

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

LORI ANN EVERHART,) CASE NO. 5:11CV00031
)
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 November 24, 2008 claim 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 July 14, 2010, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since August 15, 2008, her alleged disability onset date, and that she remained insured through December 31, 2012. (R. 11.) The Law Judge determined plaintiff suffered the following severe impairments: degenerative disc

disease, osteoarthritis, and obesity¹. (*Id.*) The Law Judge found that that she did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (*Id.*) The Law Judge further found that plaintiff retained the residual functional capacity (“RFC”) to perform a full range of light work, and that she was not precluded from returning to her past relevant work as a pricer/marker. (R. 12, 16.) Thus, the Law Judge ultimately found plaintiff was not disabled. (R. 17.)

Plaintiff appealed the Law Judge’s July 14, 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 initially argues that the Law Judge erred by discounting the opinions offered by her primary treating source,

¹ At her hearing, plaintiff testified that she is 5’4” tall and weighs 260 pounds. (R. 22-23.)

Deborah Nio, M.D. (Pl's Brief, pp. 6-8.²) Specifically, plaintiff contends that Dr. Nio's opinion is supported by objective medical evidence and is not inconsistent with other substantial evidence in the record. (Pl's Brief, pp. 7-8.) The undersigned disagrees, and finds that the Law Judge's decision to accord less than controlling weight to Dr. Nio is supported by substantial evidence.

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.

Dr. Nio completed a physical assessment on March 16, 2010. (R. 345-350.) In that assessment, Dr. Nio opined that plaintiff could lift/carry less than ten pounds and could

² Plaintiff's brief in support of her motion for summary judgment is not paginated. For ease of reference, the undersigned has assigned page numbers to the document.

stand/walk for a total of thirty to forty-five minutes with breaks. (R. 345-346.) The physician believed plaintiff could stand/walk for a total of three to four hours per day and, at most, could stand/walk for thirty minutes at a time without interruption. (R. 346.) She also opined that plaintiff could sit for thirty to forty-five minutes at a time for a total of three to four hours per day, and that she would be required to elevate her foot and/or feet above her heart during a typical eight-hour workday. (*Id.*, 349.) Dr. Nio found that plaintiff could never climb, stoop, crouch, kneel, or crawl. (R. 346.) She had to avoid heights, moving machinery, temperature extremes, chemicals, dust, noise, fumes, or humidity. (R. 348.) Dr. Nio believed plaintiff would miss three to five days of work per month due to a combination either of the effects of her conditions or the need for treatment, and that she was not capable of working on a sustained basis (i.e. eight hours a day/five days per week). (R. 348-349.) Finally, Dr. Nio opined that plaintiff's conditions limited her to the performance of less than sedentary work. (R. 349.)

The Law Judge believed that Dr. Nio's assessments of plaintiff's limitations were "extreme" and not supported either by her own objective findings or the course of treatment followed by plaintiff's other treating sources. (R. 16.) Thus, the Law Judge found that Dr. Nio's findings were entitled to "little weight." (*Id.*)

As the Law Judge observed, the evidence from plaintiff's other treating sources does not reflect the degree of limitations found by Dr. Nio. For example, treating source Justin L. Nolen, PA-C, evaluated plaintiff on April 10, 2009. (R. 320-321.) He found that plaintiff was able to fully flex/extend both knees without limitation or complaining of significant reproduction of pain. (R. 320.) Nolen further found that varus/valgus stress for ligament laxity or reproduction of pain was negative bilaterally. (*Id.*) Further, he determined that a hyperextension maneuver

was negative bilaterally for production of pain; the anterior/posterior drawer signs were negative; the McMurray sign was negative for the production of pain bilaterally; and the strength testing of the bilateral extremities was 5/5. (*Id.*) Nolen determined that plaintiff had a relatively normal gait and was able to ambulate without the use of an assistance device. (*Id.*)

The opinions offered by the State agency record reviewing physicians also are contrary to Dr. Nio's opinion that plaintiff suffered work-preclusive limitations. Rajeschwar Kadian, M.D. evaluated plaintiff's medical records on February 2, 2009. (R. 36-43.) He found that plaintiff suffered disorders of the back-discogenic and degenerative, osteoarthritis and allied disorders, and obesity. (R. 39.) Dr. Kadian concluded that, although she had exertional limitations, she retained the RFC to perform light exertional work. (R. 41.) The physician found that this RFC did not preclude plaintiff from performing her past relevant work at pricing garments as it is actually performed. (R. 42.) William Amos, M.D. evaluated plaintiff's medical records on October 8, 2009. (R. 46-56.) Dr. Amos also opined that plaintiff could perform light exertional work and return to her past relevant work. (R. 53-55.)

Next, plaintiff argues that the Law Judge erred in his evaluation of her pain complaints. (Pl's Brief, pp. 8-11.) Specifically, plaintiff contends that the record is replete with documentation establishing that she suffers disabling pain in her knees and back. (Pl's Brief, p. 9.) In that regard, there is a two-step process for evaluating subjective complaints. *Craig v. Chater*, 76 F.3d 585 (4th Cir. 1996). The two-step process corresponds with Social Security Ruling ("SSR") 96-7p and the regulations at 20 C.F.R. § 404.1529. At step one, the Law Judge must determine whether there is objective medical evidence showing the existence of a medical impairment that reasonably could be expected to produce the pain or symptoms alleged. *Craig*,

76 F.3d at 594. At step two, the Law Judge must evaluate the intensity and persistence of the claimant's pain or other symptoms alleged based on all the evidence in the record, including the claimant's testimony. *Id.* at 595. Step two of the credibility analysis involves consideration of the claimant's statements of pain and other alleged symptoms, as well as factors such as: (1) the claimant's daily activities; (2) the location, duration, frequency, and intensity of the pain or other symptoms; (3) precipitating or aggravating factors; (4) the type, dosage, effectiveness, and side effects of medication; (5) treatments, other than medication, received for relief of symptoms; (6) measures used to relieve symptoms; and (7) other factors concerning functional limitations and restrictions caused by symptoms. 20 C.F.R. § 404.1529(c)(3).

At step one in his credibility assessment, the Law Judge found that that plaintiff's medically determinable impairments reasonably could be expected to cause the alleged symptoms. (R. 13.) At step two, the Law Judge found that plaintiff's 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 finding that plaintiff could perform a full range of light work. (*Id.*) For the reasons that follow, the undersigned finds that the Law Judge's determination of plaintiff's credibility is supported by substantial evidence.

The Law Judge noted that plaintiff's overall medical treatment had been routine and conservative in nature, a conclusion well-supported by the medical record. (R. 16.) For instance, plaintiff testified that she was not taking any prescribed pain medication. (R. 26.) Rather, she acknowledged that when her pain gets "really bad" she uses pain cream and over-the-counter pain medication. (*Id.*)

The Law Judge's credibility finding is also supported by treating orthopedist Robert C. Kime, III, M.D. Dr. Kime examined plaintiff on August 15, 2008. (R. 190-193.) At that time, Dr. Kime noted that plaintiff was being evaluated for low back pain and bilateral knee pain. (R. 190.) In his assessment, Dr. Kime noted as follows: "Questionable secondary gain issues with the patient having a significant degree of pain out of proportion to what I would expect from her radiographic findings[.]" (R. 191.)

The opinions rendered by the State agency record reviewing physicians provide additional substantial evidentiary support. Dr. Kadian concluded that plaintiff's statements concerning the intensity, persistence, or effect of the pain or other symptoms were not fully credible based on the objective medical evidence standing alone. (R. 40.) Dr. Kadian concluded that plaintiff's activities of daily living and medication treatment undermined her credibility and rendered her allegations only "partially credible." (*Id.*) Dr. Amos, another State agency record reviewing physician, concurred that plaintiff's allegations were only "partially credible." (R. 52.)

Finally, plaintiff asserts that the fact that a private long-term disability insurance program found her disabled from full-time work and argues that the Law Judge did not accord this finding proper weight. (Pl's Brief, pp. 11-13.) The undersigned disagrees.

Plaintiff accurately cites the Commissioner's regulation requiring that disability decisions from both governmental and non-governmental agencies be given some weight and cannot be ignored. 20 C.F.R. § 404.1504. The regulation goes further to acknowledge, however, that

social security law and not those governing other governmental or non-governmental agencies is controlling. *Id.*

To the undersigned's knowledge, there are only two places in the record referring to plaintiff's being awarded disability-related benefits. The first is her testimony at the hearing in which she revealed she received "short-term disability" benefits. (R. 32.) The other is a laconic note in a medical record indicating plaintiff's employer had "approved her for long-term disability." (R. 354.) Nowhere is there evidence concerning the standards plaintiff needed to meet to be qualified for receiving such benefits. Without such standards, evidence of the mere fact plaintiff was receiving some form of disability benefits is barely, if at all, relevant to a determination of whether plaintiff meets the standards set under the Social Security Act and the Commissioner's regulations. In other words, the Law Judge did not fail to give proper weight to the record evidence concerning plaintiff's eligibility for or receipt of disability benefits supposedly under her employer's benefits plan.

For all these reasons, 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 (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)(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