

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

LISSETTE FERNANDEZ : CIVIL ACTION  
 :  
 V. :  
 :  
 COMMISSIONER OF SOCIAL :  
 SECURITY ADMINISTRATION : 03-5219

**MEMORANDUM AND ORDER**

Baylson, J.

November 24, 2004

Plaintiff, Lissette Fernandez, has brought this action under 42 U.S.C. § 1383(c)(3), which incorporates 42 U.S.C. §405(g), seeking judicial review of the Commissioner of Social Security's decision denying Plaintiff's claim for supplemental security income (SSI) under title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. The parties have filed cross-motions for summary judgment. Plaintiff initially filed an application for benefits in 1998, and was determined not to be disabled on November 30, 2000. Plaintiff reapplied for benefits in December, 2000 and an unfavorable decision was rendered on May 11, 2002, leading to this suit.

Plaintiff asserts that she is disabled and that the Administrative Law Judge (ALJ) ignored important medical evidence supporting her claim of disability, as well as the opinions of her treating physicians, Dr. Jyung and Dr. Hanson.

The Commissioner supports these decisions because Dr. Jyung's report only related to the plaintiff's prior claim period of alleged disability ending November 30, 2000. The Commissioner asserts that the doctrine of res judicata prevented the ALJ from considering Dr. Jyung's report in the subsequent proceeding for the subsequent period of alleged disability. The Court disagrees. Although the finding of the ALJ as to the earlier period is not being reopened,

that would not prevent the ALJ presiding in the second proceeding from at least considering Dr. Jyung's report as background medical evidence. The Commissioner's reliance on regulations 20 CFR 416.1487 does not preclude consideration of the earlier medical testimony. Similarly, the Commissioner's reliance on 20 CFR 416.1457 does not apply because the doctrine of res judicata only applies to challenging a prior decision and does not necessarily bar consideration of evidence introduced in the prior proceeding, if it is arguably relevant in the subsequent proceeding. The Court believes that the ALJ was unduly restrictive in refusing to consider Dr. Jyung's report as background medical evidence about the plaintiff.

Similarly, it is uncontested that the ALJ did not consider the report of plaintiff's treating physician during the relevant period, Dr. Hanson, because the ALJ's opinion does not contain any reference to Dr. Hanson, and he supported the plaintiff's claim of disability. See R.651-652: "It is my medical opinion that Mrs. Fernandez has severe disabling symptoms of the vestibular dysfunction and objective findings on physical examination to support a vestibular disorder."

The plaintiff also contends that she suffers from vertigo and a medical record was introduced into evidence showing that as of July 12, 2001, the plaintiff was found to have "persistent episodic vertigo. Vertigo has evoked positional changes, sectioning and pressure. Lasts 5-6 minutes and is accompanied by high pitched tinnitus." R68.

The plaintiff has also submitted a supplemental brief, which supports her claim that the first surgery resulted in the vertigo and that the second surgery was unsuccessful. The ALJ failed to consider this evidence.

Following a conference call with counsel on November 22, 2004, the Court, after a review of the briefs and records, believes that it is appropriate to remand this case to the ALJ for consideration of the reports of Dr. Jyung and Dr. Hanson, and further examination of the medical

record on the issue of vertigo.

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MICHAEL M. BAYLSON, J.

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**ORDER**

AND NOW, this 23<sup>rd</sup> day of November, 2004, upon consideration of plaintiff's alternative Motion to Remand, it is hereby ORDERED that the motion is GRANTED and this matter is REMANDED to the Commissioner for an evidentiary hearing in accordance with the foregoing Memorandum. This remand is ORDERED pursuant to the fourth sentence of 42 U.S.C. § 405(g). The Clerk shall mark this case CLOSED.

BY THE COURT:

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MICHAEL M. BAYLSON, J.