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

RITA LEMMENS,

Plaintiff, OPINION AND ORDER

v. 06-C-473-C

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

This is an action for judicial review of an adverse decision of the Commissioner of Social Security brought pursuant to 42 U.S.C. § 405(g). Plaintiff Rita Lemmens, who suffers from bipolar disorder, asks this court to reverse and remand the administrative law judge's determination that she is not disabled and therefore ineligible for disability insurance benefits under sections 216(i) and 223 of the Social Security Act, codified at 42 U.S.C. §§ 416(i), 423(d). Plaintiff contends that remand is required because the administrative law judge failed to consider significant evidence in plaintiff's favor that plaintiff submitted after the administrative hearing but before the record was closed, including a residual functional capacity questionnaire completed by a psychiatrist who treated plaintiff. In the alternative, plaintiff contends that the evidence that *was* before the administrative law judge at the time he rendered his decision fails to provide substantial support for his conclusion that plaintiff is not disabled. The commissioner opposes remand, arguing that the administrative law

judge's decision is supported by substantial evidence. As for the additional evidence submitted by plaintiff that was not considered by the administrative law judge, the commissioner argues that remand is not warranted because plaintiff has failed to show that the evidence is new or material or that good cause existed for her failure to present it at the hearing, as required by sentence six of § 405(g).

As explained in detail below, I find that the additional evidence submitted by plaintiff is new and material and that good cause exists for plaintiff's failure to incorporate the evidence into the record before the administrative law judge. Accordingly, I will remand this case pursuant to sentence six of § 405(g) without reaching the merits of the administrative law judge's determination.

From the administrative record, I find the following facts to be undisputed for the purposes of this opinion and order.

FACTS

On September 19, 2003, plaintiff filed an application for a period of disability and disability insurance benefits, alleging disability beginning December 30, 2002. The local agency denied the claim initially on September 18, 2003 and upon reconsideration on January 27, 2004.

Pursuant to plaintiff's request for a hearing, an administrative hearing was convened on September 1, 2005 before Administrative Law Judge Larry Johnson. Plaintiff and a

vocational expert, Michael Guckenberg, testified. Plaintiff was represented at the hearing by her attorney Dana Duncan. At the start of the hearing, Duncan asked the administrative law judge to leave the record open after the hearing so that Duncan could submit plaintiff's updated medical records as well as a report from a treating psychiatrist, Dr. Herbert White. The administrative law judge indicated that he would leave the record open for 30 days.

On September 9, 2005, Duncan mailed to the administrative law judge a residual functional capacity questionnaire from Dr. White dated September 6, 2005 and progress notes from plaintiff's therapist and psychiatric nurse covering the period January 2004 to August 2005.[1] On the questionnaire, Dr. White reported that plaintiff suffered from bipolar disorder characterized by severe mood swings. He indicated that plaintiff was incapable of even low stress work and would likely miss work more than four times per month. Dr. White also indicated that plaintiff had various physical restrictions, including the need to shift positions from sitting to standing and to include periods of walking around during an eight-hour day.

Duncan mailed Dr. White's questionnaire responses and the other medical records via regular United States mail to the Office of Hearings and Appeals in Albuquerque, New Mexico. The zip code on Duncan's cover letter was "87103," not "87102" as shown on

[1]Although Duncan's assertion that he mailed the documents to the Office of Hearings and Appeals on September 9, 2005 consists solely of an unsworn allegation in his brief, the commissioner has not argued that unsworn statements are inadequate to show good cause under sentence six of 42 U.S.C. § 405(g).

correspondence from the administrative law judge. The administrative law judge never received the records, either because they were lost in the mail or because they were misplaced by staff at the Office of Hearings and Appeals.

On November 25, 2005, the administrative law judge issued a decision finding plaintiff not disabled. The administrative law judge found that although plaintiff suffered from bipolar disorder that was cyclical in nature and decreased her ability to tolerate stress, plaintiff retained the ability to perform unskilled work that did not require more than superficial contact with the public. The administrative law judge did not indicate that he had received any additional evidence from plaintiff and did not mention Dr. White's report or the updated progress notes.

When plaintiff's lawyer received a copy of the hearing file in connection with his appeal to the Appeals Council, copies of Dr. White's report and the other records were not included. On June 8, 2006, plaintiff asked the Appeals Council to review the administrative law judge's decision. Plaintiff submitted the report from Dr. White and the additional medical records to the council and explained that the records had been mailed to the Office of Hearings and Appeals during the 30-day period after the administrative hearing. Plaintiff argued that the agency had committed an administrative error and that the case should be remanded to the administrative law judge so that he could consider the evidence. The Appeals Council denied plaintiff's request for review, stating only that plaintiff's additional evidence did not provide a basis for changing the administrative law judge's decision.

OPINION

This case is governed by 42 U.S.C. § 405(g), which provides for judicial review of final decisions of the commissioner in social security cases. That statute specifies what actions the district court may take on review and gives the court only limited authority to remand a case to the agency. Melkonyan v. Sullivan, 501 U.S. 89, 99-100 (1991). Those actions are set forth in the fourth and sixth sentences of the statute. Under sentence four, a district court may remand "in conjunction with a judgment affirming, modifying, or reversing the [commissioner's] decision."[2] Id., at 100. Under sentence six, the district court may remand in light of additional evidence without making any substantive ruling as to the correctness of the commissioner's decision, but only if the additional evidence is new and material and the claimant shows good cause for failing to present the evidence earlier.[3] Id.

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[2] The fourth sentence of § 405(g) provides:

> The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.

[3] The sixth sentence of § 405(g) provides:

> The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it 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 . . .

(Sentence six also authorizes the court to remand on a motion made by the commissioner before the commissioner files his answer. That type of remand is not at issue in this case.)

In her opening brief, plaintiff argues that this court should remand this case pursuant to sentence four because the administrative law judge "ignored" Dr. White's report and the additional medical records. As proof that the administrative law judge received the records, plaintiff has submitted an affidavit from Dawn Woloszyn, Duncan's secretary, in which she avers that the documents were never returned by the post office as "undeliverable" and that a previous piece of correspondence sent by Duncan's office bearing the 87103 zip code was received by the administrative law judge. These assertions are insufficient to support an inference that the administrative law judge received the records. Plaintiff acknowledges that she has no receipt confirming receipt by the agency. By contrast, the absence of the records from the list of exhibits and the administrative law judge's failure to mention them lead inescapably to the conclusion that the records were not before the administrative law judge when he issued his decision.

When deciding whether to remand a case pursuant to sentence four, the district court is limited to reviewing the evidence that was before the administrative law judge at the time he rendered his decision or before the Appeals Council if the Council accepted the case for review and made a decision on the merits. Eads v. Sec'y of Dept. of Health and Human Services, 983 F.2d 815, 817 (7th Cir. 1993). Because the additional evidence was not before the administrative law judge and because the Appeals Council declined to review the

case, this court cannot remand this case under sentence four on the basis of the agency's failure to consider Dr. White's report or the updated progress notes.

Nonetheless, plaintiff argues, this court should remand the case because staff at the Office of Hearings and Appeals failed to comply with the office's internal procedures when they failed to insure that the additional evidence made it into plaintiff's file before the administrative law judge issued his decision. This argument is a nonstarter. Plaintiff has not shown that the agency received the documents or that it ignored its operating procedures. Even if plaintiff could prove such error, she has failed to cite any authority to support her contention that the district court may rectify it by ordering a remand under sentence four.

I agree with the commissioner that the only type of remand this court could order on the basis of the additional evidence is a remand pursuant to sentence six. Although plaintiff did not argue in support of a sentence six remand in her opening brief, in her reply she explains why she meets the criteria of newness, materiality and good cause. Ordinarily, arguments raised for the first time in a reply brief are waived. See, e.g., United States v. Adamson, 441 F.3d 513, 521 n.2 (7th Cir. 2006). However, to his credit, the commissioner raised and addressed the merit of any putative sentence six issue in his responsive brief. Accordingly, because the commissioner has not been prejudiced by plaintiff's belated change in legal theory, I will consider plaintiff's sentence six argument.

As noted previously, sentence six of 42 U.S.C. § 405(g) authorizes the court to order additional evidence to be taken by the commissioner "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 . . .". "'New' evidence is evidence 'not in existence or available to the claimant at the time of the administrative proceeding.'" Sample v. Shalala, 999 F.2d 1138, 1144 (7th Cir. 1993) (quoting Sullivan v. Finkelstein, 496 U.S. 617, 626 (1990)). Evidence is "material" if there is a "reasonable probability that the Commissioner would have reached a different conclusion had the evidence been considered." Perkins v. Chater, 107 F.3d 1290, 1296 (7th Cir. 1997) (internal quotations omitted.) A claimant shows "good cause" by demonstrating a "reasonable justification" for the failure to incorporate the evidence into the record before the administrative law judge. Foster v. Halter, 279 F.3d 348, 357 (6th Cir. 2001).

The commissioner does not dispute that the additional evidence submitted by plaintiff is new. He contends, however, that plaintiff cannot demonstrate good cause for his failure to submit the records to the administrative law judge. Whatever the reason the additional evidence did not make it into the record after the hearing, argues the commissioner, Duncan had ample opportunity to obtain and submit the evidence to the administrative law judge before the hearing.

The commissioner's argument overlooks the fact that Duncan sought and was granted permission from the administrative law judge to submit the records after the hearing. Had the records not been lost in the mail or misplaced by the agency, they would have been incorporated into the record. In other words, although Duncan *could* have obtained and

submitted the evidence earlier, his failure to do so is not the reason for the gap in the record. Duncan acted with reasonable diligence in advising the administrative law judge that he had additional evidence to submit and in asking the judge to keep the record open for that purpose. Cf. Campbell v. Shalala, 988 F.2d 741, 745 n.2 (7th Cir. 1993) (good cause lacking where claimant could and should have obtained evaluations while his case was pending with ALJ); Cline v. Commissioner of Social Security, 96 F.3d 146, 149 (6th Cir.1996)(failure to notify ALJ at or following hearing of need to consider additional medical evidence prevented claimant from later asserting good cause to submit new evidence).

Duncan did use the wrong zip code when he mailed the documents, which might be the reason the documents never made it to the administrative law judge. Even if that is the case, however, I am satisfied that plaintiff has shown good cause. The zip code on plaintiff's submission differed by only one numeral from the proper zip code and the agency had received a prior submission from Duncan bearing that same incorrect zip code. Whether the result of a minor clerical error by Duncan, a glitch in the mail system or an oversight by the agency, plaintiff's failure to submit the evidence to the administrative law judge was for good cause.

A closer question is whether the additional evidence is material, that is, whether there is a reasonable probability that the commissioner would have reached a different conclusion had the evidence been considered. Focusing solely on Dr. White's report, plaintiff argues that this evidence is material because Dr. White offered limitations for plaintiff that are

incompatible with even unskilled employment, including the inability to perform even low stress jobs and a high rate of absenteeism. The commissioner does not disagree that Dr. White's opinion supports plaintiff's claim that she is disabled, but argues that the outcome would not change on remand because the administrative law judge would be unlikely to give Dr. White's opinion any weight. The commissioner points out that Dr. White saw plaintiff only a few times; on one of these occasions, Dr. White noted that plaintiff's condition had improved; and the limitations endorsed by Dr. White appeared to be based in part on plaintiff's physical condition, for which Dr. White had never treated plaintiff.

Although I agree with the commissioner that various reasons exist to question the credibility of Dr. White's opinion, I am satisfied that plaintiff has met her burden to show that there is at least a reasonable probability that the outcome of her case might be different if Dr. White's opinion is considered. Dr. White's opinion relates to plaintiff's condition during the time period under consideration by the administrative law judge and is non-cumulative of other evidence in the record. Cf. Kapusta v. Sullivan, 900 F.2d 94, 97 (7th Cir. 1990) (reports not material where they addressed only plaintiff's current condition and not condition at time of hearing). Dr. White was the only treating source to complete a residual functional capacity assessment. For that reason, his report provides a perspective on plaintiff's pre-hearing condition otherwise lacking in the record. That there are reasons to question the opinion's credibility does not make it immaterial. I leave it to the

administrative law judge to determine on remand the weight to be afforded to Dr. White's opinion.

Finally, I note that plaintiff has not devoted much attention to the updated progress notes from Bryan and Kunda. However, insofar as these records may provide context for Dr. White's opinion, I will order the commissioner to consider that evidence as well.

In sum, plaintiff has satisfied her burden to show that the additional evidence not considered by the administrative law judge is new and material and that she had good cause for her failure to incorporate the evidence into the record during the administrative proceedings. Accordingly, this case will be remanded pursuant to sentence six of § 405(g).

ORDER

IT IS ORDERED that this case is REMANDED to the Commissioner of Social Security for consideration of additional evidence pursuant to sentence six of 42 U.S.C. § 405(g). Specifically, the commissioner shall consider the residual functional capacity questionnaire completed by Dr. Herbert White on September 6, 2005 and plaintiff's mental health records covering the time period January 5, 2004 to August 16, 2005. These reports are identified in the administrative record as Exhibit AC-2 and Exhibit AC-3.

In accordance with sentence six of 42 U.S.C. § 405(g),

> the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the

Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based.

Entered this 3rd day of May, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge