

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

REBECCA TROUTMAN-HENSLEY,)	CASE NO. 3:07CV00058
)	
Plaintiff,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
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 23, 2006 protectively filed 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. 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 undersigned will RECOMMEND that an Order enter GRANTING plaintiff’s motion for summary judgment, and REMANDING the case to the Commissioner for further proceedings under the fourth sentence of 42 U.S.C. § 405(g).

In a decision eventually adopted as a final decision of the Commissioner, an Administrative Law Judge (“Law Judge”) concluded that plaintiff had an alleged a disability onset date of November 28, 2004, had not engaged in substantial gainful activity during the relevant time period, and was insured for benefits through June 30, 2006. (R. 16.) It was determined that she had the

following severe impairments: disorder of the back, lower extremity pain, and migraine headaches.¹ (*Id.*) The Law Judge found that when plaintiff's impairments were viewed individually or in combination with one another, they did not meet or equal a listed impairment. (R. 19.) The Law Judge determined that although her medically determinable impairments reasonably could be expected to produce some of the alleged symptoms, her statements concerning the intensity, persistence and limiting effects of these symptoms were not entirely credible. (R. 22.) He then found that plaintiff retained the residual functional capacity ("RFC") to perform unskilled, sedentary work. (R. 20.) The Law Judge further found that this RFC did not preclude plaintiff from performing her past relevant work as an inspector, as the position is actually and generally performed. (R. 22.) Thus, the Law Judge concluded that plaintiff was not disabled under the Act. (*Id.*)

Plaintiff filed a timely request for review by the Appeals Council and submitted additional evidence.² (R. 5-7, 395-418.) On September 27, 2007, the Appeals Council Action issued a Notice which summarily stated that the additional evidence was reviewed, but that the information did not provide a basis for changing the Law Judge's June 21, 2007 decision.³ (R. 5-6.) Thus, plaintiff's

¹The Law Judge noted that plaintiff alleged impairments due to acid reflux, asthma, and a nervous disorder, but he found that these conditions did not constitute severe impairments. (R. 16.)

²Although plaintiff was apprised of her right to have an attorney or other representative on her behalf at her May 15, 2007 hearing before the Law Judge, she elected to proceed *pro se*. (R. 422.) However, the record reveals that the additional evidence provided to the Appeals Council was furnished though by her present counsel, Marcelin McKie. (R. 395.)

³The Appeals Council did not explain why it decided that the additional evidence did not provide a basis for changing the Law Judge's decision. (R. 5-6.) The Regulations do not provide that the Appeals Council must provide a rationale for denying review. *See* 20 C.F.R. §§ 404.970(b), 416.1470(b). However, there are conflicting opinions among the district courts in the Fourth Circuit regarding whether the Appeals Council must provide a basis for its decision. *See*

request for review was denied, and the Law Judge's decision was adopted as the final decision of the Commissioner. (R. 5.) This action ensued.

In a brief filed in support of her motion for summary judgment, plaintiff argues that the Appeals Council essentially disregarded and failed to properly consider the additional evidence she submitted to the Appeals Council. (Plaintiff's Brief, pp. 9-10.)⁴ Specifically, she refers to the July 20, 2007 physical capacities evaluation provided by her primary treating physician, Jerome J. Hotchkiss, M.D., and she asserts that this evaluation is especially relevant and material in establishing the extent of her functional limitations. (Pl's Brief, p. 9.) The undersigned agrees.

The Regulations provide that the Appeals Council shall consider additional evidence submitted with a request for review if the evidence is new, material, and relates to the period on or before the date of the Law Judge's decision. 20 C.F.R. §§ 404.970(b), 416.1470(b); *Davis v. Barnhart*, 392 F.Supp.2d 747, 750 (W.D. Va. 2005). Evidence is deemed "new" if it is neither duplicative nor cumulative, and it is "material" if a reasonable probability exists that the evidence would have changed the outcome of the case. *Wilkins v. Secretary, Dep't of Health & Human*

Boggs v. Astrue, No. 5:07CV10, 2008 WL 467386, *10 (N.D. W.Va. February 19, 2008) (finding the Appeals Council is not required to explain its determination); *Davis v. Barnhart*, 392 F.Supp.2d 747, 751 (W.D. Va. 2005) (finding that the Appeals Council was not obligated to provide reasons); *Riley v. Apfel*, 88 F.Supp.2d 572, 580 (W.D. Va. 2000) (finding the Appeals Council needs to provide more than a "scant discussion" of the evidence); *Ridings v. Apfel*, 76 F.Supp.2d 707, 709 (W.D. Va. 1999) (finding the Appeals Council is not required to state its rationale for denying review); *Alexander v. Apfel*, 14 F.Supp.2d 839, 843 (W.D. Va. 1998) (finding the Appeals Council must provide reasoning for its determination). This case will be decided on other grounds. Thus, it is not necessary for the undersigned to address the propriety of the Appeals Council's failure to explain its decision that the additional evidence plaintiff provided did not provide a basis for changing the Law Judge's decision.

⁴Plaintiff's brief is not paginated. For ease of reference, the undersigned has assigned page numbers to the document.

Servs., 953 F.2d 93, 96 (4th Cir.1991); *Davis*, 392 F.Supp.2d at 750.

The record reveals that Dr. Hotchkiss served as plaintiff's primary treating physician from April 6, 2004 through July 20, 2007. (R. 160-204, 396-408.) During this time period, Dr. Hotchkiss treated plaintiff on a regular basis for a variety of physical and mental conditions. The additional evidence plaintiff provided to the Appeals Council includes a physical capacities evaluation from Dr. Hotchkiss dated July 20, 2007. (R. 408.) Dr. Hotchkiss opined that plaintiff could stand/walk for less than one hour in an eight-hour workday, and she could sit for five to six hours in an eight-hour workday, but she must change positions every one to five minutes. (*Id.*) The physician found that plaintiff could lift up to five pounds occasionally, and she could use her hands for repetitive simple grasping and fine manipulation. (*Id.*) Dr. Hotchkiss determined that she couldn't use her hands for pushing and pulling; she was unable to reach above shoulder level; she was precluded from stooping (bending back at the waist), squatting (bending at the knees), crawling, climbing (stairs and ladders); and she could only occasionally work with her arms extended at the waist or shoulder level. (*Id.*) Finally, he suggested that x-rays, muscle spasms, a MRI, and abnormal nerve conduction velocity testing serve as objective factors suggesting she suffers with severe pain. (*Id.*)

Dr. Hotchkiss' July 20, 2007 evaluation was "new" because it is neither duplicative nor cumulative of the other evidence of record. Specifically, plaintiff's records do not contain any other functional assessment which specifically addresses both the limitations caused by her physical conditions, and the extent to which these limitations impact her capacity to perform substantial gainful activity.

The undersigned also finds that the evidence is "material." Dr. Hotchkiss' July 20, 2007 evaluation contains numerous limitations not accounted for in the Law Judge's RFC finding.

Thus, if the Law Judge had been provided with this evaluation, it likely would have affected his RFC finding, which would have impacted his decision that her RFC allowed her to perform her past relevant work.

Finally, Dr. Hotchkiss' July 20, 2007 evaluation relates to the time period on or before the Law Judge's June 21, 2007 decision. Dr. Hotchkiss saw plaintiff on a very regular basis during the relevant time period, and his July 20, 2007 evaluation serves as a summation of his extensive medical records over that same period of time.

For the foregoing reasons, it is RECOMMENDED that an Order enter GRANTING plaintiff's motion for summary judgment, and REMANDING the case to the Commissioner for further proceedings under the fourth sentence of 42 U.S.C. § 405(g).

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

