

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

BARBARA C. FREEMAN, ) CASE NO. 5:04CV00096  
Plaintiff )  
)  
v. ) REPORT AND RECOMMENDATION  
)  
JO ANNE B. BARNHART, ) By: B. Waugh Crigler  
Commissioner of Social Security, ) U. S. Magistrate Judge  
Defendant )

This challenge to a final decision of the Commissioner which denied plaintiff's August 16, 2002 claim for a period of disability, disability income benefits and supplementary security income benefits 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 a report to the presiding District Judge 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 REMANDING the case to the Commissioner for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, a Law Judge found that plaintiff was insured from January 1, 2002, the alleged date of disability onset, through the date of his decision, and that she had not been engaged in any gainful activity since the alleged disability of onset. (R. 19, 23.) While he also found that plaintiff had been seen by various physicians for what was diagnosed as mild disc disease, an incidental spinal cyst, back pain and Crohn's disease, he further

found to be significant gaps in plaintiff's medical treatment and such inconsistencies between statements she made to her treating doctors and those made at the hearing as to both discredit plaintiff's testimony and lead to a conclusion that she did not suffer any physical or mental impairment that significantly limited her ability to work for twelve consecutive months. (R21-23.) Accordingly, the Law Judge denied plaintiff's claim at that early stage of the sequential inquiry. 20 C.F.R. §§ 404.1520 and 416.920.

While the case was on administrative appeal, plaintiff, by her counsel, submitted additional treating evidence. (R. 222-247.) The Council determined that there was no basis in the record or in the new evidence to review the Law Judge's decision and, thus, denied review and adopted that decision as the final agency decision. (R. 6-8.) Plaintiff then instituted this action, and included with the Complaint were additional medical records, which action the undersigned will treat as evidence in support of a request to remand the case for further proceedings.

The Commissioner is charged with evaluating the medical evidence, assessing symptoms, signs and findings, and, in the end, determining the functional capacity of the claimant. 20 C.F.R. §§ 404.1527-404.1545; *Hays v. Sullivan*, 907 F.2d 1453 (1990); *Shively v. Heckler*, 739 F.2d 987 (4<sup>th</sup> Cir. 1984). In that connection, the Commissioner regulatorily is granted some latitude in resolving inconsistencies in evidence and the court reviews the Law Judge's factual determinations only for clear error. 20 C.F.R. §§ 404.1527 and 416.927; *See also Estep v. Richardson*, 459 F.2d 1015, 1017 (4<sup>th</sup> Cir. 1972). In the end, if the Law Judge's resolution of the conflicts in the evidence is supported by substantial evidence then the Commissioner's final decision must be affirmed. *Laws v. Celebrezze*, 368 F.2d 640 (4<sup>th</sup> Cir. 1966).

Where evidence is offered on administrative review, the Appeals Council has a duty to fully and fairly evaluate any evidence tendered on administrative appeal and state reasons for denying review. *Riley v. Apfel*, 88 F.Supp 2d 572 (W.D.Va. 2000). Failure to do so may lead to a remand of the case with direction to make findings upon which judicial review might more appropriately occur. Moreover, new and material evidence offered on judicial review may constitute good cause to remand the case in the event that evidence likely would have affected the decision below had it been before the Commissioner in the first instance. *Borders v. Heckler*, 777 F.2d 954 (4<sup>th</sup> Cir. 1985).

Suffice it to say that the extant record at the time the Law Judge issued his decision until May 15, 2004 clearly supported the findings and conclusions the Law Judge made about plaintiff's credibility and the extent and duration of her medical impairments. By the same token, the medical data forwarded to the Appeals Council shed new light on the duration and severity of plaintiff's maladies, but the Council gave that evidence nothing more than short shrift in declining to review the Law Judge's decision. The undersigned does not see the Council as having discharged the duty recognized by *Riley* to fully and fairly evaluate the new evidence and to make findings which the court could meaningfully review. The newer evidence offered on judicial review, likewise, is material to a full and fair review of the claim if for no other reason that it demonstrates continued treatment, a factor adversely used by the Law Judge in denying the claim at one of the earliest stages of the sequential evaluation.

For these reasons, the undersigned finds that good cause has been shown to remand the case to the Commissioner for further proceedings. It is so RECOMMENDED. The order of remand should direct that in the event the Commissioner cannot grant benefits on the current record, she is to recommit the case to a Law Judge for further proceedings in which both sides would be entitled to 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