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

DANIEL WALL,

Plaintiff, ORDER

v. 06-C-103-C

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

On September 14, 2006, United States Magistrate Judge Stephen Crocker issued a report and recommendation in this case, recommending reversal of the decision of the commissioner denying plaintiff Daniel Wall's applications for social security benefits and a remand of the case for the purpose of obtaining updated information from plaintiff's treating neurologist, Dr. McDonnell, concerning whether plaintiff could return to full time work nine months after his back surgery. The parties were notified on that date that they had until October 4, 2006, in which to file any objections to the report and recommendation. The commissioner filed objections on September 29, 2006; plaintiff did not file any objections before the October 4 deadline. On October 6, 2006, after considering defendant's objections, I entered an order in which I declined to adopt the magistrate judge's recommendation to remand the case and ordered that the commissioner's decision be affirmed.

On October 9, 2006, plaintiff filed his objections to the report and recommendation and a response to defendant's objections. (I infer that at the time he made this submission, plaintiff's lawyer had not yet received his copy of my order affirming the commissioner's decision.) Plaintiff's objections are untimely and will not be considered. Plaintiff has not explained why he did not file his objections by the October 4 deadline. In the absence of an explanation, I am unable to find that good cause exists to warrant considering plaintiff's objections.

In addition to objecting to those portions of the report and recommendation that were unfavorable to him, plaintiff asserts he has "new evidence" consisting of a form completed by Dr. McDonnell on November 21, 2005. (Although plaintiff referred to the report in his October 9 submission, he did not provide a copy of it to the court until October 11, 2006.) On the form, which is titled "Division of Vocational Rehabilitation Physical Capacity Evaluation Form," Dr. McDonnell indicates that plaintiff is capable of performing light work; however, he asserts that plaintiff is limited on a permanent basis to working only four hours a day. (On another part of the form, however, Dr. McDonnell indicated that plaintiff is capable of sitting, standing and walking each for 2 hours a day, suggesting that plaintiff can work six hours a day.) Plaintiff asserts that this new evidence makes it necessary to remand the case pursuant to sentence six of § 405(g) because it shows that Dr. McDonnell changed what was initially a temporary, part-time restriction to a permanent restriction. Plt.'s Response to Def.'s Objections, dkt. #16, at 7-8.

Insofar as plaintiff's new evidence could be construed as a motion to amend or alter the judgment under Fed. R. Civ. P. 59(e), it must be denied. Although "Rule 59(e) allows the movant to bring to the district court's attention a manifest error of law or fact, or newly discovered evidence . . . [i]t 'does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment.'" Bordelon v. Chicago School Reform Bd. of Trustees, 233 F.3d 524, 529 (7th Cir. 2000) (quoting Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996)). As with his objections, plaintiff has offered no explanation why he could not have submitted the "new" evidence from Dr. McDonnell within his deadline for objecting to the report and recommendation or any time while this case has been pending. Even if plaintiff was not aware personally of the form's existence, with any amount of diligence his lawyer could have discovered it long before now. Plaintiff is not entitled to relief under Rule 59(e).

Even assuming for argument's sake that I were to entertain plaintiff's motion, I would deny it. To be entitled to a sentence-six remand, plaintiff must show a reasonable probability that the commissioner would have reached a different conclusion had she considered the evidence. Perkins v. Chater, 107 F.3d 1290, 1296 (7th Cir. 1997). In the "comments" section of the physical capacity form, Dr. McDonnell indicated that plaintiff's fusion was successful and that plaintiff was "neurologically intact." He indicated that plaintiff's "complaints and disabilities appear subjective." Thus, Dr. McDonnell's report

indicates that his opinion that plaintiff was limited to part-time work was not based upon any objective findings or abnormalities but upon plaintiff's own statements regarding his pain and limitations. However, the administrative law judge determined, in reliance on considerable evidence in the record, that plaintiff's statements regarding his limitations were not worthy of belief. Because Dr. McDonnell's November 2005 report is based upon subjective complaints that the administrative law judge properly determined were not credible, that report would not be likely to change the outcome on remand. Diaz v. Chater, 55 F.3d 300, 308 (7th Cir. 1995) (ALJ could discount portion of doctor's report that appeared to be based upon claimant's own statements about functional restrictions). The new evidence submitted by plaintiff merely confirms my conclusion that remanding this case under either provision of § 405(g) would serve no useful purpose.

ORDER

IT IS ORDERED that plaintiff's constructive motion for reconsideration of the order of October 6, 2006 is DENIED.

Entered this 17th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge