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

KAYLA M. RACEY,	)	CASE NO. 5:12CV00036
	)	
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 found that plaintiff was not eligible to receive supplemental security income as of September 1, 2009 under the Social Security Act ("Act"), as amended, 42 U.S.C.§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 Commissioner's motion for summary judgment, DENYING plaintiff's motion for summary judgment, AFFIRMING the Commissioner's final decision, and DISMISSING this action from the docket of the court.

Plaintiff is a twenty-two year old woman. (R. 14, 66.) On December 18, 2006, she was found disabled beginning on January 1, 2004 and entitled to child supplemental security income

benefits.[1] (R. 70.) Plaintiff attained the age of 18 on October 23, 2008, and, as is required by law, her eligibility for disability benefits was re-determined.[2] (R. 12, 14.) On September 3, 2009, it was determined that plaintiff no longer was disabled as of September 1, 2009, and her benefits were terminated effective November 1, 2009. (R. 12.) The determination was upheld on reconsideration, and, on March 5, 2010, plaintiff filed a written request for a rehearing. (R. 12.)

In a decision dated January 28, 2011, an Administrative Law Judge ("Law Judge") determined plaintiff's organic mental disorder, learning disorder, and affective mood disorder were severe impairments.[3] [4] (R. 14.) He also concluded that, since September 1, 2009, plaintiff did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (R. 14-15.) Furthermore, the Law Judge found that, since September 1, 2009, plaintiff possessed the residual functional capacity ("RFC") to perform a full range of work at all exertional levels, with the non-exertional limitations that she requires short, simple instructions and jobs that do not require maintaining attention and concentration for extended periods.[5] (R. 15-18.)

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[1] Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C.§1382c(a)(3)(A).

[2] *See* 20 C.F.R.§416.987.

[3] A severe impairment is any impairment or combination of impairments which significantly limits a claimant's physical or mental ability to do basic work activities. See 20 C.F.R.§404.1520(c).

[4] The five step sequential evaluation of eligibility for adult disability benefits normally requires the Law Judge to determine whether the claimant has engaged in substantial gainful activity since their disability onset date. 20 C.F.R.§416.920. However, in matters of redetermination of eligibility for individuals who attain age 18, this step is not required. 20 C.F.R.§416.987(b). These disability redeterminations do not employ the eight step medical improvement standard. *Id.*

[5] *See* 20 C.F.R.§404.1567.

The Law Judge further relied on portions of the testimony of Asheley Wells, a vocational expert ("VE"), which was in response to questions premised on the Law Judge's RFC finding. (R. 19, 54-59.) The Law Judge found that plaintiff had no past relevant work. (R. 18.) Again, relying on evidence adduced from the VE, he determined that jobs existed in significant numbers in the local and national economy which a person of plaintiff's limitations could perform, including as a laundry folder, housekeeper, and merchandise marker. (R. 19.) Accordingly, the Law Judge found that plaintiff was not disabled.

Plaintiff appealed the Law Judge's January 28, 2011 decision to the Appeals Council. (R. 1-8.) In its February 28, 2012 notice, the Appeals Council found no basis to review the Law Judge's decision, denied review, and adopted the Law Judge's decision as the final decision of the Commissioner. (R. 1-3.) This action ensued, cross motions for summary judgment were filed together with supporting briefs, and oral argument was held by telephone before the undersigned on January 7, 2013.

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 preponderance." *Id.* at 642. When the Appeals Council considers additional evidence offered for the first time on administrative appeal and denies review, 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. *Meyers v. Astrue*, 662 F.3d 700, 707 (4th Cir. 2011); *Wilkins v. Secretary*, 953 F.2d 93, 96 (4th Cir. 1991).

Plaintiff challenges the final decision on several grounds. First, she argues that the Law Judge erred by considering her work with Ride with Pride, Inc. and People Places, Inc., as evidence that she was capable of performing similar tasks in an occupational setting. (Dkt. No. 14, at 4-5.) Second, plaintiff contends that the Law Judge erred in declaring that Sally Skeeters Koch, Ed.S.,[6] plaintiff's therapist, was not an acceptable medical source and by giving no significant weight to either her opinion or that of Gerald R. Showalter, Psy.D., a consultative examiner. *Id.* at 4, 6-7. Finally, plaintiff argues that the Law Judge abused his discretion in conditioning his credibility finding on the extent to which plaintiff's allegations were consistent with his RFC assessment. *Id.* at 4, 7-9.

As to plaintiff's first argument, the undersigned observes that the Law Judge did not find that plaintiff's work and volunteer history rose to the level of substantial gainful activity.[7] However, he did consider plaintiff's work-related history as evidence that plaintiff was not as limited as she alleged. Specifically, he found that plaintiff was "doing some part time work involving tutoring children with disabilities" and that "[d]espite her difficulties she was able to work with disabled children and was paid for her work with other students." (R. 16.) The Law

[6] The Law Judge refers to Ms. Koch as "Sally Skeeters" throughout his decision. (R. 18.) For the sake of consistency, she will be referred to as "Skeeters."

[7] Plaintiff's testimony reveals they she made no more than around $500 a month working for Ride with Pride, People Places, and Happy Tails. (R. 42-44; *See also* R. 171-174.) These earnings are well below the level of substantial gainful activity, which is around $1000. *See* U.S. Social Security Administration. Substantial Gainful Activity. http://www.ssa.gov/oact/cola/sga.html. Last updated October 16, 2012.

Judge further noted that plaintiff worked part time at an animal boarding facility and volunteered at a facility for therapeutic horseback riding. (R. 17.)

At the hearing, Donna Cason, a family consultant at People Places, Inc., plaintiff's therapeutic foster care program, testified that plaintiff's work with Ride With Pride was "100 percent therapeutic" even though she was paid for her work. (R. 48.) Cason also testified that plaintiff's work at People Places, though paid, was under the auspices of her therapeutic foster care program and treatment plan, pointing out that all those who attend "groups" are paid, rather than just helpers. (R. 49-50.)

It is true that the Law Judge never referred to either position as being therapeutic or part of any treatment plan.[8] However, a Law Judge must consider all relevant evidence concerning a claimant's ability to work, including plaintiff's work and daily activities, medical history, testimony, etc. *See DeLoatche v. Heckler*, 715 F.2d 148, 150 (4th Cir. 1983); *Dyer v. Barnhart*, 395 F.3d 1206, 1211 (11th Cir. 2005); SSR 96-7p (July 2, 1996). In particular, the work-related activities that a claimant performs during the alleged period of disability may be considered as evidence of a claimant's ability to work at the substantial gainful activity level, even if the work-related activity actually performed does not rise to that level. *See* 20 C.F.R.§404.1571. In these contexts, the Law Judge must take into account the nature of the work, how well it was performed, and whether the work was done under any special conditions. *See* 20 C.F.R.§ 404.1573.

Donna Cason's undisputed testimony indicated that plaintiff's work-related activities were intended to be therapeutic and primarily were undertaken on a supervised volunteer basis. However, it is the nature of the work and how plaintiff performed it that are relevant factors

[8] As said, the Law Judge does discuss plaintiff's work as a volunteer at "a facility for therapeutic horseback riding," quoting the consultative opinion of Joseph Cianciolo, Ph.D. (R. 17.) However, the Law Judge did not mention that plaintiff's work was itself intended as therapy.

rather than just the therapeutic nature of plaintiff's foster program. Here, the record demonstrates that plaintiff possessed an ability to generally perform work and school activities in a regular, reliable, and responsible manner. (R. 552, 559, 565.) None of these jobs rose to the level of substantial gainful activity and were not performed on a "regular and continuing basis,"[9] but plaintiff was able to keep to a schedule and manage the responsibility of several different jobs and her classes in both high school and now community college. (R. 37-38, 346.) Cason's records and plaintiff's testimony indicate that she worked several hours a day several days a week at her volunteer and part time positions. (R. 35-44, 559.) Cason wrote that plaintiff "has demonstrated responsibility in keeping up with her schedule and is independent in getting to work/school." (R. 559.) At "Ride With Pride," plaintiff was described as "reliable and responsible," with improving work skills and ethics and varied barn work duties. (R. 565.) In summary, the Law Judge did not specifically acknowledge that the plaintiff's work with Ride with Pride, Inc. and People Places, Inc. was therapeutic in nature, but he was entitled to consider this evidence in evaluating plaintiff's RFC and ability to work, especially to the extent it demonstrated plaintiff's increased ability to function independently and perform regular tasks in a work environment.

Moreover, the Law Judge did not rely solely on plaintiff's therapeutic work experience. He considered the objective medical evidence, the opinion evidence, the hearing testimony, plaintiff's educational level including her special education high school diploma and her attendance in community college courses, as well as plaintiff's "straight up work experience" as a kennel attendant 2-3 hours a day 3-4 days a week. (R. 16-18, 50, 559.) There is substantial evidence to support the Law Judge's finding that plaintiff had improved, and that she had developed work skills and coping mechanisms sufficient to allow her to function effectively, though with some limitations, in a competitive work environment.

[9] SSR 96-8p (July 2, 1996).

Plaintiff also challenges the weight the Law Judge assigned to certain opinion evidence of record, and this challenge presents a close question to consider. In particular, the Law Judge declined to give significant weight to the opinions of Sally Skeeters Koch ("Skeeters"), plaintiff's therapist, and Gerald Showalter, Psy.D, a consultative examiner, finding that neither was consistent with the overall objective evidence. (R. 18.) The Law Judge found that plaintiff generally functioned well socially, was able to do her school work, maintain employment, do volunteer work, that her depression and anxiety symptoms had mostly disappeared, and that she was able to maintain a stable mood without medication. (R. 18.) He also pointed out that there had been no previous diagnosis of post-traumatic stress disorder ("PTSD") before Skeeters so opined, and, under the regulations, Skeeters was not an acceptable medical source. Accordingly, the Law Judge declined to accept her opinion that plaintiff suffered PTSD for diagnostic purposes without a diagnosis from an acceptable source. (R. 18.) The Law Judge acknowledged that Dr. Showalter also had included in his report a diagnosis of PTSD with significant limitations, but he found that the objective evidence demonstrated that plaintiff's condition and improved, and that she was able to function from a mental health standpoint. (R. 18.)

The record shows that Skeeters not only opined that plaintiff suffered from PTSD, but that she continued to require high levels of support and intervention. (R. 541.) She described plaintiff as continuing to have anxiety and increased emotional arousal, as well as being easily startled and frightened. (R. 541.) Skeeters acknowledged that plaintiff's symptoms come and go, and that she has made progress in her treatment. *Id.* However, she offered that plaintiff's symptoms impair her in relationships and, thereby, in her job performance; and that PTSD places plaintiff at higher risk for other mental health problems, such as depression, drug abuse, and suicidal ideation. (R. 541-542.)

Under the regulations, Skeeters, as plaintiff's therapist, would not be considered an acceptable medical source. 20 C.F.R. 404.1513(a), (d); *Craig v. Chater*, 76 F.3d 585, 590 (4th Cir. 1996). Thus, without more, her evidence could not be considered in determining whether plaintiff suffered a medically determinable impairment. By the same token, evidence from such a source may be considered in determining the severity of any impairment, and how the impairment may affect the claimant's ability to work. 20 C.F.R. 404.1513(a), (d).

On the other hand, Dr. Showalter, a licensed clinical psychologist, does qualify as an acceptable medical source under the regulations, and his opinion may be relied upon in determining whether plaintiff suffers a medically determinable impairment such as PTSD. (R. 607.); 20 C.F.R. 404.1513(a)(2). Dr. Showalter does not appear to offer his own independent diagnosis of PTSD, only one by history. (R. 609.) However, he does opine that plaintiff had been "appropriately" diagnosed with and treated for PTSD which the record showed was the result of "significant abuse during her childhood."[10] (R. 609-610.) He further opined that plaintiff's learning difficulties and problematic personality characteristics, including vulnerability to stress reactions as a result of her past trauma, "may comprise the greatest challenged to her current pursuit of goals with regard to training, employment and independent living." *Id.*

Together these two opinions offer some, though not dispositive, support for a diagnosis of PTSD.[11] However, the Law Judge properly observed that the record medical evidence concerning plaintiff's mental health is, itself, inconsistent. Despite Skeeters' and Showalter's opinions that plaintiff suffers from PTSD and thereby is significantly impaired, other evidence,

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[10] It appears that Dr. Showalter was not sure of the source of the previous diagnosis, suggesting that it came from Tina Judge, FNP, and was confirmed by Skeeters. (R. 608.) No diagnosis of PTSD is found in Ms. Judge's treatment notes of record. (R. 380-398.)

[11] Donna Cason, plaintiff's foster care worker, also testified that plaintiff had significant emotional and behavioral impairments that would limit her ability to function in a competitive work setting. (R. 50-54.)

including some of Skeeters' treatment notes, leaves the diagnosis, and the degree of plaintiff's mental impairment, in question. As the Law Judge found, only Skeeters and Showalter reference PTSD in their opinions, and no other medical evidence refers to it.[12] Moreover, plaintiff's mental health examinations generally have revealed normal functioning. For example, records from Comprehensive Behavioral Health note that her mood was "mostly good," that she had no anxiety or irritability, no suicidal ideation, that her mood did not decline when her depression medication was reduced, and that she preferred to no longer take the medication. (R. 380-397.) In February and April 2009, Blue Ridge Pediatrics noted that plaintiff was doing well off antidepressants and was not presenting with depression or any other psychiatric symptoms. (R. 403-406.) In a May 2009 psychological evaluation, Robin Hawks, LPC, observed that plaintiff was free of psychological stress and revealed that her test results indicated that her depression, anxiety, impulse control, and self-esteem were all within normal range.[13] (R. 417.)

Likewise, the records from the Woodrow Wilson Rehabilitation Center noted that plaintiff got along well with others, worked well with her peers, and had "very positive work behaviors." (R. 450-453.) Woodrow Wilson also reported that plaintiff performed very well on the Independent Living Skills Assessment. (R. 463, 473-477.) In his August 2009 opinion, Joseph J. Cianciolo, Ph.D., opined that plaintiff's depressive disorder was mild, that plaintiff was mildly impaired in managing stress and interacting with coworkers, had a current and past year Global Assessment of Functioning Score of 75, indicating no more that a slight impairment and

[12] Donna Cason's February 19, 2010 Progress Report refers to Skeeters' diagnosis, but Cason offers no personal opinion on it. Furthermore, Skeeters never referred to PTSD in any of her counseling notes. (R. 587-605.)

[13] Hawks admits, however, that "these tests do not measure characterological or Axis II personality traits that may be present." (R. 417.) She also noted that plaintiff had a very low frustration tolerance during testing. (R. 417.)

transient symptoms;[14] and that she could perform simple and repetitive tasks, follow instruction, and complete a normal work day and workweek with few limitations.[15] (R. 514-516.) Moreover, plaintiff successfully worked and volunteered on a regular basis, and her treatment notes document continued improvement in working with others and managing tasks. (R. 549-566, 587-605.)

The Law Judge is charged with resolving inconsistencies in the record and assessing the weight of the evidence, and his findings are to be affirmed if they are supported by substantial evidence. *Craig v. Chater*, 76 F.3d 585, 589-590 (4th Cir. 1996). The undersigned very well may have given more weight to the evidence of plaintiff's therapist and the consultative examiner. However, on judicial review, the undersigned finds that there is substantial evidence supporting the Law Judge's determination that plaintiff was not as limited as they opined.

Finally, plaintiff argues that the Law Judge's credibility finding is not supported by substantial evidence and fails to comply with the regulations. Plaintiff argues that the finding that "the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment,"[16] represents meaningless boilerplate language. (Dkt. No. 14, at 8.) Accordingly, she asserts that the finding fails to explain why plaintiff's testimony was found not credible and, thereby, denies plaintiff a full and fair review of her claim. (Dkt. No. 14, at 8.).

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[14] The GAF is a numeric scale ranging from zero to one hundred used to rate social, occupational and psychological functioning "on a hypothetical continuum of mental health-illness." American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 32 (4th ed. 1994) (DSM-IV). A GAF score of 71 to 80 indicates that if symptoms are present, they are transient and expectable reactions to psychosocial stressors, with no more than slight impairment in social, occupational, or school functioning. *Id.* at 47.

[15] Dr. Cianciolo does opine, "It is likely that [plaintiff] would require additional supervision." (R. 516.) Notably, the Law Judge did not specifically address this limitation in his RFC finding or his analysis of Dr. Cianciolo's opinion. (R. 15-18.)

[16] (R. 16.)

Plaintiff cites relevant case law in support of her argument. *See Duff v. Astrue*, 5:11cv00103, Dkt. No. 18 (W.D.Va. November 30, 2012) (adopted January 31, 2013); *Bjornson v. Astrue*, 671 F.3d 640 (7th Cir. 2012) (Judge Posner). The undersigned agrees with plaintiff and Judges Welsh and Posner that the boilerplate template used by the Social Security Administration reveals little about how the Law Judge considered and evaluated plaintiff's testimony. However, it is clear that in the pages that follow the boilerplate language in this case, the Law Judge considered the evidence of record and provided sufficient support for both his RFC finding and his determination of plaintiff's credibility regarding the limiting effects of her condition. (R. 16-19.) He specifically compared plaintiff's alleged symptoms to the results of her mental health assessments and treatment records and discussed the relatively normal findings, minimal treatment, very high GAF scores, daily activities, and all the evidence from treating and consultative sources. (R. 16-18.) Accordingly, while the Law Judge employed "meaningless boilerplate" language in his decision, the substance of the decision nevertheless substantially supports his credibility finding.[17] *See Webb v. Astrue*, No. 2:11CV00103, 2012 WL 3061522, at *16-17 (N.D.W.Va. July 26, 2012) (a credibility determination that uses template or boilerplate language is supported by substantial evidence if the Law Judge discusses the evidence and the substance of the decision itself supports the determination); *See also Smith v. Astrue*, No. 2:11CV00032, 2011 WL7768882, at *8 (N.D.W.Va. August 31, 2011).

For all these reasons, it is RECOMMENDED that an Order enter GRANTING the Commissioner's motion for summary judgment, DENYING plaintiff's motion for summary

[17] However, this is not to say that Law Judges would be unwise to refer back to their credibility finding in their summation of the evidence of record. Doing such would greatly aid in review and avoid increasingly common arguments regarding the adequacy of these credibility determinations.

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 (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: s/ B. Waugh Crigler
U.S. Magistrate Judge

February 13, 2013
Date