

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RHONDA O. CUNNINGHAM : CIVIL NO.
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KENNETH S. APFEL : 00-4050

MEMORANDUM

I. INTRODUCTION

Rhonda O. Cunningham (“Cunningham”) brings this action pursuant to 42 U.S.C. § 405(g) for review of the final decision of the Commissioner of Social Security, who denied her application for Social Security Disability Benefits and for Supplemental Security Income. The parties have filed cross motions for summary judgment. For the following reasons, Plaintiff’s motion for summary judgment is GRANTED and defendant’s motion is denied.

II. PROCEDURAL BACKGROUND

Cunningham filed an application for Social Security Disability Benefits and for Supplemental Security Income on December 9, 1996, alleging a disability onset of epilepsy on December 7, 1995. (R. 83). These applications were denied at the initial and reconsideration levels. (R. 67-72, 74-75, 338-45). Plaintiff filed a timely request for a hearing before an Administrative Law Judge (“ALJ”) on October 23, 1997. (R. 78).

On August 19, 1998, a hearing was held before an ALJ, who rendered a decision on November 16, 1998 that plaintiff was not “disabled” within the meaning of the Social Security

Act (“the Act”). The ALJ determined that Cunningham was not “disabled” and that she had the residual functional capacity to perform a range of work at the medium exertional level with limitations to avoid exposure to unprotected heights, moving machinery, and other hazards. (R. 28-29).

At the end of the ALJ hearing, the ALJ requested Cunningham’s counsel to try to obtain additional evidence from Dr. Franca Cambi, her treating neurologist at Thomas Jefferson University Hospital (“Jefferson”), and left the record open for three weeks. (R. 60-61). One month later, on September 17, 1998, Cunningham’s counsel wrote to the ALJ, stating that he was still having difficulty obtaining the records. (R. 32). On October 20, 1998, Cunningham’s counsel informed the ALJ that he had nothing further to submit. (R. 31). On November 16, 1998, the ALJ rejected Cunningham’s application for benefits. (R. 20-30).

Cunningham appealed the ALJ’s decision to the Appeals Council on December 7, 1998. (R. 17). By March 2000, Dr. Cambi’s medical records had been located, and additional medical records of Cunningham’s condition in the months following the ALJ’s opinion had been obtained by counsel. (R. 346-417). On July 25, 2000, after considering all the additional evidence submitted by counsel and the appeal record, the Appeals Council denied Cunningham’s appeal. She then appealed to this court.

III. STATEMENT OF FACTS

Cunningham was born on June 30, 1973, and is a high school graduate. (R. 64). Her only past employment was as a cashier/cook at a fast food restaurant from May 1993 to December 1995. (R. 97). Her last day of work was December 7, 1995. (R. 88, 97). She

experienced her first seizure disorder in 1995. (R. 87-89, 104, 336-37). The evidence submitted before the ALJ includes medical reports from December 1995 to April 1997.

Cunningham was first admitted to the Medical College of Pennsylvania (“MCP”) on December 8, 1995, after experiencing a clonic-tonic seizure¹ at 5 a. m. that morning. (R. 210). She fell from the bed, bit her tongue, and lost bladder control. (R. 210). The seizure lasted for about ten minutes. She remembered waking up in the emergency room in a confused state. (R. 210). The medical records note that she had one previous episode of a clonic-tonic seizure eight months before, for which she was not hospitalized. (R. 210). On December 8, 1995, Cunningham underwent a CT scan², the result of which was normal. (R. 218). An MRI³ of the brain on December 11, 1995, demonstrated mild prominence of high parieto-occipital⁴ sulci⁵ bilaterally with no evidence of mass, hemorrhage or abnormal enhancement. (R. 215). She was given Dilantin⁶ and discharged on December 11, 1995. (R. 211).

¹A clonic-tonic seizure is a grand mal seizure. A grand mal seizure features uncontrolled muscle spasms involving the entire body, and loss of consciousness. During the fit, the person may clench the teeth, bite the tongue, and lose bladder control. After the seizure passes, the person may fall into a deep sleep for an hour or more. Usually, there is no recall of the seizure on waking up. The Signet Mosby Medical Encyclopedia, Revised Edition (1996) at p. 293-94. (Hereinafter “Mosby’s”).

²A CT scan is a computer-assisted x-ray test providing three dimensional images. This scan is capable of producing images with greater detail than conventional x-rays. Laboratory and Diagnostic Test Handbook, at 211.

³Using magnetic fields, MRI (magnetic resonance imaging) is a non invasive method that provides valuable information about soft and/or fluid filled tissues without the use of ionizing radiation. Laboratory and Diagnostic Test Handbook, Revised (1996) p. 473.

⁴Parieto-occipital- pertaining to, or involving, the parietal and occipital bones of the cranium (the part of the skull which contains the brain) or the parietal and occipital lobes of the brain. Attorney’s Dictionary of Medicine and Word Finder (1996).

⁵Parieto-occipital sulci is a groove that separates the occipital lobe of the brain from the two parietal lobes. Attorney’s Dictionary of Medicine and Word Finder (1996).

⁶Indicated for the control of generalized tonic-clonic (grand mal) seizures and complex partial (psychomotor, temporal lobe) seizures and prevention and treatment of seizures occurring during or following neurosurgery. Physician’s Desk Reference, 53rd Ed. 1999, p. 2280. (Hereinafter “PDR”).

Cunningham was again admitted to MCP from December 19, 1995, to December 22, 1995 for Dilantin toxicity and right temporal lobe seizures. (R. 178). Cunningham had an EEG⁷ on December 19, 1995, which was reported as abnormal due to: (1) generalized background slowing; (2) rare focal slowing identified from the right mid to anterior temporal region; and (3) rare right mesio-temporal sharp waves or sharply contoured delta. (R. 192). The EEG report stated that this tracing supported a partial mechanism for her seizures and that the awake background showed more significant generalized background slowing in comparison to a previous record. (R. 192).

Cunningham was again admitted to MCP on January 16, 1996, for Dilantin toxicity and complex partial epilepsy. (R. 155). Cunningham complained that she had dizziness, felt off balance, and was unable to walk. (R. 155). She was discharged on January 21, 1996, after the level of Dilantin was decreased. (R. 156-57).

A follow up visit to MCP on January 16, 1996, revealed that Cunningham had effects of mild bilateral horizontal nystagmus⁸, very slow gait, and blurred vision while walking. (R. 152). She needs assistance walking. (R. 152). According to the report, her Dilantin level was decreased from 300 mg to 230 mg. qhs after her discharge from the hospital. (R. 152). It was fully explained to Cunningham that therapeutic levels of Dilantin were needed, and with lower levels the risk of having frequent seizures is increased. (R. 152). A change to Depakote was suggested because of problems with Dilantin, but Cunningham refused to change the medication,

⁷EEG- Abbreviation for electroencephalogram, a chart of the electric impulses, called brain waves, made by the brain cells, as picked up by electrodes placed on the scalp. Changes in brain wave activity can show nervous system disorders, mental states, and level of consciousness. Mosby's at 281.

⁸Nystagmus- Involuntary, rhythmic movements of the eyes side-to-side, up and down, around, or mixed. Mosby's at 557.

stating that she did not want to take the new medication. (R. 152).

The last record of Cunningham's visit to MCP was on April 17, 1996. (R. 151). The record stated that her last clonic-tonic seizure occurred on March 14, 1996, and that she had suffered a total of four seizures. (R. 151). Her medication was gradually changed to Tegretol, another anti-epilepsy medication, and the dosage was increased on March 16, 1995. (R.151, 315).

Cunningham began treatment at the clinic of Thomas Jefferson University Hospital ("Jefferson") in June 1996. Progress notes for the period between June 1996 and April 1997 and an EEG report dated October 13, 1997 were included into the ALJ's record. (R. 289-315).

At the August 19, 1998 hearing before ALJ, Cunningham testified that she could not work any longer because of the frequency of her seizures. (R. 44). She testified that she had seizures about twice a month, even though she complied with her medication. (R. 46). As to the typical seizure pattern, she testified that she always loses consciousness, and her seizures last for about ten minutes. During her seizures, her eyes roll back into her head, she loses her bowels, she urinates on herself, falls out of bed, bites her tongue, and her whole body shakes. (R. 52, 53). After the seizures, she feels tired, thirsty, she cannot speak clearly, her body aches, and her hands tremble. (R. 55). She testified that she has had seizures during the day and at night, both while she was awake or during her sleep. (R. 51, 52). She also testified that she did not take public transportation by herself because she has had seizures without warning (R. 41), although she has never had a seizure on the street. (R. 51). Plaintiff also stated that she experienced hand trembling as a side effect of Tegretol. (R. 47, 54, 55).

At the ALJ hearing, a vocational expert ("VE"), Margaret Preno, testified that

Cunningham's previous work as a fast food cook/cashier was defined as unskilled, light exertional work. (R. 58). The VE noted that even though Cunningham would not be able to perform the previous work because she has to avoid exposure to heights, rapidly moving machinery, and other hazards, there was multitude of jobs that she could perform. (R. 58). The ALJ asked the VE whether Cunningham could work if she missed two days of work per month (twenty-four days per year) because of health problems, and the answer was in the negative. The VE responded that twenty-four days a year would constitute excessive absenteeism and therefore such a plaintiff "would not be competitive to be able to maintain their job in either the national or local economy." (R. 59). Nevertheless, on the basis of the record presented, the ALJ found that Cunningham was not disabled.⁹

ALJ's Request for Additional Evidence

At the close of the hearing, the ALJ inquired of Cunningham's counsel whether "there is any chance of getting something from Dr. Cambi... [it] would be a tremendous help," (R. 60), and stated that he would leave "the record open for three weeks." (R. 61). Cunningham's counsel attempted to obtain and submit the additional medical records and seizure residual functional capacity ("RFC") questionnaire by Dr. Cambi after the ALJ hearing. (R. 32). In a letter dated September 17, 1998, Cunningham's counsel notified the ALJ that he still had not been able to obtain the medical records from Dr. Cambi. (R. 32). Dr. Cambi had recently

⁹The ALJ does not appear to have considered the unpredictability of the seizure condition, and the effect of that unpredictability on the availability of jobs nationally, if the seizures could occur at work. Moreover, the ALJ does not appear to have considered the predictable manifestations of the seizures, and the seizure condition, in the context of a workplace. For example, the VE opined that hand tremors, a side effect of Tegretol of which Cunningham complained, would, if occurring at work, result in no job availability. (R. 28, 60).

examined Cunningham on July 6, 1998, August 3, 1998, and September 14, 1998, and had ordered laboratory tests on July 13, 1998, July 17, 1998, and August 6, 1998. (R. 371-76, 346-54). By letter Cunningham's counsel asked the ALJ whether or not he would be given time to pursue these records. The ALJ did not respond. (R. 32). On October 20, 1998, Cunningham's counsel sent a letter to the ALJ, stating that as of that date, he had nothing further to submit. The ALJ rendered his decision on November 16, 1998. (R. 31, 20-30).

The ALJ's Decision

The ALJ concluded that Cunningham was not entitled to a period of disability or disability insurance benefits. (R. 30). In doing so, the ALJ followed the sequential evaluation process. 20 C.F.R. §§ 404.1520; 416.920. The ALJ found that Cunningham had a seizure disorder, but that her impairments were not sufficiently severe to meet or equal the applicable listings found in Appendix I, subpart P, Regulation 4.¹⁰ (R. 25- 26). The ALJ also found that the plaintiff could perform a range of work at the medium exertional level despite her impairment, with limitations of avoiding exposure to unprotected heights, moving machinery, and other hazards. (R. 28-29). He also found that the plaintiff's subjective complaints were credible only to the extent they are supported by and consistent with the medical evidence. (R. 27). In reaching his decision, the ALJ relied on medical records from MCP and Hahnemann Hospital

¹⁰The relevant provisions of this listing are as follows:
11.02 Epilepsy— major motor seizures (grand mal or psychomotor), documented by EEG and by detailed description of a typical seizure pattern, including all associated phenomena; occurring more frequently than once a month, in spite of at least 3 months of prescribed treatment. With:
A. Daytime episodes (loss of consciousness and convulsive seizures) or
B. Nocturnal episodes manifesting residuals which interfere significantly with activity during the day. 20 C.F.R. pt. 404, subpt. P, app. 1, § 11.02.

from September 10, 1995, to April 17, 1996, treatment notes from Jefferson from June 6, 1996, to June 28, 1997. (R. 24-25). A CT scan report dated August 20, 1997, and an EEG report dated October 13, 1997 were among the medical reports. (R. 24-25). The ALJ had treatment notes from Dr. Cambi dated January 27, 1997, and September 14, 1997, and a report from Dr. Richard Bennett, a consulting physician at Pennsylvania Bureau of Disability Determination, dated March 15, 1997. (R. 24-25). Although the ALJ concluded that the plaintiff was unable to perform her past relevant work, he found her not disabled. (R. 27-28).

Additional Evidence Submitted to the Appeals Council

While her appeal to the Appeals Council was pending, Cunningham submitted additional medical records and a new response to a RFC questionnaire to the Appeals Council on March 19, 23, and 28, 2000. (R. 9, 10, 16, 346-417). The new evidence submitted to the Appeals Council contained records from Jefferson dated January 27, 1997 to August 6, 1998, and December 7, 1998 to February 22, 1999. (R. 5, 346-92, 393-97). These records included a current report and opinion from Dr. Cambi, which Cunningham's counsel had attempted to obtain after the ALJ hearing and before the close of the record. (R. 346-92).

Additional medical records evidenced Cunningham's condition in the months following the ALJ's opinion, and included three RFC questionnaires dated February 22, 1999 (R. 399-403), May 13, 1999 (R. 412-17), and June 10, 1999 (R. 404-11), and a narrative report by Dr. Carissa Pineda, a treating neurologist at Jefferson, dated May 13, 1999. (R. 404-11).

1. Medical Records Relating To The Period As Of November 16, 1998.

The following summarizes the additional medical evidence submitted by Cunningham to the Appeals Council, relating to her condition as it existed on or before the date of the ALJ's decision, November 16, 1998.

At the ALJ hearing, Cunningham's testimony was the sole basis for the claim that she had seizures twice a month. (R. 39, 44, 45, 46, 61). The record before the ALJ showed that Cunningham reported to her physician that she had seizures every three to five months. (Def.'s Mot. S.J. 5-6; R. 289-315). Cunningham started treatments at Jefferson in January 1997, which were continued through November 16, 1998. Those hospital records showed that her seizures occurred at least twice a month. (R. 381, 384, 385, 389, 390, 393).

The medical records also showed that Cunningham had had seizures during January, February, and March 1996, but had been seizure free from November 1996 to January 1997; that Dr. Cambi first saw her on January 27, 1997, and treated her for over two years (R. 45-46); that a progress note from Dr. Cambi dated September 14, 1998 showed that her Tegretol level was within therapeutic level (R. 371) but that she nevertheless had one seizure per week for three weeks (R. 374); that Dr. Cambi concluded that Tegretol did not seem to be controlling her seizures completely; and that her medical plan was to try to obtain for Cunningham a seizure free existence for at least two years before trying weaning her from Tegretol. (R. 391-93).

2. Additional Medical Records Relating To The Period After November 16, 1998.

Dr. Pineda assumed Cunningham's treatment at the Jefferson seizure clinic between February 1999 and June 1999. (R. 404-11). In a narrative report dated May 13, 1999, Dr. Pineda

concluded that Cunningham had been treated for idiopathic¹¹ generalized clonic-tonic seizures. (R. 404); that she had been prescribed Dilantin, Tegretol, and Depakote; that her blood work showed that she was at therapeutic levels for the respective drugs; that none of the drugs had succeeded in controlling her seizure condition; and that the frequency of her seizures, once a week, had not changed. (R. 404). Dr. Pineda noted that pre-surgical evaluation was being considered. (R. 404-05).

In separate assessments, dated February 22, 1999, and June 10, 1999, Dr. Pineda evaluated Cunningham's condition using a residual functional capacity questionnaire. There, she noted that Cunningham was having generalized clonic-tonic seizures approximately three times a month, each lasting approximately 5 minutes, (R. 399) and that postictal¹² manifestation included confusion, exhaustion and severe headaches, which lasted up to an hour. She described Cunningham as capable of working in low stress jobs but that her impairment would cause her to be absent from work about twice a month. (R. 402). The report also noted that Cunningham was having more seizures, approximately once a week without warning. (R. 406).

Cunningham's family physician, Dr. Lisa Stiller, also completed a physical residual functional capacity assessment on May 13, 1999. (R. 412). She diagnosed Cunningham's condition as uncontrolled epilepsy. (R. 412). She noted that Cunningham was experiencing three grand mal seizures per month, that clinical objective findings included a seizure focus on an EEG, and that grand mal seizures had been witnessed. (R. 412, 413). She opined that

¹¹ Idiopathic- of the nature of an idiopathy; self-originated; of unknown causation. Dorland's Illustrated Medical Dictionary, 27th Edition (1988).

¹² Resulting from, or following, a stroke; following a seizure, as of epilepsy. Attorney's Dictionary of Medicine and Word Finder (Schmidt, 1962).

Cunningham should not work until her seizures were under control. (R. 416).

The Appeals Council's Decision

The Appeals Council considered the contentions raised in Cunningham's brief dated January 27, 2000, as well as the additional evidence, but concluded that neither the contentions nor the additional evidence provided a basis for changing the ALJ's decision. (R. 6). The Appeals Council found that the frequency of Cunningham's seizures was inadequate to meet or equal a listing. (R. 6). Although the Appeals Council did not grant review, it incorporated the newly proffered evidence into the record. (R. 6-8, 346-417). On August 10, 2000, Cunningham filed an appeal in this court.

IV. STANDARD OF REVIEW

The Social Security Act provides that a claimant who was unsuccessful in the administrative process may seek judicial review once there is a final decision by the Commissioner of Social Security. Matthews v. Apfel, 239 F. 3d 589, 592 (3d Cir. 2001); 42 U.S.C. § 405(g). Judicial review of an administrative decision is limited. The court may not reweigh the evidence. The court determines only whether the Commissioner's decision is supported by substantial evidence. Matthews v. Apfel, 1999 WL 1268043 (E.D. Pa. 1999), aff'd, 239 F. 3d 589 (3d Cir. 2001) (citing Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986)). Findings of fact made by the ALJ must be accepted as conclusive, provided that there is substantial evidence that "a reasonable mind might accept as adequate to support a conclusion." 42 U.S.C. § 405 (g); Kangas v. Bowen, 823 F. 2d 775, 777 (3d Cir. 1987). A

district court may not undertake a de novo review of the Commissioner's decision; or reweigh the evidence. Monsour Med. Ctr., 806 F. 2d at 1190 (3d Cir. 1986).

V. SCOPE OF REVIEW

Although evidence considered by the Appeals Council, but not by the ALJ, may be part of the administrative record on appeal, it cannot be considered by the district court in making its substantial evidence review. Matthews, 239 F. 3d at 593. The scope of a court's review is limited to the record developed before the ALJ. Id. (citing Eads v. Sec'y of HHS, 983 F. 2d 815, 817 (7th Cir. 1993)).

If the claimant proffers evidence in the district court that was not previously presented to the ALJ, then the district court may remand to the ALJ, but only upon a showing that there is new evidence which is material and that there was good cause for the failure to incorporate such evidence into the record in the prior ALJ proceeding. Szubak v. Sec'y of HHS, 745 F. 2d 831, 833 (3d Cir. 1984); 42 U.S.C. § 405(g).

The evidence must be "new" and not merely cumulative of what is already in the record. Szubak, 745 F. 2d at 833. It must be relevant and probative. Id. An implicit materiality requirement is that the new evidence must relate to the time period for which benefits were denied, and must not relate to a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition. Id. Moreover, the materiality standard requires that there be a reasonable possibility that the new evidence would have changed the outcome of the ALJ's determination. Id.

VI. DISCUSSION

To determine whether a plaintiff is disabled, an ALJ must follow a five-step sequential analysis. 20 C.F.R. § 404.1520. The first step evaluates whether the plaintiff is working. If so, she is not disabled. Luff v. Bowen, 1989 WL 56410 (W.D. Pa. 1989). If the plaintiff is not working, the second step evaluates whether the plaintiff has a severe impairment. A plaintiff may be severely impaired either because her medical condition meets the requirements of the Social Security's listing of impairments, 20 C.F.R. Part 404, Subpart P, Appendix I (hereinafter "Appendix I"), or because her medical condition significantly limits her ability to do basic activities. Id.; 20 C.F.R. § 404.1520(c). If a plaintiff's condition satisfies the Appendix I requirements, she is automatically determined to be disabled. 20 C.F.R. § 404.1520(d). If the impairment fails to meet the listing's criteria, her residual functional capacity must be evaluated to determine whether she can perform her past relevant work or other work. If she is unable to perform either, she is then determined to be disabled. Id.; 20 C.F.R. § 404.1520 (e, f).

Following this sequential evaluation as to Cunningham, the ALJ found at the first step that there is no indication that she had been engaged in any substantial gainful activity since June 1, 1996. (R. 24). At step two, the ALJ found that Cunningham's medical records revealed that her seizure disorder was severe as defined under the Social Security Act, as it had significantly affected her ability to engage in basic work activity. (R. 25). At step three, however, the ALJ found that none of Cunningham's impairments, either singly or in combination, met or equaled in severity any of the impairments listed in Appendix I of part 404, Subpart P of the Regulations. (R. 25-26). 20 C.F.R. § 404.1520(d); 20 C.F.R. § 416.920(d). At steps four and five, the ALJ found that even though Cunningham cannot return to her past work, there are other jobs she

could perform consistent with her medically determinable impairments, functional limitations, age, education, and work experience. (R. 27-28).

A. The Additional Evidence Is New And Material.

Cunningham argues that the ALJ erred in failing to consider relevant medical evidence in step three of his five-step analysis. (Pl.'s Mot. S.J. 10-17). Specifically, she contends, the ALJ did not consider an abnormal EEG report dated December 19, 1995 (Pl.'s Mot. S.J. 12; R. 192), a narrative report by Dr. Pineda dated May 13, 1999, (Pl.'s Mot. S.J. 14; R. 404-05), a physical assessment questionnaire by Dr. Stiller dated May 13, 1999, (Pl.'s Mot. S.J. 14; R. 412-17), and records dated January 27, 1997, July 6, 1998, and May 13, 1999, indicating that her levels of Tegretol and Dilantin were therapeutic. (Pl.'s Mot. S.J. 15-16; R. 391-92, 375, 404).

As discussed supra, Cunningham only proffered the new evidence, her medical records from January 1997 to June 1999, before the Appeals Council. (R. 9, 10, 16, 346-417). These additional medical reports are not cumulative of what is already in the record before the ALJ. The new evidence, to be cognizable, must relate to the time period for which benefits were denied and must not be solely evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition. 42 U.S.C. 405(g); 20 C.F.R. § 404.970(b); Szubak, 745 F. 2d at 833. The only new evidence that relates to the time period on or before the ALJ's decision is the medical records from Jefferson from January 27, 1997, to August 6, 1998. (R. 346-92). The other records are beyond the appropriate time period, and thus inadmissible. (R. 393-417).

Nevertheless, the medical records from January 27, 1997, to August 6, 1998 are material

in that there is a reasonable probability that they would have influenced the ALJ to decide Cunningham's claim differently. See, Flanders v. Chater, 1995 WL 608287 (S.D.N.Y. 1995) (citing Tirado v. Bowen, 853 F. 2d 595, 597 (2d Cir. 1975)). These records contain medical records from Dr. Cambi which corroborate Cunningham's testimony that she had seizures more frequently than twice a month. (R. 381, 384, 385, 389, 390, 393). For example, the progress note dated September 14, 1998, shows that Cunningham's Tegretol level was within therapeutic level yet she had had one seizure per week for three straight weeks. (R. 371, 374).

Since the ALJ, in his opinion, stated that the medical records did not show that Cunningham's impairment met the listing of Appendix I, and that Cunningham was credible only to the extent that the medical evidence substantiated her allegation, the court finds that, with this evidence, it was reasonably likely that the ALJ would have found that Cunningham had met the Appendix I listing. Therefore, the additional evidence from the period January 27, 1997, to August 6, 1998, is both new and material.

B. Good Cause Existed For Cunningham's Failure To Profer the Evidence To The ALJ.

In Matthews v. Apfel, 239 F.3d 589 (3d Cir. 2001), the third circuit held that new and material evidence not presented to the ALJ should not be reviewed by the district court, unless there is also good cause for not having produced the evidence earlier. Id. at 590; 42 U.S.C. § 405(g).

Good cause has been defined as some justification for a claimant's failure to have acquired and presented such evidence to the ALJ. Birchfield v. Harris, 506 F. Supp 251, 253 (D. Tenn. 1980); Matthews, 239 F.3d at 594-95. This holding serves a public policy by encouraging

disability claimants to present to the ALJ all relevant evidence concerning her impairments. Matthews, 239 F. 3d at 595. The court in Matthews reasoned that if it were to order remand for each item of new and material evidence, it would open the door for claimants to withhold evidence from the ALJ in order to preserve a reason for remand. Id.

In this case, the ALJ's November 16, 1998, decision was based on the evidence then submitted. Cunningham later submitted new and material evidence to the Appeals Council on March 19, 23, and 28, 2000. (R. 9, 10, 16, 346-417). Applicable regulations permit a claimant to submit to the Appeals Council new and material evidence that relates to the period on or before the date of the ALJ's hearing decision. 20 C.F.R. § 404.970(b); Matthews 239 F.3d at 592.

Here, the only new evidence that relates to the period on or before the date of the ALJ's decision are the records from Jefferson dated January 27, 1997, to August 6, 1998. (R. 346-92).

As discussed supra, Dr. Cambi's medical reports were submitted to the Appeals Council, but not to the ALJ, because, despite Cunningham's counsel's best efforts and for reasons not within his control, they were not available until after the hearing.

The court finds that the good faith efforts of Cunningham's counsel to obtain these reports before the ALJ closed the record constitutes good cause for remand to enable the ALJ to consider the new and material evidence that was submitted to the Appeals Council.

VI. CONCLUSION

For the reasons stated above, this matter is remanded to the Commissioner for further proceedings consistent with this opinion.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RHONDA O. CUNNINGHAM : CIVIL NO.
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KENNETH S. APFEL : 00-4050

ORDER

AND NOW, this ____ day of July 2001, upon consideration of the parties' motions for summary judgment, for the reasons outlined in the attached memorandum, it is hereby ORDERED that the above-captioned matter is REMANDED to the Commissioner of Social Security for proceedings consistent with this Court's Opinion.

BY THE COURT:

JAMES T. GILES C.J.

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to