

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

WILLIAM E. STEWART, JR.)	CIVIL ACTION NO. 3:01CV00019
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security ¹ ,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

Before the court is the defendant's "60(b)(1) Motion to Vacate the Court's September 25, 2001 Order," filed January 7, 2002. The defendant requests that the court vacate its order and resubmit the case to Magistrate Judge B. Waugh Crigler due to a mistake made in the Report and Recommendation regarding the dates of plaintiff's eligibility for disability insurance benefits. For the reasons stated herein, the defendant's motion is denied.

I.

On September 8, 1993, the plaintiff applied to the Social Security Administration for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C. §§401-33, and Supplemental Security Income ("SSI") under Title XVI of the Act, 42 U.S.C. §§ 1381-83, alleging that he became unable to work due to back pain on July 15, 1990. A mental impairment claim was subsequently raised just prior to the hearing before the Administrative law Judge ("ALJ") on January 31, 1997, at which time the ALJ remanded the matter to the Disability Determination Service for a determination of that claim.

¹Jo Anne B. Barnhart became Commissioner of Social Security, effective November 9, 2001. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C. § 405(g), Jo Anne B. Barnhart is automatically substituted as the defendant in this action.

On July 24, 1998, the ALJ issued his decision, which was eventually adopted as the final decision of the Commissioner. The ALJ accepted the SSI claim, finding that the plaintiff was disabled beginning January 13, 1997, but denied the claim for disability insurance benefits, finding that the plaintiff had not demonstrated disability by the date on which he was last covered by disability insurance, on December 31, 1995. (R. 31-33.)

On February 23, 2001, the plaintiff filed a complaint in this court, seeking review of the Social Security Administration's denial of his claim for disability insurance benefits. By order dated May 17, 2001, the matter was referred to the presiding United States Magistrate Judge B. Waugh Crigler to propose findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C. § 636(b)(1)(B). On August 27, 2001, the Magistrate Judge recommended that the court reverse the Commissioner's final decision, grant judgment for the plaintiff, and recommit the case to the Commissioner for the calculation and payment of proper benefits. No objections were filed.² See Fed. R. Civ. P. 72(b). The court adopted the Report and Recommendation in its entirety on September 15, 2001, and the case was remanded to the Commissioner.

On January 7, 2002, the defendant filed a "60(b)(1) Motion to Vacate the Court's September 25, 2001 Order." The defendant points out that in the Report and Recommendation, the Magistrate Judge erroneously stated that the last date when the plaintiff was insured for

² The failure to file objections to the findings of the Magistrate Judge after the issuance of the Report and Recommendation, pursuant to Fed. R. Civ. P. 72(b), could be grounds for denial of the defendant's motion. See *Odum v. International Longshoremen's Ass'n*, 1999 WL 50827, *1 (4th Cir.(S.C.) (unpublished) (finding no abuse of discretion by the district court in denying a Rule 60 motion because objections had not been timely filed to the report and recommendation) (citing *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982)). However, the court acknowledges that a clear error existed in the Report and Recommendation, and therefore, shall address the merits of the Rule 60 motion.

purposes of Social Security disability benefits was January 13, 1997. The actual date that the plaintiff was last insured was December 31, 1995. According to the defendant, this error has caused the plaintiff to be unjustly enriched. The defendant seeks that the court vacate its judgment and resubmit the matter to the Magistrate Judge for reconsideration under the correct date on which the plaintiff was last insured.

II.

Rule 60 of the Federal Rules of Civil Procedure provides:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect....

Fed. R. Civ. P. 60(b)(1). A Rule 60(b) motion proceeds in two stages. "First there is the question of whether the movant has met each of three threshold conditions. '[I]n order to obtain relief from a judgment under Rule 60(b), a moving party must show that his motion is timely, that he has a meritorious defense to the action, and that the opposing party would not be unfairly prejudiced by having the judgment set aside.'" *National Credit Union Admin. Bd. v. Gray*, 1 F.3d 262, 264 (4th Cir. 1993) (quoting *Park Corp. v. Lexington Ins. Co.*, 812 F.2d 894, 896 (4th Cir.1987)). The Fourth Circuit also requires a showing of exceptional circumstances for such relief to be granted. See, e.g., *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir.1984) and *Compton v. Alton S.S. Co.*, 608 F.2d 96, 102 (4th Cir.1979).

A motion filed pursuant to Rule 60(b)(1) must be made not more than one year after judgment is entered. In this case, the court entered a final order on September 25, 2001, and the defendant filed the Rule 60 motion on January 7, 2002. Accordingly, the court finds that the motion is timely filed.

Regarding a meritorious defense, “a movant must demonstrate that granting relief in its case will not have been a ‘futile gesture.’” *Holland v. Virginia Lee Co., Inc.*, 188 F.R.D. 241, 249 (quoting *Boyd v. Bulala*, 905 F.2d 764, 769 (4th Cir.1990)). The law “‘requires a proffer of evidence which would permit a finding for the [moving] party or which would establish a valid counterclaim.’” *Id.* (quoting *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir.1988)).

For the reasons stated below, the court finds that the defendant fails to meet the threshold condition of presenting a meritorious defense under Fed. R. Civ. P 60(b)(1). Therefore, it is unnecessary to address the other threshold conditions of unfair prejudice to the non-movant and exceptional circumstances.

III.

Here, the mistake brought out by the defendant entails a conclusion by the Magistrate Judge that the plaintiff was disabled on or before his date last insured, January 13, 1997. (Report and Recommendation at 5-6.) It is undisputed that the plaintiff was last insured on December 31, 1995. The Magistrate Judge confused the date on which the plaintiff was last insured with the commencement date of the plaintiff’s eligibility for supplemental security income. The defendant maintains that the Magistrate Judge considered evidence that related to the time period after the plaintiff’s insured status expired in reaching the conclusion that the plaintiff was eligible for Title II benefits. According to the defendant, this mistake has resulted in the plaintiff becoming unjustly enriched. The defendant asks this court to vacate the judgment, recommit the case to the Magistrate Judge, and grant permission to the defendant to

brief the issue before the Magistrate Judge.³

The plaintiff argues that even with this error, the Report and Recommendation cited to sufficient evidence in the record to support a finding that the plaintiff was disabled on or before December 31, 1995. Thus, according to the plaintiff, the error in dates was harmless, and the defendant has failed to put forth a proper showing for a meritorious defense.

A review of the Report and Recommendation reveals that almost every piece of evidence cited by Magistrate Judge Crigler relates to medical opinions about the plaintiff's mental and orthopedic health during the period 1990 to 1995, not the period 1990 to 1997. Only one reference is made to treatment received in 1996. The Magistrate Judge wrote that "Dr. Mathews performed laser decompression surgery on the plaintiff, and treated him from 1991 through 1993 and again in 1996." (Report and Recommendation, at 5.)

Elsewhere, the Magistrate Judge cited to numerous records filed by a number of the plaintiff's treating physicians which would support a finding that the plaintiff suffered depression on or before December 31, 1995. Specifically, in July 1991, Dr. Thomas L. Schildwachter, an orthopedist, recorded in the plaintiff's chart that a "possible psychological investigation would be beneficial..." (R. 203.) In July 1995, Dr. Marc Rose of the University of Virginia Pain Management Center reported that the plaintiff's depressive moods should be monitored. (R. 319.) As early as 1991, the plaintiff was taking the antidepressant, Elavil. (R. 181.) A *de novo* review of the record also reveals that in March 1995, another of the plaintiff's physicians, Dr. Patricia Elliot, indicated that the plaintiff had been prescribed Zoloft to address his depression. (R. 295.)

³The court notes that the defendant waived the opportunity to file a brief in the first instance. (See July 16, 2001 Statement of Intention Regarding Brief and Motion to Suspend Briefing Schedule.)

The defendant has not challenged any of this evidence cited in the Report and Recommendation. Indeed, the defendant offers no evidence beyond pointing out that the report contained the wrong date for the expiration of disability insurance. However, the court finds that this error is not fatal to the recommendation of the Magistrate Judge because the facts on which the Magistrate Judge based his recommendation support the same finding under the correct expiration date for disability insurance. As such, the defendant's concern that because of the error in dates, the Magistrate Judge did not in fact rule on the issue of whether substantial evidence supported the Commissioner's final decision that the plaintiff was not disabled for purposes of Title II benefits prior to December 31, 1995, is groundless. The court finds that the Magistrate Judge's findings, based on the record, support the conclusion that the plaintiff was disabled on or prior to the expiration of his insured status on December 31, 1995.

As such, the Magistrate Judge's recommendation to reverse the Commissioner's decision, grant judgment to the plaintiff and recommit the case to the Commissioner for calculation and payment of appropriate benefits was properly adopted by this court.

IV.

As the defendant has failed to present a meritorious defense to this action, the court finds that the granting of defendant's Rule 60 motion would be a "futile gesture." *Holland*, 188 F.R.D. at 249. Accordingly, the court denies the defendant's motion to vacate.

An appropriate order this day shall issue.

ENTERED: _____
Senior United States District Judge

Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

WILLIAM E. STEWART, JR.)	CIVIL ACTION NO. 3:01CV00019
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Plaintiff,)	
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v.)	<u>ORDER</u>
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant.)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is accordingly

ADJUDGED, ORDERED AND DECREED

that the defendant's January 7, 2002 "60(b)(1) Motion to Vacate the Court's September 25, 2001 Order," shall be, and it hereby is, DENIED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to Magistrate Judge Crigler and to all counsel of record.

ENTERED: _____
Senior United States District Judge

Date