

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT MARTINSBURG

SHELBY R. KUHN,

Plaintiff,

v.

CIVIL ACTION NO. 3:05CV126

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

ORDER ADOPTING REPORT AND RECOMMENDATION

On this day the above styled case came before the Court for consideration of the Report and Recommendation of Magistrate Judge John S. Kaul, dated December 22, 2006, and the Plaintiff's objections thereto filed on January 3, 2007. In the interests of justice and in accordance with 28 U.S.C. § 636(b)(1), the Court has conducted a *de novo* review.

The Court, after reviewing the above, is of the opinion that the Magistrate Judge's Report and Recommendation should be and is hereby ORDERED adopted.

Plaintiff objects to the Report and Recommendation on procedural grounds. The Plaintiff argues that the case should be remanded to the Social Security Administration for further review due to the Magistrate Judge's finding that the Administrative Law

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Judge (ALJ) did not properly recognize two of the Plaintiff's doctors as treating physicians.

The Plaintiff specifically objects to the following conclusion in the Report and Recommendation: ". . . [T]he ALJ's error in determining Dr. Clarke was a non-treating physician for asthma is harmless, because, regardless of Dr. Clarke's status as a treating physician, substantial evidence supports the finding that his opinion was not entitled to significant weight. The result would be the same." Essentially, the Plaintiff asks that the ALJ's decision be reversed because it was technically flawed, despite a sound basis for the decision in the record.

Magistrate Judge Kaul thoroughly reviewed the record and concluded that the ALJ's findings were established by substantial evidence. The Magistrate Judge further concluded that the physician opinions that the ALJ erroneously failed to recognize as opinions of "treating physicians" would not be entitled to controlling weight, even if those doctors were recognized as treating physicians, because the relevant opinions concern conclusory issues and are reserved to the Commissioner. Report and Recommendation, page 20.

The Court acknowledges that the normal remedy for a faulty

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application of the rules is remand; however, as cited in Alejandro v. Barnhart, “[the] courts have also declined to reverse and remand on procedural grounds when it is clear that the procedural error did not compromise the decision-making process.” Alejandro v. Barnhart, 291 F. Supp. 2d 497, 515 (D. Tex. 2003). Alejandro goes on in its analysis to relate the administrative procedures governing social security cases to Fed. R. Civ. P. 61 and Fed. R. Crim. P. 52(a), to review the statistics on the millions of social security claims processed each year, and to cite additional case law on futile remand. Alejandro also cites the Fifth Circuit’s decision in Mays v. Bowen, 837 F.2d 1362 (5th Cir. 1988). In Mays the court held that a procedurally flawed administrative judgment will be preserved when the judgment’s error does not compromise a party’s substantive rights and remand would be a waste of time. Id. at 1364.

In this case, the record clearly supports the administrative findings. The ALJ’s failure to recognize certain doctors as treating physicians affects no substantial right, and remand would be futile.

The Court, therefore, **ORDERS** that the Defendant’s Motion for Summary Judgment (Document No. 11) be **GRANTED**. The Court further **ORDERS** that Plaintiff’s Motion for Summary Judgment (Document No. 10) be **DENIED**. It is further ORDERED that this action be **DISMISSED**

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WITH PREJUDICE based on the reasons set forth in the Magistrate Judge's Report and Recommendation, and **STRICKEN** from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit true copies of this Order to the Plaintiff and all counsel of record in this matter.

DATED this 22nd day of February 2007.

/s/ Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE