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

POLLY JO HURDLE SAYLOR,	)	CASE NO. 5:11CV00035
	)	
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 September 27, 2006 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 DENYING the Commissioner's motion for summary judgment, GRANTING plaintiff's motion for summary judgment in part, and REMANDING this case to the Commissioner for further proceedings.

In a decision dated June 2, 2009, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity from September 25, 2002, her alleged date of disability onset, through December 31, 2007, the date she was last insured ("DLI").[1] (R.

[1] In order to qualify for disability insurance benefits, plaintiff must establish that she became disabled prior to the expiration of her insured status, December 31, 2007. *See* 20 C.F.R.§ 404.131(a). The Law Judge did note plaintiff had testified that she last worked in September

14-16.) The Law Judge determined plaintiff's fibromyalgia and migraine headaches were severe impairments. (R. 16.) He also concluded that, through her date last insured, plaintiff did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (R. 20.) Further, the Law Judge found that plaintiff maintained the residual functional capacity ("RFC") to perform the full range of light work. (R.20-23.)[2]

The Law Judge relied on portions of the testimony of Bonnie Martindale, a vocational expert ("VE"), provided in response to questions premised on the Law Judge's RFC finding. (R. 42-44.) Based on this testimony, the Law Judge determined that plaintiff's RFC did not prevent her from performing her past relevant work as a park ranger, remittance clerk, sales representative, and administrative assistant, as the vocational expert classified these positions as light work. (R. 23-24.) Accordingly, the Law Judge found plaintiff was not disabled under the Act. (*Id.*)

Plaintiff appealed the Law Judge's June 2, 2009 decision to the Appeals Council. (R. 1-3.) While on administrative appeal, plaintiff submitted additional evidence. (R. 352-370.) The Appeals Council found no basis to review the Law Judge's decision and determined that the evidence submitted on administrative appeal "does not change the weight of the evidence of

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2005, three years after her alleged date of disability onset. However, the Law Judge concluded that there was insufficient evidence to establish that this work constituted sustained substantial gainful activity. (R. 16.)

[2] The Law Judge found that plaintiff's medical impairments reasonably could be expected to cause the alleged symptoms. However, the Law Judge found plaintiff's testimony about the intensity, persistence, and limiting effects of these symptoms to not be credible, partly as a result of what he found were inconsistencies between the testimony and the record that undermined plaintiff's credibility. (R. 21-22.) The Law Judge granted considerable weight to the medical opinions of the state agency physicians, which found plaintiff maintained the RFC necessary to perform a full range of light work. (R. 23.)

record." (R. 1-2.) The Appeals council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 1.)[3] 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, 1456 (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, 589-590 (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, 642 (4th Cir. 1966). Substantial evidence is defined as evidence, "which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Id.* at 642. When the Appeals Council considers additional evidence not submitted before the Law Judge and adds it to the record, reviewing courts must consider the record as a whole, including the new evidence, in determining whether the Law Judge's decision is supported by substantial evidence. *Wilkins v. Secretary*, 953 F.2d 93, 96 (4th Cir. 1991).

In her brief supporting her motion for summary judgment ("Plaintiff's Brief"), plaintiff asserts that both the Law Judge and the Appeals Council applied erroneous standards in finding her not disabled, and that the Commissioner's decision is not supported by substantial evidence. First, she argues that the Law Judge's RFC assessment is both erroneous as a matter of law and is

[3] The Appeals Council specifically reviewed the evidence submitted by Robert Gerwin, M.D., indicating that plaintiff had been capable of less than sedentary work since 2005. It was rejected on the basis that the doctor's treatment notes and observations were made at least six months after the DLI. (R. 1-2.)

not supported by substantial evidence. (Plaintiff's Brief, 6.) She claims the Law Judge did not perform a function-by-function assessment of her ability to perform the physical and mental demands of work, which she asserts is required under Social Security Ruling ("SSR") 96-8p. (*Id.* at 9-10.) Additionally, plaintiff asserts the Law Judge failed to set forth an explanation of how the evidence supported each conclusion and gave no rationale for rejecting other, more favorable evidence. *Id.*

Second, plaintiff contends that the Law Judge's finding that she was not credible was erroneous and not supported by substantial evidence. (*Id.* at 11.) Plaintiff claims that the analysis of her subjective complaints concerning the intensity and limiting effects of her pain seems to have rested solely on the Law Judge's erroneous belief that these complaints needed to be supported by objective evidence. (*Id.* at 12.) Further, plaintiff charges the Law Judge mischaracterized in various places both plaintiff's hearing testimony and the information set forth in certain function reports in determining that plaintiff was not credible. (*Id.* at 15-19.)

Third, plaintiff claims the Law Judge erroneously determined that plaintiff was capable of performing her past-relevant work. (*Id.* at 19.) Plaintiff contends the Law Judge made no findings of fact relating to the physical and mental demands of plaintiff's past occupations, other than to find that they were "light," and that he did not address whether the variable and chronic nature of plaintiff's impairments could affect her ability to perform either her past relevant work or any alternate gainful activity. (*Id.* at 19-21.)

Finally, plaintiff argues that the Appeals Council failed to discharge what she believes was its duty to review the additional evidence offered on administrative appeal. (*Id.* at 3.) Plaintiff asserts the Appeals Council actually considered the evidence but erroneously rejected Dr. Gerwin's views concerning the limitations caused by plaintiff's maladies solely because the

evidence post-dated plaintiff's DLI without considering whether those limitations could be related back to the period under consideration in light of all the other evidence in the record. (*Id.* at 4-6.)

On the other hand, the Commissioner argues that the Law Judge's decision is supported by substantial evidence, and that the Council's decision denying review provides no basis for remand. The Commissioner offers four reasons for these positions. First, he contends that plaintiff's treatment was relatively limited and conservative, and there was no follow up with her primary doctor after June 2007 or ongoing treatment from a specialist. (Commissioner's Brief, 9-10.) Second, the Commissioner asserts that the Law Judge's RFC finding is supported by record evidence revealing rather benign physical examination findings and by a lack of objective findings of significant abnormality. (*Id.* at 10.) Third, the Commissioner points out that there were four state agency review opinions which supported the Law Judge's RFC assessment and that these opinions were consistent with and supported by evidence in the record as a whole. (*Id.* at 11.) Finally, the Commissioner notes that that the inconsistencies between the medical evidence and plaintiff's complaints of disabling pain and resulting limitations justified the Law Judge's decision to find plaintiff's testimony of disabling symptoms not to be credible. (*Id.* at 12-13.)

The Commissioner also argues that plaintiff's additional evidence submitted to the Appeals Council does not warrant remand. He believes that the additional evidence would not have affected the Law Judge's decision, since Dr. Gerwin's 2009 assessment of plaintiff's inability to work does not relate back to the period between September 25, 2002 through December 31, 2007, when she was last insured. (*Id.* at 16-17.) From these arguments, the Commissioner concludes that there is ample evidentiary support for the Law Judge's conclusions, and, accordingly, the Law Judge's decision should be upheld.

Plaintiff's credibility is essential to the determination of her RFC and, ultimately, the outcome of this case. In determining a claimant's RFC, a Law Judge must follow a two stop process. *Hines v. Barnhart*, 453 F.3d 559, 564-565 (4th Cir. 2006). First, the Law Judge must determine whether there is an underlying medically determinable physical or mental impairment which can be shown by medically acceptable techniques and that could reasonably be expected to produce the claimant's pain or other symptoms. *Id.* Once the impairment has been shown, the Law Judge must evaluate the intensity, persistence, and limiting effects of the claimant's symptoms to determine the extent to which they limit the claimant's ability to work. *Id.* Notably, when plaintiff's statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the Law Judge must make a finding on the credibility of the statements based on a consideration of the entire record. *Id.*; (R. 21.) The Fourth Circuit makes clear that because pain can be difficult to show with objective evidence, the absence of objective medical evidence of the intensity, severity, degree, or functional effect of pain is not determinative. *Hines v. Barnhart*, 453 F.3d 559, 564-565 (4th Cir. 2006).

Certainly, a determination of plaintiff's credibility is key here in light of the nature of her impairments, the causes of which often are not demonstrated in objective ways. Therefore, it is not surprising that the bulk of the Law Judge's RFC assessment is dedicated to making a credibility determination. (R. 20-23.) The Law Judge ultimately determined that plaintiff's statements concerning the intensity, persistence, and limiting effects of her symptoms were not credible, leading him to conclude that plaintiff maintained the RFC to perform a full range of light work. The Law Judge found that there were numerous inconsistencies between plaintiff's testimony, on the one hand, and, on the other, the balance of the medical record. (R. 21-23.)

However, as plaintiff correctly points out, many of these so called inconsistencies appear to spring from the Law Judge's mischaracterizations of the evidence. For example, the Law Judge found it inconsistent for plaintiff to testify that she was unable to drive because of her symptoms when he believed the evidence to show that she had driven to the grocery store many times and enjoyed taking a Sunday drive. (R. 21-22.) However, plaintiff testified that she could not drive only while experiencing migraines, and never claimed she was always unable to drive. (R. 31, 104, 133.) Further, plaintiff testified that her husband took her on Sunday drives, and that she had difficulties in going to the grocery store. (R. 34, 37-38.)

The Law Judge also found it inconsistent that plaintiff testified on the one hand that she cannot watch television, and yet, on the other, that she had indicated in a function report that she enjoyed reading and watching television. (R. 22.) The record actually indicates that plaintiff testified she could not watch TV only while "crashing" from a migraine. (R. 31.) Plaintiff similarly indicated in a function report that her ability to engage in hobbies like reading is controlled by whether she was suffering migraines or from fibromyalgia at the time, and that reading was possible but not easy. (R. 105, 134.)

The Law Judge's additional assessment of plaintiff's physical abilities was clouded by his observation that plaintiff was able to sit for several hours before and during the hearing. (R. 22.) The courts historically have frowned on such "sit and squirm" decision making. *See Shively v. Heckler*, 739 F.2d 987, 992 (4th Cir. 1984); *Jenkins v. Sullivan*, 906 F.2d 107, 108 (4th Cir. 1990). Moreover, he believed that plaintiff's ability to walk a mile, when coupled with the absence of objective findings of physical abnormalities in her extremities belied her assertions of functional limitations. (R. 22.) However, plaintiff made very clear that her abilities to sit, walk, stand, and engage in other physical activities only were limited while suffering the effects of her

impairments, and she never denied that she could perform certain listed activities a few days of the month when not suffering those effects. (R. 38-40, 106 and 135.)

In summary, the Law Judge believed that plaintiff's claims of a limited range of daily activities were inconsistent with testimony and evidence that she performed chores around the house, cooked meals, walked her dogs, went shopping and to massage therapy, went out to dinner twice a week, and visited her mother three to four times a week. (R. 21-22.) As a result, he concluded these daily activities, "demonstrate the capacity for work at least at the light level of exertion." (R. 22.) However, this finding ignored plaintiff's un-rebutted testimony that her ability to engage in any of these activities was controlled by the varied daily severity of her symptoms. Plaintiff testified that on many days she was somewhat functional, but, as an example, doing housework occurred only on her rare "good days." (R. 33-34.) The evidence also demonstrated that, in actuality, there are no routine daily activities, and that she actually would not dress, bath, or eat when suffering a "flare-up" or "crash" on the four or five "really, really bad days" each month. (R. 33, 102, 131.) Plaintiff testified that she was able to walk her dogs only on her average days, and then only for ten minutes. (R. 34, 38.) While plaintiff indicated in her function reports that she enjoyed going out to dinner with family, she was able to do so only up to twice per week and lately had to miss many family engagements. (R. 105, 134.) She also revealed that she **talked** to her mother three to four times a week, rather than driving over to visit her as the Law Judge reported. (R. 105.) Because the Law Judge mischaracterized much of plaintiff's testimony as well as what she revealed in the function reports, the undersigned cannot say that his decision to discredit plaintiff is supported by substantial evidence.

The undersigned acknowledges that there are inconsistencies in the record of plaintiff's medical treatment. For example, there is a gap of one year in her medical treatment, and there is

some uncertainty over when plaintiff stopped working.[4] However, the many errors in the Law Judge's analysis of plaintiff's statements undermine the whole of the credibility assessment and necessitate remand for further review.[5]

For all these reasons, it is RECOMMENDED that an Order enter DENYING the Commissioner's motion for summary judgment, GRANTING plaintiff's motion for summary judgment in part, and REMANDING this case to the Commissioner for further proceedings.

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 (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.

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[4] Despite alleging that she has been unable to work since September 2002, plaintiff testified at the hearing that she had been working regularly until September 2005. (R. 22, 28, 81-83.) This inconsistency could undermine plaintiff's credibility and support the Law Judge's RFC finding, but based on the fact that plaintiff testified her last job was as a park ranger (R. 28.), a job that the record indicates she stopped performing in September 2002 (R. 94, 111), and evidence of problems with memory, it appears quite likely she was mistaken rather than dishonest.

[5] Additionally, as the Appeals Court accepted the medical opinion of Dr. Gerwin into the record, plaintiff should be given the opportunity to present evidence before the Law Judge that Dr. Gerwin's findings, though a result of examinations occurring after the end of the insurance period, do apply to the relevant time period of her claim and encourage a reweighing of the evidence.

ENTERED: _____
U.S. Magistrate Judge

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Date