

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

PAMELA J. TALLEY,) CASE NO. 3:07CV00046
)
Plaintiff,)
v.) REPORT AND RECOMMENDATION
)
MICHAEL J. ASTRUE, 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 January 31, 2004 protectively filed applications for disability, disability insurance benefits, 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 plaintiff's motion for summary judgment, and REMANDING the case to the Commissioner for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, an Administrative Law Judge (Law Judge) found that plaintiff was insured for benefits through June 30, 2008, and that she had not engaged in substantial gainful activity since her alleged disability onset date, August 1, 2003¹. (R. 17-18, 25.) The Law Judge determined that plaintiff's obesity,

¹The Commissioner's brief provides that plaintiff's alleged disability onset date is January 1, 2003. (Comm's Brief, p. 2.) However, the record supports the Law Judge's finding that the date was actually August 1, 2003. (R. 62, 65.)

depression, and fibromyalgia were severe impairments, yet when viewed individually or in combination, were not severe enough to meet or equal any listed impairment.² (R. 18, 25.) The Law Judge was of the view that plaintiff's allegations regarding her impairments and their impact on her ability to work were "not entirely credible." (R. 23, 25.) The Law Judge determined that plaintiff, a younger individual³, retained the residual functional capacity (RFC) to perform sedentary work which involves only simple, routine work in a non-stressful environment; no climbing ladders, ropes and scaffolds; and only occasionally performing other postural activities. (R. 23, 25.) The Law Judge further determined that this RFC did not preclude her from returning to her past relevant work, and as such, plaintiff was not disabled under the Act.⁴ (R. 24-26.)

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. 6-9.) Accordingly, the Appeals Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. This action ensued.

In her motion for summary judgment⁵, plaintiff argues that the Law Judge did not

²Although the Law Judge found that plaintiff suffered with hypertension and a gastrointestinal impairment, he did not believe either of these impairments was severe. (R. 19.)

³Plaintiff testified at her hearing that she was thirty-nine years old. (R. 17, 442.) Under the Regulations, an individual less than fifty years old is a "younger person." 20 C.F.R. §§ 404.1563(c) and 416.963(c).

⁴The Law Judge determined that plaintiff could perform her past relevant work as a telephonic customer service representative and the payroll/accounts job. (R. 24-25.)

⁵The document plaintiff filed with the court is entitled "Plaintiff's Memorandum In Opposition To Defendant's Motion For Summary Judgment And Memorandum In Support Of Her Motion For Decision Reversal And/Or Remand." (Dkt. No. 12.) Notably, at the time this document was filed, the Commissioner had not filed his motion for summary judgment. The

properly weigh the opinions of J. Mooney, M.D., a psychiatrist, and her primary treating physician, Virat Bakshi, M.D. (Pl's Brief, pp. 11-14.) Plaintiff further argues that the Law Judge had a duty to inquire further about her mental impairment in view of Dr. Mooney's assessment that her impairment met the requirements of §§ 12.04, 12.06 and 12.08 of the Listings. (Pl's Brief, p. 14.)

In finding that plaintiff had only "moderate" psychological limitations, the Law Judge relied on the April 11, 2005 assessment by a consultative record reviewing psychological expert, A. John Kalil, Ph.D.⁶ (R. 24, 253-255.) The Law Judge determined that Dr. Kalil's opinion, though merely an adoption of someone else's opinion, more accurately described plaintiff's functional abilities than the evidence offered by her psychiatrist, Dr. Mooney. (R. 23-24.) In doing so, the Law Judge noted that in Dr. Mooney's August 1, 2005 assessment he found plaintiff to be "psychologically incapacitated." (R. 23.) However, the Law Judge determined that while this assessment might have reasonably reflected plaintiff's psychological capacity at that time, it did not reflect her psychological capacity at all times since her alleged disability onset date, and that she rapidly and significantly improved after the date of that assessment. (R. 23.) The undersigned is of the view that the narrow path chosen by the Law Judge to support his finding relating to plaintiff's psychological limitations, principally by relying on the adoptive report of Dr. Kalil, ignores the great bulk of other relevant, material and competent medical evidence of record and provides good cause to remand for further proceedings.

undersigned construes the pleading to be a motion for summary judgment.

⁶The undersigned notes that Dr. Kalil essentially reviewed and "affirmed, as written" evaluations submitted by a consultative record reviewing psychologist, Mary Eileen Cronin, Ph.D. on October 1, 2004. (R. 253-255, 256-259.)

There is no single source of medical evidence, no “smoking gun” if you will, upon which plaintiff has presented her claim. The most longitudinal and in-depth view of her psychological symptoms and treatment was provided by Lucille A. Barlow, a licensed clinical social worker (“LCSW”). Barlow treated plaintiff at Region Ten in conjunction with Dr. Mooney from April 29, 2004 through November 22, 2005. (R. 223-246, 303-324.) In her initial evaluation of plaintiff on April 29, 2004, Barlow found that plaintiff suffered with bipolar disorder, evidenced by depression, anxiety, an uncontrollable compulsion to pick at her skin, flight of ideas, depersonalization, homicidal/suicidal ideation, mood instability, crying spells, insomnia, weight gain, increased appetite, low energy, decreased concentration, and auditory and visual hallucinations. (R. 244.) The LCSW further found that plaintiff’s current Global Assessment of Functioning (“GAF”) was 50⁷ with symptoms of depression with psychotic features and multiple stressors that exacerbate her condition. (R. 244-245.) Ultimately, Barlow concluded that plaintiff would benefit from treatment at Region Ten, including medication management to stabilize her mood and psychotherapy to help her develop coping skills, and tolerate/regulate overwhelming mood states and control her impulsive and self-defeating behavior. (R. 245.) The Law Judge essentially ignored these findings, in addition to Barlow’s other opinions expressed in subsequent treatment notes.

Although Barlow does not qualify as an “acceptable medical source” under the Regulations, she does qualify as an “other source.” *See* 20 C.F.R. §§ 404.1513(a), (d); 20 C.F.R.

⁷The GAF ranks psychological, social, and occupational functioning on a hypothetical continuum of mental illness ranging from zero to 100. Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (Text Revision 4th ed 2000) (*DSM-IV*). A GAF of 41-50 indicates serious symptoms or any serious impairment in social, occupational, or school functioning. *Id.* at 34.

§§ 416.913(a), (d). Thus, the Law Judge was required to weigh her opinion regarding the severity of plaintiff's mental impairments and their impact on her ability to work. *See* 20 C.F.R. §§ 404.1513(d), 416.913(d). Yet, it is not Barlow's evidence alone which demonstrates to the court that good cause exists for a remand.

On August 24, 2005, Jeffrey Jenkins, M.D. of the Virginia Department of Rehabilitative Services evaluated plaintiff and opined that the primary limiting factor impacting her ability to participate in the workforce was a bipolar disorder with psychotic features. (R. 188-189.) Dr. Jenkins noted the performance of a physical assessment by him, and he recommended that she be evaluated by a mental health specialist.⁸ (R. 188.) If nothing else, Dr. Jenkins' evidence certainly is worthy of as much, if not greater, consideration by the Law Judge than Dr. Kalil's assessment because Dr. Jenkins had an opportunity to examine the plaintiff.

Moreover, Dr. Bakshi, plaintiff's primary treating physician, completed a functional assessment on December 2, 2005. (R. 295-298.) He noted plaintiff's diagnosis of a bipolar disorder and found that the condition had an impact on her physical impairments. (R. 295-296.) Also, Dr. Bakshi opined that plaintiff's ability to handle the stressors inherent in the workplace was so low that she was incapable of performing even low stress jobs. (R. 295-296, 298.) Finally, he concluded that because of her physical and psychological limitations, "she would not be able to work." (R. 298.)

Having reviewed the medical and other acceptable evidence contextually, the undersigned finds that good cause has been shown to remand this case to the Commissioner for

⁸Nothing in the record suggests plaintiff was sent for the recommended psychological evaluation.

further proceedings. Therefore, it is RECOMMENDED that an Order GRANTING plaintiff's motion for summary judgment, 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 supplemental 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