

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-11701
Non-Argument Calendar

D.C. Docket No. 4:16-cv-00061-WTM-GRS

JOHN W. WURST,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(April 4, 2019)

Before WILSON, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

John Wurst appeals the district court's order granting the Commissioner of Social Security's ("the Commissioner") motion to dismiss as untimely Wurst's complaint that sought judicial review of the Social Security Administration's ("SSA") Appeals Council's decision denying his request for review of the Administrative Law Judge's ("ALJ") unfavorable decision to cease his disability insurance benefits ("DIB"). On appeal, Wurst argues that his complaint, filed on February 22, 2016, was not untimely because the Appeals Council's notice of denial (the "Notice") postmarked envelope and his affidavit provided sufficient proof that he actually received the Notice on December 26, 2015, and he commenced the instant action within 60 days of that date. Specifically, Wurst contends that the five-day receipt presumption in 20 C.F.R. § 422.210(c) did not apply in his case because his Notice, dated December 11, 2015, was postmarked four days later on December 15, 2015, and due in part to the intervening Christmas holiday, he did not receive the Notice until December 26, 2015.

We review *de novo* a district court's dismissal of a complaint for failure to satisfy the statute of limitations, accepting as true the allegations contained in the complaint. *Jackson v. Astrue*, 506 F.3d 1349, 1352 (11th Cir. 2007). Issues not briefed on appeal are deemed abandoned. *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, 572 F.3d 1271, 1293 (11th Cir. 2009).

Under the Social Security Act, a claimant is entitled to DIB if he is “disabled” due to a physical or mental impairment. *See* 42 U.S.C. § 423(a), (d)(1). A claimant may dispute the Commissioner’s adverse determination of his benefits entitlement first through review by an ALJ. 20 C.F.R. § 404.900(a)(3). If the decision remains adverse to the claimant, he may seek further review from the Appeals Council. *Id.* § 404.900(a)(4). After the claimant has exhausted the administrative process, he may seek judicial review by filing a complaint in the appropriate federal district court. *See id.* § 404.900(a)(5); 42 U.S.C. § 405(g).

A claimant may only proceed in the district court if his action is “commenced within sixty days after the mailing to him of notice” of “any final decision of the Commissioner of Social Security made after a hearing to which he was a party” or “within such further time as the Commissioner of Social Security may allow.” 42 U.S.C. § 405(g); *see also* Fed. R. Civ. P. 6(a)(1)(C) (advising that when computing any time period stated in days, include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday).

The Commissioner’s regulations provide that a civil action

must be instituted within 60 days after the Appeals Council’s notice of denial of request for review of the [ALJ’s] decision or notice of the decision by the Appeals Council is received by the individual, institution, or agency, except that this time may be extended by the Appeals Council upon a showing of good cause.

20 C.F.R. § 422.210(c). “[T]he date of receipt of [the Appeals Council’s] notice of denial . . . shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.” *Id.*

Similarly, 20 C.F.R. § 404.981 states that a claimant has 60 days after the date that he receives notice of the Appeals Council’s decision to file a civil action. 20 C.F.R. § 404.981. The date a claimant receives notice is defined as “5 days after the date on the notice, unless [he] shows [the SSA] that [he] did not receive it within the 5-day period.” *Id.* § 404.901. Thus, a claimant generally has 65 days from the date on the notice to file his complaint. *See id.* §§ 404.901, 404.981, 422.210(c). A claimant may request an extension of the 60-day period for filing a civil action by filing a written request with the Appeals Council. *Id.* § 404.982. Further, we have held that equitable tolling can apply to an untimely filed complaint when the claimant shows that his untimely filing was justified by extraordinary circumstances. *Jackson*, 506 F.3d at 1353.

The SSA is required to send to a claimant’s representative “[n]otice and a copy of any administrative action, determination, or decision.” 20 C.F.R. § 404.1715(a)(1). The regulation states that “[a] notice or request sent to [a claimant’s] representative, will have the same force and effect as if it had been sent to [the claimant].” *Id.* § 404.1715(b).

The district court did not err in dismissing Wurst's complaint as untimely. The Notice denying Wurst's request for review was dated December 11, 2015. Wurst was presumed to have received the Notice five days later on December 16, 2015. *See* 20 C.F.R. §§ 404.901, 422.210(c). Wurst therefore had until February 15, 2016, which was 60 days from December 16, 2015, to file his complaint in federal district court. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.901, 404.981, 422.210(c); Fed. R. Civ. P. 6(a)(1)(C). However, Wurst did not file his complaint in the district court until February 22, 2016, and as such, his complaint was untimely filed.

Although Wurst argues that the five-day presumption provided in § 422.210(c) does not apply in his case, he did not make a reasonable showing that he received the Notice outside that five-day period. *See* 20 C.F.R. § 422.210(c). For the reasons set out below, Wurst's affidavit stating that he received the Notice on December 26, 2015, the discrepancy between the date printed on the Notice and the envelope's postmark date, and his assertion that the Notice failed to arrive within the five-day presumption due to the Christmas holiday all fail to sufficiently rebut the presumption that the Notice arrived by December 16, 2015. *See* 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.901, 404.981, 422.210(c).

We need not address Wurst's argument that that the time should run from the date of the postmark, rather than the date of the Notice. Assuming *arguendo*

the time runs from the postmark, Wurst's complaint is nevertheless untimely; 65 days from the postmarked date was February 18, 2016, and Wurst did not file until February 22.

Additionally, Wurst does not rebut the assumption that his counsel received the notice by December 16, 2015. The record shows that the Appeals Council also simultaneously sent the Notice to Wurst's counsel, which has the same force and effect as if it had been sent to Wurst. *See* 20 C.F.R. § 404.1715(b).

Wurst also did not argue that extraordinary circumstances justified equitable tolling of the statute of limitations. *See Carmichael*, 572 F.3d at 1293; *Jackson*, 506 F.3d at 1353. Furthermore, the Notice advised Wurst that if he disagreed with the Appeals Council's action, he had 60 days to file a civil action. Assuming that Wurst actually received the Notice on December 26, 2015, both Wurst and his attorney knew of the 60-day statute of limitations, yet neither argued that they were prevented from filing the complaint within that shortened-time period or from requesting an extension. *See Carmichael*, 572 F.3d at 1293; *Justice*, 6 F.3d at 1479-80; 20 C.F.R. §§ 404.982, 422.210(c).

Accordingly, because Wurst has failed to rebut the assumption that he received the Notice within the five-day presumption, the district court properly dismissed Wurst's complaint as untimely and we affirm.

AFFIRMED.