

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

ROGER L. SMITH, SR.,

Plaintiff,

v.

CIVIL ACTION NO. 1:06CV104
(Judge Keeley)

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Defendant.

ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. §636(b)(1)(B), Rule 72(b), Federal Rules of Civil Procedure and Local Court Rule 4.01(d), on June 29, 2006, the Court referred this Social Security action to United States Magistrate John S. Kaull with directions to submit to the Court proposed findings of fact and a recommendation for disposition.

On June 27, 2007, Magistrate Judge Kaull filed his Report and Recommendation ("R&R") and determined that the record did not contain substantial evidence to support the Administrative Law Judge's ("ALJ") determination that "Plaintiff's headaches were not medically determinable where there are objective studies documenting a possible cause for the headaches" and also did not contain substantial evidence to support the ALJ's finding that the plaintiff was not totally credible. Significantly, the Magistrate Judge noted that the record does not contain any medical evidence that Smith does not have headaches and further noted that the State Agency physicians on whom the ALJ relied did not have and, therefore could not review, the brain MRI that revealed the arachnoid cyst prior to submitting their opinions.

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The R&R directed the parties, in accordance with 28 U.S.C. §636(b)(1) and Rule 6(e), Fed. R. Civ. P., to file with the Clerk of Court any written objections within ten (10) days after being served with a copy of the Report and Recommendation and further directed the parties that failure to file objections would result in a waiver of the right to appeal from the judgment of this Court. The parties did not file any objections.

Upon consideration of the Magistrate Judge's recommendation and having received no written objections,¹ the Court accepts and approves the Report and Recommendation. Therefore, it is

ORDERED That Magistrate Judge Kaul's Report and Recommendation/Opinion is accepted in whole and this civil action be disposed of in accordance with the recommendation of the Magistrate. Accordingly,

1. The plaintiff's motion for Summary Judgment (Docket No. 10) is **GRANTED-IN-PART**;
2. The defendant's motion for Summary Judgment (Docket No. 11) is **DENIED**;

¹ The failure of the parties to object to the Report and Recommendation not only waives their appellate rights in this matter, but also relieves the Court of any obligation to conduct a *de novo* review of the issues presented. See Wells v. Shriners Hospital, 109 F.3d 198, 199-200 (4th Cir. 1997); Thomas v. Arn, 474 U.S. 140, 148-153 (1985).

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3. The plaintiff's claim is **REMANDED** to the Commissioner pursuant to sentence four of 42 U.S.C. §§ 504(g) and 1383(c)(3) for further proceedings consistent with the recommendations made by Magistrate Judge Kaul in his June 27, 2007 report and recommendation; and
4. This civil action is **DISMISSED WITH PREJUDICE** and **RETIRED** from the docket of this Court.

The Clerk of Court is directed to enter a separate judgment order. Fed.R.Civ.P. 58. If a petition for fees pursuant to the Equal Access to Justice Act (EAJA) is contemplated, the plaintiff is warned that, as announced in Shalala v. Schaefer, 113 S.Ct. 2625 (1993), the time for such a petition expires ninety days thereafter.

The Clerk of the Court is directed to transmit copies of this Order to counsel of record.

DATED: July 11, 2007.

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