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

RICHARD WILFRED STOVER, JR.,	)	
Plaintiff,	)	Civil Action No. 16-1265
	)	Chief Judge Conti
v.	)	Magistrate Judge Mitchell
COMMISSIONER OF SOCIAL SECURITY,	)	
Defendant.	)	

MEMORANDUM OPINION

CONTI, Chief District Judge.

Pending before the court is an appeal filed on August 23, 2016, pursuant to § 405(g) of the Social Security Act ("SSA"), 42 U.S.C. § 405(g), from the final decision of the Commissioner of Social Security ("Commissioner" or "defendant") disallowing the claim of Richard Wilfred Stover, Jr. ("plaintiff" or "claimant") for Supplemental Security Income benefits under §§ 1614 and 1631 of the SSA. (ECF No. 3.) This action was referred to a magistrate judge for report and recommendation in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges. Both parties filed motions for summary judgment. (ECF Nos. 14, 18.) On May 25, 2017, the magistrate judge issued a report and recommendation recommending that plaintiff's and defendant's cross-motions for summary judgment each be denied, and that the case be remanded to the Commissioner for review of additional evidence pursuant to 42 U.S.C. § 405(g). (ECF No. 21.) For the reasons set forth below, the court will reject the report and recommendation and return

the matter to the magistrate judge to consider the additional arguments claimant raised in his motion for summary judgment. (*See* ECF Nos. 14, 15, 20.)

I. Procedural Background

Plaintiff filed an application for benefits on May 2, 2013. (ECF No. 7-6.) This application was denied. (ECF No. 7-5.) Plaintiff then requested a hearing, which was held on September 24, 2014. (ECF Nos. 7-5, 7-3.) On October 8, 2014, an Administrative Law Judge (the "ALJ") denied benefits, after which plaintiff requested reconsideration. (ECF No. 7-2 at 33, 31.) In a letter to the Appeals Council dated May 22, 2015, plaintiff offered two additional pieces of evidence to support his application: a physical capacity evaluation by his primary care physician, Dr. Gordon Gold, dated January 20, 2015, and a neuro-psychological report by Dr. J. Audie-Black and Dr. Glen Getz, dated February 24, 2015. (ECF No. 7-8.) On June 22, 2016, the Appeals Council denied plaintiff's request for review of the ALJ's decision and affirmed the "not disabled" decision as final. (ECF No. 7-2.) The Appeals Council stated:

> We also looked at . . . Physical Capacity Evaluation from Gordon Gold M.D. . . . [and the] NeuroPsychological Evaluation from J. Audie-Black, Ph.D. . . . The Administrative Law Judge decided your case through October 8, 2014. This new information is about a later time. Therefore, it does not affect the decision about whether you were disabled beginning on or before October 8, 2014.

(ECF No. 7-2 at 2.)

On August 23, 2016, plaintiff filed this action against the Commissioner pursuant to § 405(g), for review of that decision. (ECF No. 3.) On May 25, 2017, the magistrate judge issued a report and recommendation denying plaintiff's and defendant's motions for summary judgment, and remanding the matter to the Commissioner pursuant to Sentence Six of § 405(g). (ECF No. 21.) On June 7, 2017, defendant filed objections to the report and recommendation.

(ECF No. 22.) On June 22, 2017, plaintiff filed a reply. (ECF No. 23.) Having been fully briefed the matter is now ripe for disposition.

II. Standard of Review

Generally, when a claimant proffers new evidence not presented to the ALJ, a reviewing court's determination about whether to remand to the Commissioner is governed by Sentence Six of § 405(g) of the SSA. Salem v. Colvin, Civ. Action No. 15-1453, 2017 WL 363011, at *4 (W.D. Pa. Jan. 24, 2017) (citing Matthews v. Apfel, 239 F.3d 589, 593 (3d Cir. 2001)).[1] Sentence Six provides that the court may order remand "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." 42 U.S.C. § 405(g) (emphasis added); *see* Matthews, 239 F.3d at 593 (holding that "when the claimant seeks to rely on evidence that was not before the ALJ, the district court may remand . . . only if the evidence is new and material and if there was good cause why it was not previously presented to the ALJ (Sentence Six review)."). The burden of showing new and material evidence and good cause for delay is on the party seeking review. Platt v. Berryhill, Civ. Action No. 16-537, 2017 WL 1927721, at *3 (W.D. Pa. May 10, 2017) (stating that "[a]ll three requirements must be satisfied by a plaintiff to justify remand.").

III. Discussion

Plaintiff argues that the Appeals Council violated his due process rights by excluding

[1] While plaintiff's brief (ECF No. 15) did not specifically request a Sentence Six remand, it cited Matthews, 239 F.3d at 593, and the requirement that the Appeals Council evaluate new, material evidence. Because plaintiff implicitly invoked this argument and explicitly invoked Sentence Six in his reply brief, (ECF No. 20) the court will consider whether plaintiff meets the requirements for Sentence Six remand.

post-decision evidence from the administrative record. (ECF No. 15 at 15.) Plaintiff also attacks the Commissioner's findings.[2] Defendant, citing to Matthews, 239 F.3d at 593, states that district courts lack statutory authority to review a decision by the Appeals Council to deny review, but may examine additional evidence and remand pursuant to Sentence Six of § 405(g). (ECF No. 19 at 13.) Defendant argues, however, that the two additional pieces of evidence presented by plaintiff do not meet the new, material, and good cause requirements of Sentence Six. (ECF No. 19 at 13-15.)

i. New Evidence

Sentence Six requires that "the evidence must first be 'new' and not merely cumulative of what is already in the record." Szubak v. Sec'y of Health & Human Servs., 745 F.2d 831, 833 (3d Cir. 1984); Haney v. Comm'r of Soc. Sec., Civ. Action No. 13-3033, 2014 WL 2916454, at *14 (D.N.J. June 26, 2014) ("Evidence must raise new issues or clarify existing ones, so as to go beyond merely reiterating past findings through new sources."). New evidence must "not [be] in existence or available to the claimant at the time of the administrative proceeding." Sullivan v. Finklestein, 496 U.S. 617, 626 (1990); *see* Chalfant v. Colvin, Civ. Action No. 15-1555, 2016 WL 7104387, at *3 (W.D. Pa. Dec. 6, 2016) (finding a medical report not to be "new" because it was "merely indicative of [the claimant's] condition during and based upon records in existence during the relevant period of time but crafted after the ALJ issued his decision.").

[2] Plaintiff argues that: 1) the ALJ and Appeals Council erred by finding plaintiff's left ear hearing loss, right leg injury, and left arm and finger numbness to be "nonsevere impairments"; 2) the ALJ and Appeals Council wrongly disregarded the medical opinions of plaintiff's treating physicians and the consultative examiner; 3) the residual functional capacity ("RFC") erroneously fails to include the impairments cited above; 4) the ALJ wrongly discredited plaintiff's subjective complaints of pain; and 5) the ALJ disregarded the vocational expert's testimony and relied on an improper hypothetical which failed to consider plaintiff's use of a cane, having to miss two days of work per month, being off task for more than 10% of the time and limited ability to use his nondominant upper extremity. (ECF No. 21 at 11.)

Neither Dr. Gold's evaluation nor the neuro-psychological report were cumulative of past evidence. Each report offered new evidence with respect to plaintiff's medical condition. Additionally, neither report was "available to the claimant at the time of the administrative proceeding." Sullivan, 496 U.S. at 626. The administrative hearing was held on September 24, 2014. (ECF Nos. 7-3; 7-5.) Dr. Gold did not complete his evaluation until January 20, 2015. The neuro-psychological evaluation was not completed until February 24, 2015. (ECF No. 15-1 at 4.) Because these evaluations and the accompanying reports were not conducted and compiled prior to plaintiff's hearing, they were not "available" to plaintiff at that time. *See* Szubak, 745 F.2d at 833 (finding that the additional "medical reports offered are clearly new in the sense that they were compiled after the Secretary's first decision, and therefore they could not have been presented at the hearing."). Both reports, therefore, meet the standard for "new evidence" under Sentence Six.

ii. Materiality

"[T]he materiality standard requires that there be a reasonable possibility that the new evidence would have changed the outcome of the [ALJ's] determination." Szubak, 745 F.2d at 833. Courts have found this to be "an arguably lax standard." Shuter, 537 F. Supp. 2d at 757; Newhouse v. Heckler, 753 F.2d 283, 287 (3d Cir.1985) (holding that the burden of showing materiality, namely the reasonable possibility standard, "is not great.").

Here, both pieces of evidence are material, as both are "relevant and probative" to plaintiff's ability to engage in substantial gainful activity and to the severity and extent of his

impairments.[3] Id. Dr. Gold reported that plaintiff is limited in his ability to perform tasks necessary to many job functions and is unable to work a full month.[4] (ECF No. 15-1 at 1-3.) The neuro-psychological report detailed plaintiff's "extremely impaired" reading and motor performance capacity, skills often vital for gainful employment. (ECF No. 15-1 at 7-9.) Given the relatively low bar for the materiality standard, there is a reasonable possibility that this information could change the ALJ's decision.

iii. Good Cause

Section 405(g) requires "good cause for failure to incorporate such evidence into the record in a prior proceeding." 42 U.S.C. § 405(g). Plaintiff must show "some justification for the failure to acquire and present such evidence" or else "[a] claimant might be tempted to withhold medical reports, or refrain from introducing all relevant evidence, with the idea of 'obtaining another bite of the apple'" as an "end-run method of appealing an adverse ruling by the Secretary." Szubak, 745 F.2d at 833, 34; Matthews, 239 F.3d at 595 (describing good cause as a "good reason" for failing to timely submit evidence). "Congress intended [the good cause] aspect of § 405(g) to be sparingly applied." Haney, 2014 WL 2916454, at *15; *see* Evangelista v. Sec'y of Health & Human Servs., 826 F.2d 136, 141 (1st Cir. 1987) (holding that "Congress plainly intended that remands for good cause should be few and far between, that a yo-yo effect

[3] Disability under the SSA is defined as the inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). The nature and extent of these mental or physical impairments must be so severe that they preclude the plaintiff not only from returning to his or her previous employment but also from acquiring substantial gainful work that exists in the national economy, considering his age, education, and prior work experience. 42 U.S.C. § 423(d)(2)(A).

[4] According to Dr. Gold's report, plaintiff can only sit for 3 hours a day, stand for 2 hours and can only sit and stand alternately for 4 hours; he needs to lie down for 2 hours in an 8-hour workday; he cannot perform repetitive pushing and pulling or fine manipulation; he should avoid many environmental conditions (heat, cold, smoke, etc.) and if exposed to them will suffer serious problems (severe pain, dizziness, etc.); he would miss work at least 5 days per month; and his right leg's mobility limitations place him off balance, thus increasing the severity of vertigo and vice versa. (ECF No. 15-1 at 1-3.)

be avoided—to the end that the process not bog down and unduly impede the timely resolution of social security appeals.").

Plaintiff argues that he has shown good cause because the evidence he failed to submit at the hearing did not exist at that time. (ECF No. 20 at 8.) Plaintiff, however, offered no explanation as to why he did not ask Dr. Gold to fill out his examination form prior to the hearing. (ECF No. 19 at 13.) These facts mirror those of Chandler v. Commissioner of Social Security, where the plaintiff, in submitting medical opinions after the ALJ's decision, failed to satisfy the good cause requirement, "because she [had] not explained 'why she did not attempt to obtain [the] evaluation[s] at a time when [they] could be considered by the ALJ.'" 667 F.3d 356, 361 (3d Cir. 2011) (quoting Matthews, 239 F.3d at 595). Here, plaintiff similarly failed to explain why he did not attempt to obtain a timely evaluation by Dr. Gold, and, thus, plaintiff did not provide "some justification," Szubak, 745 F.2d at 833, let alone "good reason," Matthews, 239 F.3d at 595, for failing to timely present the evidence. *See* Morrow v. Colvin, Civ. Action No. 15-1335, 2017 WL 118405, at *1 (W.D. Pa. Jan. 12, 2017) (where a "[p]laintiff has not offered any explanation for why the evidence was not submitted to the ALJ . . . there is no basis for finding the required 'good cause' "); Waugaman v. Astrue, Civ. Action No. 08-1548, 2009 WL 2177219, at *6 (W.D. Pa. July 22, 2009) ("[w]ithout an explanation for the delay in obtaining and submitting the report, the court can only find that the factors indicating the propriety of a remand based on new evidence have not been met.").

Regarding the neuro-psychological report, plaintiff states that it was requested by a physician who examined plaintiff post-hearing and, therefore, the report could not have been made available prior to the hearing. (ECF No. 20 at 7.) Plaintiff, however, "must provide a

logical reason why the proffered additional evidence was not, *or could not have been*, presented . . . during the administrative proceedings." DeMoss v. Heckler, 706 F. Supp. 303, 309 (D. Del. 1988) (emphasis added). Plaintiff's explanation rests on the assumption that he had to wait for a referral to seek an evaluation despite the presence of severe symptoms. (ECF No. 20 at 7.) Plaintiff does not offer a logical reason why a neuro-psychological report could not have been independently obtained in a timely manner, and instead merely relies on the fact that he did not receive the referral until after the administrative proceedings.[5] *See* Lopacinski v. Barnhart, Civ. Action No. 01-4364, 2003 WL 1962302, at *5 (E.D. Pa. Apr. 21, 2003) (rejecting the plaintiff's good cause argument based on the court's determination that "[i]f [the new] evidence did not exist, it was because plaintiff simply chose not to obtain it."). Given that good cause should be found sparingly, Haney, 2014 WL 2916454, at *15, and plaintiff did not provide a good reason as to why he did not or could not have obtained a neuro-psychological exam prior to his physician's referral, the court finds that plaintiff did not meet his burden of showing good cause.[6]

[5] Any argument that plaintiff did not know that a neuro-psychological exam was necessary for the hearing must fail, because plaintiff should have understood the importance of such an exam. *See* Mathews, 239 F.3d at 595 (finding no good cause where plaintiff "did not realize the importance of obtaining a vocational evaluation" because she "should have known that her ability to work was an issue at the ALJ hearing . . ."); Lopacinski v. Barnhart, Civ. Action No. 01-4364, 2003 WL 1962302, at *5 (E.D. Pa. Apr. 21, 2003) (finding that plaintiff's argument that he did not know he needed a psychological evaluation did not constitute good cause for failure to timely provide the evaluation as evidence, "because he *should have* known this.") Here, plaintiff *should have* known that additional evidence regarding his functional capacities and neuro-psychological condition would be relevant to the ALJ's decision, because plaintiff claimed disability based on physical and mental impairments. Plaintiff could have requested that the ALJ leave the record open in order for him to obtain the referral and to submit the report to the ALJ.

[6] Plaintiff appears to implicitly argue that good cause exists in this matter because he is now represented by new counsel, who may have recommended garnering additional medical evidence to support his disability claim. Where a plaintiff retains new counsel on appeal and this counsel obtains new evidence, the change in counsel cannot in and of itself serve as good cause for remanding the case under Sentence Six. *See* Salem v. Colvin, Civ. Action No. 15-1453, 2017 WL 363011, at *5 (W.D. Pa. Jan. 24, 2017) (rejecting that obtaining new counsel constitutes good cause, as "the fact that plaintiff now has new counsel who believes that the additional evidence may support her claim for disability is not grounds for remanding the case under sentence 6."); Haney, 2014 WL 2916454, at *15 ("Plaintiff contends that good cause exists because she is represented by new counsel on appeal, and her previous counsel was

IV. Conclusion

The Third Circuit Court of Appeals has held that "a claimant must satisfy all three requirements of Sentence Six (new, material and good cause) in order to justify a remand" under Sentence Six of 42 U.S.C. § 405(g). Matthews, 239 F.3d at 594. Plaintiff did not show good cause for his delay in providing Dr. Gold's evaluation and the neuro-psychological report. Accordingly, remand pursuant to Sentence Six of § 405(g) of the SSA is unavailable.

The magistrate judge did not address the five arguments (*supra*, footnote 4) about the merits of the Commissioner's determination. The court will, therefore, reject the magistrate judge's report and recommendation, and refer the matter back to the magistrate judge to address plaintiff's remaining arguments. An appropriate order will follow.

Date: July 27, 2017

/s/ Joy Flowers Conti
Joy Flowers Conti
Chief United States District Judge

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not diligent in obtaining these records. This circumstance is insufficient to provide good cause for Plaintiff's motion."). To find otherwise would impermissible enable plaintiff to "obtain[] another bite of the apple." Szubak, 745 F.2d at 834. Any argument that plaintiff's retention of new counsel, even if that counsel was more diligent in acquiring evidence than plaintiff's original attorney, does not satisfy the good cause element of Sentence Six.