

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

CARRANZA GUIDRY

CIVIL ACTION

VERSUS

NO. 05-1122-A-M2

**JO ANNE B. BARNHART,
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION**

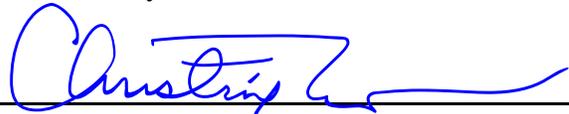
NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the United States District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have ten (10) days after being served with the attached Report to file written objections to the proposed findings of fact, conclusions of law and recommendations therein. Failure to file written objections to the proposed findings, conclusions, and recommendations within 10 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions of the Magistrate Judge which have been accepted by the District Court.

**ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO
FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.**

Signed in chambers in Baton Rouge, Louisiana, May 30, 2006.



MAGISTRATE JUDGE CHRISTINE NOLAND

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

FILED

May 30, 2006

CARRANZA GUIDRY

VERSUS

**JO ANNE B. BARNHART,
COMMISSIONER OF THE SOCIAL
SECURITY ADMINISTRATION**

CIVIL ACTION

NO. 05-1122-A-M2

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter comes before the Court on the defendant's motion to remand filed by the Commissioner of Social Security with this Court on April 21, 2006. Plaintiff has not filed an opposition. Claimant seeks reversal of the denial of his claim for Disability Insurance Benefits. Claimant filed his memorandum in support of appeal on December 27, 2005 (R. Doc. 4). The Commissioner now seeks a remand pursuant to sentence four of 42 U.S.C. § 405(g). The Commissioner has not filed her answer. A sentence four remand is a final judgment and would require this Court to either modify or reverse the decision of the ALJ. 42 U.S.C. § 405(g). The Commissioner seeks a remand so that the Commissioner may conduct further proceedings, and specifically for an Administrative Law Judge (ALJ) to consider and address the Department of Veterans Affairs (VA) disability rating, the VA's finding regarding employability, and to more fully consider plaintiff's alleged mental impairment, including plaintiff's treating physician's opinion of June 20, 2003, Paul Lamberty, Ph.D., regarding plaintiff's employability. Plaintiff, in his memorandum in support of appeal, argues that the ALJ erred in the weight to assign the finding of disability by the U.S. Department of Veterans Affairs, and the weight assigned to the opinion of Dr. Paul Lamberty, Ph.D. regarding his mental residual functional capacity. Additionally, plaintiff argues that other legal errors were committed and that the ALJ's decision

is not supported by substantial evidence.

In addition to a sentence four remand, the Commissioner asks the Court to issue an Order of Dismissal without prejudice to the subsequent filing for attorney fees under the EAJA and requests entry of judgment for plaintiff pursuant to Federal Rule of Civil Procedure 58.¹

Remands in SSI cases must be specifically classified as either sentence four or sentence six remands. Melkonyan v. Sullivan, 501 U.S. 89, 111 S. Ct. 2157, 2164, 115 L. Ed. 2d 78 (1991). Sentence four of 42 U.S.C. § 405(g) states: "The Court shall have power to enter, **upon the pleadings and the 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." 42 U.S.C. § 405(g) (emphasis supplied). The relevant part of sentence six of 42 U.S.C. § 405(g) states: "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 . . . for further action by the Commissioner. . . and the Commissioner of Social Security shall, after the case is remanded, . . . 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 a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based." *Id.* (emphasis supplied). The choice between designating a remand as either a sentence four or six remand determines two important aspects of the litigation: 1. whether the district court retains

¹ Fed. R. Civ. P. 58 provides that a judgment is effective only when the district court sets forth the judgment on a separate document (*See also* Fed. R. App. P. 4(a)(1), (7) (60-day appeal time begins to run only after entry of judgment in compliance with Federal Rule of Civil Procedure 58). Defendant Commissioner also cites to Shalala v. Schaefer, 113 S. C. 2625 (1993) which dictates that a fee application under EAJA must be filed within 30 days of entry of judgment pursuant to an order remanding the case under sentence four.

jurisdiction over the case until after a determination on remand is made; and 2. whether the plaintiff is entitled to attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Seaborn v. Sullivan, 822 F. Supp. 121, 123 (S.D.N.Y, 1993). The Court rejects the argument that the defendant is entitled to a sentence four remand. The defendant has not answered, thus there are no "pleadings" on which the Court could enter a judgment. "Sentence four's reference to 'pleadings,' in contrast to sentence six, presumes that issue has been joined." Tucunango v. Sullivan, 810 F. Supp. 103, 107 (S.D.N.Y. 1993). Furthermore, remands pursuant to sentence four follow a "substantive ruling" by the district court rather than merely returning the matter to the Commissioner for disposition. Seaborn, 822 F. Supp. at 124; Fernandez v. Sullivan, 809 F. Supp. 226, 229 (S.D.N.Y. 1992). To remand under sentence four, the Court would have to reverse the decision of the Commissioner, and before the Court can do that it must engage in a plenary review of the entire record. Id. However, there is no need for such a review in this matter because the Commissioner admits that the ALJ committed an error.

This Court joins those courts that have decided that where the defendant seeks a motion to remand prior to filing an answer and admits that the ALJ made a legal error, the remand will be deemed as one pursuant to sentence six. Seaborn, 822 F. Supp. 121, 125 (S.D.N.Y. 1993); Longey v. Sullivan, 812 F. Supp. 453, 457 (D.Vt. 1993); Tucunango, 810 F. Supp. 103, 105 (S.D.N.Y. 1993); Fernandez, 809 F. Supp. 226, 229 (S.D.N.Y. 1992); Rivera Sanchez v. Secretary of Health and Human Services, 786 F. Supp. 147, 149 (D.P.R. 1992); Thomas v. Sullivan, 778 F. Supp. 473, 475 (W.D.Mo. 1991). These cases hold that any reason for remand under sentence four is *ipso facto* "good cause" to remand under sentence six. As stated by the Court in Seaborn:

Remanding this case pursuant to sentence six is consistent with the dual goals of meaningful judicial review of the decision to deny benefits and the expeditious, yet fair, adjudication of disability claims. Under the circumstances presented here, these goals are best served by remanding for further administrative proceedings **without relinquishing jurisdiction**. . . . [C]ongress provided the Secretary with the opportunity to reconsider a benefits denial decision without having to defend her decision by answering the complaint. The Secretary's opportunity to neither admit nor deny error is provided with the understanding that the plaintiff may return to the district court during the remand process to resolve disputes and/or seek interim relief." 822 F. Supp at 125.(emphasis supplied)

Finally, if the Court permitted the Commissioner to obtain a sentence four remand in this matter as suggested, this would more or less put back in place the pre-1980 amendment practice where the Secretary had the unfettered power to remand matters on its own motion. This result would be contrary to clear intent of 42 U.S.C. § 405(g).

RECOMMENDATION

Accordingly, it is the recommendation of the Magistrate Judge that the Commissioner's motion to remand be **DENIED**, in as much as it seeks a remand pursuant to the fourth sentence

of 42 U.S.C. § 405(g), but that the motion to remand be **GRANTED**, pursuant to the first clause of the sixth sentence of 42 U.S.C. § 405(g), that this matter be **REMANDED** to the Commissioner for further administrative proceedings, pursuant to the first clause of the sixth sentence of 42 U.S.C. § 405(g).

Signed in chambers in Baton Rouge, Louisiana, May 30, 2006.



MAGISTRATE JUDGE CHRISTINE NOLAND