

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CALVIN L. CUNNINGHAM

PLAINTIFF

vs.

Civil No. 5:09-cv-05065

MICHAEL J. ASTRUE

DEFENDANT

Commissioner, Social Security Administration

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Before this Court is Plaintiff's Motion to Dismiss (Doc. No. 4). Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) (2005), the Honorable Jimm Larry Hendren referred this case to the Honorable Barry A. Bryant for the purpose of making a report and recommendation. Pursuant to this referral, this Court recommends that this case be **DISMISSED**.

There are currently two cases pending in the Western District of Arkansas that were filed by Plaintiff, Cause No. 5:06-cv-05088 and the instant case. These two cases involve the same Plaintiff, allege the same cause of action, and arise out of the same facts. The first case was filed on May 18, 2006, when Plaintiff appealed the SSA's unfavorable decision denying his request for social security disability benefits. *See* Cause No. 5:06-cv-05088 (Doc. No. 1). Thereafter, Defendant requested that the court remand Plaintiff's case to the Social Security Administration (hereinafter "SSA") for further administrative findings. (Doc. No. 6). On January 23, 2007, the Court granted Defendant's motion and remanded Plaintiff's case to the SSA for further administrative review pursuant to Sentence 6 of Section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). (Doc. No. 8). Further administrative review has been completed, and that case has now been reopened. The second case, the instant case, was filed on March 25, 2009. Apart from the filing of the Complaint, the an order

granting Plaintiff's IFP application, and the issuance of four summonses, no other action has been taken in this case.

Plaintiff has moved to dismiss this case because it presents the same issues as presented in Cause No. 5:06-cv-05088. The Court has contacted the Defendant, and Defendant has no objection to dismissal of this action.

Because these two cases involve the same Plaintiff, allege the same cause of action, and arise out of the same facts, this Court recommends that Plaintiff's Motion to Dismiss (Doc. No. 4) be **GRANTED**, and that this case be dismissed without prejudice. The Court further recommends that Cause No. 5:06-cv-05088 remain active.

The parties have ten (10) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court. See *Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

ENTERED this 20th day of April, 2009.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE