

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

STAR Y. GRIFFIN,) CASE NO. 5:05CV00041
)
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 December 20, 2002 claim for a period of disability, disability insurance benefits and 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 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 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 44 years old with a high school education and past relevant light-to-medium unskilled work as a cook and dishwasher, was insured for disability benefits on July 21, 2001, the alleged date of disability onset, through

the date of his decision. (R. 16, 20, 21.)¹ The Law Judge also found that plaintiff has peripheral neuropathy secondary to alcoholism, now in sustained full remission, which he determined was severe though not severe enough to meet or equal any listed impairment. (R. 17, 22.)

Interestingly, the Law Judge also concluded that, although plaintiff's allegations concerning the effects of her impairments were not totally credible and that she was capable of performing a significant range of light work with certain lifting, standing, walking and manipulative restrictions, the plaintiff was unable to perform her past relevant light-to-medium work. (R. 20, 21-22.) By application of the Medical-Vocational Guidelines ("grids") as a framework for his decision, and by reference to some of the evidence offered by a vocational expert (VE), the Law Judge determined plaintiff to be "not disabled" under the Act. (R. 22.)

Plaintiff appealed the Law Judge's decision to the Appeals Council. While the case was on administrative appeal, plaintiff submitted a brief with additional evidence for the Council's consideration. (R. 324-335.) Nevertheless, and without any detailed assessment of the materials submitted to it, the Appeals Council determined there was no basis to review the Law Judge's decision and denied review. (R. 7-10.)² The Council, thus, adopted the Law Judge's decision as a final decision of the Commissioner, and this action ensued.

There is no question in this case that the plaintiff has suffered alcohol addiction. Under the current statutory and regulatory framework, alcoholism and drug addiction may disqualify a

¹The Law Judge found that plaintiff's past relevant work required "extensive use of the hands." (R. 20.)

²Plaintiff's counsel filed a thorough brief before the Appeals Council along with certain employment data concerning the tasks of school crossing guards, a job identified by the VE in his testimony at the hearing. (R. 324-335.) To the extent that this material constituted additional or material evidence for the Council to consider, the undersigned will assess the Council's treatment of it under *Riley v. Apfel*, 88 F. Supp. 2d 572 (W.D. Va. 2000).

claimant from benefits to the extent such is “a contributing factor material to the Commissioner’s determination that the [claimant] is disabled.” 42 U.S.C. § 423(d)(2)(C); accord 20 C.F.R. §§ 404.1535(a) and 416.935(a). The regulatory test for determining the degree to which alcoholism or drug addiction may be a “contributing factor” is whether the claimant would be found disabled if he/she “stopped using drugs or alcohol.” 20 C.F.R. §§ 404.1535(b)(1) and 416.935(b)(1). Moreover, the Commissioner seems to have come to the realization that alcoholism and drug addiction are likely to produce or cause impairments which, in themselves, may be disabling, and in that vein promulgated §12.09 of the Listings, 20 C.F.R. §§ 404.1525 and 416.925, Appendix I, § 12.09, to account for that reality. Essentially, § 12.09 provides that behavioral and physical changes linked to alcohol and drug addiction will be considered disabling if they, in turn, meet the specific requirements of the Listing for such impairment. Section 11.14 of the Listings specifically requires that any disabling neuropathy produce “[s]ignificant and persistent disorganization of motor function in two extremities, resulting in sustained disturbance of gross and dexterous movements, or gait and station[,]” as set forth in § 11.04.

Plaintiff contends that the decision below should be reversed for several reasons. First, she offers that the Law Judge did not give proper weight to the evidence of her treating physicians. Second, she contends that the Law Judge did not properly assess the case at the third level of the sequential evaluation in that the substantial evidence shows that her impairment meets or equals the requirements of § 11.14 of the Listings. Finally, plaintiff offers that even if her condition does not qualify as a listed impairment, the Commissioner failed to discharge her burden at the final level of the sequential evaluation because the jobs identified required use of hands, something plaintiff’s medical condition foreclosed.

The Commissioner acknowledges that plaintiff suffers peripheral neuropathy which is severe under her regulations. However, she takes the position that none of the medical data, in contrast to mere physician opinions, supports a conclusion that her impairment meets or equals any listed impairment. In particular, the Commissioner observes that plaintiff's treating sources fail to disclose any disturbance of gross and dexterous movement, or gait and station, though they do reveal some numbness and subjectively reported limitations. Moreover, the Commissioner notes the absence of any treating medical source opinion suggesting that plaintiff's condition meets or equals any listed impairment.

The Commissioner takes the view that the opinions expressed by plaintiff's doctors that she is disabled do not have objective bases in the treating source medical record, and the Commissioner offers that those opinions would not be binding on the Law judge or upon her. Thus, the Commissioner believes the Law Judge properly determined plaintiff's residual functional capacity for a significant range of light work because, apart from the opinions to the contrary, there was evidence from four medical sources, including at least one of plaintiff's treating doctors, suggesting her ability to perform work in that category.

Having reviewed the medical record, the undersigned believes that at least one of the plaintiff's own treating sources provides substantial evidence to sustain the Commissioner's final decision that plaintiff does not suffer a listed impairment. Arthur Steele, M.D., a primary treating source, reported neurological findings as a result of an examination on May 23, 2003: Plaintiff's mental status, gait and station, sensation for pin prick and reflexes all were reported as "normal." (R. 280-82.) Thus, according to her own medical data, plaintiff's impairment clearly fell short of that required to meet the requirements of §§ 11.04 and 11.14 of the Listings.

In turn, this very kind of treating source evidence provided a basis for the state agency consultants, and the Law Judge, for that matter, to opine or find that, while plaintiff very well may be unable to perform her past relevant work, her subjective complaints were not totally credible, and that she possessed the capacity for less than a full range of light work.³ (R. 18-20, 268-271, 288-291, 297-300.) The question then becomes whether there are alternate jobs which plaintiff can perform either in the light or sedentary work categories.

In this connection, and based upon the hypothetical facts presented to the VE by the Law Judge which included a reduced capacity to grip, even the VE admitted there were “[n]ot an awful lot” of jobs available in the light and sedentary ranges for a person who was of plaintiff’s age and educational level which did not require the use of the employee’s hands. (R. 356.) The VE essentially testified that the unskilled jobs he had in mind did require “a fair amount of handling and reaching” with occasional “fingering.” (R. 356-57.) In other words, the VE revealed that there were not “a lot of sedentary jobs” available which did not require a “fair amount of fingering.” (R. 357.)⁴

This raises a serious question in the undersigned’s mind about whether the Commissioner actually came forward at the final sequential level of the process with substantial evidence that jobs were available to the plaintiff. To put it another way, the vocational evidence appears a bit equivocal on whether the jobs the VE identified jobs actually would be available to a person with

³Of course, if plaintiff can perform a range of light work, under the Commissioner’s regulations, she would be considered able to perform sedentary work. 20 C.F.R. § 404.1567 (b).

⁴The VE also appears to have acknowledged that if plaintiff suffered swelling in her feet, or any effect of her neuropathy which required her to elevate her feet on a consistent basis, the jobs he had identified would not be available. (R. 361.) Dr. Steele found no swelling in the joints of plaintiff’s extremities, and there is an absence of any other medical corroboration for plaintiff’s testimony that such occurs. (R. 222, 282.)

plaintiff's diagnosed malady and its effects on the person's ability to use her hands. The Commissioner offers that the court distinguish on judicial review between fine manipulation, which is limited in this plaintiff, and "fingering." The Commissioner then takes the position that the jobs of gate or crossing guard do not require "fingering" as the positions are described in Appendix C, C-3 of the *Dictionary of Occupational Titles* ("DOT"). Because the Commissioner believes that Dr. Steele did not limit plaintiff's ability to "finger" as that term is defined, only her ability to manipulate, then the court should read the record as substantially supporting the conclusion that jobs would be available to this plaintiff.

By the same token, the materials offered by the plaintiff to the Appeals Council seems to call into question whether the guard positions mentioned by the VE actually involve activities plaintiff cannot perform, or even constitute SGA because of their part-time nature. (R. 330-335.) These are serious questions not resolved satisfactorily on the record, and *Riley*, if not literally then by its principles, would seem to suggest a remand of the case is in order. In addition, whether and to what extent plaintiff is able to "finger" is one never answered satisfactorily by Dr. Steele, or anyone else for that matter, in the medical record. Because more complete answers are required in order to determine the substantiality of the vocational evidence, good cause has been shown to remand the case for further proceedings.

Accordingly, it is RECOMMENDED that an order enter REMANDING the case to the Commissioner for further proceedings at the final sequential level. The order of remand should provide that in the event the Commissioner is unable to grant benefits on the current record, she forthwith should recommit the case to a Law Judge to conduct supplemental proceedings in which both sides may present 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.A. § 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