

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

ROSE M. LIPSCOMB,)	CASE NO. 4:06CV00027
)	
Plaintiff,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
)	
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, respectively, plaintiff's May 19, 2003 and September 26, 2003 claims for a period of disability, disability insurance benefits and supplemental security income benefits (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 will recommend that an order enter AFFIRMING the Commissioner's final decision, GRANTING the Commissioner's motion for summary judgment, and DISMISSING this action from the docket of the court.

In a decision issued on December August 20, 2004, the Administrative Law Judge (Law Judge) found that plaintiff, who 39 years old with a high school equivalent education, was insured through the date of his decision, had history of past relevant work as a machine operator/supervisor and had not engaged in substantial gainful activity due to back disorders and depression since her

alleged date of disability onset, March 22, 2002. (R. 16, 23.) The Law Judge further found that her mental impairment (depression) was not severe, and he implicitly found that she had a severe back impairment, which he determined was not severe enough to meet or equal any listed impairment. (R. 19, 23.) The Law Judge was of the view that plaintiff's allegations regarding the limitations imposed by her impairments, particularly her testimony about pain and its functional effects, were not consistent with the medical evidence and, thus, not "totally credible." (R. 20-23.) The Law Judge determined plaintiff was unable to perform her light past relevant work, and she possessed the capacity to perform sedentary work, provided it did not require her to lift more than 10 pounds or repetitively lift/bend. (R. 21, 23-24.) By application of the Medical-Vocational Guidelines ("grids") to plaintiff's exertional limitations and by reference to testimony offered by the vocational expert (VE), the Law Judge concluded that unskilled sedentary jobs as an order clerk, various other clerks, and an assembler were available to plaintiff in the national economy. (R. 22, 24.) The Law Judge concluded that plaintiff not disabled under the Act.¹ (R. 23-24.)

The plaintiff appealed the Law Judge's decision. On March 30, 2006, the Appeals Council found no reason to review the Law Judge's decision, denied review and adopted that decision as the Commissioner's final decision in the case. (R. 5-7.) This action ensued.

According to the plaintiff, the Law Judge committed legal error in failing to properly adjudicate the severity of her impairments at the second level of the sequential evaluation. 20 C.F.R. §§ 404.1520(a)(4)(ii) and 416.920(a)(4)(ii) and §§ 404.1529 and 416.929; *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). Specifically, plaintiff contends the Law Judge did not assess whether the

¹It is noted that the Law Judge considered and rejected, for the reasons set forth in his decision, post-hearing evidence from Asma Afzal, M.D., who examined plaintiff and provided a functional capacities evaluation which showed greater restrictions than those ultimately found by the Law Judge. (R. 21, 23, 233-236.)

objective medical evidence demonstrated a medical impairment likely to produce the intensity and extent of pain claimed by her. (Pl's Memorandum of Points and Authorities ("Memorandum") at 19-22.)

Second, plaintiff contends that the Law Judge's resolution of her credibility is not supported by substantial evidence, and that her complaints are consistent with the record and inconsistent with what the Law Judge concluded. (Pl's Memorandum at 23-27.) Specifically, plaintiff offers that the evidence she provided in a Daily Activities Questionnaire does not conflict with her testimony concerning her daily activities, and when read together, the record demonstrates consistent, if not progressively worsening, limitations on her activities since the onset of her back impairment.

Finally, plaintiff takes issue with the Law Judge's rejection of the functional capacity assessments offered by Asthma Afzal, M.D. (Pl.'s Memorandum at 27-29; R. 21.) Distilled, she offers a "goose and gander" argument, in that while rejecting Dr. Afzal's views as not being supported by objective medical evidence, the Law Judge relied in part on the opinions of the State agency medical consultants who evaluated plaintiff's case at the initial and reconsideration levels and reached the same conclusions. (R. 19.) Plaintiff does not believe these consultants provided substantial evidence contrary to that of Dr. Afzal, as plaintiff argues that they rendered their reports before there was much of any treating or consultative medical evidence in the record. (Pl.'s Memorandum at 28.)

The Commissioner holds opposing views. First, she points to the Law Judge's decision, itself, and argues that he actually found plaintiff suffered a documented impairment which could be expected to produce pain and limitations. (Def's Brief at 10-11.) Second, the Commissioner offers that the Law Judge properly determined plaintiff's credibility and properly rejected her subjective limitations in offering hypothetical questions to the VE. (Def.'s Brief at 11-12.) Finally, the

Commissioner points to the fact that Dr. Afzal did not have any long-term treatment relationship with the plaintiff, and that the limitations he placed on her functional capacity were made without aid of clinical or laboratory findings and were inconsistent with findings plaintiff's other doctors had rendered while treating her. (Def.'s Brief at 13.) Thus, the Commissioner believes it was perfectly permissible for the Law Judge to have not fully credited plaintiff and to have rejected her consulting examiner's evidence in light of the other evidence in the record, including the State agency non-examining, non-treating consultants which were entitled to be given some weight under the regulations. (Def.'s Brief at 14-15.)

In general, the Commissioner is charged with evaluating the medical evidence and assessing symptoms, signs and medical findings to determine the functional capacity of the claimant. *Hayes v. Sullivan*, 907 F. 2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F. 2d 987 (4th Cir. 1984). The Regulations grant the administrative fact-finders some latitude 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*, 76 F.3d at 585. 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).

Treating medical source evidence is to be given controlling weight where it is well-supported by medically acceptable diagnostic techniques and not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2) and 416.927(d)(2). A Law Judge or the Commissioner must "always give good reasons" for not according controlling weight to the opinions of a treating source. *Id.* One of those good reasons may lie in the length of the treating relationship. The longer the relationship, the better the "longitudinal picture" that physician has of

the plaintiff's impairments and its vocational effects. 20 C.F.R. § 404.1527(d)(2)(i) and 416.927(d)(2)(I). Other factors the Law Judge and Commissioner may consider in determining the weight to be accorded the opinions of a treating source include the nature of the treating relationship, the support of the opinion offered, consistency in holding to the view over the course of treatment, the specialty of the treating source, and all other factors in the record which tend to either conform or dispel the views held by the treating medical source. 20 C.F.R. §§ 404.1527(d)(3)-(6) and 416.927(d)(3)-(6). In the end, the regulations reserve to the Commissioner opinions relating to whether the claimant is disabled or unable to work. 20 C.F.R. §§ 404.1527(e) and 416.927(e).

The regulations further address a Law Judge's consideration of findings by non-examining State agency medical sources. These findings "must" be considered, relying on the same factors mentioned above and reserving to the administrative fact-finder determinations about the claimant's ability to work and, ultimately, whether the claimant is disabled. 20 C.F.R. §§ 404.1527(f) and 416.927(f).

There is no question here that plaintiff discharged her initial burden in the sequential evaluation by demonstrating she suffers a medically determinable severe impairment which disables her from her past relevant work. 20 C.F.R. §§ 404.1520 and 416.920. The Law Judge found that plaintiff possessed the residual functional capacity to perform sedentary work which did not require lifting in excess of 10 pounds, or repetitive lifting or bending. (R. 21.) It is interesting to note that in arriving at these conclusions the Law Judge stated he had given "great weight" to the State agency physicians' determinations, "no weight" to the opinion of Dr. Afzal, and "controlling weight" to the opinions of George Gruner, M.D. and E. Clarke Haley, Jr., M.D., plaintiff's ongoing treating and examining physicians. (R. 21.) As a matter of fact, the evidence offered by plaintiff's "ongoing treating physicians" reveals that, in August 2002, plaintiff *was* "capable of working", so long as she

avoided repetitive lifting and repetitive bending and no lifting greater than ten pounds. (R. 165.) By October 2002, Dr. Gruner felt as though plaintiff was doing so well that she did not need to be seen again by him for three to four months. (R. 164.) In April, 2003, plaintiff's first visit with Dr. Gruner since October 2002, Dr. Gruner's examination showed a positive straight-leg raising on the left side at 80 degrees, no major weakness, a low back range of motion 80-90% normal, and only "mild discomfort" in her lower back. (R. 163.) A neurological examination by Dr. Halley in April, 2004 produced many normal findings, such as "symmetrically brisk reflexes with preserved sensation and full muscle power in the arms and legs" and no permanent neurological dysfunction. (R. 231.) These findings do conflict with the functional assessment offered by Dr. Afzal, whom the Law Judge had reason to find was not a treating doctor, in that he had evaluated plaintiff only on *one* other occasion on the date he performed the August 4, 2004 evaluation plaintiff finds so compelling. (R. 233-236.) Moreover, the findings of plaintiff's treating physicians are consistent with the views of the State agency review consultants, notwithstanding the fact that those consultants examined the record before much of the treating evidence was produced.² In other words, the conclusions the Law Judge reached concerning plaintiff's residual functional capacity are supported by the substantial medical evidence in the case and, in turn, provides the basis upon which the Law judge found jobs available to the plaintiff in light of the vocational evidence.

For these reasons, it is RECOMMENDED that an order enter AFFIRMING the Commissioner's final decision, GRANTING the Commissioner's motion for judgment, and DISMISSING this action from the docket of the court.

The Clerk is directed to immediately transmit the record in this case to the presiding United

²Frankly, had the treating evidence been inconsistent with the State agency reports, the undersigned would not believe the Law Judge's decision had substantial evidentiary report under the circumstances of this case.

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