Parks v. Colvin Doc. 34

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAJOR PARKS,

Plaintiff,

– against –

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

OPINION AND ORDER

15 Civ. 6470 (ER)

Ramos, D.J.:

Before the Court are objections to the Report and Recommendation ("R & R") issued by Magistrate Judge Gabriel W. Gorenstein on October 17, 2016. Doc. 31. This matter was referred to Magistrate Judge Gorenstein for judicial review of a final decision of the Commissioner of Social Security, denying *pro se* plaintiff Major Parks' ("Plaintiff") request for a review of how his Social Security Disability Insurance Benefits were calculated. In the R & R, Judge Gorenstein recommended granting the Commissioner's motion for judgment on the pleadings. Plaintiff timely objected to the R & R. For the reasons stated herein, the Court ADOPTS the R & R and directs the entry of judgment as recommended.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 11, 2005, the Social Security Administration ("SSA") granted Plaintiff retirement benefits. R & R (Doc. 30) at 2. Plaintiff then filed for Supplemental Social Security ("SSI") benefits on June 16, 2005. *Id.* On August 29, 2007, after a denial and an appeal, an Administrative Law Judge ("ALJ") awarded SSI benefits to Plaintiff, which included a retroactive component. *Id.*

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On September 14, 2007, the SSA sent Plaintiff a notice of award (the "2007 determination"). *Id.* This document explained that the award covered back payments between 2005 and 2007, as well as future payments. *Id.* However, the notice did not indicate that any deduction would be made from his benefits. *Id.*

Plaintiff was represented by Robin Duncan, Esq., from the law firm of Binder and Binder in connection with his application for SSI benefits. *Id.* at 3. In a separate letter dated September 14, 2007 – the same date as the notice of award – SSA indicated that his lawyer was permitted to charge up to $2,791, which was deducted from Plaintiff's SSI benefits.[1] *Id.*

Plaintiff sought reconsideration of the deduction from his award of attorney's fees, asserting that he had dismissed his lawyer. Declaration of Jean Hall (Doc. 27) ("Dec. JH.") at 8. First, Plaintiff sought review through the SSA's case review mechanism. R & R at 3. The SSA denied his request. *Id.* Then, Plaintiff requested a hearing before the ALJ. *Id.* On November 15, 2007 and January 7, 2008, SSA sent letters to Plaintiff at his last known address, 40 Ann Street, 1st Floor New York, NY ("40 Ann Street") requesting documents related to the hearing. *Id.*; Doc. 32 at 6. Plaintiff failed to return the acknowledgment of receipt form and failed to appear at the hearing. *Id.* Then, on September 18, 2008 ("2008 hearing"), SSA mailed Plaintiff an order of dismissal, again to 40 Ann Street, noting that no hearing was held as a result of Plaintiff's failure to appear. *Id.* The order of dismissal concluded that "the prior determination [finding that the deduction of attorney's fees from his SSI benefits was proper] remain[ed] in effect." Tr. 60.[2] Then, on November 17, 2008, SSA mailed Plaintiff another letter finding that

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[1] The Regional Commissioner of SSA confirmed that a payment made to Parks's counsel of record, Binder and Binder, was deducted from his SSI benefits on March 4, 2008. Dec. JH. at 4–5.

[2] References to "Tr." are to the SSA Administrative Record, Doc. 14, and the pagination on ECF.

the attorney fees were properly deducted because the claim that he fired his attorney was factually unsupported. Dec. JH. at 8.

One month later, on December 16, 2008, Plaintiff filed another hearing request regarding the attorney fee deduction from the 2007 determination. Dec. JH. at 5–6. He again claimed that the deduction was in error because he had dismissed his attorney. *Id.* On October 22, 2009, the ALJ held another hearing which Plaintiff attended. *Id.* Thereafter, on January 15, 2010, the ALJ issued a decision again finding the attorney fee deduction was proper, and mailed this decision to 900 Grand Concourse Apartment Mos Bronx New York, 10451 ("900 Grand Concourse"), the address Plaintiff has provided as his then current address. *Id.* Plaintiff filed no objections to or appeals from that decision. *Id.* at 3.

Almost three years later, on November 25, 2012, SSA issued Plaintiff a notice alerting him to a change in the amount of the monthly benefits he was to receive beginning January 2013. Tr. 59–68, 93. This change of benefits had nothing to do with the prior deduction of attorney's fees. Plaintiff sought reconsideration of amended benefit amount, but the determination was upheld. Tr. 74. Plaintiff then requested a hearing before an ALJ, Tr. 81–84, which was held on December 10, 2013. Tr. 185–91. Prior to his hearing, Plaintiff sent the agency a written submission in which he suggested that he was entitled to a possible refund due to the previous deduction of attorney's fees from his benefits, which he asserted should be counted as earned rather than unearned income. Tr. 178–84. He based his argument on a form he received from the SSA entitled "Information Concerning the Fee Authorization," which contained the following language:

> A claimant may be due more money when the Social Security Administration authorizes a representative's fee and a claimant receives both Social Security and SSI benefits. This is because the social security administration deducts the authorized fee from the amount of

> the Social Security benefits that count as income for SSI purposes. Then more SSI benefits are due.

Tr. 12, 184. At the hearing, he pressed the position that he was due additional benefits because the attorney's fees should have been considered earned rather than unearned income. Tr. 188-89. Plaintiff testified that his only challenge to the agency's benefit calculation related to the previous deduction of an attorney's fee. Tr. 189–90.

On December 19, 2013, the ALJ issued a decision affirming that Plaintiff's monthly SSI benefits had been correctly determined. Tr. 14–20. Plaintiff requested review of the ALJ's decision. Tr. 5–13. The ALJ's decision became the final decision of the Commissioner on June 16, 2015, when the Appeals Council denied Plaintiff's request for review. Tr. 2–4. In addition to affirming the ALJ's decision, the Appeals Council noted that Plaintiff's claims regarding any possible underpayment of SSI or other payment of representative's fees were not part of the determination before the ALJ. Tr. 2–3. This action followed.

As is clear from his various submissions, Plaintiff continues to argue that he is entitled to additional monies because of the payment that was made to his attorneys in connection with the application for SSI benefits, which was deducted from his benefits. He initially argued that the attorney's fees should not have been paid because he had fired his attorneys. As discussed, that argument was rejected. Dec. JH. at 8. He then argued that the SSA misclassified the payment as unearned income.

In the R & R, Judge Gorenstein found that he was not allowed to even consider the issue raised by Plaintiff because the governing statute, 42 U.S.C. § 405(g), does not permit him to seek judicial review of any decision made in 2008 regarding the attorney fees. R & R at 7. Section 405(g) limits judicial review to only final decisions, and Judge Gorenstein found that Plaintiff did not have a final decision. *Id*. Therefore, the 2008 hearing dismissing Plaintiff's request for a

review, and affirming the attorney fee deduction, was both binding and unreviewable. *Id.* Thus, Judge Gorenstein recommended that Defendant's motion for judgement on the pleadings should be granted. R & R at 1. The Plaintiff now objects to the R & R, arguing for the first time that he did not receive proper notice of the 2008 hearing. Plaintiff's Objections ("Pl. Obj.") (Doc. 31) at 11.

II. STANDARD OF REVIEW

A district court reviewing a magistrate judge's report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). Parties may raise "specific," "written" objections to the report and recommendation "[w]ithin fourteen days after being served with a copy." *Id.*; *see also* Fed. R. Civ. P. 72(b)(2). A district court reviews *de novo* those portions of the report and recommendation to which timely and specific objections are made. 28 U.S.C. § 636(b)(1)(C); *see also United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). The district court may adopt those parts of the report and recommendation to which no party has timely objected, provided no clear error is apparent from the face of the record. *Lewis v. Zon*, 573 F. Supp. 2d 804, 811 (S.D.N.Y. 2008) (quoting *Arthur v. Goord*, No. 06 Civ. 326 (DLC), 2008 WL 482866, at *3 (S.D.N.Y. Feb. 21, 2008)). The district court will also review the report and recommendation for clear error where a party's objections are "merely perfunctory responses" argued in an attempt to "engage the district court in a rehashing of the same arguments set forth in the original petition." *Ortiz v. Barkley*, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008) (citations and internal quotation marks omitted).

III. DISCUSSION

Plaintiff makes one objection to the R & R: that he did not receive proper notice for the 2008 hearing concerning the attorney fee deduction. Pl. Obj. at 2. Plaintiff explains that SSA sent the notice of hearing to the wrong address, 40 Ann Street, and that SSA had his correct address, 900 Grand Concourse, and should have sent it there. *Id.* Plaintiff further contends that the lack of notice denied him a fair hearing. *Id.*

A. New Argument

As a threshold issue, the Court notes that Plaintiff's objection raises an argument not previously raised before the SSA or the Magistrate Judge. Whether a party may raise a new legal argument for the first time before the district court after a report and recommendation has been filed is an issue that is undecided by the Second Circuit. *Amadasu v. Ngati*, 05 Civ. 2585 (RRM), 2012 WL 3930386, at *15 (E.D.N.Y. Sept. 9, 2012); *Wells Fargo Bank N.A. v. Sinnott*, 07 Civ. 169 (CR), 2010 WL 297830, at *2 (D. Vt. Jan. 19, 2010). Some district courts follow the framework outlined in *Wells Fargo Bank N.A. v. Sinnott*. In *Wells Fargo*, the district court applied a multi-factor test in deciding whether to exercise its discretion to consider arguments raised for the first time at the objection stage: "(1) the reason for the litigant's previous failure to raise the new legal argument; (2) whether an intervening case or statute has changed the state of the law; (3) whether the new issue is a pure issue of law for which no additional fact-finding is required; (4) whether the resolution of the new legal issue is not open to serious question; (5) whether efficiency and fairness militate in favor or against consideration of the new argument; and (6) whether manifest injustice will result if the new argument is not considered." *Id.* at *2; *see also Cabrera v. Schafer,* 12 Civ. 6323 (ADS) (AKT), at *6–8 (E.D.N.Y. Mar. 27, 2017) (applying the six factors to new arguments raised); *Stock Mkt. Recovery Consultants, Inc. v.*

Watkins, 3 Civ. 193 (PKC), 2015 WL 5771997, at *8 (E.D.N.Y. Sep. 30, 2015) (applying the *Wells Fargo* factors and addressing Plaintiff's new argument); *Machicote v. Ercole*, 06 Civ. 13320 (DAB), 2011 WL 3809920, at *16 (S.D.N.Y. Aug. 25, 2011) (applying the Wells Fargo factors and declining to consider the new argument).

Other district courts in this circuit have simply refused to consider new arguments raised in the objections to a report and recommendation without reference to the *Wells Fargo* factors. *See Pirog v. Colvin*, 15 Civ. 438 (KMK), 2016 WL 5476006, at *15 (S.D.N.Y. Sep. 28, 2016) (declining to address new argument because "[d]efendant is correct that [an] argument, not raised in Plaintiff's initial brief . . . is improperly introduced for the first time in Plaintiff's objections to the R & R."); *Flores v. Keane*, 211 F. Supp. 2d 426, 47 (S.D.N.Y. 2001) (declining to hear new argument because petitioner did not raise claim before the magistrate); *Chisolm v. Headley*, 58 F. Supp. 2d 281, at 284 n.2 (S.D.N.Y. 1999) ("A petitioner is not permitted to raise an objection to a Magistrate Judge's report that was not raised in his original petition.") (citing *Harris v. Pulley*, 885 F.2d 1354, 1377–78 (9th Cir. 1989)).

In this case, the Court does not need to decide which standard applies because under either standard the result would be the same – the Court would decline to address the argument. Appling the *Wells Fargo* six factor test here, the first three factors weigh against consideration of the new argument. First, there is no excuse, and Plaintiff offers none, for his failure to raise this issue before Judge Gorenstein. There can be no dispute that Plaintiff was well aware of the alleged failure to provide adequate notice when he filed the instant action. Second, there has been no change in the applicable law. Third, the Court would need more facts to decide whether Plaintiff had adequate notice of the hearing. *See Barrett v. Prison Health Servs.*, 08 CV 203, 2010 WL 2837010, at *30 (D. Vt. July 19, 2010) (declining to hear new argument because "it is

likely to require further briefing and additional fact-finding.”). Thus, this is a situation where letting the Plaintiff belatedly raise this theory would “thwart the efficiencies gained through the Magistrates Act and . . . permit [Plaintiff] to change tactics after the issuance of [the R & R].” *Amadasu*, 2012 WL 3930386, at *5 (citation omitted).

The fourth factor weighs in Plaintiff’s favor because the resolution of whether Plaintiff had proper notice of the hearing is not open to serious question; if in fact he did not receive proper notice it would be a clear due process violation.

However, the fifth and sixth factors weigh against considering the new argument. Allowing the argument would be a waste of judicial resources because remanding the claim would be futile. Plaintiff argues that the SSA never held a hearing, much less a fair hearing in 2008. Pl. Obj. at 1–2. Even if he is correct, Plaintiff was granted a second hearing in 2009. Pl. Obj. at 11. The record reflects that at that hearing Plaintiff had a fair opportunity to contest the attorney fee deduction before the ALJ, Dec. JH. at 5–6, the very issue that was to be the subject of the 2008 hearing. Pl. Obj. at 11. The Court also notes that the 2009 hearing decision was mailed on January 15, 2010 to Plaintiff’s proclaimed correct address–900 Grand Concourse. Therefore, remanding the case back to the ALJ will not render different result because the alleged due process violation concerning the notice for the 2008 hearing was completely cured by the hearing Plaintiff was afforded in October 2009.

Furthermore, as correctly found by Magistrate Judge Gorenstein,[3] Plaintiff has not exhausted all administrative remedies to redress the 2007 determination. The Plaintiff did not

[3] Judge Gorenstein’s finding is based on the determination made after the 2008 hearing. He made no reference to the subsequent 2009 hearing in which Plaintiff was present. R & R at 7. Even with respect to that second hearing, the Court does not have subject matter jurisdiction because the Plaintiff has not exhausted all administrative remedies and does not have a final decision.

appeal the 2009 ALJ decision.[4] Dec. JH. at 5–6. The Court would waste judicial and administrative resources by allowing the Plaintiff to raise this new argument when he could and should have addressed it through SSA procedures. *See Guerra v. Commissioner of Social Sec.*, 12 Civ. 6750 (CS), 2013 WL 3481284, at *3 (S.D.N.Y. July 1, 2013) (to qualify for judicial review, the plaintiff is required to demonstrate that he had a hearing before an ALJ and review by the Appeals Council). Regarding the sixth factor, the Court finds no manifest injustice will arise. Thus, Judge Gorenstein properly determined that the Court did not have subject matter jurisdiction to review the 2007 determination. R & R at 7.

Accordingly, based on a balance of the *Wells Fargo* factors, the Court declines to hear Plaintiff's newly presented argument.

IV. CONCLUSION

For the reasons set forth above, the Court declines to address the Plaintiff's new argument, which is the sole objection to the R & R. Having reviewed the remainder Judge Gorenstein's thorough R & R, the Court finds no error, clear or otherwise. The Court therefore ADOPTS Judge Gorenstein's R & R recommended judgment for the reasons stated in the R & R. Accordingly, the Commissioner's motion for judgment on the pleadings is GRANTED.

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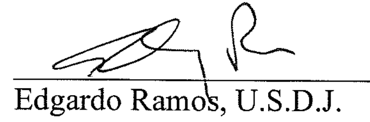
[4] Section 405(g) authorizes the Court to review "any final decision of the commissioner of the social security made after a hearing to which [the claimant] was a party. . . . [J]udicial review is limited to final decisions made by the SSA." *Califano v. Sanders*, 430 U.S. 99, 108 (1977). To exhaust the administrative "review process and obtain a final decision that may be subject to federal judicial review, a claimant must complete the following steps: (1) initial determination, (2) reconsideration, (3) hearing before an ALJ, and (4) review by the Appeals Council." *Guerra*, 2013 WL 3481284, at *1 (citing C.F.R. § 404.900(a)). Here, Plaintiff does not have a final decision because he did not appeal the 2009 decision. Dec. JH. at 5–6.

The Clerk of the Court is respectfully directed to enter judgment, terminate the motions, Docs. 15 & 20, and to close this case.

It is SO ORDERED.

Dated: July 17, 2017
New York, New York



Edgardo Ramos, U.S.D.J.