

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

SANDRA TIBBELS,)	
)	
Plaintiff,)	
)	CIVIL ACTION
v.)	
)	No. 10-2141-JWL
)	
MICHAEL J. ASTRUE)	
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

ORDER OF DISMISSAL

Currently at issue in this case is Plaintiff's "Motion to Dismiss Without Prejudice." (Doc. 8). The Commissioner of Social Security filed a "Response" in which he does not object to dismissal of the case, but argues that "there is no reason why the dismissal should be without prejudice." (Doc. 9, p.1). Plaintiff did not file a reply to the Commissioner's argument.

Rule 41 of the Federal Rules of Civil Procedure provides that in cases such as this, where the defendant has filed his answer, the case "may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). A dismissal under paragraph (a)(2) is without prejudice unless the court's dismissal order states otherwise. Id.

As the Commissioner argues, Plaintiff admits that the decision upon which Plaintiff sought judicial review, “is well grounded in law and fact.” (Doc. 9, p.1) (citing (Doc. 8, p.3)). Moreover, the Social Security Act provides jurisdiction to this court to review a final decision of the Commissioner only in a civil action filed within sixty days after the claimant receives notice of the final decision, or “within such further time as the Commissioner of Social Security may allow.” 42 U.S.C. § 405(g). Plaintiff received notice of the Commissioner’s final decision on January 12, 2010. (R. 1-3). Therefore, it is now impossible for Plaintiff to timely file another civil action, and even a dismissal without prejudice would not permit Plaintiff to retain her right to judicial review. Therefore, as the Commissioner argues, “there is no reason why the dismissal should be without prejudice.” (Doc. 9, p.1). Moreover, Plaintiff did not reply to the Commissioner’s response, leaving the Commissioner’s argument unopposed.

IT IS THEREFORE ORDERED that plaintiff’s motion (Doc. 8) is granted, except that dismissal shall be with prejudice.

IT IS FURTHER ORDERED that judgment shall be entered DISMISSING Plaintiff’s complaint with prejudice.

Copies of this order shall be provided to counsel of record for the parties.

Dated October 12, 2010, at Kansas City, Kansas.

s/ John W. Lungstrum

John W. Lungstrum
United States District Judge