

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

PATRICIA JOHNSON,)
)
) Plaintiff,)
)
) v.) REPORT AND RECOMMENDATION
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) JO ANNE B. BARNHART, Commissioner) By: B. Waugh Crigler
) of Social Security,) U. S. Magistrate Judge
)
)
) Defendant.)

This challenge to a final decision of the Commissioner which denied plaintiff's December 15, 2003 claim for a period of disability, disability insurance benefits, and supplemental security income under the Social Security Act ("Act"), as amended, 42 U.S.C. §§ 416, 423 and 1381 *et seq.*, is before this court under authority of 28 U.S.C. § 636(b)(1)(B) to render to the presiding District Judge a report setting forth appropriate findings, conclusions and recommendations for the disposition of the case. For the reasons that follow, the undersigned will RECOMMEND that an order enter AFFIRMING the Commissioner's final decision, GRANTING the Commissioner's motion for summary judgment, and DISMISSING this case from the docket of the court.

In a decision eventually adopted as a final decision of the Commissioner, an Administrative Law Judge ("Law Judge") applied the sequential five-step process outlined in the Code of Federal Regulations to determine whether the plaintiff was "disabled" under the Act. A Law Judge must consider, in sequence, whether a claimant: (1) is working, (2) has a severe impairment, (3) has an impairment that meets or equals the requirements of a listed impairment, making her disabled as a matter of law, (4) can return to her past work, and if not, (5) retains the

capacity to perform specific jobs that exist in significant numbers in the national economy. *See* 20 C.F.R. §§ 404.1520, 416.920 (2005). The claimant bears the burden of production and proof during the first four steps of the inquiry. *See Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992) (*per curiam*). At the fifth step, the burden shifts to the Commissioner to prove that other jobs exist in the national economy that the claimant can perform. *See id.*

In this case, the Law Judge found that the plaintiff, who was 49 years old, graduated from the eighth grade, and worked as a filter pad cutter, jean tagger and pricer, dress buttoner, and CD packer, had not engaged in substantial gainful activity since her alleged onset of disability date, September 1, 2003, and was insured for disability benefits through March 31, 2007. (R. 13, 15). The Law Judge determined that the plaintiff had medical impairments consisting of moderate bilateral degenerative joint disease of the knees and obesity, which were collectively severe within the meaning of the Regulations, but did not meet or medically equal a listed impairment (R. 20–21). The Law Judge also found, however, that the plaintiff’s statements were not entirely credible. (R.21). The Law Judge noted that the plaintiff had stated to her doctor that she was comfortable when sitting, and the plaintiff’s daily activities, which included sitting and watching television for four hours every day without difficulty, did not support plaintiff’s allegations of pain. *Id.* The Law Judge determined that the plaintiff could sit for six hours a day, stand and walk for two hours a day, and lift weights of up to ten pounds frequently. Thus, the Law Judge concluded that the plaintiff was able to perform her past relevant work as a CD packer, stopping the analysis at the fourth step. (R. 25).

Plaintiff appealed the Law Judge’s decision to the Appeals Council. The Appeals Council found no basis in the record or in the reasons the plaintiff advanced on appeal to review

the Law Judge's decision. (R. 5–7). Accordingly, the Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. This action ensued.

The Commissioner is charged with evaluating the medical evidence and assessing symptoms, signs and medical findings to determine the functional capacity of the claimant. 20 C.F.R. §§ 404.1527- 404.1545 and 416.927-404.945; *Hayes v. Sullivan*, 907 F. 2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F. 2d 987 (4th Cir. 1984). The regulations grant some latitude to the Commissioner in resolving conflicts or inconsistencies in the evidence, which the court is to review for clear error or lack of substantial evidentiary support. 20 C.F.R. §§ 404.1527 and 416.927; *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). In all, if the Commissioner's resolution of the conflicts in the evidence is supported by substantial evidence, the court is to affirm the Commissioner's final decision. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

Plaintiff contends that the Law Judge did not properly evaluate the plaintiff's credibility. The Law Judge found that the plaintiff's complaints were not entirely credible as to the severity and frequency of her symptoms, or the extent of her limitations, based partly on the plaintiff's own descriptions of her symptoms and activities. For example, the plaintiff admitted that prescription medication relieves her symptoms. (R.22, 83). The plaintiff appears to have no mental problems, and has not required any emergency treatment. She told her doctor that she was comfortable when sitting. (R.189). She sits for four hours every day and watches television (R.99). The plaintiff also reported fixing meals once a day, sometimes with help, and walking one-half mile or ten minutes daily, grocery shopping with help, and going out about

once a day.¹ (R. 97). The plaintiff's pain did not make it impossible to work at her former job; instead, she was laid off. (R. 198). The Law Judge also cited medical evidence to support his conclusion that the plaintiff's allegations of pain were not completely credible: an x-ray from December 2004 (and another from 2003) revealed only mild or moderate degenerative joint disease in the plaintiff's knees. (R.140, 184).²

The undersigned also notes that when asked to describe her pain, although the plaintiff has occasionally referred to pain while sitting, she has generally described pain only when standing or walking. (R. 79) ("Trouble standing and walking"); (R. 86) ("I don't know what cause [sic] the pain, but when I stand up a lot or walk on it a lot, it really pains"); (R. 136) ("It hurt [sic] to change from sit to stand and stand to sit. Once I'm down its [sic] better."); (R. 189) ("In general she is comfortable when sitting but has difficulty rising from a squat or from sitting to a standing position."). Plaintiff then testified at the hearing that she can only sit for "about 20 minutes at a time." (R. 200). This testimony appears to be contradictory to many of the statements that the plaintiff made to her doctors. Thus, there is substantial evidence in the record to support the Law Judge's finding that the plaintiff's testimony was not entirely credible.

Plaintiff also argues that the Law Judge did not give the proper weight to the opinion of

¹The plaintiff asserts that although the Law Judge mentioned that Johnson included visiting with friends and family and attending church among her normal activities, in fact, the plaintiff had reported in a Daily Activities Questionnaire that she did neither of those things. (R. 114). However, the Plaintiff had also stated in a different document that she visited relatives once a week, and went to Laurel Hill Baptist Church. (R. 99). Such inconsistent statements do not support the plaintiff's credibility.

²The Law Judge also mistakenly asserted that in November 2003, a doctor found full range of motion in the plaintiff's knee. Instead, the doctor stated: "She is quite obese so it is difficult to get the full range of motion of the knee." (R. 139).

the plaintiff's treating physician, Dr. McDonald ("McDonald"). Plaintiff contends that under Fourth Circuit law, the opinions of a claimant's treating physician are to be given great weight and disregarded "only if there is persuasive contradictory evidence." *Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987). However, a 1991 Social Security regulation superseded the Fourth Circuit's treating physician rule discussed in *Coffman*. 20 C.F.R. §416.927(d)(2) ("Generally, we give more weight to opinions from your treating sources... If we find that a treating source's opinion on the issues is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight."). Controlling weight is given to a treating physician's opinion only if the two conditions mentioned in the regulation are met. *Craig v. Chater*, 76 F.3d 585, 590 (4th Cir. 1996); *Ward v. Chater*, 924 F. Supp. 53, 56 (W.D. Va. 1996).

In this case, the Law Judge gave limited weight to McDonald's opinion about plaintiff's endurance for sitting, because the Judge felt that the doctor's opinions were not supported by the record as a whole, including medical records, treatment, and claimant's daily activities, such as those referred to above. McDonald cited the plaintiff's x-rays as objective evidence of pain, but those x-rays showed only mild or moderate degenerative joint disease. The doctor offered no other reasons for her assessment. Because the treating physician's opinion was not well-supported, and was inconsistent with the other evidence, including the plaintiff's self-reported activities, the Law Judge was not required to give controlling weight to the opinion. *See* 20 C.F.R. §416.927(d)(2).

The plaintiff also argues that the Vocational Expert ("VE") at the hearing stated that plaintiff could not perform her past relevant work. However, in the statement referenced, the VE

was using the limitations set forth by the plaintiff's treating physician. (R. 212). As the Law Judge did not give controlling weight to that physician's opinion, the VE's statement does not contradict the final holding.

Given the medical records, which do not suggest that the plaintiff experiences excessive pain while sitting, and the plaintiff's enumeration of her own activities, the undersigned finds Law Judge's determination of the plaintiff's residual functional capacity was supported by substantial evidence, when the Law Judge found that the plaintiff could sit for six hours at a time, and therefore could perform her past relevant work as a CD packer. Thus, it is RECOMMENDED that an order enter AFFIRMING the Commissioner's final decision, GRANTING the Commissioner's motion for summary judgment, and DISMISSING this case from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to the presiding United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note objections, if any they may have, to this Report and Recommendation within (10) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned not specifically objected to within the period prescribed by law may become conclusive upon the parties. Failure to file specific objections pursuant to 28 U.S.C. § 636(b)(1)(C) as to factual recitations or findings as well as to the conclusions reached by the undersigned may be construed by any reviewing court as a waiver of such objection. The Clerk is directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date

