

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

SKYLAR M. HARRIS,)	
)	
Plaintiff,)	
)	Civil Action No. 5:11cv041
v.)	
)	
MICHAEL J. ASTRUE,)	By: Michael F. Urbanski
Commissioner of Social Security,)	United States District Judge
)	
Defendant.)	

MEMORANDUM OPINION

This social security disability appeal is before the court for review of the Report and Recommendation issued in this case by the magistrate judge on November 23, 2011, in which it is recommended that this matter be reversed and that final judgment be entered in favor of the plaintiff. The Commissioner has filed an objection to the Report and Recommendation pursuant to Federal Rule of Civil Procedure 72(b). For the reasons set forth below, the court finds the Commissioner's objection to the Report and Recommendation to be well-taken and further finds it prudent to remand this matter to the Commissioner for further consideration. As such, the recommendation that the Commissioner's decision be reversed will be rejected and an Order remanding the case to the Commissioner for further consideration will be entered.

I.

Plaintiff Skylar M. Harris, was born in 1991 with cerebral palsy; she also suffers from a seizure disorder. As a result of her disability, Harris is eligible to receive benefits pursuant to the Virginia Birth-Related Neurological Injury Compensation Act, Virginia Code § 38.2-5009. The Act provides that individuals such as Harris are entitled to receive loss-of-earnings payments

But as the Commissioner points out in his objection, the magistrate judge skipped the first step of the analysis, which is determining whether the Virginia Compensation Benefits payments are in fact even assignable by law.

POMS SI 01120.200G.1.b provides that “[a]dditions to trust principal made directly to the trust⁵ are not income to the grantor, trustee or beneficiary.” It further provides that exceptions to this rule are listed in SI 01120.200G.1.c and SI 01120.200G.1.d.

POMS SI 01120.200G.1.c states that:

Certain payments are non-assignable by law and, therefore, are income to the individual entitled to receive the payment under regular income rules. They may not be paid directly into a trust, but individuals may attempt to structure trusts so that it appears that they are so paid. Non-assignable payments include:

- Temporary Assistance to Needy Families (TANF)/Aid to Families with Dependent Children (AFDC);
- Railroad Retirement Board-administered pensions;
- Veterans pensions and assistance;
- Federal employee retirement payments (CSRS, FERS) administered by the Office of Personnel Management;
- Social Security title II and SSI payments; and
- Private pensions under the Employee Retirement Income Security Act (ERISA) (29 U.S.C.A. section 1056(d)).

It appears from the language of the Virginia Birth-Related Neurological Injury Compensation Act that the benefits at issue may be non-assignable by law and thus would be considered income attributable to Harris pursuant to SI 01120.200G.1.c. Virginia Code § 38.2-5009(A)(2) specifically states that “[t]he provisions of § 65.2-531 shall apply to any benefit awarded under this subdivision.” Virginia Code § 65.2-531 provides: “No claim for compensation under this title shall be assignable.”

⁵ It is not entirely clear whether the Virginia Compensation Benefits payments at issue are “made directly to the trust.” The court need not reach the issue at this time, however; it will be presumed for purposes of this analysis that the benefits are indeed made directly to the trust. This is an issue to be resolved on remand.

The magistrate judge does not address the assignability issue and focuses his analysis solely on whether any assignment to the trust is revocable, pursuant to POMS SI 01120.200G.1.d. In fact, the Appeals Council failed to address the assignability issue as well. Citing to SI 01120.200G.1.d, the Appeals Council held that “[a] legally assignable payment that is assigned to a trust, is income for supplemental security income purposes unless the assignment is irrevocable.” (R. 8.) The Appeals Council found that the Virginia Compensation Benefits payments in this case were not irrevocably assigned and thus are countable as income for SSI purposes. But in so doing, it presumed without first determining whether the benefits payments are assignable.

Because the Appeals Council did not consider whether the Virginia Compensation Benefits payments are assignable before determining whether any assignment is irrevocable, the court cannot find that the Commissioner’s decision is supported by substantial evidence. See Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966) (judicial review of disability cases is limited to determining whether substantial evidence supports the Commissioner’s conclusion that the plaintiff failed to satisfy the Act’s entitlement conditions). As such, the court believes it prudent to remand this case to the Commissioner for consideration of whether the Virginia Compensation Benefits are “[a]dditions to the trust principal made directly to the trust” pursuant to SI 01120.200G.1.b and, if so, whether the payments are non-assignable pursuant to SI 01120.200G.1.c.

III.

The court cannot agree with the magistrate judge that reversal is appropriate here. Accordingly, an Order will be entered rejecting the recommendation that this case be reversed

and remanding this matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for further consideration as set forth above.

Entered: September 27, 2012

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge