

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

LIBERTY NATIONAL LIFE)	
INSURANCE COMPANY,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 03-0010-CG-C
)	
COMMISSIONER, SOCIAL)	
SECURITY ADMINISTRATION,)	
)	
Defendant.)	

ORDER

This matter is before the court on the Report and Recommendation of the Magistrate Judge (Doc. 5), plaintiff's objection thereto (Doc. 6), and defendant's response to plaintiff's objection (Doc. 9). The Magistrate Judge recommended that the court find that the decision of the Commissioner, Social Security Administration (SSA) to not allow the taking of the deposition of Joseph Newton was not arbitrary and capricious. The Magistrate Judge found that SSA considered the relevant factors in its determination and clearly set forth its position that allowing the testimony would unduly burden the agency and would not serve the agency's interests. The Magistrate Judge reasoned that:

Given the thousands of applications for social security benefits pending in Alabama and the significant backlog of cases, this Court simply cannot find that the agency's belief that allowing Newton's testimony (for even just an hour) would unduly burden it is arbitrary and capricious. This is particularly so where, as here, Liberty National cannot establish that Newton has information regarding Barefield's file that goes to the heart of the central issue in this case [FN 4: In the undersigned's opinion, testimony from Newton that the Barefields likely or may have signed forms assigning to Medicaid any private health insurance benefits available to them would not promote Liberty

National's position in the state case any more than the forms available to the corporation through its FOIA request or by Internet search.] nor that Newton has information about SSA procedure that has not been supplied by the state agency deponent or cannot be gained from SSA documents obtained through the corporation's pending FOIA request. Cf. Stacey v. Caterpillar, Inc., 901 F.Supp. 244, 247 (E.D.Ky. 1995) ("Where a party's interests in discovery of information held by the government or a government official outweigh the unique interests of the government, then section 301 must yield to discovery in the appropriate manner. . . . Although the Court appreciates the legitimate and important interest of MSHA in shielding its employees from becoming involved in time consuming discovery so that they may properly do their jobs, in this instance that interest is outweighed by Caterpillar's need to obtain **this critical information which is otherwise unavailable.**"). [FN 5: As heretofore indicated, there is no evidence suggesting that the information Liberty National hopes to gain from Newton is critical but even more importantly, there has been no showing that this information is unavailable through the corporation's pending FOIA request or by simply searching the Internet for the desired forms.] Finally, this Court cannot find the SSA's wish to remain impartial in a lawsuit pitting private litigants in the least bit arbitrary and capricious. Crowther, supra, 572 F.Supp. at 290 ("The policy behind prohibition of testimony is to conserve governmental resources where the United States is not a party to a suit, and to minimize governmental involvement in controversial matters unrelated to official business.

(Doc. 5, *10-11, emphasis in original).

Plaintiff, Liberty National Life Insurance Company, ("Liberty National") objects on the bases that 1) it has established that Newton has critical information which cannot be obtained from an alternate source, and 2) the testimony would not unduly burden the agency and would serve a vital interest. Liberty National contends that the evidence sought is critical to dispute the claim that the plaintiff in the underlying action reasonably relied on the representations made by Liberty National. Liberty National further asserts that such information cannot be obtained through a FOIA request or by Internet search. However, as SSA's response demonstrates, the notice which is the basis of Liberty National's defense can be found on the Internet at the sites indicated, and the policy and statutory

citations underlying the notice are also available through the Internet. In addition, SSA states that it has now completed Liberty National's FOIA request and that the materials requested are available to Liberty National upon payment to SSA for its employee time spent researching and assembling the information. The court finds that Liberty National has not established that Newton has important information regarding the underlying case that cannot be found elsewhere. It does not appear that Newton could testify as to what actually occurred in Mr. Barefield's case. Newton cannot be expected to have any knowledge of actual documents or notices related to Barefield, and Liberty National has access to the documents or notices that would presumably have been executed by or provided to Barefield. The court finds that Newton's testimony is not crucial to Liberty National's defense of the underlying case.

The court also agrees with the Magistrate Judge's finding that permitting the testimony would not serve SSA's interests. Given the thousands of applications for social security benefits pending in Alabama and the significant backlog of cases, requiring Newton's testimony would be burdensome on the SSA. In addition, it is the policy of SSA to remain neutral in private actions, and providing aid to Liberty National would not serve that interest.

Liberty National cites Stacey v. Caterpillar, Inc., 901 F.Supp. 244 (E.D.Ky. 1995) for the proposition that where deposition testimony is critical and otherwise unavailable, the need to obtain that information outweighs the interests of SSA. However, in this case the information is not critical or otherwise unavailable. The court finds that Liberty National's need to obtain the information does not outweigh the interests of SSA.

CONCLUSION

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a de novo determination of those portions of the recommendation to which objection is made, the recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) and dated May 27, 2003, is **ADOPTED** as the opinion of this court.

DONE and ORDERED this 12th day of August, 2003.

/s/ Callie V. S. Granade
CHIEF UNITED STATES DISTRICT JUDGE