

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 17-2273

KENNETH EUGENE CARTER,

Plaintiff - Appellant,

v.

NANCY A. BERRYHILL, Acting Commissioner of Social Security,

Defendant - Appellee.

Appeal from the United States District Court for the Southern District of West Virginia,
at Charleston. Thomas E. Johnston, Chief District Judge. (2:15-cv-11485)

Submitted: February 15, 2018

Decided: February 16, 2018

Before WILKINSON, FLOYD, and THACKER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Kenneth Eugene Carter, Appellant Pro Se. Stephen Michael Horn, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia; Nicole Appalucci Schmid, Assistant Regional Counsel, Nora R. Koch, SOCIAL SECURITY ADMINISTRATION, Philadelphia, Pennsylvania, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Kenneth Eugene Carter appeals the district court's order adopting the magistrate judge's recommendation and dismissing without prejudice his complaint for lack of jurisdiction because Carter failed to exhaust the administrative remedies for his claim under the Social Security Act.* *See* 42 U.S.C.A. § 405(g), (h) (Supp. 2017); 20 C.F.R. § 416.1400(a) (2017). On appeal, we confine our review to the issues raised in the Appellant's brief. *See* 4th Cir. R. 34(b). Because Carter's informal brief does not challenge the district court's conclusion that he failed to exhaust his administrative remedies before filing his complaint, Carter has forfeited appellate review of the district court's dispositive ruling. *See Williams v. Giant Food Inc.*, 370 F.3d 423, 430 n.4 (4th Cir. 2004). Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

* The district court's order is final and appealable because the defect identified by the district court must be cured by something more than an amendment to the allegations in the complaint. *Goode v. Cent. Va. Legal Aid Soc'y*, 807 F.3d 619, 623-24 (4th Cir. 2015).

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

KENNETH EUGENE CARTER,

Plaintiff,

v.

CIVIL ACTION NO. 2:15-cv-11485

NANCY A. BERRYHILL,

Acting Commissioner of Social Security,

Defendant.

MEMORANDUM OPINION AND ORDER

In this civil action, Plaintiff Kenneth Eugene Carter seeks judicial review of the nonpayment of his retroactive Supplemental Security Income ("SSI") benefits. Pending is Defendant's Motion to Dismiss. (ECF No. 17.)

By standing order entered January 5, 2016, this action was referred to United States Magistrate Judge Omar J. Aboulhosn for entry of proposed findings and a recommendation for disposition ("PF&R"). Magistrate Judge Aboulhosn issued his PF&R on January 6, 2017, recommending the Court grant Defendant's Motion to Dismiss and dismiss Plaintiff's Complaint for failure to exhaust administrative remedies. Plaintiff filed timely objections on January 23, 2017.

I. BACKGROUND

Plaintiff is a West Virginia inmate incarcerated at Mount Olive Correctional Complex in Mount Olive, West Virginia. He has been incarcerated since at least May 2012 when he was

convicted by jury verdict of first-degree murder. *See State v. Carter*, 750 S.E.2d 650, 652 (W. Va. 2013) (per curiam).

Plaintiff obtained SSI benefits while the criminal proceedings were ongoing. On April 2, 2012, an administrative law judge (“ALJ”) issued a favorable decision finding Plaintiff disabled beginning on July 26, 2009. (Compl., ECF No. 2 at 4.) On April 25, 2012, the Social Security Administration (“SSA”) mailed a Notice of Award letter to Plaintiff, informing him that he was owed retroactive benefits in the amount of \$10,784.16. (*Id.* at 5.) Though Plaintiff appears to have been on pretrial detention at the time, the SSA neglected to inform him that he would not be eligible to receive any retroactive award of benefits while incarcerated. *See* 42 U.S.C. § 1383(b)(7)(A)(i).¹

Plaintiff filed this action on July 23, 2015 to seek payment of his retroactive SSI benefits. After being served on August 12, 2016, Defendant moved to dismiss on November 2, 2016. Defendant alleged that Plaintiff had failed to exhaust his administrative remedies and was thus precluded from seeking judicial review pursuant to 42 U.S.C. § 405(g). Meanwhile, also on August 12, 2016, Plaintiff served a “Petitioner for Execution Judgment Payment Owed” on the SSA, again seeking his retroactive benefits award. On September 19, 2016, the SSA responded

¹ The statute reads:

(7)(A) In the case of payment of less than the correct amount of benefits to or on behalf of any individual, no payment shall be made to such individual pursuant to this subsection during any period for which such individual--
(i) is not an eligible individual or eligible spouse under section 1382(e)(1) of this title because such individual is an inmate of a public institution that is a jail, prison, or other penal institution or correctional facility the purpose of which is to confine individuals as described in clause (ii) or (iii) of section 402(x)(1)(A) of this title . . .
until such person is no longer considered an ineligible individual or ineligible spouse under section 1382(e)(1) or 1382(e)(4) of this title.

with an official notice that the agency could not issue the award while Plaintiff remains in prison. Plaintiff was also informed that he had 60 days—until November 23, 2016—to request reconsideration review.

Plaintiff requested a reconsideration on November 10, 2016. (Pl. Response to Mot. to Dismiss Ex. Obj. Ex. 3, ECF No. 20-1.) The SSA affirmed its September decision and advised Plaintiff that he had 60 days to request a hearing before an administrative law judge. Plaintiff submitted a request for a hearing on December 19, 2016.² (Pl. Obj. Ex. A, ECF No. 23-1.)

As stated, the Magistrate Judge entered his PF&R on January 6, 2017. The Magistrate Judge found that this Court is precluded from judicial review of this matter until the SSA issues a final decision. Plaintiff objects to this proposal and to the recommended dismissal of his case.

II. LEGAL STANDARD

“The district judge must determine *de novo* any part of the magistrate judge’s disposition that has been properly objected to.” Fed. R. Civ. P. 72(b)(3). The Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. *Thomas v. Arn*, 474 U.S. 140, 150 (1985). Failure to file timely objections constitutes a waiver of *de novo* review. 28 U.S.C. § 636(b)(1); *see also Snyder v. Ridenour*, 889 F.2d 1363, 1366 (4th Cir. 1989); *United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984). In addition, this Court need not conduct a *de novo* review when a party “makes general and conclusory objections that do not direct

² Plaintiff submitted the documentation evidencing the SSA’s denial of his reconsideration request and his request for a hearing in conjunction with his objections to the PF&R. As such, the Magistrate Judge did not have access to these documents in drafting his recommendation.

the Court to a specific error in the Magistrate's proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982).

III. DISCUSSION

Plaintiff's objections are difficult to understand. He appears to argue that the SSA ignored him until he filed the instant civil action. (Pl.'s Obj. at 2.) He also contends that the continued withholding of his retroactive SSI benefits constitutes a violation of Plaintiff's constitutional rights. The Court has no evidence of any appeals Plaintiff made to the SSA prior to filing this action. Further, as explained below, the Court lacks jurisdiction to review Plaintiff's challenge to the SSA's decision.

Section 405(g) governs federal judicial review of claims arising under the Social Security Act. Under that provision, an individual may seek judicial review of the final decision of the Commissioner of Social Security within sixty days of notice of the decision. 42 U.S.C. § 405(g). "No findings of fact or decision of the Commission of Social Security shall be reviewed by any person, tribunal, or governmental agency" except as provided by § 405. § 405(h). Despite Plaintiff's claims of unfairness, the law is clear—the SSA's final decision is a prerequisite to judicial review.

It is similarly clear that the SSA had not issued a final decision on the matter of Plaintiff's right to retroactive benefits before he filed his Complaint. Under Social Security regulations, a "final decision" is achieved through completion of a four-step administrative process. That process requires (1) an initial determination; (2) reconsideration; (3) a hearing before an ALJ; and (4) Appeals Council review. 20 C.F.R. § 416.1400(a). At the fourth step, the Appeals Council may either deny the request for review, allowing the ALJ's decision to stand as the final decision

of the SSA, or grant the request for review and issue its own decision. 20 C.F.R. § 404.981. Only then may a claimant seek judicial review of the SSA's final decision by filing an action in federal district court. 20 C.F.R. § 422.210. Plaintiff had not initiated the administrative process prior to filing this action, and based on the record before the Court, it appears the process still has not proceeded beyond step two. The Court is compelled to dismiss this action because Plaintiff had not obtained a judicially reviewable final decision.

IV. CONCLUSION

Accordingly, the Court **OVERRULES** Plaintiff's objections (ECF No. 23), **ADOPTS** the PF&R (ECF No. 22), and **GRANTS** Defendant's Motion to Dismiss, (ECF No. 17.) Plaintiff's Complaint is **DISMISSED WITHOUT PREJUDICE**. (ECF No. 2.) The Clerk is **DIRECTED** to removed this action from the Court's active docket.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: October 5, 2017

A handwritten signature in black ink, appearing to read 'Thomas E. Johnston', is written over a horizontal line.

THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

KENNETH EUGENE CARTER,

Plaintiff,

vs.

CIVIL ACTION NO. 2:15-11485

**CAROLYN W. COLVIN
ACTING COMMISSIONER OF
SOCIAL SECURITY,**

Defendant.

PROPOSED FINDINGS AND RECOMMENDATION

This is an action seeking review of the nonpayment of Plaintiff's retroactive Supplemental Security Income (SSI) award under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. By Order entered January 5, 2016 (Document No. 4.), this case was referred to the undersigned United States Magistrate Judge to consider the pleadings and evidence, and to submit Proposed Findings of Fact and Recommendation for disposition, all pursuant to 28 U.S.C. § 636(b)(1)(B). Presently pending before the Court are the Defendant's Motion to Dismiss this action without prejudice because the Plaintiff had not exhausted his administrative remedies below prior to filing this action, and the Plaintiff's Response in Opposition. (Document Nos. 17 and 20.)

The *pro se* Plaintiff, Kenneth Eugene Carter¹, filed this action on July 23, 2015 (Document No. 2) styled as "Petition for Execution Judgment Payment Owed", in which he seeks the back payment of a fully favorable SSI award that was entered on April 2, 2012 by Administrative Law Judge ("ALJ") James P. Toschi, in the amount of \$10,784.16. The Defendant was served on August

¹ Plaintiff has been and is currently an inmate at Mount Olive Correctional Complex in Mt. Olive, West Virginia throughout these proceedings.

12, 2016. (Document No. 14.)

In support of the Defendant's Motion to Dismiss, the Acting Commissioner states that in Plaintiff's Notice of Award letter, it was not explained to him that while he is incarcerated, she is prohibited from paying any retroactive SSI benefits to individuals while they are in prison in accordance with the No Social Security Benefits for Prisoners Act of 2009, 42 U.S.C. § 1383(b)(7)(A)(i). (Document No. 18 at 2.) The Defendant further argues that the Plaintiff had not exhausted his administrative remedies, and had to file his Request for Review by November 23, 2016 in order to preserve his appeal regarding the nonpayment of his back award. (*Id.*) The Defendant further contends that because a "final decision" has not been entered by the Acting Commissioner in the Plaintiff's Social Security case, this Court does not have jurisdiction to entertain the Plaintiff's civil action pursuant to 42 U.S.C. § 405(g). Weinberger v. Salfi, 422 U.S. 749, 766 (1975) (Document No. 18 at 4-5.) Finally, under the Regulations, a claimant may obtain judicial review of a decision by the ALJ if the Appeals Council has denied the claimant's request for review or of a decision by the Appeals Council rendering a final decision of the Commissioner. 20 C.F.R. §§ 404.981, 422.210. (*Id.* at 5-6.)

The Plaintiff represents that he filed his timely Request on November 10, 2006. (Document No. 20 at 4, Document No. 20-1 at 5.) However, the Plaintiff takes issue with the Defendant's failure to pay his back award because at the time of the fully favorable award, April 2, 2012, he "was innocent of any crime" and that in the Notice of Award, there was "no monthly payment rate at the time." (Document No. 20 at 2-3.) Further, the Plaintiff contends that at no time did any administrative agency "protest" or "object" to the payment of his award payment of \$10,784.16. (*Id.* at 4.) The Plaintiff has couched the Defendant's Motion as "tainting" the finality of the ALJ's

decision, ostensibly due to the Acting Commissioner never having denied the back pay allowance during the administrative proceedings. (Id.)

Further, the Plaintiff was not imprisoned for the conviction of any crime or serving a sentence for same at the time of the ALJ's favorable decision on April 2, 2012, at the time of the phone interview he had with the Agency employee to confirm his banking information on April 16, 2012, or when the Commissioner's decision was finalized on April 25, 2012; this award is not a benefit, but a debt owed to the Plaintiff which the Defendant is "improperly suspend[ing]" under 42 U.S.C. § 1383(b)(7)(A).² (Id. at 5-6.) The Plaintiff contends that he was only confined in the county jail awaiting bond or bail. (Id. at 6.) Moreover, the Plaintiff argues that his SSI claim was dated October 14, 2008, prior to the enactment of the aforementioned statute, and it is a violation of his due process rights to implement same retroactively. (Id.) The Plaintiff was found guilty by a jury on May 14, 2012, sentenced on June 11, 2012, and only from the latter date has he been "incarcerated doing a commitment."³ (Id.)

Finally, the Plaintiff states that the Defendant's refusal to pay his back award was determined prior to his actual date of conviction envisioned under the No Social Security Benefits for Prisoners Act of 2009, which violated the Plaintiff's Constitutional rights insofar as the presumption of his innocence was disregarded and that he suffered substantial prejudice and bias by the Commissioner by avoiding her obligation to pay the debt owed to him. (Tr. at 7-8.) In closing, the Plaintiff prays the Court exercise jurisdiction "to the extent of determining by

² The undersigned notes that during the administrative hearing held before ALJ Toschi, the Plaintiff appeared by video at the South Central Regional Jail in Charleston, West Virginia. (Document No. 17 at 3.)

³ The Plaintiff was convicted in the Circuit Court of Kanawha County, West Virginia, criminal action no. 11-F-692, of the felony offense of Murder in the First Degree and of the felony offense of Malicious Wounding. He was sentenced by Judge James C. Stucky "for the rest of his natural life" for the Murder conviction, and to not less than two nor more than ten years for the Malicious Wounding conviction, each sentence to run consecutively with one another. (Document No. 20-1 at 3-4.)

examination of the record whether or not a hearing would serve the ends of justice” and deny the Defendant’s Motion. (Id. at 9.)

The applicable law pertaining to the arguments herein, 42 U.S.C. § 1983 (b)(7)(A)(i) provides:

In the case of payment of less than the correct amount of benefits to or on behalf of any individual, no payment shall be made to such individual pursuant to this subsection during any period for which such individual – is not an eligible individual . . . under section 1382(e)(1) of this title because such individual is an inmate of a public institution that is a jail, prison, or other penal institution or correctional facility the purpose of which is to confine individuals as described in clause (ii) or (iii) of section 402(x)(1)(A) of this title[.]

Pursuant to 42 U.S.C. § 402(x)(1)(A)(i), the Social Security Administration will not pay monthly benefits to any individual for any month ending with or during or beginning with or during a period of more than 30 days throughout all of which such individual is confined in a jail, prison, or other penal institution or correctional facility pursuant to his conviction of a criminal offense.

Subparagraph (B)(i) provides that for purposes under subparagraph (A), clause (i):

[A]n individual shall not be considered confined in an institution comprising a jail, prison, or other penal institution or correctional facility during any month throughout which such individual is residing outside such institution at no expense (other than the cost of monitoring) to such institution or the penal system or to any agency to which the penal system has transferred jurisdiction over the individual.

The undersigned agrees with the Defendant and further **FINDS** the Court is precluded from judicial review of this matter pending a final decision by the Acting Commissioner in accordance with the legal authority *supra*. Until the Acting Commissioner renders a final decision regarding the Plaintiff’s appeal concerning the non-payment of his back SSI award, the Court has no choice but to dismiss this matter without prejudice until jurisdiction is properly conferred upon it.

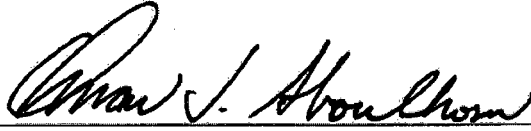
For the reasons set forth above, it is hereby respectfully **PROPOSED** that the District Court confirm and accept the foregoing findings and **RECOMMENDS** that the District Court **GRANT** the Defendant's Motion to Dismiss (Document No. 17.), and so Order it **DISMISSED WITHOUT PREJUDICE** for the reasons stated herein, and remove it from the docket of the Court.

The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable Thomas E. Johnston, United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(d) and 72(b), Federal Rules of Civil Procedure, the parties shall have fourteen days (filing of objections) and then three days (mailing/service) from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this Court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 106 S.Ct. 466, 475, 88 L.E.2d 435 (1985), reh'g denied, 474 U.S. 1111, 106 S.Ct. 899, 88 L.E.2d 933 (1986); Wright v. Collins, 766 F.2d 841 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir.), cert. denied, 467 U.S. 1208, 104 S.Ct. 2395, 81 L.E.2d 352 (1984). Copies of such objections shall be served on opposing parties, District Judge Johnston, and this Magistrate Judge.

The Clerk of this court is directed to file this Proposed Findings and Recommendation and to send a copy of same to *pro se* parties and counsel of record.

ENTER: January 6, 2017.

A handwritten signature in black ink, reading "Omar J. Aboulhosn", written over a horizontal line.

Omar J. Aboulhosn
United States Magistrate Judge

**Additional material
from this filing is
available in the
Clerk's Office.**