

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

PAULA LEE WAYLAND,)	CASE NO. 5:11CV00010
)	
Plaintiff,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	By: B. Waugh Crigler
Defendant.)	U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's August 24, 2007 application for a period of disability and disability insurance 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. 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, it is RECOMMENDED that an Order enter GRANTING the Commissioner's motion for summary judgment, AFFIRMING the Commissioner's final decision and DISMISSING this case from the docket of the court.

In a decision issued on September 25, 2009, an Administrative Law Judge ("Law Judge") found that plaintiff had not continuously engaged in substantial gainful activity since September 29, 2006, her alleged disability onset date, and that she remained insured for benefits through December 31, 2012. (R. 11.) The Law Judge determined that the plaintiff suffered the following severe impairments: degenerative disc disease of the lumbosacral spine with an L5-S1 herniation

requiring a laminectomy and fusion, obesity, stress urinary incontinence, and chronic obstructive bronchitis. (R. 12.) He concluded that the plaintiff did not suffer an impairment or combination of impairments that met or equaled a listed impairment. (*Id.*) The Law Judge was of the belief that plaintiff's medically determinable impairments reasonably could be expected to cause her alleged symptoms, but that her statements concerning the intensity, persistence and limiting effects of these symptoms were "not credible" to the extent they were inconsistent with the Law Judge's residual functional capacity ("RFC") finding. (R. 14.) The Law Judge found that the plaintiff retained the RFC to perform light work, except that she cannot bend beyond the waist and must be allowed to arise from a seated position two to three times per hour. (R. 13.) She can perform only indoor work with minimal exposure to respiratory irritants and temperature extremes, and requires close proximity to the bathroom. (*Id.*) The Law Judge found that this RFC did not preclude her from performing her past relevant work as a patent specialist for a law firm and a home companion. (R. 16.) Thus, the Law Judge ultimately determined that the plaintiff was not disabled under the Act. (*Id.*)

Plaintiff appealed the Law Judge's September 25, 2009 decision to the Appeals Council. (R. 1-3.) The Appeals Council found no basis in the record or in the reasons advanced on appeal to review the decision, denied review, and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 1.) This action ensued.

The Commissioner is charged with evaluating the medical evidence and assessing symptoms, signs and medical findings to determine the functional capacity of the plaintiff. *Hays v. Sullivan*, 907 F.2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). The regulations grant some latitude to the Commissioner in resolving conflicts or inconsistencies in the

evidence which the court is to review for clear error or lack of substantial evidentiary support. *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). However, if the Commissioner's resolution of the conflicts in the evidence is supported by substantial evidence, the court is to affirm the Commissioner's final decision. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir. 1966).

In a brief filed in support of her complaint, plaintiff initially argues that the Law Judge failed to consider the combined effects of her exertional and non-exertional limitations. (Pl's Brief, p. 2.) Specifically, plaintiff contends that the Law Judge failed to consider her obesity, fatigue, lack of sleep, inability to concentrate, side effects from her medication and the expected absences from employment that her impairments would cause. (*Id.*)

In his RFC finding, the Law Judge accounted for plaintiff's back impairment and obesity by limiting her to light work which does not require bending beyond the waist and allows her to arise from a seated position two to three times per hour. (R. 13.) The Law Judge accounted for plaintiff's chronic obstructive bronchitis by limiting her to the performance of indoor work with minimal exposure to respiratory irritants and temperature extremes. (R. 13.) The Law Judge accounted for plaintiff's stress urinary incontinence by limiting her to work which is performed within close proximity to a bathroom. (R. 13.) Plaintiff has not pointed to any evidence which would support a finding that fatigue, lack of sleep, an inability to concentrate, side effects from medication and expected absences from employment would create limitations not accounted for in the Law Judge's RFC finding. In sum, the Law Judge considered the combined effects of plaintiff's impairments and accounted for any limitations supported by the record in his RFC finding.

Next, plaintiff argues that “there was not sufficient questioning by the Administrative Law Judge.” (Pl’s Brief, p. 2.)

Plaintiff next contends that the records establish that she has a combination of impairments that meets or medically equals a listed impairment. (Pl’s Brief, p. 2.) A claimant bears the burden of establishing that she meets or equals a listed impairment. *Dennison v. Astrue*, 2011 WL 2604847, 5 (W.D.Va. July 1, 2011) (citing *Pass v. Chater*, 65 F.3d 1200, 1203 (4th Cir.1995)). “For a claimant to show that his impairment matches a listing, it must meet all of the specified medical criteria. An impairment that manifests only some of those criteria, no matter how severely, does not qualify.” *Sullivan v. Zebley*, 493 U.S. 521, 530 (1990).

The Law Judge found that plaintiff’s back impairment did not meet Listing 1.04 (disorders of the spine) because it was not accompanied by evidence of nerve root compression, spinal arachnoiditis, or lumbar spinal stenosis with pseudoclaudication and an inability to ambulate effectively. (R. 12.) The Law Judge determined that plaintiff’s chronic obstructive bronchitis did not meet Listing 3.02A (chronic pulmonary insufficiency) because it was not accompanied by any results which met the requisite pulmonary function studies. (R. 12.) Her stress urinary incontinence was not accompanied by any evidence of impaired renal function meeting any provision of Listing 6.01 (genitourinary impairments). (R. 12.) The Law Judge concluded that the plaintiff’s impairments, viewed individually or in combination, did not impose functional limitations which made them functionally equivalent to a listed impairment. (R. 12.) Plaintiff has

presented no evidence to suggest that she meets or medically equals a listed impairment. Thus, the Law Judge properly found plaintiff did not meet her burden of showing that she met a listing.

Finally, plaintiff argues that the Law Judge erred by failing to produce evidence from a vocational expert (“VE”) that, if she could not perform her past relevant work, there were other jobs available to her. (Pl’s Brief, p. 2.) The Law Judge was not required to rely on evidence from a VE because the Law Judge’s RFC finding did not preclude her from returning to her past relevant work as a patent specialist for a law firm and a home companion. Moreover, the record reveals that the Law Judge did receive testimony from a VE, and the VE opined that someone limited to sedentary work could work as an addresser, call-out operator, and charge account clerk. (R. 41.)

For the reasons set forth above, it is RECOMMENDED that an Order enter GRANTING the Commissioner’s motion for summary judgment, AFFIRMING the Commissioner’s final decision and DISMISSING this case from the docket of the court.

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 fourteen 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 transmit a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date