

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

JOYCE ANN COMFORT,) CASE NO. 3:06CV00053
)
Plaintiff,)
)
v.) REPORT AND RECOMMENDATION
)
MICHAEL J. ASTRUE, Commissioner) By: B. Waugh Crigler
of Social Security¹,) U. S. Magistrate Judge
)
Defendant.)

This challenge to a final decision of the Commissioner which denied plaintiff's January 31, 2004 protectively filed claim for a period of disability, disability insurance benefits ("DIB"), and supplemental security income ("SSI") 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. The questions presented are whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand for further proceedings. 42 U.S.C. § 405(g). For the reasons that follow, the court will RECOMMEND that an Order enter GRANTING the plaintiff's motion for summary judgment, REVERSING the Commissioner's final decision, and REMANDING the case to the Commissioner for further proceedings.

This *pro se* action seeks judicial review of the Commissioner's final decision on her fifth

¹On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. In accordance with Rule 25(d)(1) of the Federal Rules of Civil Procedure, he should be substituted for Jo Anne B. Barnhart as the defendant.

application for DIB and SSI benefits filed on January 31, 2004.² (R. 18.) Plaintiff represented herself at the March 1, 2006 hearing before an Administrative Law Judge (“Law Judge”), whose July 11, 2006 decision was eventually adopted as a final decision of the Commissioner. (R. 11-13, 18-26, 56-91.) The Law Judge found that plaintiff was alleging a disability onset date on September 17, 2003, she was insured through March 31, 2006³, and she had not engaged in substantial gainful activity during the relevant time period⁴. (R. 18, 20.) The Law Judge further found that plaintiff suffered atopic dermatitis and mild osteoarthritic changes of the bilateral hands and lumbago, which were severe impairments, though not severe enough to meet or equal any listed impairment.⁵ (R. 20-22.) The Law Judge was of the view that, although plaintiff’s impairments reasonably could be expected to produce the alleged symptoms, her statements concerning the intensity, duration, and limiting effects of these symptoms were “not entirely credible.” (R. 22-23.) The Law Judge further determined that plaintiff retained the residual

²The record reveals that plaintiff filed applications in 1992, 1995, 1999 and 2002. (R. 34-40, 49-55.) She was represented by counsel in pursuit of her 1999 applications but apparently has declined counsel ever since. (R. 18, 34.)

³In order to qualify for disability insurance benefits, the plaintiff must establish that she became disabled prior to the expiration of her insured status, March 31, 2006. *See* 20 C.F.R. § 404.131(a). Therefore, any evaluation of the plaintiff’s disability following March 31, 2006 relates solely to her claim for SSI benefits.

⁴The Law Judge determined that, although plaintiff had performed work-related activities in 2004 and 2005, this did not meet the regulatory definition of substantial gainful activity. (R. 20.) However, the Judge did note that these activities were consistent with his finding that she was not disabled than they were with her “allegation of work-precluding debility.” (*Id.*)

⁵The Law Judge found that plaintiff’s depression was reactive and a non-severe impairment. (R. 21.)

functional capacity (RFC) to perform a range of light work.⁶ (R. 22.) The Law Judge determined that plaintiff's RFC did not preclude her from performing her past relevant work (PRW) as a childcare provider⁷, which led to his conclusion that she was not disabled under the Act. (R. 25-26.)

Plaintiff appealed the Law Judge's decision to the Appeals Council, which found no basis in the record, or in the reasons advanced on appeal, to review the Law Judge's decision. (R. 11-13.) Accordingly, the Appeals Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. This action ensued.

On June 19, 2007, plaintiff submitted for the first time on judicial review, additional medical evidence, principally from M. Norman Oliver, M.D., her family practice physician in the University of Virginia Health System. (Dkt. No 15.) While these records reveal little new about plaintiff's physical impairments and a normal mental examination status, they present corroboration for the physician's earlier determination that plaintiff suffers sufficient distress and depression, even "most disabling psychological distress," that her treating doctor recommended psychological counseling. (Compare R. at 12-13 with R. 508.)

Plaintiff raises the specter that, as a *pro se* litigant, she cannot adequately represent

⁶The Law Judge specifically found that she could stand/walk for four-to-six hours in an eight-hour workday and sit from six to eight hours in an eight-hour workday. (R. 22.) He also concluded plaintiff only could occasionally crouch and stoop and should not be exposed or utilize chemical or solvents, but that she suffered no communicative, visual or manipulative limitations. (*Id.*)

⁷The vocational expert testified that plaintiff's PRW as a childcare provider was light, unskilled work. (R. 85.)

herself against the opposing “distinguished counsel.” (Plaintiff’s Brief⁸, p. 6.) That aside, she advances several arguments challenging the substantiality of the evidence in support of the Commissioner’s decision that she could perform her past relevant child care work. One of these relates to whether there is any substantial evidence in the record to refute plaintiff’s psychological evidence. (*Id.* at 2-3.)

On the other hand, the Commissioner argues that substantial evidence supports the Law Judge’s finding that plaintiff can return to her past relevant work as a child care worker. (Commissioner’s Brief, pp. 11-14.) Specifically, he contends that there is no evidence to support Dr. Oliver’s conclusions that plaintiff suffers disabling depression. However, the undersigned is of the view that the impact of plaintiff’s *psychological* conditions on her ability to perform substantial gainful activity has not been adequately or fully and fairly evaluated.

On October 5, 2005, M. Norman Oliver, M.D., plaintiff’s treating physician, opined that her psychological distress was her most disabling condition, she suffers from major depression, and her psychological conditions render her “unable to work.” (R. 21, 508.) The Law Judge discredited Dr. Oliver’s opinion on the bases that it was not substantiated by plaintiff’s allegations, it was inconsistent with plaintiff’s reported activities of daily living, it was not supported by the objective evidence, and plaintiff had neither received nor been referred for psychological treatment. (R. 21.) The Law Judge ultimately concluded that plaintiff’s depression was reactive to the present stresses in her life and did not impose limitations on her

⁸The undersigned construes plaintiff’s “Response” as a motion for and brief in support of summary judgment. (Dkt. No. 14.)

ability to perform substantial gainful activity, and as such, was a non-severe impairment⁹. (R. 21.) There is no question that in the treatment records submitted on judicial review, Dr. Oliver believes a psychological referral was indicated.

Moreover, there is other evidence of record which supports the need for a further evaluation of plaintiff's psychological conditions. (R. 21.) Plaintiff had been psychologically examined on January 10, 2003 by Sulaiha Mastan, Ph.D. (R. 349.) Even then, Dr. Mastan opined that plaintiff suffered with anxiety-related disorders, though he concluded the impairment was not severe. (*Id.*) However, Dr. Mastan's assessment was based solely upon his review of plaintiff's medical records and was done *prior to her alleged disability onset date* of September 17, 2003. (*Id.*) At her March 1, 2006 hearing, plaintiff testified that she had been taking Effexor¹⁰ to help her "relax" since 2002. (R. 81-82.) On August 29, 2005, Dr. Oliver provided plaintiff with an excuse from jury duty which provides that she is unable to handle the "stress" of jury duty. (R. 507.) Then, there is the evidence submitted on judicial review in which Dr. Oliver recommends a psychological consult.

In all, the undersigned believes that good cause has been shown to remand the case to the Commissioner for further proceedings. *See Zumbro v. Astrue*, Civil No. 3:06CV00058 (July 3, 2007, Moon, J.)(copy attached hereto). Therefore, the undersigned RECOMMENDS that an

⁹The regulations define a "non-severe" impairment as an impairment or combination of impairments that does not significantly limit a claimant's ability to do basic work activities. 20 C.F.R. § 404.1521(a).

¹⁰Effexor is a prescription medicine used to treat depression, generalized anxiety disorder, and social anxiety disorder in adults. Effexor XR, <http://effexorxr.com/faqs.asp#2> (last visited June 21, 2007).

Order enter GRANTING the plaintiff's motion for summary judgment, REVERSING the Commissioner's final decision, and REMANDING the case to the Commissioner for further proceedings. The order should direct that in the event the Commissioner cannot grant benefits on the current record, he should recommit the case to a Law Judge for supplementary evidentiary proceedings in which each side may introduce additional evidence.

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