

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

OTHO SPEIGHTS, JR.

CIVIL ACTION

VERSUS

NUMBER 04-003-D-M3

JO ANNE B. BARNHART,  
COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION

**MAGISTRATE JUDGE'S REPORT**

This matter comes before the Court on the Commissioner's Rule 12(b)(6) motion to dismiss for lack of subject matter jurisdiction (*rec. doc. no. 8*). The motion is opposed. The primary issue for decision is whether plaintiff has raised a colorable constitutional claim that independently establishes jurisdiction.

***Procedural Background***

Plaintiff Otho Speights, Jr. initially filed claims for disability insurance benefits ("DIB") and supplemental security income ("SSI") on August 14, 1995. An administrative law judge ("ALJ") denied plaintiff's claims in a written decision issued on October 14, 1998. The Commissioner contends<sup>1</sup>, and plaintiff does not deny, that plaintiff received notice advising him that he had sixty (60) days thereafter to file an appeal of the ALJ's decision to the Appeals Council.

The parties further agree that plaintiff waited until March 6, 2003, *i.e.*, almost 4 years

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<sup>1</sup> Although the Commissioner did not file a copy of the Administrative Record with this Court, plaintiff did attach a copy of the "Notice of Decision – Unfavorable" as Exhibit A to her Complaint (*rec. doc. no. 1*). A review of that documents shows that it clearly states as follows: "To file an appeal, you must file your request for review **within 60 days** from the date you get this notice." (Emphasis supplied.)

and 5 months later, before contacting the Appeals Council (by letter) and requesting that it find good cause existed to grant an extension of time beyond the 60 day period for filing his appeal. (*Rec. doc. no. 9*, exhibit 2.) Plaintiff's counsel stated in her letter of that date that plaintiff was not represented by counsel during the March 16, 1998, hearing that preceded the ALJ's written decision, and "was not mentally capable of representing himself." *Id.* In plaintiff's memorandum in opposition to the Commissioner's motion to dismiss, his counsel further argues that he was also "not mentally capable of understanding and/or acting upon the need to request review to preserve his rights." (*Rec. doc. no. 12*, p. 2.)

In a decision dated October 31, 2003, the Appeals Council determined that plaintiff failed to show good cause that merited an extension of time beyond 60 days for filing his administrative appeal of the ALJ's decision. The Council noted that the evidence submitted by plaintiff did not support his claim that "that he was unable to file the request for review timely." (*Rec. doc. no. 9*, exhibit 3.)

Plaintiff then filed suit in this Court seeking judicial review of the Appeals Council's decision. Plaintiff alternatively requested a writ of mandamus pursuant to 28 U.S.C. § 1361, but did not clearly articulate in either his brief or his Complaint the exact nature of the relief sought by such a writ. As best as the Court can discern, plaintiff seeks a writ ordering the Appeals Council to grant the extension of time requested for appealing the ALJ's decision, and/or ordering the Appeals Council to reopen his case.

### **The Parties' Contentions**

The Commissioner argues that plaintiff's Complaint should be dismissed because the Appeals Council's action in denying plaintiff's request for an extension of time for

administratively appealing the ALJ's decision did not constitute a "final decision" under 42 U.S.C. § 405 (g) and (h), which the Commissioner contends is a prerequisite for this Court to have subject matter jurisdiction. As for plaintiff's request for a writ of mandamus, the Commissioner argues that plaintiff has failed to demonstrate the two essential elements of obtaining such relief: (1) that plaintiff has no other adequate avenue of relief; and (2) that the Commissioner, through her Appeals Council, clearly owed him a non-discretionary duty.

In opposing the Commissioner's motion to dismiss, plaintiff concedes that he did not timely file a request with the Appeals Council to review the ALJ's decision. He further agrees that the law does not permit judicial review of administrative decisions that are not final, such as his belated requests for an extension of time and to reopen his claim. But, although he admits that his failure to exhaust his administrative remedies would ordinarily preclude judicial review, plaintiff emphasizes that "the law **does require** judicial review of these situations where **the plaintiff raises a colorable constitutional claim.**" (*Rec. doc. no. 12, p. 5.*) (Emphasis supplied.) Plaintiff contends that his right to due process was in fact violated because he submitted sufficient evidence to the Appeals Council to show that he lacked the mental capacity both to represent himself at the administrative hearing and to understand and act upon the notice of his right to administratively appeal the ALJ's decision.

### ***Governing Law***

In *Harper v. Bowen*, 813 F.2d 737, 739 (5th Cir. 1987), the Fifth Circuit noted that jurisdiction for judicial review of a decision by the Commissioner's Appeals Council is

provided by Section 205(g) of Title II of the Social Security Act:

Any individual, after any *final decision* of the Secretary 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 Secretary may allow.

42 U.S.C. § 405(g) (emphasis added). Importantly, judicial review is expressly limited to the procedures<sup>2</sup> set forth in the Act. See 42 U.S.C. § 405(h).<sup>3</sup> “Thus, whether there is jurisdiction depends on whether the actions of the SSA amount to a *final decision* after a hearing by the Secretary of Health and Human Services (the Secretary) under section 205(g).” *Harper*, 813 F.2d at 739 (emphasis added).

The regulatory system established by the Secretary provides that a “final decision” is rendered by the Commissioner for the purposes of section 205(g) when the Appeals

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<sup>2</sup> In *Harper*, the Fifth Circuit describe the four-step administrative process as follows: “The Secretary has established a regulatory system for administrative review, leading up to a final decision that may then be appealed to the district court. The process is begun when an individual files a claim with the SSA for benefits. This claim is either granted or denied, creating an initial determination. See 20 C.F.R. §§ 416.1404 to 416.1405. Next, the claimant must file a request for and receive a reconsideration. See generally 20 C.F.R. §§ 416.1407 to 416.1422. The Secretary reviews the claim again, and then issues a reconsidered determination. 20 C.F.R. § 416.1420. After obtaining the initial and reconsidered determinations, a dissatisfied claimant may file for an evidentiary hearing before an ALJ. See generally 20 C.F.R. §§ 416.1429 to 416.1468. If the claimant objects to the subsequent decision, he or she may appeal the ALJ’s determination to the Appeals Council. See generally 20 C.F.R. §§ 416.1467 to 416.1483. The decision rendered at the initial, reconsideration, and ALJ stage is binding on the claimant unless further administrative review with the Appeals Council is sought within 60 days. These four steps exhaust the claimant’s administrative remedies.” 813 F.2d at 739.

<sup>3</sup> “The findings and decision of the Commissioner 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 person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner, 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.”

Council either reviews or denies review of the ALJ's decision. 20 C.F.R. §§ 416.1405, 416.1421, 416.1455, 416.1481. After such a "final decision" has been rendered by the Appeals Council, it is binding unless the claimant files for judicial review within 60 days. 20 C.F.R. § 416.1481.

However, if instead of reviewing or denying a request for review, the Appeals Council instead dismisses a claimant's request that it review for untimeliness, such a dismissal is binding and is not subject to further review by the courts. 20 C.F.R. § 416.1472. The Appeals Council, however, has the discretion to grant an extension of time beyond the 60 day period for administratively appealing an ALJ's decision. *Harper*, 813 F.2d at 739. The extension will be granted if the claimant can show "good cause" for missing the deadline for review. 20 C.F.R. § 416.1468(b). Findings must be made in order to grant an extension of time based upon good cause. SSR 91-5p. Importantly, the Secretary's regulations provide that the denial of a request for an extension of the 60 day period is not subject to judicial review. *Harper, supra, citing* 20 C.F.R. § 416.1403(a)(8).

Independently of the foregoing, judicial review is permissible in rare instances when the Secretary's denial of a request to reopen is challenged on constitutional grounds. *Califano v. Sanders*, 430 U.S. 99, 109, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). *See also, Robertson v. Bowen*, 803 F.2d 808, 810 (5th Cir. 1986) ("As Robertson correctly notes, federal courts have subject matter jurisdiction over a petition to reopen if a colorable constitutional claim is asserted.")<sup>4</sup> However, a "conclusional assertion" of a colorable

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<sup>4</sup> *Accord, Byam v. Barnhart*, 336 F.3d 172, 179-180 (2nd Cir. 2003) ("As a general rule, federal courts lack jurisdiction to review an administrative decision not to reopen a previous claim for benefits. . . . Nevertheless, federal courts may review the Commissioner's decision not to reopen a disability application in two circumstances: where the Commissioner has constructively reopened

constitutional claim is insufficient to vest jurisdiction in a district court. See *Robertson, supra, citing Holloway v. Schweiker*, 724 F.2d 1102, 1105 (4th Cir.), cert. denied, 467 U.S. 1217, 104 S.Ct. 2664, 81 L.Ed.2d 369 (1984), wherein the Fifth Circuit stressed that if subject matter jurisdiction could be established by the mere allegation of a due process claim, then every decision of the Secretary would be subject to review ““by the inclusion of the [magic] words.””

When colorable constitutional claims are asserted in the context of an alleged mental impairment, due process requires the Commissioner to have provided a claimant with both (1) meaningful notice of his procedural rights, and (2) an opportunity to be heard, before his claim for disability benefits may be denied. *Udd v. Massanari*, 245 F.3d 1096, 1099 (9th Cir. 2001), citing *Matthews v. Elridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

In 1991, the Social Security Administration (“SSA”) issued Ruling 91-5p (“SSR 91-5p”), which provides the procedural framework for a claimant to obtain an extension of time for filing an appeal with the Appeals Council based on the grounds that he lacked mental capacity to understand the procedures for requesting such a review. If a claimant presents evidence that mental incapacity prevented him from requesting a timely review of an administrative action by the Commissioner, and the claimant had no one legally responsible for prosecuting the claim on his behalf at the time of the prior adverse action, the SSA “will

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the case and where the claim has been denied due process.”) The *Byam* Court held that a constructive reopening occurs when the Commissioner reviews the entire record and renders a decision on the merits, thereby waiving any claim of administrative *res judicata*. *Id.* at 180. In the present matter, plaintiff has not contended that the Commissioner constructively reopened his claims.

determine whether or not good cause exists for extending the time to request review.” SSR 91-5p. “The claimant will have established mental incapacity for the purpose of establishing good cause when the evidence establishes that he or she lacked the mental capacity to understand the procedures for requesting review.” *Id.* To determine whether the claimant lacked such mental capacity, the adjudicator must consider the following four factors as they existed at the time of the prior administrative review: (1) inability to read or write; (2) lack of facility with the English language; (3) limited education; and (4) any mental or physical condition that limits the claimant’s ability to do things for him/herself. *Id.* Any reasonable doubt will be resolved in favor of the claimant. *Id.* But if the adjudicator determines that good cause does not exist to extend the time, he or she will consider the claimant to have filed an untimely request for review, deny the request to extend the time for filing, and dismiss the request.

In *Udd*, the Court<sup>5</sup> held that an ALJ’s decision in a 91-5p hearing should be reviewed under the substantial evidence<sup>6</sup> standard to determine whether the claimant lacked the

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<sup>5</sup> The parties did not cite, and this Court has not found, any Fifth Circuit cases addressing SSR 91-5p applications or hearings.

<sup>6</sup> Under Fifth Circuit law, substantial evidence means more than a scintilla, but less than a preponderance, and is such relevant evidence as a reasonable mind might accept to support a conclusion. *Harrell v. Brown*, 862 F.2d 472, 475 (5<sup>th</sup> Cir. 1988). When applying the “substantial evidence” standard, the Court must carefully scrutinize the record to determine if, in fact, substantial evidence supporting the decision does exist, but the Court may not re-weigh the evidence in the record, nor try the issues *de novo*, nor substitute its judgment for the Commissioner’s even if the evidence preponderates against the Commissioner’s decision. *Id.* A finding of “no substantial evidence” will be made only where there is a conspicuous absence of credible choices or an absence of medical evidence contrary to the claimant’s position. *Id.*

However, the substantial evidence standard of review is not a mere rubber stamp for the Commissioner’s decision, and it involves more than a search for evidence

requisite mental capacity at the time of the adverse benefits decision. 245 F.3d at 1100. “If so, the termination of his benefits constitutes a due process violation.”

### ***Discussion***

The threshold issue for this Court to decide is whether or not the substantial evidence shows that plaintiff has effectively stated a colorable constitutional claim that provides the Court with subject matter jurisdiction.

A significant part of defendant's brief is devoted to the argument that the Court lacks subject matter jurisdiction because the Appeals Council's refusal to grant plaintiff additional time to file an appeal was not a “final decision” subject to judicial review. *Rec. doc. no. 9*, pp. 1 - 6, *citing Harper*<sup>7</sup>, *supra*. This is essentially a non-issue as plaintiff does not dispute defendant's argument in that regard, and the record in this matter, in conjunction with the Fifth Circuit's holding in *Harper*, clearly shows that the Appeals Council did not render a final decision that is subject to judicial review. Plaintiff argues instead that jurisdiction is independently vested in the Court because the evidence produced by plaintiff to the Appeals Council raised a colorable constitutional claim that he was deprived of due process.

With respect to the evidence before this Court, the record shows that the

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supporting the Commissioner's findings. *Cook v. Heckler*, 750 F.2d 391, 393 (5<sup>th</sup> Cir. 1985). The Court must scrutinize the record and take into account whatever fairly detracts from the substantiality of evidence supporting the Commissioner's findings. *Id.*

<sup>7</sup> In *Harper*, the Fifth Circuit was not confronted with a claim of subject matter jurisdiction based upon a colorable constitutional claim of any sort, much less one involving an allegation of mental incapacity.

Commissioner did not file the administrative record into the record of the Court. Plaintiff argues in his brief (p. 14) that the Court should therefore assume that the administrative record fully supports the allegations of his Complaint. The First Circuit<sup>8</sup> rejected a similar argument in its unpublished decision in *Dudley v. Apfel*, 2 Fed.Appx. 61, \*2 (1st Cir. 2001) (“[W]e note that the fact that the Commissioner did not file the entire administrative record below does not require a remand in this case. Appellant cites to no authority requiring such a filing where jurisdiction is contested and the Commissioner does not file an answer. See 42 U.S.C. § 405(g). . . . And, although appellant alluded below to the absence of the complete record, he never filed a motion specifically requesting the district court to order the Commissioner to submit the record. As a result, this objection is not well taken.” In the present matter, the record similarly shows that the Commissioner has not filed an Answer to plaintiff’s Complaint, and plaintiff did not file a motion requesting this Court to order the Commissioner to submit the administrative record. The Court will therefore similarly make its recommendation on defendant’s motion based upon the record at hand.

As noted earlier herein, the record shows that plaintiff’s counsel sent a letter to the Appeals Council on March 6, 2003. In that letter, plaintiff’s counsel requested an extension of time to appeal the ALJ’s decision on the grounds that plaintiff lacked the mental capacity to understand the notice of administrative appeal procedures sent out more than four years

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<sup>8</sup> Plaintiff did not cite, and this Court has not found, any Fifth Circuit law requiring the Commissioner to file the administrative record if she files a motion to dismiss prior to filing her Answer. The literal language of 42 U.S.C. § 405(g) requires the Commissioner to file the administrative record only when she files an Answer.

earlier after the ALJ rendered his decision on October 14, 1998. In both that letter<sup>9</sup> and in plaintiff's brief in opposition to defendant's present motion, plaintiff's counsel relied in large part upon an October 6, 1997, report from Dr. Alan Taylor, Ph.D., to support the argument that plaintiff lacked the mental capacity to understand defendant's notice of appeals procedures. Although defendant did not file a copy of the administrative record into the record of this Court, plaintiff did attach a copy of Dr. Taylor's report<sup>10</sup> to his Complaint (*rec. doc. no. 1*, unnumbered exhibit).

In his prefatory remarks, Dr. Taylor clearly states that he evaluated plaintiff "in order to assess his intellectual and academic potential as they relate to vocational planning." In the personal history section of his report, Dr. Taylor noted that plaintiff reported he earned average to superior grades in high school, from which he graduated in 1963 without being held back any years. Starting in 1974, plaintiff studied accounting at the Detroit Business Institute for one and a half years, but did not complete the program. In 1976, plaintiff did complete a course of study in broadcasting technology at the Electronics Institute of Technology. As recently as 1989, plaintiff also completed a course of study at the Diesel Driving Academy in Baton Rouge.

Plaintiff further advised Dr. Taylor that he was employed as a truck driver from 1989 through 1993. At other times not specified, he has also worked as a laborer, for the United States Post Office, in insurance sales, as an accountant, in the auto industry, and as a fast

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<sup>9</sup> A copy of plaintiff's counsel's letter is attached to both defendant's brief (*rec. doc. no. 9*) in support of her motion to dismiss, and to plaintiff's Complaint (*rec. doc. no. 1*).

<sup>10</sup> Dr. Taylor's report, which is addressed to Louisiana Rehabilitation Services, appears to have been the product of a consultative examination.

food manager.

As part of his examination of plaintiff, Dr. Taylor administered the Wechsler Adult Intelligence Test – 3rd Edition (“WAIS-III”) in order to evaluate plaintiff’s intellectual functioning. Plaintiff scored a verbal IQ of 87, a performance IQ of 70, and a full scale IQ of 77, which placed him in the borderline range. Dr. Taylor also administered the Wide Range Achievement Test – Revision 3 (“WRAT3”) to evaluate plaintiff’s academic achievement levels. On this test, plaintiff scored in the bottom 2 percentile for reading, which reflected a 4th grade reading equivalence. Dr. Taylor did not administer objective personality tests because “given his assessed reading level, it was believed that he was incapable of providing valid responses.” Dr. Taylor noted in his report that he believed plaintiff exerted “his best efforts” during the course of the evaluation.

With respect to military service, plaintiff told Dr. Taylor that he served in the Marine Corps in Vietnam from 1968 through 1970. He further stated that he suffered flashbacks, panic episodes, and hypersensitivity for about five months after he returned from Vietnam. He added, somewhat inconsistently, that all of those symptoms completely remitted after approximately five years.

The exhibits attached to plaintiff’s Complaint include VA medical records (often illegible) for the period January 1, 1995, through December 31, 1998. Those records show plaintiff was primarily treated for rheumatoid arthritis. A record dated February 21, 1995, does show that he underwent an evaluation for exposure to Agent Orange, but the patient notes for that examination state that high blood pressure and rheumatoid arthritis were plaintiff’s only complaints.

The VA records show that (for reasons not specified) plaintiff requested a psychiatric

consultation during his visit on March 12, 1998. During an April 9, 1998, visit to the VA clinic, plaintiff complained of depression and reported that his behavior, thoughts, and feelings were “consumed by his depressive disorder.” Due to a lack of available psychiatric resources, the VA clinic referred plaintiff to his neurologist “to prescribe something for him.” On July 30, 1998, plaintiff complained of recurrent dreams of the Vietnam War, night sweats, problems interacting with people, and feeling withdrawn. He requested a psychological evaluation, and was diagnosed on that day by Dr. Efren Tanjuncto as suffering from a depressive disorder and “probable PTSD” (*i.e.*, post-traumatic stress disorder). Notably, this diagnosis was rendered approximately two and one-half months before the ALJ rendered his decision on October 14, 1998.

On September 17, 1998, plaintiff was awarded a VA pension effective November 1, 1997. The VA record does not explain the basis for the pension, but the Court notes that the award came soon after plaintiff was diagnosed with depression and PTSD, and only one month before the ALJ rendered his decision on plaintiff’s social security claims.

As the Fifth Circuit emphasized in *Robertson, supra*, the question for this Court to decide is whether plaintiff’s opposition to defendant’s motion is based upon more than just a conclusional assertion of a colorable constitutional claim. *See also, Byam v. Barnhart*, 336 F.3d 172, 182 (2nd Cir. 2003), wherein the Second Circuit expounded upon the claimant’s burden of showing that she was so impaired as to be unable to pursue administrative remedies. Like the Fifth Circuit, the *Byam* Court stressed that the claimant’s burden requires more than just a generalized allegation of confusion; instead, the claimant is required to make a “particularized allegation” of mental impairment plausibly of sufficient severity to impair both comprehension *and* the ability to act upon notice of procedural

mandates. *Id.* (Emphasis added.) In *Byam*, the Court made a number of observations that are particularly apposite to the present matter:

The question was not whether Byam could understand and act upon instructions in the context of certain jobs, but whether she was impaired in her ability to understand and pursue administrative and legal procedures. “Moderate limitations” in an employment context may be severe ones in understanding legal notice and filing requests for administrative and judicial review. Depression and social phobia might not prevent one from holding certain jobs, but they may impede one’s ability to act on notice or go to a hearing.

*Id.* at 183. Notably, the record in the present matter shows that plaintiff did suffer from both depression and social phobia around the time the ALJ rendered his decision.

In *Udd, supra*, the ALJ had rejected the claimant’s argument of mental incapacity because Udd’s impairment did not totally incapacitate him, as evidenced by his ability to live by himself and have relationships. The district court upheld the ALJ’s decision in that regard, but was reversed by the appellate court, which emphasized that “SSR 91-5 does not require that the impairment ‘totally incapacitate’ the claimant, but merely that it ‘limit [his] ability to do things for him/herself.’” 245 F.3d at 1101.

In the present matter, the chronology of the evidence is particularly important with respect to plaintiff’s assertion of a colorable constitutional claim. Almost exactly one year prior to the ALJ’s October 14, 1998, decision rejecting plaintiff’s claims, Dr. Taylor determined (on October 6, 1997) that plaintiff had a borderline intellect that included a performance IQ of only 70 and a 4th grade reading level that was so poor that Dr. Taylor concluded plaintiff was “incapable” of taking an objective personality test. The VA record show that plaintiff then began complaining of mental ailments, and requesting psychiatric consultations, from March through July, 1998. On July 30, 1998, plaintiff was diagnosed

by a VA physician as suffering from a depressive disorder and PTSD. A little over two months later, and less than a month before the ALJ rendered his decision, the VA granted plaintiff a disability pension.

Despite that evidence, the Appeals Council rejected plaintiff's claim that he suffered from a mental incapacity that limited his ability to pursue his administrative remedies following the ALJ's October 14, 1998 decision. The Appeals Council did so despite the evidence discussed above, the fact that plaintiff was unrepresented by counsel until years after the ALJ's decision, and – as was noted in *Udd, supra* – there is no requirement that plaintiff be “totally” incapacitated in that regard. Furthermore, the Appeals Council reached its decision despite the fact that SSR 91-5p specifically requires that any reasonable doubt regarding the plaintiff's mental capacity “will be” resolved in favor of a claimant, and only required a showing by plaintiff that his mental impairments “limited” his ability to do things for himself.

In viewing the record as a whole, the Court therefore has no problem in finding that plaintiff has independently established subject matter jurisdiction by showing a colorable constitutional claim that is viable.

However, based on the record at hand, the Court cannot determine whether or not the substantial evidence supports the Appeals Council's October 31, 2003, decision with respect to plaintiff's request for an extension of time based upon a mental impairment.<sup>11</sup>

The decision itself appears to be little more than a form letter incorporating boilerplate

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<sup>11</sup> Among other things, there is a huge gap in the medical records with respect to the substantial evidence. For example, the VA records discussed above pertain primarily to the year 1998, which leaves a five year gap leading up to the Appeals Council's decision on October 31, 2003.

language. There is no mention whatsoever in the letter of SSR 91-5p and the four factors set forth therein that the Appeals Council “must consider” (per the language of that regulation) in order to determine whether a claimant lacked the mental capacity to understand the procedures for requesting review. Thus, this Court cannot even make a determination as to whether the Appeals Council even engaged in a 91-5p analysis

The Court further finds that in the context of plaintiff’s mental impairment claim, the Appeals Council’s decision lacks the requisite specificity mandated by the Commissioner’s *Hearings, Appeals and Litigation Law Manual* (“HALLEX”). In *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000), the Fifth Circuit noted that Section I-3-501 (Nov. 11, 1994) of HALLEX “provides that the Appeals Council must ‘specifically address additional evidence or legal arguments or contentions submitted in connection with the request for review.’” Notably, the Fifth Circuit expressly held in *Newton* that HALLEX provisions are entitled to considerable weight:

While HALLEX does not carry the authority of law, this court has held that “where the rights of individuals are affected, an agency must follow its own procedures, even where the internal procedures are more rigorous than otherwise would be required.” See *Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir. 1981). If prejudice results from a violation, the result cannot stand. *Id.*

*Newton*, 209 F.3d at 459.

In *Hines v. Barnhart*, 2003 WL 23323615, \*5 (N.D. Tex. 2003), citing *Ripley v. Chater*, 67 F.3d 552, 557 & n. 22 (5th Cir. 1995), the Court noted that prejudice results from an Appeals Council’s violation of agency rules such as those set forth in HALLEX if the new or additional evidence presented to the Appeals Council might have led to a different decision. The *Hines* Court noted that the Fifth Circuit concluded in *Newton* that the

Appeals Council's failure to follow Section I-3-501 of HALLEX did not result in prejudice in that case because the plaintiff's new medical evidence consisted of opinions regarding her condition for a time period outside of her claimed disability period. Thus, the new evidence was not relevant. *Id.* But in *Hines*, the new evidence did relate to the claimed disability period, and the Court held that the Appeals Council therefore erred in failing to specifically address that evidence in its opinion. *Id.* The same applies to the present matter. The VA records cited earlier herein show that plaintiff's mental condition and treatment therefore were ongoing for over a half year leading up to the ALJ's decision. As in *Hines*, the substantial evidence in the present matter shows that plaintiff did suffer prejudice as a result of the Appeals Council's violation of its duties under HALLEX. Thus, as the Fifth Circuit stressed in *Newton*, "the result cannot stand." *Newton*, 209 F.3d at 459.

Additionally, because *Newton* was decided based upon the November 11, 1994, edition of HALLEX, this Court finds itself in a situation similar to that encountered by the Court in *Hawker v. Barnhart*, 235 F.Supp.2d 445, 451-52 (D. Md. 2002). In that case, the Court held that the Appeals Council's duty of explanation regarding new evidence introduced post hearing was imposed by Chapter I-1-001 of HALLEX, which provides as follows: "[w]hen evidence is new and material but does not provide a basis for granting review, the analyst must provide language for the denial notice assessing the 'weight of the evidence' (20 C.F.R. 404.970 and 416.970) and explain why the evidence does not justify granting the request for review."<sup>12</sup>

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<sup>12</sup> As the *Hawker* Court noted in fn. 10 of its opinion, the entire HALLEX manual is available on the Social Security Administration's website at [www.sa.gov](http://www.sa.gov). 235 F.Supp.2d at 451.

However, the *Hawker* Court noted that the cited passage from HALLEX may have been abandoned at the time the case was decided because the SSA issued a memorandum in January 1995 that said the duty to explain imposed by HALLEX was temporarily suspended due to an increased case load. The Court further noted that the memorandum stated that the temporary suspension will be assessed over the next sixty days, but the parties did not advise the Court of the status of that suspension. Thus, “this Court lacks information about whether the HALLEX manual’s provision requiring explanation is in effect or whether it is still ‘temporarily’ suspended.” *Hawker*, 235 F.Supp.2d at 452, *citing Cromer v. Apfel*, 2002 WL 1544778, \*3 (7th Cir. 2002) (“The court lacks sufficient information to determine whether the HALLEX provision or the memorandum was guiding the commissioner’s policy at the time of the Appeals Council’s decision.”).

In the present matter, Court likewise cannot discern from the record presented whether or not the duty of explanation set forth in HALLEX is operational or under suspension. The Commissioner’s web site indicates the former, however. See, e.g., Section I-3-8-4, which is entitled “Evaluating Mental Impairments in Appeals Council Decision,” and which provides as follows:

When the Appeals Council issues a decision in a mental impairment case, that decision must incorporate the pertinent findings and conclusions based on the technique outlined in 20 CFR. 404.1520a and 416.920a. The decision must show the significant history, including examinations and laboratory findings, and the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment(s). The decision must include a specific finding as to the degree of limitation in each of the functional areas described in 20 CFR 404.1520a(c) and 416.920a(c).

Notably, the Commissioner's web site shows that this section of HALLEX was revised on July 31, 2001, thus indicating that it is in fact currently operational. Moreover, the record before the Court shows that the Appeals Council's written decision issued on October 31, 2003, clearly did not comply with the requisite specificity set forth in Section I-3-8-4 of HALLEX. Based on the record now before the Court, and the Fifth Circuit's holding in *Newton*, the result therefore cannot stand.<sup>13</sup>

In light of the constitutionally protected interest at stake here, and Congress's intent<sup>14</sup> to protect Social Security claimants, the best and most equitable result in this case would therefore be a remand to the Appeals Council with instructions to fully comply with SSR 91-5p and the pertinent provisions of HALLEX, including a detailed discussion of all the requisite factors set forth therein. In its written decision, the Appeals Council should

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<sup>13</sup> In *Hawker*, the Court made the following astute observation that is equally apposite to the present matter: "Requiring the Appeals Council to explain its handling of evidence is neither a novel concept nor a burdensome obligation. Indeed there is no shortage of reported cases in which the Appeals Council provided reasoning as to why newly submitted evidence was rejected. *See, e.g., Mills v. Apfel*, 244 F.3d 1, 3 (1st Cir. 2001) (Appeals Council denied review but administrative appeals judge sent separate letter discussing why additional evidence was 'consistent' with other evidence before the ALJ); *Riley v. Shalala*, 18 F.3d 619, 622 (8th Cir. 1994) ('The Appeals Council's decision summarizes the content of each report and gives the reasons why those reports did not affect the Appeals Council's conclusion that the administrative law judge's decision was in accord with the weight of the evidence currently in the record (including the newly submitted reports). The Appeals Council thus explained why it was denying review.');" *Troy ex rel. Daniels v. Apfel*, 2002 WL 31247075 (D. Colo. Sept. 30, 2002) ('In explaining its reasons for denying Mr. Daniels' request for review of the ALJ's decision, the Appeals Council discussed with great specificity other new evidence concerning the deterioration of Mr. Daniels' health after the ALJ issued his December 29, 1997 decision.');" *Davis . Sec. Of HHS*, 1995 WL 351093 (M.D. Pa. 1995) ('By letter dated June 17, 1993, the Appeals Council denied the request for review, explaining that the additional records essentially duplicate (*sic*) evidence previously provided.');" *Burlingame v. Shalala*, 1994 WL 675680 (S.D. Tex. 1994) ('In a June 10, 1993 letter, the Appeals Council denied review, explained its reasons, and advised Plaintiff that she had sixty days to file a civil action.')

<sup>14</sup> *See, e.g., Dolmat v. Barnhart*, 2004 WL 432194, \* 4 (D.N.H. March 8, 2004), *citing Canales v. Sullivan*, 936 F.2d 755, 758 (2nd Cir. 1991).

also specifically address the evidence regarding plaintiff's mental impairments.

### **Writ of Mandamus**

Plaintiff alternatively claims that the Court has mandamus jurisdiction pursuant to 28 U.S.C. § 1361. The Fifth Circuit has clearly held that mandamus is not available to review discretionary acts of the Commissioner's officials. *See, e.g., Green v. Heckler*, 742 F.2d 237, 241 (5th Cir. 1984). "Allowing mandamus as a substitute for appeal is improper. . . . Furthermore, it would frustrate the purpose of 42 U.S.C. § 405(g) and (h), by which Congress provided the sole method of review of Social Security claims. . . . Either review is available under section 405(g) for Social Security claims, or review is precluded completely." (Citations omitted.)

Moreover, even if mandamus jurisdiction was not precluded by 42 U.S.C. § 405(h), the Court finds that plaintiff has not met the prerequisites for such jurisdiction. Mandamus is an extraordinary remedy. *Clark v. United States*, 2004 WL 2526371, \*1 (5th Cir. Nov. 9, 2004). Three elements must co-exist to establish mandamus jurisdiction: (1) a plaintiff must show a clear right to the relief sought, (2) plaintiff must show a clear non-discretionary duty by the defendant to perform a particular act, and (3) plaintiff must show that no other adequate remedy is available. *Id.*; *Green*, 742 F.2d at 241.

In *Harper, supra*, the Fifth Circuit held that the Appeals Council's authority to grant an extension of time for appealing an ALJ's decision is discretionary. 813 F.2d. at 740. Furthermore, the regulations provide that the denial of a request for an extension is not subject to judicial review. *Id.*, citing 20 C.F.R. § 416.1403(a)(8). Upon reviewing the record as a whole, the Court agrees with defendant that plaintiff has not shown that defendant owed him a non-discretionary duty or that mandamus is his only adequate remedy. Thus,

mandamus jurisdiction has not been established.

**RECOMMENDATION**

For the foregoing reasons, the Magistrate Judge recommends that defendant's Rule 12(b)(6) motion to dismiss for lack of subject matter jurisdiction (*rec. doc. no. 8*) be **DENIED**, and pursuant to the fourth sentence of 42 U.S.C. § 405(g), final judgment be entered reversing the decision of the Commissioner denying plaintiff's request for an extension of time to administratively appeal the ALJ's decision of October 14, 1998, that denied plaintiff's claim for benefits, and remanding this matter to the Commissioner for further proceedings consistent with the opinion of the Court, including the presentation of any further relevant evidence developed by the parties.<sup>15</sup>

Baton Rouge, Louisiana this \_\_\_\_\_ day of November, 2004.

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**MAGISTRATE JUDGE DOCIA L. DALBY**

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<sup>15</sup> *See Brenem v. Harris*, 621 F.2d 688, 690 n.1 (5<sup>th</sup> Cir. 1980) (“... with a remand ordered the hearing shall cover all pertinent evidence,” including evidence that might not otherwise warrant a remand for new evidence). Relevant evidence may include evidence subsequent to the prior decision and/or subsequent to the expiration of insured status where such evidence is relevant to the determination of whether an impairment existed as well at an earlier time. *See also, e.g., Ivy v. Sullivan*, 898 F.2d 1045, 1048 (5<sup>th</sup> Cir. 1990).

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA**

**OTHO SPEIGHTS, JR.**

**CIVIL ACTION**

**VERSUS**

**NUMBER 04-003-D-M3**

**JO ANNE B. BARNHART,  
COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION**

**NOTICE**

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U.S. District Court.

In accordance with 28 U.S.C. §636(b)(1), you have ten days from date of receipt of this notice to file written objections to the proposed findings of fact and conclusions of law set forth in the Magistrate Judge's Report. A failure to object will constitute a waiver of your right to attack the factual findings on appeal.

**ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE**

**WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.**

Baton Rouge, Louisiana, this \_\_\_\_\_ day of November, 2004.

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**MAGISTRATE JUDGE DOCIA L. DALBY**