

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

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| DELORES Y. HOWARD, |) | CASE NO. 5:05CV00037 |
| |) | |
| 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 plaintiff's July 29, 2002 claim for a period of disability and disability income benefits under the Social Security Act (Act), as amended, 42 U.S.C. §§ 416 and 423, 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. For good cause shown based upon the reasons that follow, the undersigned will RECOMMEND that an order enter REMANDING the case for further proceedings.

In a decision eventually adopted as a final decision of the Commissioner, an Administrative Law Judge (Law Judge) found that plaintiff, who was 43 years old at the time with a general equivalency diploma (GED) and past relevant work as a program analyst, administrative specialist, foster parent, utility company cleaner, motel cleaner, and caretaker for the elderly, 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. 17, 22.) He further found that the medical evidence established plaintiff had a discogenic/degenerative disorder of the

cervical spine (status post two cervical spinal fusions) and vascular headaches which constituted severe impairments, but which were not severe enough to meet or equal any listed impairment. (R. 18, 22.) He also was of the view that plaintiff's "credibility to be low at best," and that her "allegations of disabling neck and headache problems are deemed excessive, [and] not fully credible." (R. 19.) The Law Judge determined that plaintiff was unable to perform her past relevant work. (R. 20.) In the body of his decision, the Law Judge concluded that plaintiff retained the residual functional capacity to occasionally lift up to 20 pounds and frequently lift up to 10 pounds with a sit/stand at will option with limited contact with the general public. (R. 19.) He concluded, therefore, that plaintiff retained the capacity to perform "a significant range of light and sedentary" work. (R. 21, 23.) By application of the Medical-Vocational Guidelines ("grids"), 20 C.F.R. § 404.1569, Appendix 2, §§ 202.21 and 201.18¹, to plaintiff's exertional limitations, and by reference to some of the evidence offered by a vocational expert (VE), the Law Judge found that jobs existed for plaintiff in the national economy, and that she was not disabled under the Act. (R. 21-23.) The Appeals Council denied review and adopted the Law Judge's decision as a final decision of the Commissioner. (R. 8-10.) This action ensued.

The Law Judge determined that plaintiff carried her initial burden in the sequential evaluation process by demonstrating the presence of severe impairments which prevent her from performing her past relevant work. 20 C.F.R. § 404.1520; *Hunter v. Sullivan*, 993 F.2d 31 (4th Cir. 1992). Thus, the burden shifted to the Commissioner to come forward with evidence: "(1)

¹On page 22 of the Law Judge's report he notes that he applied sections 202.21 and 201.28, and on page 23 he notes that he applied 202.21 and 201.18. Section 201.28 applies to individuals age 18-44, and 201.18 applies to individuals age 45-49. At the time of the Law Judge's report, plaintiff was 43; thus, it appears that the reference to section 201.18 was a typographical error.

that the claimant, considering [her] age, education, work experience, skills and physical shortcomings, has the capacity to perform an alternative job and (2) this specific type of job exists in the national economy.” *Hall v. Harris*, 658 F.2d 260, 264 (4th Cir. 1981). Because there are non-exertional limitations on plaintiff’s work-related abilities, the Commissioner could discharge her burden in this case only by the presentation of vocational evidence. *Id.*; *McLain v. Schweiker*, 715 F.2d 866 (4th Cir. 1983); *Coffman v. Bowen*, 829 F.2d 514 (4th Cir. 1987). In that connection, the VE’s role is not to determine the ability of a claimant to perform work, rather it is to offer evidence about whether there are jobs available to a person with the claimant’s impairments and their effects. *Walker v. Bowen*, 889 F. 2d 47 (4th Cir. 1989). Thus, for the testimony of a VE to be relevant, the VE must have considered all the evidence in the record material to plaintiff’s limitations and their effects on her work-related capacity. *Id.* Otherwise, the Commissioner will not be viewed as having properly discharged her sequential burden.

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; *Hays v. Sullivan*, 907 F.2d 1453 (1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). The court should not substitute its judgment for that of the Commissioner, but must determine whether there is substantial evidence to support her conclusions.

On administrative appeal, plaintiff’s counsel challenged the propriety of the Law Judge’s rejection of the opinion evidence and recommendations offered by plaintiff’s treating physician, his assessment of plaintiff residual functional capacity, and the use of the grids in deciding the claim without an explanation of the non-exertional limitations affecting plaintiff’s ability to

work. (R. 276.)

In the Defendant's Brief in Support of Her Motion for Summary Judgment, the Commissioner recites substantial portions of the treating and consultative medical record and has argued that the Law Judge properly weighed the opinion of plaintiff treating physician, Kenneth Parker, M.D., that plaintiff was disabled; properly determined that any conclusion about plaintiff's functional capacity or her disability regulatorily was reserved to her; and properly found that Dr. Parker's assessment was undermined by the absence of objective test results and by the fact he provided only conservative treatment and medication. The Commissioner also takes the position there is other substantial evidence in the record inconsistent with that offered by Dr. Parker, namely unremarkable or essentially normal findings on the examinations by various physicians, thus providing bases for the Law Judge's findings and conclusions. Moreover, the Commissioner offers that she met her burden at the final level of the sequential evaluation by reference to the evidence provided by the VE, not just that offered by the grids. She believes the Law Judge's questions to the VE were supported by substantial evidence and were relevant, in that they included all the plaintiff's limitations shown by the substantial evidence in the record. The Commissioner seeks entry of an order affirming her final decision and dismissing the action from the court's docket.

There is no doubt that the Commissioner's regulations commit to her the responsibility to make initial determinations related to the credibility of the witnesses, the weight of the evidence, the capacity of the claimant and whether the claimant is disabled under the Act. However, the Act commits to reviewing courts a duty to examine the record and to determine whether those decisions are supported by substantial evidence. The reason the undersigned has restated these

obvious axioms is that a proper resolution of the nature and extent of plaintiff's subjective symptoms, namely pain and its effects on plaintiff's functional abilities, essentially is dispositive of the case. If the symptoms identified in the evidence were found both to exist and persist in a way even approximating plaintiff's description, both the medical and vocational evidence would compel a finding that plaintiff was disabled under the Act.

The undersigned's analysis begins with the uncontroverted, and even acknowledged fact, that between 1992 and March 2002, plaintiff experienced what was observed to be a "complicated past medical history of cervical fusions, diskectomies, neck and arm pain." (See R. 222.) Underlying and pre-existing spinal impairments dating back to the 1990's appear to have been exacerbated in a vehicular accident in 2000, and there is no question plaintiff underwent multiple surgical procedures in at least two different hospitals on her cervical spine. (*Id.*) Therefore, the undersigned does not believe it can be debated that plaintiff suffered medically determinable conditions or impairments which "could reasonably be expected to produce . . . symptoms," particularly pain and headaches. 20 C.F.R. § 404.1529(c)(1). Any perusal of the medical records from 2000 through 2004 would reveal treating source diagnostic impressions that plaintiff's complaints of often intense, and certainly persistent pain, were consistent with her well-documented chronic cervical and lumbar strain/sprain, multilevel cervical disk disease, and nerve root irritation. (R. 165-66, 169-73, 175, 177, 180, 227, 229, 231-35.)

The also evidence shows, and the Law Judge found, that, at least since her latest surgery, plaintiff has been treated conservatively only with medication and therapy. It is true that an MRI performed shortly after her surgery in 2000 revealed no evidence of recurrent disc herniation, and, apart from a electromyogram (EMG) performed in 2002, which showed no evidence of

active left cervical nerve root compression, there are no records revealing that any empirical tests were performed on the plaintiff. (R. 114, 159.) The remaining medical evidence consists mainly of the reports of clinical neurological examinations performed during the course of plaintiff's various office visits to treating doctors.

In her brief to the court, the Commissioner has painted a picture of those examinations as producing "grossly normal" results, though she seems to acknowledge that plaintiff has been diagnosed as suffering failed neck syndrome with chronic neuropathy. Def.'s Brief at 4; (R. 223.) The Commissioner also correctly has acknowledged that while the results of X-rays taken of plaintiff's lumbar spine were within normal limits, they did show degenerative changes at L4-5. Def.'s Brief at 5.

Suffice it to say that plaintiff's primary treating physician believes she is disabled, and apart from the view expressed by Luc Vinh, M.D., who was a state agency consultant who reviewed plaintiff's medical records, there is not a single medical opinion to the contrary. (R. 118-125.) The Commissioner offers Vinh's assessment as substantial evidence to support the Law Judge's rejection of the evidence offered by primary treating sources which suggest plaintiff has been disabled. Def.'s Brief at 8.

Dr. Vinh's report represents appears to be nothing more than a bare or bald statement of the claimant's residual functional capacity in a contextual vacuum. The opinion offered in the report seems to depend entirely on a single EMG taken in 2002, and it excludes any apparent consideration of virtually all the other medical evidence in the record. Furthermore, Dr. Vinh curiously concludes by reminding the Commissioner that she is the one who decides whether the claimant can work.

The undersigned believes the opinion expressed in Dr. Vinh's consultative assessment of plaintiff's functional capacity is insufficient to provide substantial evidentiary support for rejecting the assessments offered by plaintiff's treating sources, such as Dr. Parker. 20 C.F.R. § 4040.152. Vinh's evidence does little more than offer a naked or bare opinion about plaintiff's residual capacity and then essentially tosses the question of plaintiff's capacity back in the Commissioner's lap with a reminder that she is the one who makes the decision. In other words, Vinh's report has little or no substance to it and supplies only surface support for the Law Judge's decision.

The undersigned does not believe the Law Judge's conclusions about plaintiff's credibility bear up any better under the weight of the substantial evidence contained in this record. The Law Judge found the plaintiff's "credibility to be low at best." (R. 19.) This conclusion is followed in the decision by a recitation of evidence relating to plaintiff's activities which the Law Judge found to present inconsistencies which, when examined, amount to only minor variations, and which, when read or discerned in the context of the whole record, corroborate rather than dispel her claim of significant limitations on her ability to function. 20 C.F.R. § 404.1529.

In the end, it is the undersigned's view that there has been an inadequate adjudication of plaintiff's residual functional capacity and, accordingly, of whether there are jobs available to a person with that residual capacity. Therefore, "good cause" has been shown to remand the case for further proceedings.

The undersigned hereby RECOMMENDS that an order enter REMANDING the case to the Commissioner for further proceedings at the final level of the sequential evaluation. The

order of remand should provide that in the event the Commissioner is unable to grant benefits on the current record, she is to recommit the case to a Law Judge to conduct supplemental evidentiary proceedings at the final level of the evaluation in which both sides may introduce additional evidence.

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

