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

DOROTHY E. CONSTABLE,	)	CASE NO. 5:11CV00023
	)	
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 July 11, 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 plaintiff's motion for summary judgment and REMANDING the case to the Commissioner for further proceedings.

In a decision issued on December 18, 2009, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since June 14, 2007, her alleged date of disability onset, and that she remained insured through December 31, 2012. (R. 76.) The Law Judge determined that plaintiff suffered the following severe impairments: fibromyalgia (although she has not seen a rheumatologist), migraine headaches, and mild diffuse

lumbar spondylosis.[1] (*Id.*) The Law Judge further determined that plaintiff did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (R. 77.) The Law Judge concluded that plaintiff retained the residual functional capacity ("RFC") to perform light work (lifting or carrying twenty pounds occasionally and ten pounds frequently, standing or walking about six hours in an eight-hour workday, and sitting about six hours in an eight-hour workday) that avoids overhead reaching. (*Id.*) The Law Judge also concluded that plaintiff's medically determinable impairments reasonably could be expected to produce some symptoms and limitations of the general type that she had alleged, but that her statements as they relate to intensity, persistence, and limiting effects of those symptoms were "not entirely credible" to the extent they were inconsistent with the RFC finding, in light of the longitudinal record as a whole. (R. 78-79.) The Law Judge determined that plaintiff's RFC precluded her from performing her past relevant work, but that a significant number of jobs exist in the national economy that she could perform. (R. 89-90.) Ultimately, the Law Judge found plaintiff was not disabled. (R. 91.)

Plaintiff appealed the Law Judge's December 18, 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 claimant. *Hays v. Sullivan*, 907 F.2d 1453 (4th Cir. 1990); *Shively v. Heckler*, 739 F.2d 987 (4th Cir. 1984). The

[1]The Law Judge found that, while plaintiff suffered osteoporosis, this impairment was not severe. (R. 77.)

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 the brief filed in support of her motion for summary judgment, plaintiff argues that the Law Judge's failure to find that her osteoporosis was a severe impairment is not supported by substantial evidence. (Pl's Brief, pp. 13-14.[2]) A severe impairment is one which, either separately or in combination with another impairment, significantly limits the claimant's physical or mental ability to perform basic work activities[3]. 20 C.F.R.§404.1520(c). "[T]he severity hurdle is a fairly easy one to clear." *Carr v. Commissioner of Social Security*, No. 4:10CV00025, 2011 WL 1791647, at *9 (W.D.Va. May 11, 2011).

The Law Judge found that plaintiff's osteoporosis had not caused a loss in height or fractures, and as such, was a non-severe impairment[4]. (R. 77.) Moreover, he found that plaintiff's osteoporosis had not caused significant work-related limitations lasting twelve months.

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

[3] Basic work activities are the abilities and aptitudes necessary to do most jobs, including: physical functions such as sitting and standing; capacities for seeing, hearing and speaking; understanding, carrying out, and remembering simple instructions; use of judgment; responding appropriately to supervisors, co-workers and usual work situations; and dealing with changes in a routine work setting. 20 C.F.R.§404.1521(b)(1)-(6).

[4] To be non-severe, an impairment must be more no more than "a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." *Brady v. Heckler*, 724 F.2d 914, 920 (11th Cir. 1984).

(*Id.*) For the reasons that follow, the undersigned is of the view that these findings are not supported by substantial evidence.

The record is replete with evidence irrefutably demonstrating that plaintiff suffered diagnosable osteoporosis. (R. 300, 301, 305, 329, 347, 352, 359, 370, 375, 383, 385, 389, 394, 445, 473, 483, 515, 521, 525, 527, 528, 530, 531, 539, 542, 545, 548, 551, 553, 554, 557, 560, 563, 566, 569.) That the osteoporosis caused work-related limitations also is well-documented. For instance, the Commissioner's own consultative medical examiner, Christopher Newell, M.D., found that plaintiff experienced postural limitations caused by the osteoporosis in her spine. (R. 385-386.) Specifically, the physician found that plaintiff's ability to bend, stoop, and squat were limited. (*Id.*)

The limitations caused by plaintiff's osteoporosis are more than minimal and rise to the level that significantly limit her ability to perform work activities. Moreover, the combined effects of plaintiff's osteoporosis may very well limit her to less than light work. As a result, the effects of severe osteoporosis never were address, and there is good cause to remand the case for further proceedings in which the Commissioner is to consider those effects, not only on plaintiff's RFC, but also on her ability to perform alternate gainful activity.

For this reason, it is RECOMMENDED that an Order enter GRANTING the plaintiff's motion for summary judgment, REVERSING the Commissioner's final decision and REMANDING the case to the Commissioner for further proceedings under Sentence Four of 42 U .S.C.§405(g).

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 (14) 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)(l)(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

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Date