

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:07CV188-J

LARRY G. HANEY

PLAINTIFF

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security

DEFENDANT

MEMORANDUM OPINION AND ORDER

Plaintiff Larry G. Haney seeks Disability Insurance and Supplemental Security Income Benefits which were denied by the Commissioner. This matter was referred to United States Magistrate Judge W. David King who recommends that the final decision of the Commissioner be affirmed and the plaintiff's Complaint dismissed.

Plaintiff has timely filed objections to the Magistrate's Report arguing that there was good cause for the delay in submission of treating physician Dr. Marc A. Tressler's deposition testimony. As the magistrate judge explained, the typical procedure for getting such information into the record is generally by means of a Sentence Six remand pursuant to 42 U.S.C. §405(g). In that instance, the Court does not address the correctness of the administrative decision, but rather remands because new evidence has come to light that was not available to the claimant at the time of the administrative proceeding, and the new evidence might have changed the outcome of the prior proceeding, Melkonyan v. Sullivan, 501 U.S. 89, 98 (1991). The party seeking a prejudgment remand has the burden of demonstrating the new evidence is material and that good cause exists for not presenting it to the Administrative Law Judge, Faucher v. Secretary of HHS, 17 F.3d 171, 174-175 (6th Cir. 1994). New evidence is "material" if there is a reasonable probability that it would

have changed the outcome of the prior proceeding, Sizemore v. Secretary of HHS, 865 F.2d 709, 711 (6th Cir. 1988) (*per curiam*).

This Court is limited to considering only that evidence which was properly before the Commissioner at the time the final decision was rendered. Dr. Tressler's deposition was not before the ALJ, and is therefore not before this Court. Further, the Court can find no basis for a Sentence Six remand.

As a practical matter, the Court is cognizant of the difficulties social security practitioners face in obtaining supporting medical opinions from treating physicians in a timely manner. Difficulties often arise in obtaining necessary treating physician opinions because of the physician's unavailability, and not from miscalculation of the need for such evidence. Nonetheless, the Court is bound to follow the law applicable in this circuit.

Accordingly, for the reasons stated herein, IT IS ORDERED:

- 1) The Magistrate Judge's Report and Recommendation is ADOPTED, and those findings and conclusions are incorporated by reference herein;
- 2) The final Decision of the Commissioner denying benefits is AFFIRMED; and
- 3) Plaintiff's Complaint is DISMISSED, with prejudice.

This is a final and appealable Memorandum Opinion and Order, and there is no just cause for delay.