

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

STACEY CAVE,) CASE NO. 5:11CV00015
)
Plaintiff,)
v.) REPORT AND RECOMMENDATION
)
MICHAEL J. ASTRUE,)
Commissioner of Social Security,)
Defendant.) By: B. Waugh Crigler
U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's December 4, 2008 protectively-filed 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, the undersigned will RECOMMEND that an Order enter GRANTING the Commissioner's motion for summary judgment, AFFIRMING the Commissioner's final decision and DISMISSING this action from the docket of the court.

In a decision issued on August 27, 2010, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since June 21, 2006, her alleged disability onset date, and that she remained insured through December 31, 2011. (R. 12.) The Law Judge determined that plaintiff's degenerative disc disease of the lumbar spine was a severe impairment. (*Id.*) He concluded that plaintiff did not suffer an impairment or combination of impairments that met or equaled a listed impairment. (*Id.*) The Law Judge found that plaintiff possessed the residual

functional capacity (“RFC”) to perform sedentary work, except that her musculoskeletal impairment would limit her to occasional bending, crawling, crouching, kneeling and stooping. (R. 13.) The Law Judge also believed she should avoid ladders, scaffolding and ramps, and that she should not be exposed to hazardous machinery. (*Id.*) He found that she would miss approximately ten days of scheduled work a year, and she would require a sit/stand option during the workday for two minutes in place each hour. (*Id.*) Finally, the Law Judge determined that the plaintiff’s RFC precluded her from performing her past relevant work, but that other jobs existed in significant numbers in the national economy that she could perform. (R. 16.) Thus, the Law Judge concluded that plaintiff was not disabled under the Act. (R. 17.)

Plaintiff appealed the Law Judge’s August 27, 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 claimant. *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). In all, 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 argues that the Law Judge’s RFC finding that she could perform sedentary exertional work is not supported by substantial

evidence.¹ (Pl's Brief, pp. 5-9.²) Specifically, plaintiff contends that her testimony that she cannot perform sedentary work is supported by objective medical findings, and the Law Judge erred in rejecting the opinions offered by her treating sources. (Pl's Brief, pp. 5, 8.) The undersigned disagrees and finds that substantial evidence supports the Law Judge's RFC finding.

On November 19, 2007, at the request of plaintiff's treating physician, Tara C. Fulk, PT, MS, ATC performed a functional capacity evaluation of plaintiff's back. (R. 249-254.) Plaintiff presented with complaints of constant low back pain, pain in her posterolateral lower extremities, and pain in the plantar aspect of her feet. (R. 250.) Plaintiff reported to Fulk that she had suffered a work-related injury on June 21, 2006. (R. 249.) Fulk found that plaintiff showed only minimal to moderate movement dysfunctions, and was of the view that there was some "inappropriateness to her behavior." (R. 251.)

Fulk opined that plaintiff retained the functional capacity to work full time at least at the sedentary exertional level. (R. 249, 251.) Specifically, she believed plaintiff could lift/carry ten pounds occasionally and less than seven pounds frequently and constantly. (R. 249.) Fulk also believed that plaintiff could occasionally stand, bend, reach forward and overhead, climb stairs, squat, kneel, walk, crawl, balance, and perform repetitive leg and arm movements. (*Id.*) Fulk also reported that plaintiff could frequently sit and had the ability of bilateral fine control and low speed assembly. (R. 249-250.)

The Law Judge's finding that plaintiff retained the capacity to perform sedentary work further is supported by the opinions offered by the State agency record reviewing physicians.

William Amos M.D. noted that plaintiff was limited as a result of stenosis and spondylosis. (R. 56.)

¹ "Residual functional capacity" is defined as that which an individual is still able to do despite the limitations caused by her impairments. 20 C.F.R. § 404.1545(a).

² Plaintiff's brief is not paginated. For ease of reference, the undersigned has assigned page numbers to the document.

However, Dr. Amos opined that plaintiff could lift and/or carry twenty ten occasionally and ten pounds frequently; stand and/or walk (with normal breaks) for a total of two hours in an eight-hour workday; and sit and/or walk (with normal breaks) for a total of about six hours in an eight-hour workday. (R. 55-56.) He further believed that plaintiff could occasionally perform the following: climbing ramps/stairs/ladders/ropes scaffolds, balancing, stooping (i.e., bending at the waist), kneeling, crouching, and crawling. (R. 56.) He noted no visual, communicative, or environmental limitations. (R. 57.) He found plaintiff able to perform work less demanding than plaintiff's past relevant work. (R. 60.) This was echoed by R.S. Kadian M.D. (R. 62-71.) These opinions are supported by the substantial evidence in the record as a whole.

The argument that the Law Judge erroneously discounted the opinions offered by treating sources, Teresa L. Sullivan, N.P. and Mark Shaffrey, M.D., also lacks merit. (Pl's Brief, pp. 8-9.) The relevant notation states: "If she [plaintiff] can get her pain controlled, she will begin a physical therapy program and then progress to a work hardening program before proceeding with a job." (R. 270.) It was authored by Sullivan, a nurse practitioner, and merely "authenticated" by Dr. Shaffrey. There is no indication that Shaffrey adopted or shared Sullivan's view.

The Law Judge determined that Sullivan's opinion was entitled to "little weight" because Sullivan is not a physician, and because her evaluation was inconsistent with plaintiff's longitudinal treatment history and by plaintiff's admissions as they relate to her functional capabilities. (R. 16.) Those reasons are supported by the substantial evidence in the record. Therefore, the undersigned finds that the Law Judge's RFC finding was obtained in a manner consistent with applicable law and is supported by substantial evidence.

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