

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

DONNA GRIFFITH,) CASE NO. 5:11CV00011
)
Plaintiff,)
v.) REPORT AND RECOMMENDATION
)
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 protectively-filed March 10, 2009 applications for a period of disability, disability insurance benefits, and supplemental security income ('SSI') 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 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 GRANTING the plaintiff's motion for summary judgment and REMANDING this case to the Commissioner for further proceedings.

In a decision issued on October 29, 2010, an Administrative Law Judge ('Law Judge') found that plaintiff had not engaged in substantial gainful activity since October 13, 2008, her amended alleged disability onset date, and that she remained insured through December 31, 2013. (R. 13.) The Law Judge determined that the plaintiff suffered the following severe impairments: obesity, left ear deafness, mood disorder/bipolar with anxiety and depression, personality disorder, and

polysubstance abuse in reported five year remission. (*Id.*) He concluded that the plaintiff did not suffer an impairment or combination of impairments that met or equaled a listed impairment. (R. 14.) The Law Judge found that the plaintiff had the residual functional capacity (RFC) to perform a full range of work at all exertional levels, with the nonexertional limitation to work that does not require stereoscopic hearing. (R. 15.) Due to the combination of her impairments, he found that plaintiff was limited to no more than occasional interaction with peers, the public, and supervisors, and could not perform assembly line production work. (R. 15-16.) While the Law Judge determined that plaintiff's medically determinable impairments reasonably could be expected to produce her alleged symptoms, he also was of the view that the her statements concerning the intensity, persistence and limiting effects of these symptoms were not credible to the extent they were inconsistent with the RFC finding. (R. 17.) The Law Judge concluded that plaintiff possessed the RFC to perform her past relevant work as a dishwasher and housekeeper. (R. 20.) The Law Judge, thus, ultimately determined that the plaintiff was not disabled under the Act. (*Id.*)

Plaintiff appealed the Law Judge's October 29, 2010 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 motion for summary judgment, plaintiff's sole argument is that the Law Judge failed to evaluate her mental impairments on a longitudinal basis. (Pl's Brief, pp. 11-20.) Specifically, plaintiff contends that the Law Judge selectively chose only that evidence from the record which revealed some functioning during periods between psychiatric hospitalizations. (Pl's Brief, p. 11.) The undersigned agrees.

"[O]ne characteristic of mental illness is the presence of occasional symptom-free periods." *Andler v. Chater*, 100 F.3d 1389, 1393 (8th Cir. 1996) (quoting *Poulin v. Bowen*, 817 F.2d 865, 875 (D.C.Cir. 1987)). The existence of symptom-free periods may negate a finding of disability when a physical impairment is alleged; however, this is not necessarily the case when a mental impairment is the basis of a claim. *Id.* Unlike many physical impairments, it is extremely difficult to predict the course of mental illness because symptom-free periods and brief remissions generally are of uncertain duration and marked by the impending possibility of relapse. *Id.*

In support of his contention that plaintiff can perform her past relevant work, the Commissioner has cited to a record review performed by Sandra Francis, Psy.D. (Commissioner's Brief, p. 10.) The Commissioner argues that this assessment provides support for the Law Judge's decision that plaintiff can perform her past relevant work. (*Id.*) A thorough review of the record, however, reveals quite to the contrary, namely Francis' opinion that plaintiff could *not* perform her past relevant work. (R. 113.) In fact, she stated, in pertinent part, "The evidence shows you have

some restrictions. Considering these restrictions, either singly or combined, *you are not able to perform work that you have done in the past?*" (R. 114 (emphasis added).)

In further support of his contention that plaintiff could perform her past relevant work, the Commissioner cites to instances where plaintiff's mental impairments showed improvement. (Commissioner's Brief, pp. 9-10.) Somewhat surprisingly, the Commissioner has removed those references from their context and has offered those selections to support the Law Judge's decision. His assessment of the record fails to parse the evidence in its full context and amounts to little more than cherry-picking. For instance, the record reveals that plaintiff's mental impairments necessitated four psychiatric hospitalizations during a nine-month period of time: March 10-13, 2009, April 19-22, 2009, November 13-16, 2009 and November 23-27, 2009. (R. 292-299, 312-320, 435-444, 463-471.) On March 10, 2009, plaintiff was brought to Winchester Medical Center by her aunt with suicidal ideation and an overdose on Xanax. (R. 313.) She was admitted to the behavioral unit secondary to depression, crying, and an expressed desire to die. (*Id.*) Plaintiff reported that her life was too overwhelming, and that she wanted to be with her deceased relatives. (*Id.*) She was diagnosed as suffering a Bipolar II disorder mixed without psychosis and bereavement. (R. 318.) Upon admission, plaintiff's GAF was found to be only 22, which had improved to 57 at discharge.¹ (*Id.*)

¹ GAF ratings are subjective determinations based on a scale of zero to one hundred of "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 32 (4th ed. 2000) ('DSM-IV Manual'). A GAF of 21 to 30 indicates that behavior is considerably influenced by delusions or hallucinations OR serious impairment in communication or judgment (e.g., sometimes incoherent, acts grossly inappropriately, suicidal preoccupation) OR inability to function in almost all areas (e.g., stays in bed all day; no job, home, or friends.) *Id.* at 34. A GAF of 51 to 60 indicates moderate symptoms (e.g., flat affect and circumstantial speech, occasional

On April 19, 2009, plaintiff once again was admitted to the behavioral unit at Winchester Medical Center feeling “down” and suicidal. (R. 293.) She reported, “I just want to feel better.” (*Id.*) She was diagnosed with Bipolar I disorder, depressed; bereavement; and alcohol dependence in remission. (R. 297.) On admission, plaintiff’s GAF was found to be 25, but again improved to between 55-60 on discharge. (*Id.*)

On November 13, 2009, plaintiff was admitted to the behavioral unit at Winchester Medical Center following reports that she was not feeling safe outside the hospital and felt, at times, like she was “going crazy.” (R. 464.) Plaintiff reported that the one-year anniversary of her mother’s death was approaching, and that she had no one with whom to talk. (*Id.*) Plaintiff also reported that she did not want to do anything, so much so that it was hard for her to walk the dog. (*Id.*) At the time of her admission, plaintiff’s GAF was 20². (R. 469.) Plaintiff was diagnosed with the following: Bipolar I disorder, depressed; personality disorder, not otherwise specified; and borderline intellectual functioning. (*Id.*) At discharge, her GAF was 55. (*Id.*)

Finally, on November 23, 2009, plaintiff was admitted to the behavioral unit at Winchester Medical Center reporting that “I don’t know what’s wrong with me.” (R. 436.) Plaintiff was diagnosed with Bipolar I disorder, depressed; bereavement; and alcohol dependence, in remission. (R. 441.) She was admitted with a GAF of 20, but, upon discharge her GAF was 56. (*Id.*)

panic attacks) OR moderate difficulty in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers). *Id.*

² A GAF of 20 indicates some danger of hurting self or others (e.g., suicide attempts without clear expectation of death; frequently violent; manic excitement) OR occasionally fails to maintain minimal personal hygiene (e.g., smears feces) OR gross impairment in communication (e.g., largely incoherent or mute). *Id.*

In addition to the medical evidence, plaintiff submitted letters from third-parties which provide further insight into her mental impairments. On September 10, 2010, Joanie Newton wrote a letter in which she revealed meeting plaintiff at AA meetings and observing that plaintiff was tearful most of the time at meetings. (R. 270.) She described plaintiff as struggling with emotional issues. (*Id.*) Marsha Poe, the supervisor at a job plaintiff held in 2008 indicated that plaintiff worked as a coffee hostess, but that she was relieved from her position because it was “too much for her,” and plaintiff “needed a much slower pace.” (R. 272.) Plaintiff also submitted a letter from Susan Hambleton who reported that she had known plaintiff for approximately eight to ten years. (R. 273.) Hambleton also reported that she often visited plaintiff in her home at various times of the day, and that she never had gone to the house and found plaintiff out of the bed. (*Id.*) Hambleton observed plaintiff’s having no desire or energy to “meet the world.” (*Id.*)

There are several reasons for referring to the evidence offered by plaintiff’s lay witnesses. First, their evidence is not contradicted by other evidence in the record. Second, the Law Judge gave laconic attention in one sentence of his decision. Most importantly, this is the very kind of lay observation evidence that confirms what the medical literature underpinning the decisional authorities cited above suggest as the classic behaviors exhibited by one suffering the mental impairments plaintiff was found by the Law Judge to suffer. When coupled with the plaintiff’s other lay and professional evidence and that offered by the State agency review physician, the undersigned finds the Commissioner’s determination that plaintiff can perform her past relevant work is not supported by the substantial evidence.

Therefore, it is RECOMMEND that an Order enter GRANTING the plaintiff’s motion for summary judgment and REMANDING this case to the Commissioner for further proceedings

under Sentence Four of 42 U.S.C. § 405(g) to address the balance of questions posed by the sequential evaluation process.

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