

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9501
Summary Calendar

CLARENCE A. MARSE,

Plaintiff-Appellant,

versus

DEPARTMENT OF HEALTH
& HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-91-1816 H)

(July 28, 1993)

Before POLITZ, Chief Judge, HIGGINBOTHAM and DeMOSS, Circuit Judges.

PER CURIAM:*

Clarence Marse appeals the limitations dismissal of his petition under 42 U.S.C. § 405(g) for judicial review of the denial of his application for social security disability benefits. Finding no error, we affirm.

*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Marse applied for disability insurance benefits and supplemental security income and on March 1, 1991 the Appeals Council denied Marse's petition for review of an adverse ruling by an administrative law judge. Marse filed the instant action on May 13, 1991. Service of process was not effected until November 19, 1991.

The Secretary moved to dismiss for failure to comply with the 65-day limitations period provided for by 42 U.S.C. § 405(g) and 20 C.F.R. § 422.210(c). Under the statute and regulation Marse had to seek judicial review on or before May 6, 1991. Marse argued in response that the district court should excuse his untimely filing because (1) he believed that his ownership of an unencumbered home ruled out an *in forma pauperis* status and he could not obtain the filing fee before expiration of the limitations period; and (2) the district court refused on May 10, 1991 to accept a filing without the required fee or to permit payment of the fee in installments. Rejecting the recommendation of a magistrate judge, the district court granted the Secretary's motion. Marse sought reconsideration, alleging as an additional excuse that he and his attorney both suffered physical and mental illnesses before and after expiration of the limitations period. After the district court denied reconsideration, Marse filed additional documents noting the terminal illness and death of his attorney's mother during the limitations period as yet another explanation for the untimeliness of his complaint. This appeal followed.

Analysis

Marse maintains that the district court should have applied equitable tolling to excuse his untimely filing. We review the district court's ruling in this regard *de novo*.¹

Equitable tolling may extend the limitations period of 42 U.S.C. § 405(g).² As the Supreme Court recently has noted, however:

Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. . . . Because the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity, it is evident that no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants.³

Thus, it is only a rare social security case which will present equities strong enough to toll limitations.⁴ The instant case does

¹ See **Rhodes v. Guiberson Oil Tools Div.**, 927 F.2d 876, 881 (5th Cir.) (court of appeals reviews *de novo* district court determination as to tolling of limitations period by equitable estoppel), cert. denied, 112 S.Ct. 198 (1991).

² **Bowen v. City of New York**, 476 U.S. 467 (1986); **Barrs v. Sullivan**, 906 F.2d 120 (5th Cir. 1990).

³ **Irwin v. Veterans Administration**, 498 U.S. 89, 96 (1990) (citing **Baldwin County Welcome Center v. Brown**, 466 U.S. 147 (1984)) (other citations omitted).

⁴ **Barrs** (citing **Bowen**).

not present the requisite compelling equities.⁵

The judgment of the district court is AFFIRMED.

⁵ Marse suggests that the district court clerk's failure to issue summonses in this action until November 19, 1991 constitutes governmental misconduct somehow warranting equitable tolling. While governmental misconduct may warrant equitable tolling in appropriate cases, see Bowen, the clerk's alleged conduct -- assuming *arguendo* its impropriety -- did not occur until after Marse's untimely filing and in no way induced his tardiness. This contention is frivolous.