

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3594
Summary Calendar

DIXID MOORE,

Plaintiff-Appellant,

VERSUS

LOUIS W. SULLIVAN, M.D.,
DEPARTMENT of HEALTH and HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 91 3673 G)

(January 19, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Dixid Moore appeals the dismissal, with prejudice, of his complaint for review of a denial of Social Security benefits. We **AFFIRM.**

I.

In October 1991, Moore filed this action, pursuant to 42 U.S.C. § 405(g), for review of a final decision of the Secretary of the Department of Health and Human Services denying him Social

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Security benefits. The action was automatically referred to the magistrate judge.

In March 1992, the Secretary moved to dismiss, pursuant to Fed. R. Civ. P. 4(j), for Moore's failure to serve process timely upon the Secretary. The Secretary contended that Moore's attempted service failed to comply with Fed. R. Civ. P. 4(d). In opposition, Moore presented only his attorney's affidavit stating that service had been sent by certified mail to both the United States Attorney General and the Secretary, and conceded that there was no record of the mailing. Because Moore could not provide a certified mail number, the Secretary could not produce evidence regarding whether service was made.

Relying on the affidavit and the Secretary's lack of evidence, the magistrate judge denied the motion. The Secretary filed an objection with the district court, contending that the magistrate judge had improperly shifted the burden of proof to the Secretary. Concluding that Moore failed to carry his burden of proving valid service and that the magistrate judge committed clear error, the district court granted the dismissal with prejudice.

II.

Proper service upon a federal agency requires service of a copy of the summons and complaint upon the United States and registered or certified mailing of the same to the agency. Fed. R. Civ. P. 4(d)(5). Service upon the United States requires delivery of the summons and complaint to the United States Attorney for the district in which the action is brought, and registered or

certified mailing of the same to the Attorney General of the United States. Rule 4(d)(4) (in pertinent part). If proper service is not made within 120 days of the filing of the complaint, the action shall be dismissed without prejudice, unless the party on whose behalf such service was required can show good cause for its failure. Rule 4(j).

A district court enjoys broad discretion in determining whether to dismiss an action for failure of service, **George v. United States Dept. of Labor, O.S.H.A.**, 788 F.2d 1115, 1116 (5th Cir. 1986); and this court reviews a Rule 4(j) dismissal only for abuse of discretion, **Systems Signs Supplies v. United States Dept. of Justice**, 903 F.2d 1011, 1013 (5th Cir. 1990). Moore concedes that service upon the Secretary did not comply with the rules, but asserts that, for several reasons, good cause exists to excuse the failure.

First, Moore contends that his failure to comply with the rules did not prejudice the Secretary, because the United States Attorney received actual notice of the suit both by personal service and by mail (the Secretary does acknowledge receipt by *regular* mail). Although actual notice arguably provides grounds for leniency in considering technical imperfections, dismissal despite the presence of actual notice does not constitute an abuse of discretion. **Systems**, 903 F.2d at 1014.

Second, Moore contends that "[f]ailure to make proof of service does not affect the validity of the service", quoting Rule 4(g). But, as provided in Rule 4(g), this statement addresses only

the failure to record the proof of service promptly with the court, as provided in that rule. It does not affect a litigant's burden, when service of process is challenged, of proving the validity of service or good cause for failure to effect timely service. See **Systems**, 903 F.2d 1013. As noted, the district court found that Moore failed to carry this burden; and Moore does not challenge this finding.

Finally, Moore seems to assert that good cause exists because he made a good faith effort to comply with the rules for service, and because the Secretary evaded service by failing to execute a return of service. The district court found, however, that the Secretary twice notified Moore, before the 120 days had expired, that the attempted service was improper. It further found that Moore's failure to take appropriate steps in response, and consequent inability to prove proper service, amounted to "little more than inadvertence and negligence". Inadvertence, mistake, or ignorance of counsel does not establish good cause. **Traina v. United States**, 911 F.2d 1155, 1157 (5th Cir. 1990).

The district court did not abuse its discretion in dismissing Moore's complaint for failure of service of process. It did, however, err in dismissing the action with prejudice; Rule 4(j) mandates dismissal without prejudice.²

² As indicated, the judgment provides that the dismissal is "with prejudice". The government states erroneously in its brief that the dismissal was "without prejudice". Neither party addressed this issue.

III.

Accordingly, the judgment is **MODIFIED** hereby so that the dismissal is without prejudice, and the judgment as modified is **AFFIRMED**.

AFFIRMED as MODIFIED.