

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF KANSAS

MELISSA SLOCUM,)	
)	
Plaintiff,)	
)	
v.)	Case No. 09-1310-WEB
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

Now before the court is the Motion to Dismiss (Doc. 7) filed by the Defendant. The Defendant seeks dismissal because plaintiff failed to exhaust administrative remedies, which would preclude judicial review. The Plaintiff replies that she was not provided notice of the ALJ decision. The Magistrate Judge issued a Report and Recommendation (Doc. 12) on the Motion to Dismiss on February 9, 2010. Neither party filed an objection.

The Magistrate Judge found that the Plaintiff asserted a colorable constitutional claim, that she was denied due process because she was not provided notice of the decision by the ALJ which prevented her from being able to exhaust her administrative remedies. The Magistrate Judge found that there was no concrete evidence to establish that the decision of the ALJ was mailed to the claimant and when it was mailed. The Magistrate Judge recommended Motion to Dismiss be denied and the case be remanded to the Commissioner in order for the Commissioner to conduct an evidentiary hearing, including testimony and/or affidavits, to make findings as to whether Plaintiff was mailed a copy of the ALJ decision of April 13, 2009, and if so, the date the notice was mailed.

After a review of the record, the court find the analysis of the Magistrate Judge is correct.

The Appeals Council did not examine any testimony or an affidavit that would show the letter was mailed to the Plaintiff. Instead, the Appeals Council relied on the fact that the address on the letter in the file was the correct address of the Plaintiff, and that there was no undelivered mail returned. Due process requires more than an assumption that the correct standard or procedure was followed. Due process requires that the court determine if the notice was mailed to the claimant, and when it was mailed.

IT IS THEREFORE ORDERED that the Recommendation and Report (Doc. 12) be adopted by the Court.

IT IS FURTHER ORDERED the Motion to Dismiss (Doc. 7) be DENIED.

IT IS FURTHER ORDERED that the decision of the Commissioner be REVERSED and the matter be REMANDED pursuant to sentence four of 42 U.S.C. § 405(g) for further development in accordance with the standards set out in the Recommendation and Report.

The Clerk of the Court is directed to enter Judgment accordingly.

SO ORDERED this 6th day of April, 2010.

s/ Wesley E. Brown
Wesley E. Brown
U.S. Senior District Judge