

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

GREGORY STIDHAM

V.

KENNETH S. APFEL,  
Commissioner of Social Security

CIVIL ACTION NO.  
98cv1118

MEMORANDUM

Broderick, J.

March 11, 1999

Plaintiff Gregory Stidham is a 48 year old former janitorial worker who suffers from hypertension. On February 28, 1997, an Administrative Law Judge decided that Plaintiff was not under a “disability” as defined by the Social Security Act. After the hearing, Plaintiff was hospitalized on three separate occasions for his hypertension. Plaintiff submitted this new evidence to the Appeals Council and requested that the ALJ’s decision be reviewed in light of this evidence. On October 13, 1997, Plaintiff was hospitalized a fourth time as a result of a stroke. On January 2, 1998, without having evidence of Plaintiff’s stroke, the Appeals Council denied Plaintiff’s request for review. Plaintiff appealed to the district court.

Presently before the Court is Plaintiff’s motion to remand for consideration of newly obtained evidence. Defendant has opposed the motion. For the reasons which follow, the Court will grant Plaintiff’s motion to remand.

Plaintiff is a 48 year old former janitorial worker who suffers from hypertension. He filed for disability benefits on September 9, 1994. His claim was denied at the initial determination level on October 21, 1994 and denied again on reconsideration on June 12, 1995. After a hearing on the merits, the ALJ, in an opinion dated February 28, 1997, held that Plaintiff is not

under a “disability” as defined in the Social Security Act. Specifically, the ALJ determined that Plaintiff has severe hypertension, and is unable to perform his past relevant work, but that he could perform a limited range of “light work activity,” and therefore he is “not disabled.” Tr. at 27-28.

Between March and June of 1997, after the ALJ’s decision, Plaintiff was hospitalized three times due to his hypertension (collectively, the “three post-hearing hospitalizations”). Plaintiff submitted to the Appeals Council the hospital admission reports describing these three post-hearing hospitalizations. On October 13, 1997, Plaintiff was hospitalized for 16 days as a result of a stroke. Evidence of the stroke did not become available in time for Plaintiff to submit this evidence to the Appeals Council. On January 2, 1998, without having evidence of Plaintiff’s stroke, the Appeals Council denied Plaintiff’s request for review,

Plaintiff filed this request for a “new evidence” remand under 42 U.S.C. § 405(g) sentence six, which states: “The court may. . . order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding. . . .” In his opposition to Plaintiff’s motion to remand, Defendant contends that “the dismissal of a request for Appeals Council review is binding and not subject to further review” therefore, “this Court lacks jurisdiction to entertain Plaintiff’s motion to remand.” (Docket No. 7 at p. 2). This Court will first address Defendant’s challenge to its jurisdiction.

While Defendant is correct that this Court would not have jurisdiction over a *dismissal* of a request for Appeals Council review, see Bacon v. Sullivan, 969 F.2d 1517 (3d Cir. 1992); 20 C.F.R. § 404.972, Defendant misconstrues the procedural history of this case. The January 2,

1998 Appeals Council decision makes it clear that Plaintiff could seek review in district court by stating that “[i]f you desire a court review of the Administrative Law Judge’s decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside....” Tr. at 5. The decision explicitly states that Plaintiff’s “request [for review] is denied.” *Id.* Thus, the January 2, 1998 decision is a *denial* of review. See 20 C.F.R. § 404.981 (stating that claimant may file an action in district court after denial of review). Both the regulations and the Secretary’s own decision make it clear that this Court has jurisdiction to hear Plaintiff’s claim.

Turning to the merits of the motion, Plaintiff contends that the evidence of his three post-hearing hospitalizations and his October 1997 stroke is “new evidence.” However, as Plaintiff concedes in his brief, Plaintiff submitted the records of his three post-hearing hospitalizations to the Appeals Council. The record confirms that evidence of Plaintiff’s three post-hearing hospitalizations in 1997 was considered by the Appeals Council.

The January 2, 1998 Order of the Appeals Council states:

Evidence in addition to that which was before the Administrative Law Judge has been received by the Appeals Council and is hereby made a part of the record. That evidence consists of the following exhibit(s): Exhibit AC-1 Hospital admission report for March 3, 1997; Exhibit AC-2 Hospital admission report for June 6, 1997 and June 16, 1997; Exhibit AC-3 Letter from Bruce Kornberg, D.,O.,F.A.C.C.F.A.C.O.I.

Tr. at 7. Moreover, the Appeals Council letter denying Plaintiff’s request for review explicitly states:

The Appeals Council has also considered the contentions raised in your representative’s letter dated May 2, 1997 as well as the additional evidence also identified on the attached Order of the Appeals Council, but concluded that neither the contentions nor the additional evidence provides a basis for changing

the Administrative Law Judge's decision.

Tr. at 5. Clearly, the evidence of Plaintiff's three post-hearing hospitalizations was before the Appeals Council, and Plaintiff's characterization of these hospital reports as "new evidence" is factually incorrect. However, the evidence of Plaintiff's October 13, 1997 stroke was not submitted to the Appeals Council prior to its denial of review, and is properly regarded as "new evidence."

For this Court to order a "new evidence" remand pursuant to 42 U.S.C. § 405(g), the Plaintiff must show "that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." The Third Circuit has held that the "new evidence" must not be "merely cumulative of what is already in the record." Szubak v. Secretary of Health and Human Serv., 745 F.2d 831, 833 (3d Cir. 1984)(per curiam). Not only must new evidence be relevant and probative, the materiality standard requires "that there be a reasonable possibility that the new evidence would have changed the outcome of the Secretary's determination." Id. The burden of showing a "reasonable possibility" is not great. Newhouse v. Heckler, 753 F.2d 283, 287 (3d Cir. 1985). This "reasonable possibility" requires more than a minimal showing, but need not meet a preponderance test. Id.

While deciding a "new evidence" remand, a district court may also consider the effect of the claimant's failure to present the evidence in the first instance and the possibility that the claimant may be denied a fair hearing if the additional evidence is not considered. Id. fn 6. Finally, Plaintiff must demonstrate good cause for not having incorporated the new evidence into the administrative record. Szubak, 745 F.2d at 833.

It is clear that the evidence of Plaintiff's October 13, 1997 stroke is not "merely

cumulative” of the evidence already in the record. The evidence of the stroke is relevant and probative of Plaintiff’s claim of disabling hypertension. The report appears to corroborate Plaintiff’s testimony of being unable to perform “substantial gainful activity,” and details the physician’s aggressive efforts to control Plaintiff’s hypertension. There is a reasonable possibility that the evidence of the stroke, coupled with the three post-hearing hospitalizations and other evidence on the record, would have changed the Secretary’s determination that Plaintiff’s severe hypertension is not disabling.

Moreover, Plaintiff’s inability to present the evidence at the administrative level has potentially substantial effects on this case. Given the severity of the condition described by the new evidence, it is entirely possible that Plaintiff would be denied a full and fair hearing if this new evidence is not considered. In addition, Plaintiff has demonstrated good cause for the failure to incorporate this evidence into the administrative record. As the submission of the three post-hearing hospitalizations indicates, Plaintiff promptly submitted his evidence as it became available, and simply did not yet have evidence of his post-hearing stroke. The record is devoid of any allegation that Plaintiff “withheld” evidence in order to appeal an adverse ruling. See Szubak, 745 F.2d at 833. Having demonstrated a reasonable possibility that new evidence would have changed the outcome of the Secretary’s determination, and good cause for not incorporating the new evidence into the administrative record, Plaintiff’s motion for remand will be granted.

An appropriate Order follows.

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O R D E R

AND NOW, this            day of March, 1999; upon consideration of Plaintiff's Motion to Remand and Defendant's response; for the reasons stated in the Memorandum filed on this date;

IT IS ORDERED: Plaintiff's motion to remand is GRANTED. This remand is ordered for the consideration of new evidence of Plaintiff's October 13, 1997 stroke, pursuant to sentence six of 42 U.S.C. § 405(g).

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RAYMOND J. BRODERICK, J.