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

AUDREY G. TAYLOR,	)	CASE NO. 5:05CV00019
	)	
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 June 7, 2002 claim for a period of disability, disability insurance benefits and her July 1, 2002 claim for supplemental 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 to the presiding District Judge a report setting forth findings, conclusions and recommendations for the disposition of the case.[1] The question presented is whether the Commissioner's final decision is supported by substantial evidence, or whether there is good cause to remand the case 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 under Sentence 6 of 42 U.S.C. § 405(g).

In a decision eventually adopted as a final agency decision, an Administrative Law Judge

[1]Plaintiff's SSI claim was protectively filed on June 21, 2001.

(Law Judge) found that plaintiff, who was 43 years old on the alleged date of disability onset with a 9th grade (limited) education, and with past relevant work as a hairdresser, met the special earnings requirements of the Act on the alleged date of disability onset and continued to meet them through the date of his decision. (R. 22, 28.) The Law Judge further determined that plaintiff suffered cervical spondylosis, chronic pain disorder and "possible cervical myelopathy," which he found to be severe impairments but not sufficiently severe to meet or equal any listed impairment.[2] (R. 16, 20.) Notwithstanding these findings, the Law Judge was of the view that plaintiff's allegations concerning the limitations imposed by her impairments on her work-related capacity were not totally credible, and the Law Judge credited the assessments of the State agency physicians over those of plaintiff's treating doctors. The Law Judge was of the view that plaintiff was disabled from her past relevant light /skilled work as a hairdresser. (R. 22, 26, 28.) Based on those State agency assessments, the Law Judge concluded that plaintiff was able to perform a limited, but none-the-less "significant range of sedentary work." (R. 26-27, 29.) By application of the Medical-Vocational Guidelines ("grids), 20 C.F.R. Pt. 404, Subpt. P, App. 2, §§ 201.00(h), 201.19 and 201.25, "as a framework," and by reference to a portion of the evidence adduced from a vocational expert (VE) based upon assumptions presented to the VE at the hearing, the Law Judge determined jobs were available to plaintiff and that she was not disabled under the Act. (R. 27, 29, 609-610.) The Appeals Council denied review and adopted

[2]The Law Judge observed that the plaintiff's treating physician diagnosed her as suffering both a cervical radiculopathy and a myelopathy. (R. 25.) However, the Law Judge's assignment of little weight to the treating physician's opinion that plaintiff was disabled signals to the undersigned that the Law Judge also rejected this physician's diagnosis concerning the nature and extent of plaintiff's impairments. (R. 26.)

the Law Judge's decision as the final decision of the Commissioner. (R. 6-8.) This action ensued.

On September 16, 2005, plaintiff, by counsel filed a Memorandum in Support of Claim.[3] Plaintiff takes issue with what she believes was the "umbrage" paid by the Law Judge to the treating source opinion evidence concerning the nature and extent of her disability. She offers that their opinions were rejected because they did not supply forensically sophisticated reports. Plaintiff believes their views should be accorded great weight because of their treating relationship with her, and that they could be disregarded only for compelling reasons, which plaintiff does not believe are shown on the record. Plaintiff contends the treating source opinions, in fact, are corroborated and not dispelled by the objective evidence as embodied in the radiological reports of June 5, 2001 which show "marked" abnormalities. (R. 438, 524-25.) In other words, plaintiff offers that her subjective complaints and the treating source opinions regarding the extent of her disability are supported by the objective medical evidence, and that the Law Judge's findings to the contrary are not supported by substantial evidence.

Plaintiff attached additional evidence to her Memorandum which she offers on judicial review. That evidence consists of an updated earnings record and a report from Winchester Imaging revealing a mass in her upper left lung which was "malignant-appearing." The "Impression" offered, *inter alia*, was that plaintiff was suffering a "[l]arge left upper lobe malignancy" and "[s]evere centrilobular emphysema." Pl.'s Memorandum, second attachment.

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[3]Plaintiff was represented by Raymond Kates, Esq., an attorney admitted to practice before this court. However, because Mr. Kates has not registered with CM/ECF, David Downes, Esq., also an attorney admitted to practice before this court, has entered an appearance for the purpose of facilitating the filing and receipt of pleadings online.

The Commissioner, on the other hand, does not deny plaintiff suffered a herniated disc in the cervical spine which produced positive findings both on X-ray and MRI eventually leading to a cervical laminectomy, discectomy and cervical fusion in 1999. Defendant's Brief at 4. However, she also points to objective medical evidence showing an uncomplicated course of recovery, with proper fusion of the cervical vertebrae and minimal or minor objective findings of disc bulging and no evidence of nerve impingement. *Id*. at 5. The Commissioner further believes that there is evidence in the record to support the opinions of the State agency review doctors concerning plaintiff's residual functional capacity. Conversely, the Commissioner offers that the statements of the treating sources concerning the severity of plaintiff's neck and other body pain as weakness in her upper and lower extremities do not have objective medical support. Instead, the statements are premised on plaintiff's subjective complaints which, according to at least one of those treating sources, had "relatively few objective deficits" to support them. *Id*. at 6; (*see also* R. 544.)

As a result, the Commissioner challenges plaintiff's assertion that the Law Judge's decision was a product of an offense taken to the evidence offered by plaintiff's treating sources. Def.'s Brief at 9. She offers, instead that the medical evidence did not lead inexorably to the opinions offered by plaintiff's treating doctors, Bradd and Bernard, to the effect that plaintiff was not capable of performing any physical activity. The Commissioner certainly believes the record evidence did not preclude a finding that plaintiff could perform sedentary work.

Finally, the Commissioner challenges the evidence from Winchester Imaging dated June 6, 2005 which plaintiff has offered for the first time on judicial review. Specifically, she asserts

that this evidence is not material to the period of disability before the court and, otherwise, is not likely to have changed the decision below had it been before the administration in the first instance. Def.'s Brief at 11.

In the instant case, plaintiff carried her initial burden in the sequential evaluation process by demonstrating the presence of severe impairments that prevent her from performing her past relevant work. (R. 20, Finding 7.) 20 C.F.R. §§ 404.1520 and 416.920; *Hunter v. Sullivan*, 993 F.2d 31 (4th Cir. 1992). Thus, the burden shifted to the Commissioner to demonstrate that alternate gainful activity was available to her, a burden the Commissioner could discharge in this case only by the presentation of vocational evidence because there were non-exertional limitations on plaintiff's ability to perform work-related functions. *Hall v. Harris*, 658 F.2d 260 (4th Cir. 1981); *McLain v. Schweiker*, 715 F.2d 866 (4th Cir. 1983); *Coffman v. Bowen*, 829 F.2d 514 (4th Cir. 1987). Moreover, for the testimony of a VE to be relevant, the VE is required to have considered all the evidence in the record material to plaintiff's limitations and their effects on her work-related capacity. *Walker v. Bowen*, 889 F.2d 47 (4th Cir. 1989). Otherwise, the VE's testimony cannot be considered sufficient to discharge the Commissioner's sequential burden, and the plaintiff would be entitled to an award of benefits based on her unrebutted *prima facie* case.

The Commissioner also is charged with making the initial evaluation of 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 and 416.927-945; *Hays v. Sullivan*, 907 F.2d 1453 (1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). A reviewing court

should not second-guess the Commissioner's resolution of those matters, but must determine whether her decision in those respects is supported by substantial evidence in the record as a whole.

There is no question in the undersigned's mind that, at a minimum, the evidence offered by plaintiff on judicial review is both new and material to her claims for benefits. Not that it is complete in itself, but that it reveals more than mere suspicions about a respiratory impairment which likely could explain why plaintiff has been tired or experiencing physical symptoms for which there had been no previous diagnostic basis. Not only could this impairment establish an independent basis for disability within the insured period, a diagnosis of either lung cancer or emphysema, or both, could present non-exertional limitations which must be taken into account by the VE in reaching any professional conclusion about whether jobs would be available to a person with plaintiff's maladies and their effects. In particular, the hypothetical questions to the VE that are contained in the record did not include a consideration of any limitations on plaintiff's exposure to dust, fumes and gases which would be imposed by a respiratory impairment. Moreover, the Law Judge did not have the benefit of this information in determining plaintiff's credibility, something that played a vital role in his ultimate decision.

In the end, the undersigned finds good cause to remand the case for further proceedings under Sentence 6 of 42 U.S.C. § 405(g). Accordingly, it is RECOMMENDED that an order enter REMANDING the case to the Commissioner for further proceedings. The remand order should provide that, in the event the Commissioner is unable to grant benefits on the extant record, she forthwith is to recommit the case to a Law Judge to conduct supplemental evidentiary

proceedings at the final level of the sequential evaluation in which both sides will 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)(l)(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