

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

REGINA M. CHRISTMAS,)	CASE NO. 3:09CV00005
)	
Plaintiff,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	By: B. Waugh Crigler
)	U. S. Magistrate Judge
Defendant.)	

This challenge to a final decision of the Commissioner which denied plaintiff's December 26, 2002 applications for a period of 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 undersigned RECOMMENDS that an Order enter REVERSING the Commissioner's final decision, GRANTING the plaintiff's motion for summary judgment, entering judgment for the plaintiff and RECOMMITTING the case to the Commissioner solely to calculate and pay proper benefits.

In a decision dated June 25, 2004, an Administrative Law Judge ("Law Judge") found that, while plaintiff suffers Ehlers-Danlos syndrome and a leg length discrepancy, she possessed the residual functional capacity (RFC) to perform a wide range of sedentary work, and as such,

was not disabled. (R. 20-27.) Plaintiff sought review of this decision, which the Appeals Council denied on April 29, 2005. (R. 247-249.) Thereafter, plaintiff filed an action in this court seeking judicial review of the Commissioner's final decision. *See Christmas v. Barnhart*, 3:05CV00027 (February 22, 2006).

On January 26, 2006, the undersigned rendered a Report and Recommendation in which it was recommended that the case be reversed and remanded for further proceedings. (R. 257.) The undersigned determined that the new evidence plaintiff had proffered to the Appeals Council warranted a remand, and that the Law Judge erred by applying the Medical-Vocational guidelines ("grids") because plaintiff suffered non-exertional limitations caused by her Ehlers-Danlos syndrome which limit her ability to stoop, climb, balance, crouch, kneel, crawl and reach in any direction. (R. 260.)

On February 22, 2006, the presiding District Judge entered an Order overruling the Commissioner's Objections, adopting the January 26, 2006 Report and Recommendation and remanding the case to the Commissioner for further proceedings. (R. 254-255.) As a result, the Appeals Council vacated the Law Judge's June 25, 2004 decision and recommitted the case to the Law Judge for further proceedings. (R. 264.)

A supplemental hearing was held on July 19, 2006. (R. 387-416.) The Law Judge issued a decision on November 24, 2006, in which he found that plaintiff had not engaged in substantial gainful activity since her alleged date of disability onset, November 28, 2002. (R. 218.) The Law Judge further found that plaintiff's Ehlers-Danlos syndrome was a severe impairment, but that she did not have an impairment or combination of impairments which were severe enough to meet or equal any listed impairment. (R. 218-219.) The Law Judge was of the opinion that

plaintiff's allegations were not entirely credible, and that she retained the RFC to perform sedentary work that accommodates a sit-stand option. (R. 219.) By reference to the testimony provided by the vocational expert ("VE") and by reference to the grids, the Law Judge found that there are a significant number of jobs available to plaintiff in the national economy.¹ (R. 220.) Thus, the Law Judge ultimately concluded that she was not disabled under the Act. (R. 221.)

Plaintiff appealed the November 24, 2006 decision to the Appeals Council. The Appeals Council considered her arguments and denied the request for review. (R. 201-203.) The Law Judge's November 24, 2006 decision became the final decision of the Commissioner, and this action ensued. (R. 201.)

In a brief filed in support of her motion for summary judgment, plaintiff initially argues that the Law Judge failed to provide a legally-sufficient explanation for his decision to give controlling weight to the opinion of Steven Lommatzsch, M.D. but then ignore other critical aspects of the physician's opinion. (Pl's Brief, pp. 14-17.) Plaintiff contends that the Law Judge improperly rejected Dr. Lommatzsch's findings that she "has a medical condition which reasonably could be expected to cause significant pain resulting in interruption of activities and/or concentration during a work day" and a condition "which reasonably could be expected to require unpredictable and/or lengthy periods of rest during a work day."² (Pl's Brief, pp. 16-17.) The undersigned agrees.

Under the regulations and applicable circuit decisional authority, a Law Judge and the

¹The VE testified that someone with the RFC found by the Law Judge could work as an information clerk or an order clerk. (R. 220.)

²If these effects and limitations existed, the clear evidence from the VE's testimony is that no jobs would be available to plaintiff. (R. 413-415.)

Commissioner must consider the following in evaluating and weighing medical opinions: “(1) whether the physician has examined the applicant, (2) the treatment relationship between the physician and the applicant, (3) the supportability of the physician's opinion, (4) the consistency of the opinion with the record, and (5) whether the physician is a specialist.” *Hines v. Barnhart*, 453 F.3d 559, 563 (4th Cir. 2006) (quoting *Johnson v. Barnhart*, 434 F.3d 650, 654 (4th Cir. 2005)).

It is a well-established general principle that the evidence of a treating doctor should be accorded greater weight. *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir.1992). When that physician's opinion is not supported by the objective medical evidence or is inconsistent with other substantial evidence, it may be given “significantly less weight.” *Craig*, 76 F.3d at 590. Moreover, where the evidence is such that reasonable minds could differ as to whether the claimant is disabled, the decision falls to the Law Judge, and ultimately to the Commissioner, to resolve the inconsistencies in the evidence. *Johnson*, 434 F.3d at 653; *Craig*, 76 F.3d at 589.

Dr. Lommatzsch, plaintiff’s primary treating physician, completed a Physical Limitations Assessment on May 26, 2004. (R. 147-149.) In the Assessment, Dr. Lommatzsch opined that plaintiff could lift/carry ten pounds and stand/walk zero to two hours in an eight-hour workday. (R. 147.) The physician found that plaintiff’s ability to sit was not impacted by her impairments. (*Id.*) Dr. Lommatzsch further found that plaintiff could perform the following postural activities occasionally: stooping, climbing, balancing, crouching and pushing/pulling. (R. 148.) She could never kneel or crawl, and she was limited to only occasional reaching in all directions, including overhead. (*Id.*) While the physician believed that plaintiff could perform sedentary work, he further found that she “has a medical condition which reasonably could be expected to cause significant pain resulting in interruption of activities and/or concentration during a work

day” and a condition “which reasonably could be expected to require unpredictable and/or lengthy periods of rest during a work day.” (R. 149.)

In his November 24, 2006 decision, the Law Judge summarily dismissed Dr. Lommatzsch’s opinion that plaintiff suffered from disabling pain. The Law Judge referred to Dr. Lommatzsch’s findings that plaintiff suffers a medical condition which reasonably could be expected to cause significant pain resulting in interruption of activities and/or concentration during a work day, and which reasonably could be expected to require unpredictable and/or lengthy periods of rest during a work day, and noted that in his previous decision he dismissed those opinions as not supported by the record. (R. 214.)

The undersigned is of the view that Dr. Lommatzsch’s opinion concerning disabling pain is supported other evidence in the record. For instance, Thaddeus E. Kelly, M.D., a geneticist and one of plaintiff’s treating sources, wrote as follows:

I am Ms. Christmas’ medical geneticist. Due to her Ehlers-Danlos syndrome and resultant degenerative arthritis, she experiences significant knee, hip, and low back pain upon prolonged standing/walking and upon prolonged sitting with her feet on the floor. In order to help control these symptoms, *she must recline for periods frequently throughout the day.*

(R. 352 (emphasis added)).

Nowhere is this evidence discredited. It corroborates the views of the treating source, whose evidence must be given great weight and special consideration absent substantial evidence to the contrary.

The undersigned acknowledges the role of the Law Judge and Commissioner in weighing and crediting the evidence, and, in the end, determining whether a claimant is disabled. Here, the Law Judge appears simply to have substituted his judgment for those of both a specialist in

the field and plaintiff's primary treating source.

It is RECOMMENDED that an Order enter REVERSING the Commissioner's final decision, GRANTING the plaintiff's motion for summary judgment, entering judgment for the plaintiff and RECOMMITTING the case to the Commissioner solely to calculate and pay proper benefits.

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