

UNITED STATES DISTRICT COURT  
DISTRICT OF RHODE ISLAND

PAULA M. RANALLO :  
 :  
 v. : C.A. No. 08-02A  
 :  
 MICHAEL J. ASTRUE, Commissioner :  
 of the Social Security Administration :

**MEMORANDUM AND ORDER**

This matter is before the Court for judicial review of a final decision of the Commissioner of the Social Security Administration (“Commissioner”) dismissing on res judicata grounds Plaintiff’s application for Social Security Disability Insurance Benefits (“DIB”) under the Social Security Act (“Act”), 42 U.S.C. § 405(g). Plaintiff filed her Complaint on January 2, 2008 seeking to reverse the decision of the Commissioner. On January 30, 2009, Plaintiff filed a Motion to Reverse the Decision of the Commissioner. (Document No. 14). On March 20, 2009, the Commissioner filed a Motion for an Order Upholding the Dismissal Order of the Commissioner. (Document No. 16).

With the consent of the parties, this case has been referred to me for all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Based upon my review of the record and the legal memoranda filed by the parties, I find that there is not substantial evidence in the record to support the Commissioner’s dismissal decision. Consequently, the Commissioner’s Motion for an Order Upholding the Dismissal Order of the Commissioner (Document No. 16) is DENIED, and Plaintiff’s Motion to Reverse the Decision of the Commissioner (Document No. 14) is GRANTED.

**Background**

On November 12, 2004, Plaintiff filed concurrent applications for Social Security Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”). Document No. 5-2; Aff. of Paul Halse, ¶ 4(a). Plaintiff was granted SSI on March 7, 2005 and denied DIB on March 8, 2005. Id. Plaintiff was found disabled for SSI purposes as of November 12, 2004 due to a mental impairment, i.e., an “affective disorder.” Id. Plaintiff was not found disabled for DIB purposes as of her date last insured, i.e., June 30, 2000. Id. Plaintiff did not appeal the DIB denial of March 8, 2005. Id. Plaintiff was not represented by counsel at that time. Id., Document No. 5-2 at 14.

Subsequently, on October 7, 2005, Plaintiff filed another application for DIB alleging disability as of January 1, 2000. (Tr. 22). This application was denied on the merits initially and on reconsideration. (Tr. 13-15, 18-20). Plaintiff requested a hearing before an Administrative Law Judge (“ALJ”). (Tr. 21). On January 29, 2007, the Chief ALJ sent a letter to Plaintiff’s counsel confirming receipt of the request for hearing and advising “[w]e will mail a Notice of Hearing to you...” and that “[t]he Notice of Hearing will state the issues the ALJ plans to consider at the hearing.” (Document No. 6-4). The letter also discussed the procedure for providing additional evidence and indicated that evidence “may be brought to the hearing.” Id. A Notice of Hearing was never issued to Plaintiff and an ALJ hearing was never held. Rather, on April 25, 2007, ALJ Gerald Resnick issued an Order dismissing Plaintiff’s request for hearing on res judicata grounds. (Tr. 8-10). In his Order, the ALJ applied Social Security Ruling (“SSR”) 91-5p<sup>1</sup> and found that “the deadline for requesting review should not be extended...because at the time of the previous

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<sup>1</sup> SSR 91-5p was “issued to avoid the improper application of res judicata...when the evidence establishes that a claimant lacked the mental capacity to understand the procedures for requesting review” and “to clarify [the Commissioner’s] policy on establishing good cause for missing the deadline to request review.” Social Security Ruling 91-5P, 1991 WL 208067, reprinted in West’s Social Security Reporting Service Rulings 1983-1991 at 809.

determination, [Plaintiff] had the mental capacity to understand the procedures for requesting review.” (Tr. 8). Without the benefit of a hearing, the ALJ found that “there is no evidence that [Plaintiff’s] mental impairment prevented her from timely filing a request for reconsideration.” Id. The ALJ also noted that Plaintiff’s counsel had not submitted any evidence despite being requested to do so “in a letter dated January 29, 2007.” (Tr. 9). The ALJ did not, however, point out that the letter also informed Plaintiff’s counsel that “[a]t the hearing, you and your client may present her case to the ALJ who will hear and decide it,” that the “Notice of Hearing will state the issues the ALJ plans to consider at the hearing,” and that evidence “may be brought to the hearing.” Document No. 6-4. As noted above, a “Notice of Hearing” was not issued, and an ALJ hearing was not held.

### **Discussion**

Plaintiff brought this action to “review [the Commissioner’s] dismissal of [her] application” for DIB. Document No. 1, ¶ 1. Although Plaintiff concedes that the dismissal “may not constitute a final decision” reviewable under 42 U.S.C. § 405(g), she predicates jurisdiction on her assertion of a “colorable constitutional claim.” Id., ¶¶ 2-3. In particular, Plaintiff asserts that:

- (1) she was “mentally ill and unable...to take appropriate action to appeal her March 8, 2005 denial of benefits,” id., ¶ 7;
- (2) the ALJ’s determination that she had the mental capacity to understand and act on her appeal rights is not supported by substantial evidence, id., ¶ 8; and
- (3) the ALJ’s dismissal of her “request for hearing without allowing her the opportunity to appear at a hearing on the issue of her mental capacity to appeal...amounted to a denial of her right to due process,” id., ¶ 9.

Plaintiff seeks an order vacating the ALJ's dismissal and remanding the case for a hearing on the issue of her mental capacity to understand and act on her right to appeal the denial of the original March 8, 2005 DIB application. Id.

By way of a motion to dismiss, the Commissioner initially challenged subject matter jurisdiction and argued that “[a]bsent a colorable constitutional claim, this Court does not have jurisdiction to review the ALJ’s decision to dismiss Plaintiff’s request for a hearing on grounds of res judicata since such a decision does not constitute a final decision of the Commissioner made after a hearing.” (Document No. 5 at 5). Thus, the issue was whether Plaintiff alleged a colorable constitutional claim. Since I concluded that Plaintiff had done so, I recommended that the Commissioner’s Motion to Dismiss be DENIED (Document No. 7) and District Judge Smith adopted my recommendation on June 12, 2008. (Document No. 8).

Although the First Circuit has not squarely addressed this issue, other circuits have held that a claimant’s “contention that his mental illness precluded him from litigating his claim for disability benefits because it prevented him from proceeding in a timely fashion from one administrative level to the next raises a colorable constitutional claim.” Elchediak v. Heckler, 750 F.2d 892 (11<sup>th</sup> Cir. 1985) (per curiam). See also Stieberger v. Apfel, 134 F.3d 37, 38-41 (2<sup>nd</sup> Cir. 1997) (recognizing existence of due process claim involving federal jurisdiction “upon a particularized allegation of mental impairment plausibly of sufficient severity to impair comprehension.”).

Plaintiff’s Complaint does not, on its face, make a “particularized” allegation of diminished “mental capacity” as contemplated by SSR 91-5p. Rather, Plaintiff generally alleges she was “mentally ill and unable to understand” her appeal rights and that the denial of a hearing by the ALJ violated her “right to due process.” Document No. 1, ¶¶ 7, 9. However, both sides submitted

portions of the administrative record in support of their positions which was considered in evaluating the Commissioner's unsuccessful motion to dismiss under Fed. R. Civ. P. 12(b)(1). See Gonzalez v. United States, 284 F.3d 281, 288 (1<sup>st</sup> Cir. 2002). These materials fleshed out the administrative history underlying Plaintiff's allegation and demonstrated to me the existence of a colorable constitutional claim.

For instance, the Commissioner approved Plaintiff for SSI as of November 12, 2004 due to the existence of a mental impairment. In other words, Plaintiff was found disabled at least from November 12, 2004 through the date of the SSI decision, i.e., March 7, 2005. The decision which Plaintiff failed to appeal was issued on March 8, 2005. Plaintiff was not represented by counsel at the time. The ALJ made a factual finding as to Plaintiff's mental capacity to understand the appeal procedures without giving Plaintiff notice that the issue would be considered and a reasonable opportunity to be heard. In fact, the Chief ALJ informed Plaintiff's counsel by letter that a "Notice of Hearing" was forthcoming which would "state the issues the ALJ plans to consider at the hearing." It also advised that Plaintiff would be able to "present her case to the ALJ" at the hearing and that "[e]vidence you cannot get to us before the hearing may be brought to the hearing." Without notice to Plaintiff and an opportunity to be heard, the ALJ dismissed Plaintiff's request for hearing and Plaintiff alleges that the ALJ made an unsupported factual finding as to her mental capacity in violation of her due process rights. Plaintiff made a sufficient showing to establish subject matter jurisdiction.

Plaintiff contends that this Court should vacate the ALJ's dismissal order and remand the case for further consideration of the mental capacity issue. Plaintiff argues that the denial of a hearing under these circumstances amounted to a denial of due process. She also contends that the

ALJ's findings regarding her mental capacity at the relevant time were not supported by substantial evidence since he failed to hold a hearing, obtained no testimonial evidence bearing on the issue decided and closed the record without giving Plaintiff notice and a fair opportunity to present evidence. In response, the Commissioner "acknowledges that it is unfortunate that the ALJ here did not send Plaintiff a preliminary notice of his intention to dismiss...her claim, along with offering an opportunity to supplement the record with any additional evidence relevant to this specific issue." (Document No. 16 at p. 5).

Plaintiff's position is supported by Judge Barbadoro's decision in Blake v. Soc. Sec. Admin., No. Civ. 02-112-B, 2003 WL 22703220 (D.N.H. Nov. 14, 2003) ("Blake II"). The claimant in Blake brought a due process challenge to an ALJ's decision under SSR 91-5p that his alleged mental illness did not sufficiently impair his ability to comprehend and utilize the appeal process. Blake v. Barnhart, No. CIV. 02-112-B, 2003 WL 1343021 at \*3 (D.N.H. March 18, 2003) ("Blake I"). In Blake I, Judge Barbadoro denied the Commissioner's Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) as the claimant had raised a "colorable constitutional claim." Subsequently, in Blake II, he granted a remand for a further hearing because the claimant "was not given a reasonable opportunity to prove his contention before an [ALJ]" and, in particular, that the ALJ failed to put the claimant on notice as to the nature of the res judicata inquiry, to inquire of the claimant as to his mental capacity at the relevant time, and to adequately develop the record. Blake II, 2003 WL 22703220 at \*1, 3.

I find Judge Barbadoro's reasoning in Blake II to be sound and, applying it to this case, conclude that a remand is warranted. The Commissioner argues in effect for a finding of harmless error and asserts that it would have "seriously considered" a voluntary remand if Plaintiff had "ever

tendered additional material evidence” on the issue of mental incapacity as defined in SSR 91-5p. (Document No. 16 at p. 5). A finding of harmless error would require this Court to conclude that the record supports the ALJ’s conclusion despite any legal error. The problem with relying on harmless error to affirm in this particular case is that there is not a complete administrative record. The ALJ never held a hearing or gave Plaintiff notice that he intended to rule without the benefit of a hearing. Thus, Plaintiff never had the opportunity to testify as to her mental capacity at the relevant time and, based on the January 29, 2007 letter (Document No. 6-4), had every reason to believe that a hearing would be held and the record would remain open at least through the conclusion of the hearing.

As did Judge Barbadoro in Blake II, I conclude that fundamental notions of fairness and due process require a remand in this case. In particular, in the January 29, 2007 letter, Plaintiff’s counsel was advised that evidence “may be brought to the hearing” and that he would have the opportunity to “see the evidence in your client’s file...on the date of the hearing.” (Document No. 6-4). However, in his Order of Dismissal, the ALJ faulted Plaintiff’s counsel for failing to submit “additional evidence” and states that he “was expressly requested to provide any additional evidence in a letter dated January 29, 2007.” (Tr. 9). The ALJ neglects to mention that the same letter indicated that “we will mail a notice of hearing to you” and that additional evidence “may be brought to the hearing.” (Document No. 6-4). While I offer no opinion as to whether an ALJ has the authority to dismiss a hearing request on res judicata grounds, I conclude that the unique circumstances of this case require remand for further hearing. These unique circumstances include the expectation of a hearing created by the January 29, 2007 letter and the ALJ’s selective reference to a portion of that letter in his decision. Also, the Commissioner approved Plaintiff for SSI through

March 7, 2005 based on a disabling mental impairment and the ALJ found that Plaintiff at the same basic time had the mental capacity to understand the appeal process during the sixty-day period commencing a day later on March 8, 2005, This appears to be a subtle distinction to draw without the benefit of a hearing.

**Conclusion**

For the foregoing reasons, the Commissioner's Motion for an Order Upholding the Dismissal Order of the Commissioner (Document No. 16) is DENIED, and Plaintiff's Motion to Reverse the Decision of the Commissioner (Document No. 14) is GRANTED. Final judgment shall enter in favor of Plaintiff vacating the ALJ's April 25, 2007 Order of Dismissal and remanding this case for further administrative proceedings consistent with this opinion.

/s/ Lincoln D. Almond  
LINCOLN D. ALMOND  
United States Magistrate Judge  
March 25, 2009