

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA**

|                                               |   |                                    |
|-----------------------------------------------|---|------------------------------------|
| <b>KATHERINE LEE,</b>                         | ) |                                    |
|                                               | ) |                                    |
| <b>Plaintiff,</b>                             | ) |                                    |
|                                               | ) |                                    |
| <b>v.</b>                                     | ) | <b>Case No. CIV-15-415-RAW-SPS</b> |
|                                               | ) |                                    |
| <b>NANCY A. BERRYHILL,</b>                    | ) |                                    |
| <b>Acting Commissioner of Social Security</b> | ) |                                    |
| <b>Administration,</b>                        | ) |                                    |
|                                               | ) |                                    |
| <b>Defendant.</b>                             | ) |                                    |

**ORDER REMANDING CASE FOR FURTHER PROCEEDINGS**

On March 2, 2017, Magistrate Judge Shreder entered a Report and Recommendation in the above-referenced case, recommending that this court reverse the Commissioner’s decision upholding on appeal the findings of the Administrative Law Judge (“ALJ”), denying benefits to plaintiff. Defendant has filed an objection to the Report and Recommendation.

The Report and Recommendation focuses on the fact that SSR 16-3p (effective March 28, 2016, i.e., after the ALJ decision under review) superseded SSR 96-7p. The new policy eliminates the term “credibility” from the ALJ’s analysis and clarifies that subjective symptom evaluation is not an examination of an individual’s character or truthfulness in the manner typically used during an adversarial court litigation. The Magistrate Judge found that “[a]lthough the ALJ’s credibility analysis was arguably sufficient under the old standard, the record does not reflect how the ALJ would have evaluated the claimant’s subjective statements under [SSR 16-3p].” (#22 at 8). On this basis, the Magistrate Judge recommended remand.

The defendant argues this was error, because the new standard is not retroactive. This is an unsettled question. “The Tenth Circuit . . . has not addressed whether SSR 16-3p applies retroactively.” *Franklin v. Colvin*, 2016 WL 7638298, \*3 (W.D.Okla.2016). There is authority for the proposition in *Mendenhall v. Colvin*, 2016 WL 4250214 (C.D.Ill.2016), as well as authority to the contrary. Defendant has presented a strong argument\*, but in the absence of controlling authority, the court will affirm the Magistrate Judge.

Accordingly, the Report and Recommendation of the United States Magistrate Judge is hereby AFFIRMED and ADOPTED as this court’s Findings and Order. The decision of the Secretary is reversed and this case is remanded to Defendant pursuant to the fourth sentence of 42 U.S.C. §405(g) for further administrative proceedings.

**ORDERED THIS 28th DAY OF MARCH, 2017.**

**Dated this 28<sup>th</sup> day of March, 2017.**

  
Ronald A. White  
United States District Judge  
Eastern District of Oklahoma

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\*Plaintiff should not expect success on a motion seeking fees on the basis that the government’s position was not “substantially justified.”