such, there is substantial likelihood Plaintiff will eventually prevail on the merits to disqualify ALJ Butler from hearing her case.

B. Substantial likelihood exists that the Plaintiff will prevail in her claim to preclude ALJ Butler from hearing her case because of the large number of improprieties in ALJ Butler's conduct and personal views.

Plaintiff also has a number of other concerns regarding ALJ Butler's ability to adjudicate cases properly. The sheer number of these concerns creates a considerable risk that the ALJ would not be able to adjudicate Plaintiff's case properly. *Cf. Rosa v. Bowen*, 677 F. Supp. 782, 785 (D.N.J. 1988) (*citing Hankerson v. Harris*, 636 F.2d 893, 897 (2d Cir. 1980)) ("[e]ven where no one error, standing alone, would suffice to set aside an administrator's determination, a large number of errors can have the combined effect of rendering a hearing unfair and inadequate."). *See also Robinson v. Comm'r of Soc. Sec'y*,

No. 07-3455 (JAG), 2009 U.S. Dist. LEXIS 26332, at *21 (D.N.J. Mar. 30, 2009). These additional concerns are listed below.

First, Commissioner currently has an ongoing proceeding against ALJ Butler alleging that ALJ Butler's behavior undermined public confidence in the administrative judiciary process which serves as a good cause for a 60-day suspension (MSPB, p. 14). Commissioner's specific allegations are that: (1) ALJ Butler refused to use interpreters during the course of disability hearings; (2) failed to comply with a case processing directive and move certain cases along the process within specified time frame; and (3) engaged in conduct unbecoming when he objected to the Agency reassigning certain cases that were assigned to him (Exhibit L, pp.14-18).

Second, this court has already remanded cases based on appearance of bias on the part of ALJ Butler. *See McEnteer v. Comm'r. of Soc. Sec'y*, Case No. 2:15-cv-288-FtM (M.D. Fla. Dec. 14, 2015); *Hill v. Comm'r. of Soc. Sec.*, Case No. Case 2:14-cv-00708 (M.D. Fla. Mar. 31, 2016); *McCann v. Comm'r. of Soc. Sec.*, Case No. 2:14-cv-00265(M.D. Fla. Mar. 31, 2016). ALJ's actions in a "systematically biased manner in deciding cases" as evidenced by "numerous sharply worded criticisms coming from federal judges and magistrate judges contained in the decisions" may serve as grounds for finding bias. *See Kendrick*, 784 F. Supp. at 102-03 (S.D.N.Y. 1992).

Third, ALJ Butler filed a complaint against Social Security Administration and its agents alleging that he has not only incurred "disciplinary measures" against him for refusing to follow the Commissioner's rules and policies, including HALLEX (Exhibit G, pp. 4, 10). Because ALJ Butler refuses to follow the Commissioners rules and policies in adjudicating cases, he may not serve as an Administrative Law Judge.

Fourth, ALJ Butler, openly refuses to follow HALLEX, alleging that he is not bound by it, even though he was "reminded" by his superiors to follow these policies and reminded by his superiors that these policies are binding (Exhibit G, pp. 4-5, 10; Exhibit H, pp. 11-13).

Fifth, ALJ Butler refuses to follow the Agency's policy prohibiting use of Symptom Validity Tests (Exhibit G, p. 5; Exhibit H, pp. 19-21). Since assessing claimant's credibility is an important part of a disability claim, *Foote v. Chater*, 67 F.3d 1553, 1561-62 (11th Cir. 1995), ALJ Butler cannot perform adjudicate disability cases.

Sixth, ALJ Butler refuses to comply with the Agency job description, for the Administrative Law Judge because he refuses to follow policy instructions (Exhibit G, pp. 34-40). The ALJ who cannot comply with his job description should not be perform the ALJ job.

Seventh, ALJ Butler refuses to follow Commissioner's Regulations because he believes the claimants who cannot communicate well in English are "advantaged" (rather than disadvantaged) by the Medical-Vocational Guidelines (a.k.a. "grid rules) located in 20 C.F.R. Part 404, Subpt. P, Appx. 2 (Exhibit J, p. 1), even though congress enacted those rules to compensation claimants for the additional erosion in the number of jobs that would be available to claimants who do not communicate well in English.

Eighth, Hearing Office Chief Administrative Law Judge D'Alessio has previously taken cases away from ALJ Butler and Regional Chief Administrative Law Judge Ollie Garmon reprimanded him due to his failure to follow agency's rules and procedures, describing ALJ Butler's objections to these actions as "inappropriate" (Exhibit G, p. 7; Exhibit H, pp. 42, 45). The ALJ who disagrees with, but also refuses to follow the Commissioner's policies and rules, should not be hearing the Plaintiff's case or anyone else's cases.

Ninth, ALJ Butler believes the Agency retaliated against him for not following the Agency's policies (Exhibit G, p. 3). He believes this is a violation of his First Amendment rights (Exhibit G, p. 3). This statement suggests that ALJ Butler will continue to refuse to follow the Commissioner's policy.

Tenth, ALJ Butler refuses to follow his job description stating that it restricted him by creating excessively broad description of his job and was intended by the agency to chill, curtail, and infringe upon the ALJ's First Amendment Rights (Exhibit G, p. 12). These allegations coupled with the ALJ's refusal to follow the Agency's rules and policies suggests that the ALJ will continue not to follow them. If the ALJ disagrees with the Agency's rules and policies on the grounds that they violate his Constitutional Rights, he should recuse and/or disqualify himself from hearing all of the cases because he opposes the Commissioner at the claimants' expense.

Eleventh, ALJ Butler expects that the Agency will continue disciplining him (Exhibit G, p. 10, ¶ 16). This suggests that ALJ Butler will continue not following the Agency procedures at the expense of the Plaintiff and other claimants.

Twelfth, ALJ Butler disagreed with the District Court's Order adopting the Agency's decision to settle the "general bias" class action suit, *Padro v. Astrue*, No. 11-1788 (E.D.N.Y.), which involved five New York ALJs who were found to be "generally biased" and ordered to rehear over 4,000 cases (Exhibit G, p. 9).

Thirteenth, ALJ Butler refused to follow Chief ALJ Bice's Emergency Messages requiring ALJ to follow the Agency's policies (Exhibit G, p. 17).

Fourteenth, ALJ Butler believes Agency's policies violate Administrative Procedure Act, and therefore, refuses to follow them (Exhibit G, p. 16).

ALJ Butler may not properly hold a hearing without addressing these concerns. ALJ Butler refused to address the Plaintiff's concerns and stated that the Plaintiff would have to file the present action in order to address these concerns (Exhibit J, p. 1). Given these concerns and circumstances, the Plaintiff has substantial likelihood to prevail on the merits of the matter.

D. Notice

Plaintiff submitted her original request to ALJ Butler to recuse himself on April 5, 2016 (Exhibit A). To-date, ALJ Butler has failed to provide a response. Plaintiff followed up with ALJ Butler's office and was verbally informed that ALJ Butler will not recuse himself (Exhibits B, C, D). Again, no reasons were given.

Plaintiff notes that the proper procedure for ALJ Butler to follow is that prior to the hearing, he must "advise the claimant *in writing, setting forth the reasons for the decision;* HALLEX I-2-1-60C[2] (emphasis added). *See also Bacca v. Apfel*, Doc. No. C-98-3471 BZ, 1999 U.S. Dist. LEXIS 11847, at *10 (N.D. Ca. Jul. 16, 1999) (*citing* HALLEX I-2-1-60). The ALJ is required to follow HALLEX when it affects a claimant's rights. *Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir. Unit A 1981) (citing *Morton v. Ruiz*, 415 U.S. 199 (1974) ("As a general rule, where the rights of individuals are affected, an agency must follow its own procedure, even where the internal procedures are more rigorous than otherwise would be required."); *Cohan v. Comm'r of Soc. Sec'y*, No. 6:10-CV-719, 2011 WL 3319608, at *5 (M.D. Fla. July 29, 2011). In this case, ALJ Butler failed to provide a written response prior to the hearing and failed to provide the reasons why he should not recuse and/or disqualify himself in violation of HALLEX. The ALJ's failure to provide a written response prior to the hearing to the Plaintiff's request

[2] http://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-60.html

outlining reasons for his refusal to recuse and/or disqualify himself violates Plaintiff's rights to a full and fair hearing.

There is no appeal of an ALJ's decision not to provide reasons prior to a hearing to a request to recuse. While the Plaintiff received a general letter from the Chief Administrative Law Judge in Fort Myers, Duane Young, that the Plaintiff can then seek relief after the decision on the merits of the case, to collateral due process issues of allegations of bias from Appeals Council (Exhibit I), by then, of course, in case of a denial by ALJ Butler, the damage would have been already done and the disabled Plaintiff would have to go through a lengthy[3] appeal process.

Given these circumstances and the fact that the Plaintiff's hearing is scheduled for Monday, March 10, 2014, at 2:45 p.m., the Plaintiff provided sufficient notice to the Commissioner of the present action.

E. Irreparable injury to the Plaintiff

Irreparable injury is distinguished from a mere injury, which can be adequately compensated through the award of money. *United States v. Jefferson County*, 720 F.2d 1511, 1520 (11th Cir. 1983). The Plaintiff will suffer an irreparable injury because the Plaintiff has a hearing scheduled for Wednesday, May 11, 2016, at 2:45 p.m. with ALJ Butler who will not fairly adjudicate the Plaintiff's claim. The Plaintiff's claim runs a significant risk of being denied by the present ALJ who is biased, which means the Plaintiff will not have access to benefits and health insurance he needs for treatment of his disabling condition. Furthermore, as mentioned above, without the relief the Plaintiff requests, ALJ Butler will hear the case and issue a biased decision.

[3] According to the most current statistics available, average processing time for the Appeals Council for the fiscal year 2014 was 374 days. https://www.ssa.gov/appeals/appeals_process.html#&a0=6 , last visited May 4, 2016.

F. The Potential Harm to the Opposing Parties and Others and Public Interest

The harm to the Commissioner is minimal as the Commissioner can reassign the case to a different judge or reschedule the hearing—something that the Commissioner does routinely. Any nuisance to the Commissioner is a significantly outweighed by public interest as ALJ who is biased and is unable to properly perform his judicial duties should not be permitted to adjudicate the Plaintiff's case or the case of any other claimant.

G. Security

While a temporary restraining order will not be issued without security by the applicant under Fed. R. of Civ. P. 65(c), the claimant requests that security be waived. The Court "has wide discretion in the matter of requiring security and if there is an absence of proof showing a likelihood of harm, certainly no bond is necessary." *Brown v. Callahan*, 979 F. Supp. 1357, 1363 (D. Kan. 1994) (*citing Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir. 1964).

Here, as noted above, the Commissioner will suffer minimal damage at best as the Commissioner can simply reassign the case to a different judge or reschedule the hearing—something that the Agency does routinely.

WHEREFORE, for all of the foregoing reasons, the Plaintiff requests that this Court issue a Temporary Restraining Order against ALJ Butler to preclude him from hearing the case for at least for the following 14 days, unless the matter is resolved beforehand.

Respectfully Submitted,

s/
DOUGLAS D. MOHNEY
Attorney for Plaintiff
P.O. Box 101110, Cape Coral, FL 33910
(239) 945-0808
FL Bar No. 0997500
Email: dmohney@avardlaw.com

s/ Carol Avard
Carol Avard, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 0834221
(239) 945-0808
Email: cavard@avardlaw.com

/s Mark Zakhvatayev
Mark Zakhvatayev, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 0086609
Telephone: (239) 945-0808
Email: mvzesq@avardlaw.com

/s Michael Sexton
Michael Sexton, Esq
Attorney for Plaintiff
Post Office Box 101110
Cape Coral, FL 33910
FL Bar No. 83407
Telephone: (239) 945-0808
Email: msexton@avardlaw.com