IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

DREMA L. ADKINS,

Plaintiff,

v. **CIVIL ACTION NO. 2:02-0087**

JO ANNE BARNHART,
Commissioner of Social Security,

Defendant.

MEMORANDUM OPINION AND ORDER

Currently pending before the court is Defendant's Motion for Reconsideration of the Court's Order dated March 5, 2003 and Alternative Motion for Relief Pursuant to Fed. R. Civ. P. 60(b), filed March 19, 2003. (Docket Sheet Document # (hereinafter "#") 20.) The parties have responded and replied and the matter is ripe for decision. (Plaintiff's Brief in Opposition to Defendant's Motion for Reconsideration and Alternative Motion for 60(b) Relief (# 24); Defendant's Reply Brief (# 26)).

Plaintiff filed applications for disability insurance benefits and supplemental security income benefits (hereinafter "DIB" and "SSI benefits" respectively) in 1994. (Transcript of the Administrative Record (hereinafter "Tr.") (# 17) at 106-09, 362-64.) Following extensive administrative proceedings, including remand by the Appeals Council, the applications were subsequently denied at the administrative law judge (hereinafter "ALJ") level, and Plaintiff appealed to the Appeals Council on August 17, 1999.

(Tr. at 9, 14-27.)

On December 20, 1999, Plaintiff moved to withdraw the request for review before the Appeals Council, noting that she would file a new application. (Tr. at 8.) Indeed, Plaintiff filed a second application for SSI benefits on April 19, 2000, and was found disabled as of the date of the second application. (Plaintiff's Motion to Require Defendant to Supplement Record (# 18), ¶ 2; Tr. at 6.) It was determined that Plaintiff, who was almost thirty-six years old at the time of the decision on the second application for SSI benefits, met Listing 12.04 related to affective disorders. (# 24, p. 3; Exhibit A to # 24.)

On November 30, 2001, the Appeals Council denied Plaintiff's motion to withdraw the request for review, noting that withdrawal/dismissal of a request for review is discretionary and "may be granted if it is clearly shown that a claimant understands the effect of the request (HALLEX 1-3-403). There is no indication in [the] file that you were advised of the effect of the request." (Tr. at 7.) The Appeals Council stated that it "considered the fact that since the date of the Administrative Law Judge's decision, you were found to be under a disability beginning April 19, 2000, based on the application you filed on April 19, 2000; however, the Council found that this information does not warrant a change in the Administrative Law Judge's decision." (Tr. at 6.) The Appeals Council concluded that "there is no basis under the [applicable] regulations for granting your request for review.

Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case." (Tr. at 6.)

On January 31, 2002, Plaintiff appealed the final decision of the Commissioner related to her 1994 application for SSI[1] benefits to this court. (# 2.) On November 14, 2002, Commissioner answered and filed the transcript of the administrative record, which included only that evidence which was before the ALJ related to the 1994 applications. (## 16, 17.) On February 3, 2003, Plaintiff moved to require the Commissioner to supplement the transcript of the administrative record to include evidence related to her second application filed on April 19, 2000, because the Appeals Council had considered this evidence in denying Plaintiff's request for review of the ALJ's decision on the prior applications. (# 18.) The Commissioner did not respond timely to this motion. By order entered March 5, 2003, the court granted Plaintiff's motion requiring the Commissioner to supplement the transcript of the administrative record to include evidence related to the second application on which Plaintiff was granted benefits. (# 19.)

On March 19, 2003, the Commissioner moved to reconsider the March 5, 2003, order and sought relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. (# 20.) The Commissioner

[1] It appears from Plaintiff's Complaint that she did not appeal the final decision of the Commissioner with respect to her application for DIB. (# 2.) Notably, her insured status expired for DIB purposes in 1993. (Tr. at 15.)

represents that she did not respond to Plaintiff's original motion due to a clerical error. (# 21, p. 2.) The Commissioner seeks an order setting aside the court's March 5, 2003, order, arguing that the court lacks the statutory authority to order the Commissioner to supplement the transcript of the administrative record beyond what is required by 42 U.S.C. § 405(g), i.e., that evidence upon which the Commissioner's final decision is based. The Commissioner argues that pursuant to 20 C.F.R. § 416.1481 (2001), the ALJ's decision related to the 1994 application is the final decision of the Commissioner. As such, according to the Commissioner, the evidence submitted in connection with Plaintiff's appeal before this court properly includes only that evidence before the ALJ, not evidence submitted to the Appeals Council related to her second application upon which benefits were granted. (# 21, pp. 3-4.)

In addition, the Commissioner argues that the instant matter is distinguishable from Wilkins v. Secretary, Dept. of Health and Human Servs., 953 F.2d 93, 94 (4th Cir. 1991) (en banc), wherein the Fourth Circuit held that the reviewing court could consider evidence submitted to the Appeals Council, because in Wilkins, the Appeals Council specifically incorporated the evidence into the administrative record. (# 21, pp. 5-6.) The Commissioner contends that in the instant case, no evidence was included by the Commissioner in the administrative record related to Plaintiff's second application, nor did Plaintiff submit additional evidence to the Appeals Council. (# 21, p. 7.)

Plaintiff responded to the Commissioner's motion and identified an internal policy implemented by the Commissioner in December of 1999, which states that where a claimant is awarded benefits on a subsequent claim, the subsequent claim must be sent to the Appeals Council considering the prior claim to determine if the subsequent claim contains new and material evidence relating to the period that was before the ALJ on the prior claim. Plaintiff cites Barrientoz v. Massanari, 202 F. Supp.2d 577, 587 (W.D. Tex. 2002), a case in which the district court remanded for a rehearing after the Commissioner failed to follow this internal policy. (# 24, pp. 1-2.) Plaintiff argues that the Appeals Council's decision reveals that it considered the evidence related to the second claim, as evidenced by the finding of the Appeals Council that it did not provide a basis for changing the ALJ's decision on the first claims. Plaintiff argues that contrary to the Commissioner's assertions, because the Appeals Council received and considered this evidence, it must be included in the administrative record to be reviewed by this court. (# 24, p. 2.) Plaintiff contends that Wilkins supports this position, as does Browning v. Sullivan, 958 F.2d 817, 822-23 (8th Cir. 1992).

The Commissioner filed a reply to Plaintiff's response indicating that she relied on the brief filed in support of her Motion for Reconsideration. The Commissioner did not address, either in her reply or otherwise, the presence or the impact of the new policy referred to above. (# 26.)

As Plaintiff points out in her response, in December of 1999, the Commissioner implemented a new policy for handling situations where a claimant is awarded benefits on a subsequent application when a prior application is pending before the Appeals Council. The new internal policy, SSA-EM-99147,[2] provides:

> 1. Effective immediately, when a prior claim is pending at the AC, we will send subsequent disability claims to the DDS for development and adjudication regardless of whether they are filed under the same or a different title than the prior claims pending at the AC. * * *
>
> 2. The DDS will limit any favorable determination on the subsequent claim to the period beginning with the day after the date of the ALJ's decision. If a subsequent claim results in a favorable determination, including a later onset or closed period of disability determination, the determination will be effectuated with an onset date no earlier than the day after the date of the ALJ decision on the prior claim. *After effectuation of the determination, the subsequent claim will be sent to the AC to determine if it contains new and material evidence relating to the period that was before the ALJ on the prior claim.*

(Emphasis added).

In comparison, under the Commissioner's former policy, when a claimant filed a second application while she had a prior claim pending before the Appeals Council, the subsequent application was "forwarded" to the Appeals Council without an initial determination by the state Disability Determination Service. The Appeals Council

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[2] This new internal policy entitled "Processing Subsequent Claims: New Policy Announced" is located at www.ssas.com/newclaim.htm. This policy has since been implemented through a variety of Program Operations Manual System (hereinafter "POMS") provisions, including (1) SSA POMS DI 12045.027, 2001 WL 1932370; (2) SSA POMS DI 20101.25, 2002 WL 1878621; and (3) SSA POMS SI 04040.025, 2002 WL 1879213.

could consider new and material evidence relating to the period before the ALJ's decision on the first claim, but it could not consider evidence of a worsened condition or of a new independent condition that arose after the ALJ's decision. If the Appeals Council ruled that a claimant was entitled to an award of benefits on the original application, the claimant was awarded benefits from the date she filed the initial claim. However, when the Appeals Council ruled against the claimant on her original application, only then was the subsequent application sent to the state Disability Determination Service for initial determination. Blackman v. Shalala, 837 F. Supp. 259, 262-63 (N.D. Ill. 1993) (the court summarized the Commissioner's former policy and ultimately determined it did not violate the Social Security Act). "Thus, when a claimant [filed] a second application, and later [had] her first claim denied, the net effect of the Secretary's [previous] policy [was] to postpone ruling on SSI eligibility for as much as six months." Id., at 263. Clearly, the new policy insures more rapid and efficient determinations on both the first and second claims. See Barrientoz, 202 F. Supp.2d at 587 (outlining new policy and its purpose).

It appears from the decision of the Appeals Council, in keeping with SSA-EM-99147, the subsequent claim was sent to the Appeals Council, which then determined whether it contained new and material evidence relating to the period that was before the ALJ on the prior claims. Specifically, the Appeals Council stated in its

decision that it "considered the fact that since the date of the Administrative Law Judge's decision, you were found to be under a disability beginning April 19, 2000, based on the application you filed on April 19, 2000; however, the Council found that this information does not warrant a change in the Administrative Law Judge's decision."[3] (Tr. at 6.) For this and other reasons, the Appeals Council denied Plaintiff's request for review of the ALJ's decision.

To enable this court to review a case in which the Appeals Council has stated that its decision included a consideration of evidence from a subsequent claim, but that the subsequent evidence did not provide a basis for changing the ALJ's decision related to the first claims, the evidence from the subsequent claim on which benefits were granted must be included in the administrative record. The court notes that the language of the new policy, that "the subsequent claim will be sent to the [Appeals Council] to determine if it contains new and material evidence relating to the period that was before the ALJ on the prior claim," is the same

[3] As Plaintiff points out, it is impossible to know whether the Appeals Council determined that the evidence was not new, not material or neither new nor material. (# 24, pp. 7-8.) However, this court generally has not required a more in depth explanation from the Appeals Council as to the weight afforded new evidence offered by the claimant. See Carter v. Apfel, No. 5:97-0600, 2001 WL 40795, at *11-12 (S.D. W. Va. Jan. 17, 2001) (this court noted in dicta that pursuant to unpublished Fourth Circuit precedent (see next citation), an in depth explanation from the Appeals Council as to the weight afforded new evidence submitted by the claimant is not required); Hollar v. Commissioner of Social Sec. Admin., 194 F.3d 1304, 1304 (4th Cir. 1999) (holding in an unpublished decision that the Appeals Council need not articulate its own assessment of additional evidence), cert. denied, 530 U.S. 1219 (2000).

language contained in the regulations outlining the instances in which the Appeals Council will grant review of an ALJ's decision. See 20 C.F.R. §§ 416.1470(b) (2001).

The regulations identify a handful of circumstances in which the Appeals Council will review the ALJ's decision, including

> (b) In reviewing decisions based on an application for benefits, if new and material evidence is submitted, the Appeals Council shall consider the additional evidence only where it relates to the period on or before the date of the administrative law judge hearing decision. In reviewing decisions other than those based on an application for benefits, the Appeals Council shall evaluate the entire record including the new and material evidence submitted if it relates to the period on or before the date of the administrative law judge hearing decision. It will then review the case if it finds that the administrative law judge's action, findings, or conclusion is contrary to the weight of the evidence currently of record.

20 C.F.R. § 416.1470(b) (2001).

The regulations further outline the procedure before the Appeals Council:

> (b) *Evidence*. (1) In reviewing decisions based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record and any new and material evidence only if it relates to the period on or before the date of the administrative law judge hearing decision. If you submit evidence which does not relate to the period on or before the date of the administrative law judge decision, the Appeals Council will return the additional evidence to you with an explanation as to why it did not accept the additional evidence and will advise you of your right to file a new application.

20 C.F.R. § 416.1476(b) (2001).

Cases decided by the Fourth Circuit define the terms "new" and

"material." "Evidence is new within the meaning of this section if it is not duplicative or cumulative." Wilkins, 953 F.2d at 96 (citing Williams v. Sullivan, 905 F.2d 214, 216 (8th Cir. 1990)). "Evidence is material if there is a reasonable possibility that the new evidence would have changed the outcome." Wilkins, 953 F.2d at 96 (citing Borders v. Heckler, 777 F.2d 954, 956 (4th Cir. 1985)).

Pursuant to the regulations cited above, if additional evidence submitted by a claimant does not relate to the time period on or before the ALJ's decision, the evidence is returned to the claimant, and the claimant is advised about her rights to file a new application. See Davis v. Sullivan, 905 F.2d 1529, 1990 WL 85355, at *2 n.1 (4th Cir. 1990) (unpublished case in which Fourth Circuit remanded case to the Secretary (now Commissioner) where Appeals Council denied request for review without mentioning or considering new evidence offered by claimant or including it in the record and noting that this was not a situation where the Appeals Council returned the evidence to the claimant as not being relevant to the period in question or advising him of his rights to file a new application).

If the additional evidence relates to the period on or before the date of the ALJ's decision, the Appeals Council must evaluate the entire record, including the additional evidence, to determine if the ALJ's findings or conclusions are contrary to the weight of the evidence. Wilkins, 953 F.2d at 95. If after reviewing the new evidence, along with the other evidence of record, the Appeals

Council determines that the ALJ's findings are contrary to the weight of the evidence, the Appeals Council will grant review and, its decision becomes the final decision of the Commissioner. 20 C.F.R. § 416.1481 (2001). If the Appeals Council denies review, the ALJ's decision becomes the final decision of the Commissioner. Id. The final decision of the Commissioner is then subject to judicial review. 42 U.S.C. § 405(g). Once a claimant files a complaint seeking review of the Commissioner's final decision, "[a]s part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based." 42 U.S.C. § 405(g).

In the case where the Appeals Council denies a request for review after considering additional evidence offered by the claimant for the first time to the Appeals Council, the transcript of the administrative record certified to the court by the Commissioner must include the additional evidence submitted to the Appeals Council, and this evidence must be considered by the court in determining whether the ALJ's decision is supported by substantial evidence. In Wilkins v. Secretary, Dept. of Health and Human Servs., 953 F.2d 93, 96 (4th Cir. 1991) (en banc), the plaintiff submitted a letter from her treating physician, Pung S. Liu, M.D., to the Appeals Council. The Appeals Council "incorporated this letter into the record on appeal and wrote that 'where new and material evidence is submitted with the request for

review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's action, findings or conclusion is contrary to the weight of the evidence currently of record.'" Id., at 95 (quoting decision of the Appeals Council). After considering Dr. Liu's letter, the Appeals Council concluded that no basis existed for review. Id. The court in Wilkins determined that the Appeals Council, pursuant to 20 C.F.R. § 404.970,[4] "must consider new and material evidence relating to the period prior to the ALJ decision in determining whether to grant review, even though it may ultimately decline review." Id. The court acknowledged that "[b]ecause the Appeals Council denied review, the decision of the ALJ became the final decision of the Secretary." Id., at 96. In addition, the Wilkins court noted that "'[r]eviewing courts are restricted to the administrative record in performing their limited function of determining whether the Secretary's decision is supported by substantial evidence.'" Id. (quoting Huckabee v. Richardson, 468 F.2d 1380, 1381 (4th Cir. 1972)). Because "[t]he Appeals Council specifically incorporated Dr. Liu's letter of June 16, 1988 into the administrative record . . . we must review the record as a whole, including the new evidence, in order to determine whether

[4] The corresponding regulation for SSI purposes, 20 C.F.R. § 416.1470 (2001), is nearly identical.

substantial evidence supports the Secretary's findings."[5] Id., at 96.

The Commissioner's argument that Wilkins favors her position is unconvincing. The Commissioner argues that "the Wilkins case shows that the Fourth Circuit recognized that it was limited to the administrative record, but could look at evidence beyond what the ALJ considered where that evidence was included, by the Agency, in the administrative record." (# 21, p. 6.) The Commissioner goes on to state: "Here, no evidence relating to Plaintiff's subsequent application was included in the administrative record and Plaintiff

[5] There is a split of authority among the circuit courts of appeals regarding whether a district court may review new evidence submitted to the Appeals Council where the Appeals Council ultimately denied review of the ALJ's decision. The Courts of Appeals for the Second, Eighth, Ninth and Tenth circuits join the Fourth Circuit in holding that a reviewing court should consider new evidence submitted to and considered by the Appeals Council in its substantial evidence review, while the Courts of Appeals for the First, Third, Sixth, Seventh and Eleventh circuits have held that the reviewing court is limited to the record before the ALJ. Compare Perez v. Chater, 77 F.3d 41, 45 (2d Cir. 1996) (holding that new evidence submitted to the Appeals Council following the ALJ's decision becomes part of the administrative record for judicial review when the Appeals Council denies review of the ALJ's decision); O'Dell v. Shalala, 44 F.3d 855, 859 (10th Cir. 1994) (same); Ramirez v. Shalala, 8 F.3d 1449, 1454 (9th Cir. 1993) (same); and Riley v. Shalala, 18 F.3d 619, 622 (8th Cir. 1994) (same); with Mills v. Apfel, 244 F.2d 1, 5-6 (1st Cir. 2001) (holding that review by district court limited to evidence before the ALJ, but permitting review of the Appeals Council's denial of review where it gives an egregiously mistaken ground for that action); Matthews v. Apfel, 239 F.3d 589, 593-94 (3d Cir. 2001) (district court cannot review evidence submitted to the Appeals Council in determining if ALJ's decision is supported by substantial evidence); Falge v. Apfel, 150 F.3d 1320, 1323 (11th Cir. 1998) (acknowledging that new evidence submitted to the Appeals Council is part of the administrative record, but holding that where Appeals Council denies request for review, district court should look only to the evidence before the ALJ); Eads v. Secretary of Dept. of Health & Human Servs., 983 F.2d 815, 817-18 (7th Cir. 1993) (a district court may not reverse an ALJ's decision on the basis of evidence first submitted to the Appeals Council); and Cotton v. Sullivan, 2 F.3d 692, 696 (6th Cir. 1993) (same). The Fifth Circuit has not considered the issue, see Masterson v. Barnhart, 309 F.3d 267, 274 n.3 (5th Cir. 2002) (acknowledging the split among the circuits and declining to rule without proper briefing), though the United Stated District Court for the Northern District of Texas recently held in Rodriguez v. Barnhart, ___ F. Supp.2d ___, 2003 WL 1478083, at *5-6 (N.D. Tex. Feb. 19, 2003), that the district court should review the evidence as a whole, including evidence submitted to the Appeals Council.

never even submitted any additional evidence to the Appeals Council." (# 21, p. 7.)

The Commissioner seems to believe that because she chose not to include evidence from the second claim in the transcript of the administrative record filed with this court and because Plaintiff submitted no evidence to the Appeals Council, this somehow ends the inquiry into whether the evidence from the subsequent claim *should* have been included in the transcript submitted to this court. That the Commissioner chose not to include the evidence in the transcript of the administrative record does not justify its absence. The Commissioner makes no mention of the existence, much less the impact of her own policy, which requires that "the subsequent claim will be sent to the [Appeals Council] to determine if it contains new and material evidence relating to the period that was before the ALJ on the prior claim." SSA-EM-99147. When SSA-EM-99147 is read in conjunction with the regulations relating to new and material evidence and the Fourth Circuit's decision in Wilkins, the inescapable conclusion is that the evidence from the second claim should have been included in the transcript of the administrative record for this court's consideration in determining whether the ALJ's decision on the first claim is supported by substantial evidence. Wilkins makes clear that where new evidence submitted by a claimant is considered by the Appeals Council, even when it ultimately denies review, that evidence should be

considered by the district court in its review of the Commissioner's final decision. Wilkins, 953 F.2d at 95; see also Browning v. Sullivan, 958 F.2d 817, 823 n.4 (8th Cir. 1992) (noting in dicta that even where the Appeals Council finds evidence submitted by the claimant is not "new and material" it "must still be included in the full certified administrative record, and the reviewing court must ultimately determine, after giving due deference to the agency's views, what constitutes the record for purposes of applying the substantial evidence test under 42 U.S.C. § 405(g)"). The court can ascertain no difference between new evidence offered by the claimant and evidence from the subsequent claim provided by the Commissioner to the Appeals Council, nor does the Commissioner identify any true distinction. The Appeals Council's decision reveals that the evidence from the subsequent claim was considered by the Appeals Council, as it should have been pursuant to the new policy.[6] As such, evidence from the subsequent application should have been included in the transcript of the administrative record provided to this court related to its review of the Commissioner's final decision on the first application.

[6] The court can conceive of the situation where the Appeals Council receives evidence from the subsequent claim and determines that it does not relate to the time period that was before the ALJ on the prior application. In that instance, the Appeals Council would not consider the evidence and, as a result, its inclusion in the transcript to be reviewed by this court would not be appropriate. This is not the situation in the instant case, where the Appeals Council's decision indicates that it considered the evidence and determined it did not provide a basis for changing the ALJ's decision, a statement the court construes to mean the Appeals Council determined the evidence either was not new, was not material or was neither new nor material.

Accordingly, it is hereby **ORDERED** that Defendant's Motion for Reconsideration of the Court's Order dated March 5, 2003 and Alternative Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) is **DENIED**.

The Clerk is directed to mail a copy of this Memorandum Opinion and Order to all counsel of record and to publish this Memorandum Opinion and Order on the court's website.

ENTER: May 14, 2003

Mary E. Stanley
United States Magistrate Judge