

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

CANDY A. CUSTER,	)	CASE NO. 5:05CV00007
	)	
Plaintiff,	)	
	)	
v.	)	<u>REPORT AND RECOMMENDATION</u>
	)	
	)	
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 November 7, 2002 claim for a period of disability, disability insurance 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 to the presiding District Judge a report setting forth findings, conclusions and recommendations for the disposition of the case. 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 REVERSING the Commissioner's final decision, but REMANDING the case to the Commissioner for further proceedings at the final level of the sequential evaluation.

In a decision eventually adopted as a final agency decision, an Administrative Law Judge (Law Judge) found that plaintiff, who was 29 years old with an 11<sup>th</sup> grade education and with past relevant work as a poultry worker, dishwasher, cook, apple packer and greenhouse laborer met the special earnings requirements of the Act on April 30, 2003, the alleged date of disability onset, and

continued to meet them through the date of his decision. (R. 13, 20.) The Law Judge further determined that plaintiff suffered with major depression, a post-traumatic disorder, back pain and fibromyalgia, which he further found to be severe but not sufficiently severe to meet or equal any listed impairment.<sup>1</sup> (R. 16, 20.) Notwithstanding these findings, the Law Judge also determined that plaintiff did not suffer any impairment which produced physical or exertional limitations. (R. 18, 20.) The Law Judge was of the view that plaintiff's impairments, and the effects thereof, prevented her from performing her light-to-medium unskilled past relevant work, but that plaintiff's complaints about the severity of her maladies and their effects were not totally credible "due to inconsistencies in the record and lack of support by the medical records." (R. 17-20.) Interestingly, the Law Judge did not make any specific findings regarding plaintiff's residual functional capacity except that he found she could not perform a "full range of heavy work." (R. 21.) By application of Rule 204.00 of the Medical-Vocational Guidelines, 20 C.F.R. Pt. 404, Subpt. P, App. 2 ("grids"), purportedly "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 her and that she was not disabled under the Act. (R. 19-20, 40-41.) The Appeals Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 6-8.) This action ensued.

Plaintiff first contends that the Law Judge's findings, themselves, are inconsistent in that he determined that she suffered entirely non-exertional limitations and no physical limitations notwithstanding his determination that she suffered a severe back impairment and severe

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<sup>1</sup>The Law Judge observed that plaintiff's major depression and post-traumatic stress disorder met the criteria under paragraph A of §§ 12.04 and 12.06 of the Listings but did not meet the criteria set forth in paragraph B of the Listings because he found her to suffer only "mild" restrictions in those various categories. (R. 16.)

fibromyalgia. Pl.'s Motion For Summary Judgment ("Pl.'s Motion") at 1-2. Plaintiff further claims that the Law Judge improperly relied on her daily activities to conclude she had the capacity for a full range of activities even though the activities reflected in the record are not those of a unimpaired person, as the Law Judge believed. *Id.* at 2-3. Plaintiff also asserts that the overwhelming evidence shows that she suffers severe psychiatric impairments meeting the requirements of the Listings, and, at the very least, that she suffers emotional impairments severe enough to eliminate all gainful activity. *Id.* at 4. Alternatively, plaintiff suggests that the evidence of her mental impairments was compelling enough to have foreclosed the Law Judge and the Commissioner from relying on a DDS record consultation to countervail essentially all the other treating, examining and consulting medical source evidence. Thus, plaintiff believes the case should be remanded for further proceedings in order to secure further testing and evaluations by medical experts, including any chosen by the Commissioner. *Id.* at 5.

The Commissioner, on the other hand, defends her final decision on the ground that it was supported by substantial evidence. Specifically, she points out that plaintiff is young; she reported that she continued to work during the period under consideration, indicating she also had to "juggle" too many responsibilities and duties; her hearing testimony differed from that offered to the agency; her treating doctors reported no physical limitations; and performance of a limited range of light, unskilled work was "possible." (Def.'s Brief at 4-8.) The Commissioner also argues that, in plaintiff's request for a hearing, she made a statement relating to the fact that she was not an apple picker "all year long," but, instead, had worked in a greenhouse doing what amounted to heavy exertional work. (Def.'s Brief at 8.) Moreover, the Commissioner believes she met her burden in the sequential evaluation by producing vocational evidence, upon proper

hypothetical questions, which demonstrated the availability of work in the economy for a person like the plaintiff. (*Id.* at 10.) Finally, the Commissioner offers that the Law Judge's findings that plaintiff suffers no exertional limitations and only non-exertional limitations are well-supported by the substantial evidence, including that of her own doctor who observed that plaintiff was attempting to work and manage her household. (*Id.* at 12; R. 174-175.)

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 (4<sup>th</sup> 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 (4<sup>th</sup> Cir. 1981); *McLain v. Schweiker*, 715 F.2d 866 (4<sup>th</sup> Cir. 1983); *Coffman v. Bowen*, 829 F.2d 514 (4<sup>th</sup> 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 (4<sup>th</sup> 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 un rebutted *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 (4<sup>th</sup> 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 plaintiff is young, and on that point the Commissioner's observation is well-taken. The facts supporting the Law Judge's determination of plaintiff's credibility, however, are worth examining. In that connection, the Law Judge found credible the facts plaintiff tendered in her pre-hearing submissions, but determined her subjective complaints were not credible, on the basis that plaintiff's hearing evidence was inconsistent with the pre-hearing information. Yet, the does not reflect any effort on the part of the Law Judge, or the Commissioner for that matter, to account for any effects plaintiff's documented severe major depression and bipolar disorder would have on plaintiff's ability to consistently report her condition or symptoms or, on the other hand, to provide a reason why plaintiff's explanation that she continued to work despite the fact matters were getting worse for her at work and her doctors could not find the problem was inaccurate or unbelievable. (R. 31-32.)

More critical to the outcome here was the Law Judge's determination of plaintiff's residual functional capacity. The record does not reflect, nor does the Commissioner suggest in her brief, that the Law Judge made a specific finding concerning plaintiff's residual functional capacity. Instead, he made a negative finding that plaintiff lacked the capacity to perform heavy work. (R. 21.) At that point, the Law Judge applied the grids to determine the availability of work for a person who could perform medium work with no non-exertional limitations, despite the fact he found plaintiff to suffer only non-exertional limitations. From an evidentiary standpoint, the Law Judge seems to have rested his entire determination of plaintiff's residual functional capacity, namely that she could perform light work on the testimony of the VE that the jobs he identified

were in the light work category. (*Id.*)

The reason this raises a concern is that the VE's responsibility is to offer opinions either about the nature of a claimant's past relevant work or the availability of work to a person who fits certain criteria set forth in hypothetical questions, and he is not authorized to testify about the ability of the person to function in certain categories of work-related activities. 20 C.F.R. §§ 404.1560(b)(2) and 416.960(b)(92); *Walker v. Bowen*, 889 F. 2d 47, 50 (4<sup>th</sup> Cir. 1989). It appears to the undersigned that the Law Judge construed the VE's testimony in a way that stepped over that line. When coupled with the regulatory prohibition against the grids being used where there are non-exertional limitations, which certainly is the case here, the undersigned is of the view that the Law Judge's decision, which the Commissioner adopted, was flawed at the final sequential level.

The questions then becomes whether the decision is sufficiently flawed to find the Commissioner failed to discharge her sequential burden, thus compelling the entry of judgment in favor of the plaintiff on her *prima facie* case, or whether good cause has been shown to remand the case for further proceedings. In that regard, even the plaintiff recognizes that additional evidence concerning the nature and extent of her mental impairments would provide a better basis upon which a final decision could be made at the final level of the sequential evaluation, and her counsel has suggested that the court should remand the case in order to give the Commissioner an opportunity to either grant benefits on the current record or direct that further testing occur and then conduct supplemental evidentiary proceedings. The undersigned agrees.

Therefore, the undersigned RECOMMENDS that an Order enter REVERSING the Commissioner's final decision which denied benefits on the evidence contained in this record but REMANDING the case to the Commissioner for further proceedings. The order should direct 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 for supplemental evidentiary proceedings in which each side may 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