[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10278
Non-Argument Calendar

D.C. Docket No. 8:19-cv-01553-NPM

JERRY WILSON,

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(August 31, 2021)

Before ROSENBAUM, JILL PRYOR, and BRANCH, Circuit Judges.

PER CURIAM:

Jerry Wilson appeals the district court's dismissal for lack of jurisdiction of his action seeking judicial review under 42 U.S.C. § 405(g) of the Commissioner of Social Security's ("Commissioner") dismissal of his request for an in-person hearing on his claim for Social Security benefits. The district court reasoned that it lacked jurisdiction because the agency's decision was not "made after a hearing" as required by § 405(g). *See* 42 U.S.C. § 405(g) (allowing for judicial review of "any final decision of the Commissioner of Social Security made after a hearing"). However, the hearing requirement is not a jurisdictional prerequisite to review and may be waived by the agency, *see Smith v. Berryhill*, 587 U.S. ___, ___, 139 S. Ct. 1765, 1773–74 (2019), and the Commissioner waived that requirement both below and on appeal. Because the district court had jurisdiction under § 405(g), we vacate the judgment and remand for further proceedings consistent with this opinion.

I.

Wilson applied for disability insurance benefits and supplemental security income with the Social Security Administration ("SSA"), alleging that he was unable to work because of a combination of physical and mental ailments. After his applications were denied initially and upon reconsideration in February and July of 2017, respectively, he requested an in-person hearing before an ALJ.

The hearing was scheduled for 9:00 a.m. on January 8, 2019, in Tampa, Florida. Before that date, Wilson received two notices in the mail from SSA

advising of the hearing date and warning that his request for a hearing may be dismissed if he failed to attend the hearing. The agency also called Wilson the day before the hearing, and he confirmed he would attend.

But Wilson did not make it to the hearing. On January 9, 2019, the day after missing the hearing, Wilson wrote the ALJ a letter in which he stated that he had missed the hearing because of traffic-related problems. He explained that he and his driver had left Mulberry, Florida, at 7:00 a.m. to travel the 60 miles to Tampa, intending to arrive at the hearing office "just before 9," but there were two accidents on Interstate 275 "that made the news." He called the hearing office when he discovered that traffic on I-275 was backed up and would prevent him from arriving on time. Then, when he found the hearing location, he "was in the wrong lane and couldn't get over," and a U-turn "sent [him] to St[.] Pete." He called the hearing office again and was told to provide an explanation to the ALJ in writing. Wilson closed his letter by requesting a new hearing date.

On January 22, 2019, the ALJ issued an order dismissing Wilson's request for a hearing. The ALJ noted that Wilson had submitted a letter "in which he explained the reason for his failure to appear at the hearing, and requested a new date for the hearing." But the ALJ found, after "consider[ing] the factors set forth in 20 C[.]F[.]R[.] [§§] 404.957(b)(2) and 416.1457(b)(2)," that "there is no good cause for the claimant's failure to appear at the time and place of hearing." The ALJ did not

further elaborate on why Wilson's explanation did not establish good cause for his failure to appear. Wilson appealed the ALJ's decision to the Appeals Council, which denied his request for review without further explanation. So the July 2017 adverse determination remained in effect as the final decision on his claims.

Wilson then filed suit in federal district court to reverse the Appeals Council's decision, invoking jurisdiction under 42 U.S.C. § 405(g). The Commissioner answered and agreed that the court had jurisdiction to review "whether the ALJ's dismissal of Plaintiff's request for a hearing was proper." The Commissioner "voluntarily decided to waive any argument that judicial review of the ALJ's dismissal is not available" in this case.

The district court,[1] however, determined that it lacked subject-matter jurisdiction under § 405(g) because the ALJ's decision was not "made after a hearing." *See* 42 U.S.C. § 405(g). While the court stated that limited judicial review was still available for "colorable constitutional claim[s]," it determined that Wilson did not present a colorable due-process violation because he did not offer a reason that facially qualified as good cause under the regulations, such that the ALJ would be required to explain in more detail his rejection of that reason, and Wilson received notice and an opportunity to be heard. This appeal followed.

[1] Our use of "district court" refers to a magistrate judge exercising jurisdiction to enter final judgment by consent of the parties. *See* 28 U.S.C. § 636(c)(1).

II.

We begin with the district court's determination that it lacked jurisdiction to review the ALJ's decision under § 405(g) because it was not "made after a hearing." We review that issue *de novo*. *Sherrod v. Carter*, 74 F.3d 243, 245 (11th Cir. 1996) ("The decision of the district court as to its subject matter jurisdiction is a question of law which we review *de novo*.").

Section 405(g) authorizes judicial review of "any final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). This provision, according to the Supreme Court, "contains two separate elements: first, a jurisdictional requirement that claims be presented to the agency, and second, a waivable requirement that the administrative remedies prescribed by the Secretary be exhausted." *Smith v. Berryhill*, 139 S. Ct. 1765, 1773–74 (2019) (cleaned up). The latter requirement, which may be waived by the agency or excused by the courts, includes whether a decision "qualifies as a 'final decision . . . made after a hearing' for purposes of allowing judicial review under § 405(g)." *Id.*

In interpreting the phrase, "final decision . . . made after a hearing," the Court observed that the text "clearly denotes some kind of terminal event," such as the "final stage of review" under the governing regulations. *Id.* at 1774. And while the Court noted that the word "hearing" signified "an ALJ hearing" in the ordinary case, the Court also made clear "that an ALJ hearing is not an ironclad prerequisite for

judicial review." *Id.* at 1774 & 1777 n.17. Beyond the statutory text, the Court cited the strong presumption that Congress intends judicial review of agency action and the fact that the Social Security Act was a "claimant-protective statute." *Id.* at 1776–77. On the whole, according to the Court, "while Congress left it to the SSA to define the procedures that claimants . . . must first pass through, Congress has not suggested that it intended for the SSA to be the unreviewable arbiter of whether claimants have complied with those procedures." *Id*. (citation omitted).

Here, the district court erred in dismissing Wilson's complaint for lack of jurisdiction under § 405(g). The Commissioner readily concedes that Wilson "clearly satisfie[d] the nonwaivable 'presentment' requirement," which is jurisdictional, by submitting applications for disability benefits and arguing that he presented good cause for failing to appear at the ALJ hearing. So "the only potential question," as the Commissioner states, is whether Wilson satisfied the waivable requirement of exhaustion of the administrative remedies prescribed by the Commissioner.

There are grounds to believe that Wilson did so. First, Wilson received a "claim-ending" determination "from the agency's last-in-line decisionmaker," the Appeals Council, under the relevant regulations. *See id.* at 1775, 1777. Second, while *Smith* declined to resolve whether § 405(g) permits review where, as here, a claimant "faltered at an earlier step" and did not "receive[] a 'hearing' at all," it

reiterated that its precedents "make clear that a hearing is not always required." *Id.* at 1777 n.17. And third, interpreting § 405(g) to preclude judicial review in this case would make the agency the "unreviewable arbiter" of whether a claimant established good case for failing to appear at an ALJ hearing, which tends to clash with Congressional intent and the presumption of judicial review. *See id.* at 1176–77.

In any event, we need not decide whether there has been a "final decision . . . made after a hearing" under § 405(g) in this case because the Commissioner, both in the district court and on appeal, has expressly waived any objection on exhaustion grounds and instead defended the ALJ's decision on the merits. According to *Smith*, § 405(g)'s hearing requirement involves the "nonjurisdictional element of administrative exhaustion," which may be waived by the agency or excused by the courts. *See id.* at 1773–74. Because the agency waived that nonjurisdictional element, and the jurisdictional element was satisfied, no barrier prevented the court's exercise of judicial review under § 405(g).

Accordingly, the district court had jurisdiction under § 405(g) to review the final decision of the Appeals Council denying review of the ALJ's dismissal of Wilson's request for an ALJ hearing.

III.

Although the district court incorrectly concluded that it lacked jurisdiction, the Commissioner contends that we should affirm the district court on alternative

grounds. *See, e.g.*, *Kernal Records Oy v. Mosley*, 694 F.3d 1294, 1309 (11th Cir. 2012) ("[T]his Court may affirm the judgment of the district court on any ground supported by the record, regardless of whether that ground was relied upon or even considered by the district court.").

An ALJ may dismiss a request for a hearing when a claimant or the claimant's representative fails to appear at the time and place set for the hearing and "good cause has not been found by the administrative law judge" for the failure to appear. 20 C.F.R. §§ 404.957(b)(1)(i), 416.1457(b)(1)(i). In determining good cause, the agency "will consider any physical, mental, educational, or linguistic limitations" which the claimant may have. *Id*. §§ 404.957(b)(2), 416.1457(b)(2). These provisions do not further define what may qualify as good cause for missing a scheduled ALJ hearing. *See id.* Elsewhere, though, the regulations set forth a non-exclusive list of circumstances that may supply good cause to change the time or place of an ALJ hearing, which includes transportation-related issues. *See id.* §§ 404.936(f)(2), 416.1436(f)(2).

In the Commissioner's view, the ALJ did not abuse his discretion in concluding that Wilson failed to show good cause for missing the hearing because Wilson "never tried to justify his failure to appear at his hearing" based a "physical, mental, educational, or linguistic limitation[]." Rather, the Commissioner notes, "the only explanation he has ever offered is that he experienced travel difficulties."

The district court relied on similar reasoning when evaluating whether he presented a colorable constitutional claim.

We decline to affirm the district court's decision on other grounds. Although the court touched on the merits of Wilson's arguments, it did so for only the limited purpose of determining whether he presented a colorable due-process claim. But the scope of review is not limited to constitutional claims, *see Smith*, 139 S. Ct. at 1774 n.7, and it includes, as the Commissioner admitted below, "whether the ALJ's dismissal of Plaintiff's request for a hearing was proper." Nor are we sure that the Commissioner's position—that good cause must be based on a "physical, mental, educational, or linguistic limitation"—is clearly correct, such that remand would be pointless. *See, e.g.*, 20 C.F.R. §§ 404.936(f)(2), 416.1436(f)(2). For these reasons, we would prefer that the district court address these matters in the first instance. *See Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 n.4 (11th Cir. 2001) (declining to address various alternative grounds for affirmance, "preferring that the district court address them in the first instance").

IV.

In sum, we vacate the district court's dismissal for lack of jurisdiction of Wilson's complaint requesting judicial review under § 405(g), and we remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.