

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Eugene MAXWELL, :
 :
 Plaintiff, :
 :
 v. : No. 3:99cv2126(JBA)
 :
 Jo Anne BARNHART, :
 Commissioner of Social :
 Security, :
 :
 Defendant. :

RULING ON PENDING MOTIONS
[DOC. #6-1, #6-2, #13, #17-1, #17-2]

Eugene Maxwell filed this action under 42 U.S.C. § 405(g), seeking review of the Commissioner of Social Security's denial of his second application for disability insurance benefits. For the reasons set out below, the Court finds "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," and therefore remands the case to the Commissioner of Social Security under sentence six of § 405(g). Id. In light of the sentence six remand, the case is stayed and all pending motions are denied without prejudice to renew following the Commissioner's filing of her modification or affirmation with the Court, as provided in 42 U.S.C. § 405(g).

I. Factual and Procedural Posture

Eugene Maxwell has filed three applications for social

security disability insurance benefits. The first was denied, and is not at issue here. The second, which was also denied, is the subject of this 42 U.S.C. § 405(g) action, which seeks reversal of the Social Security Administration's ("SSA") denial of that application. The third application was filed during the pendency of this action for review of the second application, and it was granted by SSA by notice of February 20, 2001. Thus, SSA has determined that Maxwell is disabled within the meaning of the Act, and he is currently receiving benefits.

The pending motions were referred to Magistrate Judge Margolis for recommended ruling. While the original motions were under her review, however, SSA approved Maxwell's third application for benefits, with a September 2, 1999 onset date. Plaintiff filed a supplemental motion [Doc. #17] based on progress notes of treating psychiatrist Dr. Ann Rasmussen, dated February 20, 2001. Rasmussen's notes incorporated two separate November 2000 post-traumatic stress disorder ("PTSD") diagnoses by Dr. Pellet of the Veteran's Administration, and Dr. Walsh of SSA: "[Maxwell] has been diagnosed with chronic severe combat-related PTSD this past year." Notes of Dr. Rasmussen, attached as unmarked exhibit to Pl.'s Mem. in Support of Supplemental Submission [Doc. #18].

Both PTSD diagnoses were made long after the ALJ's September 8, 1997 decision denying his claim and the September 1, 1999 decision of the Appeals Council that made that denial final. It

is undisputed that this additional evidence cannot be a part of this Court's review as it was never before the ALJ, and that the Magistrate Judge never considered or adjudicated the plaintiff's sentence six remand request to consider the new evidence.

SSA's approval of the third application was made retro-active to September 2, 1999 - the day after SSA's denial of Maxwell's second application for benefits became final. Inasmuch as Maxwell is already receiving benefits, as a practical matter, the focus of this review is the onset date of Maxwell's disability. As it stands, SSA will not consider Maxwell disabled prior to September 2, 1999, because the denial of benefits that is currently under review became final for SSA's purposes on September 1, 1999.

II. Analysis

Because this action is a review of SSA's denial of the second application for benefits, the Court's review of SSA's decision is limited in scope. Specifically, 42 U.S.C. § 405(g) provides in pertinent part:

The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. [The court] may at any time order additional evidence to be taken before the Commissioner of Social Security, but 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.

Magistrate Judge Margolis recommended a finding that there

was sufficient evidence on the record at the time SSA denied Maxwell's second application for benefits to justify SSA's denial. Plaintiff's objection focuses on an alleged improper weight given to non-examining medical examiner reports as well as the failure to consider the sentence six remand argument. The Court will address plaintiff's remand request first.

Under the statute, the Court remands an action under sentence six only when: (1) "there is new evidence which is material"; and (2) "there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." Id.; accord Tirado v. Bowen, 842 F.2d 595, 597 (2d Cir. 1988), citing Szubak v. Secretary of Health & Human Servs., 745 F.2d 831, 833 (3d Cir. 1984), Cutler v. Weinberger, 516 F.2d 1282, 1285 (2d Cir. 1975) and Tolany v. Heckler, 756 F.2d 268, 272 (2d Cir. 1985). Here, the Government does not dispute that insofar as the new evidence - Maxwell's diagnosis of PTSD - was not in existence until well after his second application was denied, there is good cause for failure to incorporate that evidence into the record of the prior proceeding. See Def.'s Mem. Opp'n [Doc. #19] at 2-3.

The Government does dispute, however, the materiality of the new evidence. Specifically, the Government contends that because the PTSD diagnosis was made in 2000 at the earliest, "nothing in the proffered treatment notes relates to the plaintiff's condition and limitations during the time period covered by the

decision under review." Id. at 3.

The Government's position ignores the potential inferences to be drawn from the recent PTSD diagnoses as to the nature and probable onset of Maxwell's condition. Dr. Rasmussen describes Maxwell's PTSD as combat-related, which is presumably referring to his service in Vietnam and the Gulf War, with symptoms which plaintiff reported to have "worsened dramatically" after the Gulf War. Notes of Dr. Rasmussen, attached to Doc. #18. In 1995 he lost his job and became cocaine dependent. Id. While it is true, as defendant contends, that Rasmussen's notes do not opine on prior levels of impairment, such an omission from progress notes is unremarkable.

Moreover, Rasmussen records a history given by Maxwell of symptoms back to 1994, and they are of a significantly different cast than those reported by Dr. Emanuel Wolfe, whose December 11, 1996 examination of Maxwell is part of the record below. See Certified Transcript of Administrative Proceedings, filed February 11, 2000 ("Tr.") 265-268. It is evident from Wolfe's report that plaintiff's reported history was to some extent impacted by memory difficulties or "puzzling" omissions. Id. at 268. Dr. Wolfe, noting that plaintiff had never previously been seen by a psychiatrist, found "a long-standing character disorder and a long-standing substance abuse problem," but based on the history the plaintiff gave, found no "stressor" which would satisfy the PTSD diagnostic criteria. Id. On the other hand,

evaluating psychologist Ralph Welch received from plaintiff a history of flashbacks and memory problems dating back to his service in Vietnam and the Gulf War, resulting in a diagnosis of anxiety disorder "with elements of post-traumatic stress syndrome . . . patient was in the service." Id. at 235.

While the Government argues that Dr. Rasmussen's retrospective opinion would carry little weight, the Court believes that the weight to be accorded is appropriately the initial province of the ALJ, whose analysis would be aided by a retrospective opinion by a treating psychiatrist who has been able to compile a fuller, more developed history of symptoms to which the criteria for PTSD have thus been able to be accurately applied.

Thus, while the PTSD diagnosis may have been made in November 2000, it is evident that Maxwell was suffering from this condition for some time prior to that date. Additionally, SSA itself has recognized the validity and disabling nature of Maxwell's PTSD in that it has now approved Maxwell's application for disability insurance benefits with an onset date of September 2, 1999. Accordingly, the Court finds that Maxwell's subsequent PTSD diagnosis constitutes additional material evidence that may well support the claim for benefits that is currently on review before the Court, and that Maxwell has shown good cause for failure to incorporate that evidence in the record below. Thus, the Court will remand the case to SSA under sentence six of the

statute in order to allow SSA to consider evidence presented in support of his third application for disability insurance benefits, which was approved. If, on remand, SSA determines that the new evidence establishes that Maxwell was in fact disabled during all or part of the relevant time frame for his second claim for benefits, then such finding may entitle Maxwell to additional retroactive benefits, in accordance with SSA regulations.

Because a remand pursuant to sentence six of 42 U.S.C. § 405(g) does not terminate the action for review of benefits or result in a judgment for either the claimant or the Commissioner, "the Court retains jurisdiction until the Commissioner files a modification or affirmation of [her] prior determination with the district court, along with a transcript of the additional record and testimony upon which the Commissioner's action is based. Judgment is then entered in the district court action only after the Commissioner makes the required filing." Schaffer v. Apfel, 992 F. Supp. 233, 238 (W.D.N.Y. 1997), citing, inter alia, 42 U.S.C. § 405(g), Sullivan v. Hudson, 490 U.S. 877, 885 (1989), Shalala v. Schaefer, 509 U.S. 292, 297-98 (1993). In light of the foregoing, the Court will stay the case pending the required filing by the Commissioner and will deny the remaining pending motions without prejudice to renew upon such filing.

III. Conclusion

For the reasons set out above, the motions to remand the case to the Commissioner [Doc. #6-2 and Doc. #17-2] are GRANTED, and the case is remanded to the Commissioner under sentence six of 42 U.S.C. § 405(g). The motions to reverse the decision of the Commissioner [Doc. #6-1 and Doc. #17-1] and the motion to affirm the decision of the Commissioner [Doc. #13] are DENIED WITHOUT PREJUDICE TO RENEW, as set forth above.

The Court retains jurisdiction over the matter, and the Clerk is directed to enter a stay pending further action by the Commissioner. The Government is directed to inform the Court immediately upon filing of the Commissioner's modification or affirmation.

IT IS SO ORDERED.

/s/

Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut, this ____ day of March, 2002.