

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

CARYN L. JONES,)	CASE NO. 5:12CV00072
)	
Plaintiff,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
CAROLYN W. COLVIN,)	
Acting 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 December 8, 2008 protectively-filed applications for a period of disability and disability insurance benefits 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 the case 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 the plaintiff's motion for summary judgment, ENTERING judgment in favor of the plaintiff, and RECOMMITTING this case to the Commissioner to calculate and pay proper benefits.

In a decision dated January 26, 2011, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since May 2, 2007, her alleged date

of disability onset.¹ (R. 14.) The Law Judge determined plaintiff's panic disorder with agoraphobia and bipolar disorder were severe impairments. (R. 14.) He also concluded that, through the date of the hearing, plaintiff did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (R. 14.) Further, the Law Judge found that plaintiff possessed the residual functional capacity ("RFC") to perform the full range of work with some non-exertional limitations. (R. 16.)

The Law Judge relied on portions of the testimony of Robert Jackson, a vocational expert ("VE"), which was in response to questions premised on the Law Judge's RFC finding. (R. 22-23, 49-51.) Based on this testimony, the Law Judge determined that plaintiff was able to perform her past relevant work as a packer, and could also perform other jobs existing in the national economy such as a cleaner or mail clerk. (R. 22-23, 50-51.) The Law Judge found plaintiff not disabled under the Act.

Plaintiff appealed the Law Judge's January 26, 2011 decision to the Appeals Council. (R. 1-11.) In its May 31, 2012 decision, the Appeals Council found no basis to review the Law Judge's decision. (R. 1-2.) The Appeals Council denied review and adopted the Law Judge's decision as the final decision of the Commissioner. *Id.* This action ensued and briefs were filed.

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

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). In order to qualify for a period of disability and disability insurance benefits, plaintiff must establish that she became disabled prior to the expiration of her insured status, which was March 31, 2011. *See* 20 C.F.R. § 404.131(a); (R. 14.)

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 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.

Plaintiff seeks reversal or remand on three grounds. First, she asserts that the Commissioner failed to discharge her burden at the final level of the sequential evaluation. Second, she believes that the Law Judge improperly construed the findings of and failed to give proper weight to the findings of Dr. Worth. Finally, plaintiff alleges that the Law Judge improperly assessed her credibility.

Plaintiff alleged onset date of disability is May 2, 2007, when she suffered a panic attack at work. Plaintiff had been previously treated for a mental disorder from 2003-2004, but she chose to discontinue treatment because her medications made her "'a walking zombie,' and she was unable to remember 'big chunks of time.'" (R. 236.) Plaintiff's first medical record is from her consultative examination (CE) with Dr. James Worth on July 25, 2009. (R. 231.) Dr. Worth diagnosed plaintiff with bipolar I disorder, most recent episode manic, severe without psychotic features, and with panic disorder with agoraphobia. (R. 240.) Dr. Worth estimated plaintiff to have a GAF of 51. He opined that "[w]ith medication, her prospects brighten both for controlling bipolar symptomatology and alleviating anxiety." (*Id.*) He further stated that plaintiff's agoraphobia would "interfere with her ability to complete an ordinary workday or workweek, perform her duties consistently or maintain regular work attendance." (R. 240.) Dr.

Worth believed antianxiety medication might be able to control plaintiff's panic disorder, but stated that she was particularly vulnerable where there were many coworkers or interaction with the public. (R. 240-241.)

Plaintiff began treatment with Rockbridge Area Community Services Board on September 22, 2009. (R. 243.) She was diagnosed there with panic disorder with agoraphobia, bipolar disorder, and posttraumatic stress disorder, and had a GAF of 40. Plaintiff had therapy sessions with Susan Hayes, M.A. Ed., on October 15, 2009 and November 4, 2009, who noted that she was able to drive to the office and fly on a plane, but that she was struggling with leaving her house. (R. 249-250.) On November 5, 2009, plaintiff was treated by Philip Hirsh, M.D. (R. 246.) Dr. Hirsh estimated plaintiff's GAF at 54. (R. 247.) He opined that she suffered a bipolar disorder and agoraphobia, and that it was more important to treat her mood disorder because she would not do well in therapy unless her moods were stabilized, and because her anxiety was triggered rather than spontaneous. (R. 248.) Dr. Hirsh initially prescribed Abilify to treat plaintiff's bipolar disorder, but switched plaintiff to Lamictal because she developed side effects. (R. 253.) When plaintiff returned to see Susan Hayes on December 28, 2009, her mood was considerably improved, and she intended to practice driving a vehicle with her husband in the car. (R. 254.)

On January 8, 2010, Dr. Hirsh reported that plaintiff was pleased with the Lamictal, but that she still had ongoing symptoms and her current GAF was 56. (R. 253.) Dr. Hirsh anticipated that plaintiff's dosage would be increased in two weeks, but when plaintiff returned on January 27, 2010, she did not want to increase her dosage. (R. 264.) Plaintiff also reported that, due to financial difficulties, she was unable to continue therapy at that time. (*Id.*) On March 10, 2010, plaintiff was treated by Dr. Philip Halapin, who noted that she had a long history of bipolar

disorder and significant agoraphobia, but was only on Lamictal monotherapy. (R. 263.) Dr. Halapin opined that plaintiff had a GAF of 60, which was the same as the highest in the past year, and stated that plaintiff did not want to increase her dosage. (*Id.*) On March 15, 2010 and April 7, 2010, plaintiff again saw Susan Hayes, who stated that plaintiff was doing much better and was markedly improved from when plaintiff began treatment. (R. 261-262.) On June 9, 2010, Dr. Halapin renewed plaintiff's prescription and stated that she would return to see him in three months. (R. 260.)

On July 7, 2010, plaintiff began therapy with Stephanie RiCharde, M.A. as her previous therapist had left Rockbridge Area Community Services. (R. 259.) Plaintiff reported that she was having difficulty with her living situation because her son and two step-sons had been staying with her. (R. 259.) On July 23, 2010, plaintiff stated that she was doing better since her step-sons had left, but that she had problems with leaving the house. (R. 258.) On September 24, 2010, plaintiff discussed her depressive symptoms related to her Bipolar Disorder. (R. 257.) On November 2, 2010, plaintiff reported that her social phobia had not improved, stating that she had attempted to go to WalMart and had to leave her cart. (R. 266.) During the hearing on December 8, 2010, plaintiff indicated that her medication was no longer effective, but that her psychiatrist had been out of the office for the last four months. (R. 42-43.) A letter from Rockbridge Area Community Services dated January 6, 2011 confirmed that Dr. Halapin was out of the office on extended medical leave. (R. 268.)

Plaintiff first contends that the Law Judge erred in not considering all of the limitations which Dr. Worth set out in his report. Interestingly, the Law Judge found that Dr. Worth's opinion was entitled to considerable weight. (R. 22.) Dr. Worth opined that plaintiff's panic disorder would interfere with her ability to complete an ordinary workday or workweek, perform

duties consistently, or maintain regular work attendance. (R. 240.) He also stated that plaintiff would be particularly vulnerable where there are many coworkers or she must interact with the public, and observed that plaintiff's mood is stable in her current low-stress environment but that competitive work could provoke a depressive reaction. (R. 240-241.) In response to the Law Judge's hypothetical, the VE testified that there would be jobs available for someone who could tolerate only occasional or superficial interaction with the public. (R. 50.) However, the VE testified that there would be no jobs available for someone with more than four absences per month, or for someone who was unable to do simple, routine, rote tasks on a regular basis for eight hours a day on a forty-hour work week. (R. 51.) It is noteworthy that none of the Law Judge's hypotheticals probed whether jobs would be available to someone who could not tolerate having many coworkers.

The Law Judge also stated that "[Dr. Worth] indicated the claimant's panic disorder with agoraphobia would interfere with her ability to complete an ordinary workday or workweek, to perform her duties consistently, or to maintain regular work attendance. He did not indicate, however, to what extent the claimant's symptoms would interfere with these abilities." (R. 21.) Dr. Worth clearly noted in his report that plaintiff suffered at least one panic attack each week, even when avoiding crowded places, and that she experiences several panic attacks per month. (R. 238-239.) While Dr. Worth considered it possible that antianxiety medication could control her symptoms, the record shows that plaintiff's treating psychiatrists have made the medical decision not to prescribe anti-anxiety medication due to plaintiff's agoraphobia. (R. 240, 248.)

The Law Judge further relied on the fact that "none of the claimant's doctors or counselors has placed limitations on the claimant or stated the she is unable to work." (R. 21.) As the court knows, had any of plaintiff's treating medical professionals explicitly opined that

plaintiff was disabled, the Law Judge likely would have dismissed such opinions on the basis that the issue is reserved to the Commissioner. Furthermore, none of plaintiff's treating psychiatrists were available to provide a report of plaintiff's functional limitations. Dr. Hirsh, who diagnosed plaintiff with agoraphobia and estimated her GAF at 54 and 56, left Rockbridge Community Services in early 2010. (R. 247, 253.) Dr. Halapin, who reiterated that plaintiff "still has significant agoraphobia", has been on extended medical leave. (R. 263, 268.) Plaintiff's first therapist, Susan Hayes, also had left Rockbridge Community Services. Plaintiff's current therapist, Stephanie RiCharde, refused to fill out a form specifying plaintiff's limitations. (R. 52.) As the goal of her mental health treatment is to help plaintiff overcome her current limitations, it is not surprising that plaintiff's mental health professionals did not place any restrictions on plaintiff beyond those she self-imposed. It is clear, on the other hand, that all of plaintiff's doctors agree she suffers agoraphobia, which, by its nature, presents its own set of vocationally-related limitations. (R. 240, 247, 263.) While there may be some debate as to whether plaintiff could benefit from medication, it is also true that plaintiff was not prescribed any medication to treat her agoraphobia.

Given the agreement of all of plaintiff's physicians regarding her diagnoses, the undersigned cannot discern any basis for the Law Judge's decision to ignore the limitations which Dr. Worth placed on the plaintiff. The Law Judge is correct that a "statement that the claimant's symptoms would interfere with her ability to work does not mean that they would preclude work." (R. 22.) However, the VE testified that these particular limitations, in fact, would preclude all work. (R. 51.) The Law Judge may have believed that Dr. Worth should have used a greater degree of specificity in stating the level of plaintiff's limitations. Yet, in response to the Law Judge's hypothetical using Dr. Worth's language, the VE testified that the plaintiff

would be unable to work, clearly finding no ambiguity in the vocational record. Furthermore, the Law Judge's question regarding four unexcused or unscheduled absences per month seems to be drawn from Dr. Worth's report indicating that plaintiff had at least one panic attack each week. This limitation alone would disable the plaintiff from all work according to the VE. (R. 51.)

The Law Judge also relied on plaintiff's activities of daily living in determining that her impairments did not preclude her from working. The Law Judge stated that "the claimant has reported tending to her personal care needs, caring for pets, cooking, cleaning, doing yard work, caring for her son and stepchildren, doing laundry, washing dishes, doing household repairs, going for walks, driving, shopping, reading, gardening, quilting, playing computer games, sewing, talking on the telephone, watching television, traveling, going out to eat, attending her son's football games, going sightseeing, and going to movies. (R. 20-21.) It is unclear to the undersigned how the majority of these activities even relate to plaintiff's main complaint of disabling agoraphobia. By its very nature, her malady does not interfere with activities performed when plaintiff is alone. With respect to those activities that occur outside the home, plaintiff testified that she goes to her son's football games once per year and may go to a movie once or twice a year.² (R. 39.) She further testified that though she travels with her husband, there are times when she has attempted to go shopping or eat in a restaurant and has had to leave due to anxiety. (R. 39-40.) None of these activities of daily living support the Law Judge's conclusion that plaintiff is able to leave her home, unaccompanied, on a regular basis and perform work-related duties.

² Dr. Hirsh reported that plaintiff's reason for seeking treatment was that she was unable to go to her son's football games or his other activities. (R. 246.)

Finally, the Law Judge relied on plaintiff's failure to seek treatment in assessing the severity of her limitations. (R. 20.) The Law Judge primarily relied on the fact that plaintiff has no recent hospitalizations or medication changes and did not seek treatment between 2004 and 2009. (R. 20.) In doing so, the Law Judge ignored the fact that agoraphobia is not a condition which routinely requires hospitalization, particularly given the fact that being placed in a setting outside the home surrounded by strangers would exacerbate that condition.³ Furthermore, the evidence provided by plaintiff establishes that her treating psychiatrist has been on extended medical leave, and that her treating doctors do not believe her agoraphobia can be successfully treated with medication.⁴ (R. 268.)

With regard to plaintiff's failure to seek medical treatment, the Law Judge appears not to have considered the factors set forth in Social Security Ruling (SSR) 96-7p. While a claimant's failure to seek treatment is an appropriate basis for determining credibility, the Law Judge "must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular medical treatment without first considering any explanations that the individual may provide, or other information in the case record, that may explain infrequent or irregular medical visits or failure to seek medical treatment." SSR 96-7p. Acceptable explanations include reasons such as an inability to afford treatment, the side effects of the medication are worse than the condition, a doctor's advice that there is no effective treatment, or that a plaintiff's daily activities have been structured to minimize symptoms. *Id.* None of plaintiff's reasons were considered by the Law Judge in determining plaintiff's

³ Therapists who treat agoraphobia may travel to their patients' homes or other "safe zones," or will offer counseling by phone or email. *Agoraphobia: Treatments and Drugs*, Mayo Clinic, <http://www.mayoclinic.com/health/metatarsalgia/DS00496> (last updated Apr. 21, 2011).

⁴ The Law Judge's credibility finding regarding whether plaintiff had requested an increase in her Lamictal is irrelevant when considering the effects of her agoraphobia because this medication is solely intended to treat her bipolar disorder.

credibility. Plaintiff has had financial difficulties which disrupted even the treatment she received from Rockbridge Area Community Services, a program designed to treat individuals who cannot afford other mental health care. (R. 264.) Plaintiff ceased psychiatric treatment in 2004 because the side effects of her medication made her feel “like a zombie” and caused her to forget large chunks of time. (R. 236, 246.) Both of plaintiff’s treating psychiatrists have told her that the agoraphobia cannot be treated with medication. (R. 47.) Finally, plaintiff has been dealing with her agoraphobia largely by staying at her home, even going so far as having a friend move so that she did not have to leave the house to do shopping. (R. 37.) None of these reasons are contradicted or challenged by any evidence in the record. The Law Judge’s failure to consider them and give them weight in evaluating plaintiff’s credibility was clear and reversible error.

For all these reasons, it is RECOMMENDED that an Order enter DENYING the Commissioner’s motion for summary judgment, GRANTING the plaintiff’s motion for summary judgment, ENTERING judgment in favor of the plaintiff, and RECOMMITTING this case to the Commissioner to calculate and pay proper benefits.

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

May 13, 2013
Date