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

TRAVIS R. MCLAUGHLIN,	)	CASE NO. 5:11CV00027
	)	
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 October 15, 2008 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 the case to the Commissioner for further proceedings.

In a decision issued on June 24, 2010, an Administrative Law Judge ("Law Judge") found that plaintiff remained insured through December 31, 2009[1], and that he had not engaged in substantial gainful activity since December 31, 2003, his alleged disability onset date. (R. 15.)

[1] In order to qualify for disability insurance benefits, plaintiff must establish that he became disabled prior to December 31, 2009, when his insured status expired. *See* 20 C.F .R. § 404.131(a).

The Law Judge determined that plaintiff had the following severe impairments: an organic mental disorder (dyslexia, a learning disorder, and borderline intellectual functioning), bipolar disorder, and an anxiety related disorder. (*Id.*) The Law Judge further determined that plaintiff did not have an impairment or combination of impairments which met or equaled a listed impairment. (R. 20.) He was of the belief that plaintiff's medically determinable impairments reasonably could be expected to cause his alleged symptoms, but that plaintiff's statements concerning the intensity, persistence and limiting effects of these symptoms were "not fully credible" to the extent they were inconsistent with the Law Judge's residual functional capacity ("RFC") assessment. (R. 23.) In assessing plaintiff's RFC, the Law Judge found that plaintiff had no exertional limitations. (R. 21.) However, the Law Judge determined that plaintiff suffered non-exertional limitations which restricted him to the performance of simple, unskilled work with only occasional interaction with the public, coworkers and supervisors. (*Id.*) Nevertheless, the Law Judge found that this RFC did not preclude plaintiff from performing his past relevant work as a fence installer at the "unskilled heavy level." (R. 25.) He also found that plaintiff could perform other light to heavy jobs in the economy which were identified by a vocational expert ("VE") in response to some, but not all the hypothetical questions posed by both the Law Judge and plaintiff's counsel. (*Id.*) Ultimately, the Law Judge found plaintiff was not disabled. (R. 26.)

Plaintiff appealed the Law Judge's June 24, 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).

Plaintiff challenges the substantiality of the evidence to support the Law Judge's decision on several grounds. Though not necessarily in the order asserted, plaintiff contends: a) the Law Judge failed to give proper weight to the treating source evidence; b) the Law Judge relied on reports by State agency medical record reviews which did not have the benefit of treating source evidence developed after those reviews; and c) the Law Judge failed to give credit to the vocational evidence that was entirely favorable to the plaintiff when the VE was asked to account for the limitations presented by the record as a whole.[2] On the first point, plaintiff essentially contends that the reports from State agency record reviewers and the consultative psychologist do not rise to the level of substantial evidence. This is so because these consultants did not have access to the later submitted evidence from plaintiff's treating physician. Plaintiff submits that if the Law Judge desired to rely on the consultative evidence, he first should have obtained updated opinions from the State agency record reviewing physicians and the consultative psychological examiner. (Pl's Brief, pp. 3-11.) The undersigned agrees that the

[2] To some extent, this argument is connected with plaintiff's first contention that the later acquired evidence from plaintiff's treating physician stood uncontroverted because the Law Judge elected not to obtain supplemental opinions from the State agency record consultants.

consultative and record review evidence before the Law Judge at the time he made his decision fails to substantially support his decision to deny benefits.

Under the regulations and applicable circuit decisional authority, a Law Judge and the Commissioner must consider the following in evaluating and weighing medical opinions: "'(1) whether the physician has examined the applicant, (2) the treatment relationship between the physician and the applicant, (3) the supportability of the physician's opinion, (4) the consistency of the opinion with the record, and (5) whether the physician is a specialist.'" *Hines v. Barnhart,* 453 F.3d 559, 563 (4th Cir. 2006) (quoting *Johnson v Barnhart,* 434 F.3d 650, 654 (4th Cir. 2005)).

It is a well-established general principle that the evidence of a treating doctor should be accorded greater weight. *Hunter v. Sullivan,* 993 F.2d 31, 35 (4th Cir. 1992). Yet, when that physician's opinion is not supported by the objective medical evidence or is inconsistent with other substantial evidence, it may be given "significantly less weight." *Craig,* 76 F.3d at 590. Moreover, where the evidence is such that reasonable minds could differ as to whether the claimant is disabled, the decision falls to the Law Judge, and ultimately to the Commissioner, to resolve the inconsistencies in the evidence. *Johnson,* 434 F.3d at 653; *Craig,* 76 F.3d at 589.

Plaintiff began treatment with psychiatrist Melissa R. Robinson, M.D. on September 24, 2009. (R. 257-259.) On January 19, 2010, Dr. Robinson completed a Mental Impairment Questionnaire. (R. 298-303.) The psychiatrist diagnosed plaintiff with a mood disorder NOS; r/o bipolar disorder NOS severe; and a learning disability. (R. 298.) She noted that plaintiff had been prescribed medications which caused drowsiness and fatigue. (*Id.*) Dr. Robinson opined that plaintiff had no useful ability to function in the following areas: ability to maintain attention for a two-hour segment; ability to maintain regular attendance and be punctual within customary

usually strict tolerance; complete a normal workday and workweek without interruptions from psychologically based symptoms; perform at a consistent pace without an unreasonable number and length of rest periods; ask simple questions or request assistance; accept instructions and respond appropriately to criticism from supervisors; get along with co-workers or peers without unduly distracting them or exhibiting behavioral extremes; dealing with normal work stress; understanding and remembering detailed instructions; carrying out detailed instructions; setting realistic goals or making plans independently of others; dealing with stress of semiskilled and skilled work; and interacting appropriately with the general public. (R. 300.) The psychiatrist further opined that plaintiff had extreme functional limitations in the areas of difficulties in maintaining social functioning and deficiencies of concentration, persistence, or pace. (R. 302.) Dr. Robinson found that plaintiff had experienced three episodes of decompensation within a twelve-month period, each of at least two weeks in duration. (*Id.*) Finally, the psychiatrist determined that plaintiff's impairments or treatment would cause him to miss more than four days of work per month. (R. 303.) In sum, Dr. Robinson's assessment contained work-preclusive mental limitations.

The Law Judge concluded that Dr. Robinson's opinion was entitled to only "limited weight." (R. 24.) Instead, the Law Judge gave "significant weight" to the opinions offered by A. John Kalil and Nicole Simpson, State agency record reviewing experts, and "great weight" to consultative psychologist Joseph J. Cianciolo, Ph.D. (*Id.*)

On January 8, 2009, Kalil evaluated plaintiff's medical records. (R. 74-94.) He opined that plaintiff had a moderate restriction on activities of daily living and moderate difficulties in maintaining social functioning. (R. 78.) Kalil believed plaintiff had no difficulties in maintaining concentration, persistence or pace and had experienced no repeated episodes of

decompensation, each of extended duration. (*Id.*) Kalil found that plaintiff suffered understanding and memory deficits and his abilities to remember locations and work-like procedures and to understand and remember detailed instructions were moderately limited. (R. 80.) Kalil opined that plaintiff had an inability to read and a verbal IQ in the 70's, and as such, he would have difficulty with complex directions. (*Id.*) Most significant, Kalil concluded that plaintiff's mental limitations did not preclude him from performing his past relevant work as a fence installer. (R. 82.)

Nicole Simpson evaluated plaintiff's medical records on April 30, 2009, again several months prior to Dr. Robinson's evaluation. (R. 97-116.) She noted that plaintiff suffered a learning disability with dyslexia and intellectual functioning in the borderline to low average range. (R. 100.) Simpson felt that plaintiff's allegations of disability were only partially credible on the basis that he had a cognitive impairment, but that the total evidence did not reveal a severity which would prevent him from performing all work. (*Id.*) Finally, Simpson opined that plaintiff had the functional capacity to perform unskilled work, despite his allegations of suffering with a severe learning disability and dyslexia. (R. 102.)

Dr. Cianciolo, a licensed clinical psychologist, performed a Psychological Assessment on plaintiff on December 30, 2008. (R. 247-250.) The psychologist opined that plaintiff suffered a learning disorder. (R. 248.) Dr. Cianciolo found that plaintiff had a GAF of 70 and that during the past year his GAF had been 70 as well.[3] (*Id.*) The psychologist opined that plaintiff was capable of performing simple or repetitive tasks, but that his ability to perform detailed or

[3] 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 Mental of Mental Disorders 32 (4th ed. 2000) ("DSM–IV Manual"). A GAF of 61 to 70 indicates some mild symptoms (e.g., depressed mood and mild insomnia) OR some difficulty in social, occupational, or school functioning (e.g., occasionally truancy, or theft within the household) but generally functioning pretty well, has some meaningful interpersonal relationships.

complex tasks appeared was markedly impaired. (R. 249.) His ability maintain regular attendance in the workplace, perform work activities on a consistent basis, and complete a normal workday or workweek without interruption from psychiatric illness appeared to be relatively unimpaired. (*Id.*) Dr. Cianciolo believed plaintiff would likely require special or additional supervision in the workplace, especially if given tasks that would require him to read or complete paperwork. (*Id.*) The psychologist found that plaintiff appeared to be capable of accepting instruction from supervisors, and his ability to interact with coworkers and the public as well as coping with routine stressors appeared to be relatively unimpaired. (*Id.*)

The undersigned is of the view that the assessments and opinions provided by State agency record reviewing experts and the consultative examiner do not constitute substantial evidence on the record before the court. These reviews and the examination were performed **prior** to the critical assessment provided by psychiatrist Dr. Robinson. Thus, neither the State agency record reviewing experts nor the consultative examiner had benefit of Dr. Robinson's opinions before rendering the very assessments relied on by the Law Judge to deny benefits.

That raises the question of whether the Commissioner should be given an opportunity to reexamine the claim in light of Dr. Robinson's evidence. One could conclude that such an opportunity has been available all along which the Commissioner deliberately by-passed. While the plaintiff seeks reversal on this record, which the undersigned is tempted to recommend, the better option is to remand the case to the Commissioner with direction to either conduct further proceedings in which the consulting source could supplement their reports or to grant benefits. For this reason, the undersigned finds good cause to remand this case to the Commissioner for further proceedings.

Thus, 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 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

_____
Date