

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

ROXANNE M. BORTH,)	CASE NO. 7:08CV00355
)	
Plaintiff,)	
)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
MICHAEL J. ASTRUE, Commissioner)	By: B. Waugh Crigler
of Social Security,)	U. S. Magistrate Judge
)	
Defendant.)	

This challenge to a final decision of the Commissioner which denied plaintiff’s February 13, 2006 protectively-filed claim for supplemental security income 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, AFFIRMING the Commissioner’s final decision, and DISMISSING this action from the docket of the court.

Plaintiff protectively-filed applications for a period of disability, disability insurance benefits, and supplemental security income on October 30, 2001. (R. 99.) In her applications, she alleged a disability onset date of August 24, 1994, but she subsequently amended her alleged

onset date to October 30, 2001.¹ (R. 75.)

On September 22, 2003, an Administrative Law Judge (“Law Judge”) found that plaintiff suffered with degenerative disc disease of the lumbosacral spine, depression, and a history of polysubstance abuse. (R. 102, 104.) The Law Judge found that these impairments were severe, but they did not meet or equal a listed impairment. (*Id.*) In assessing plaintiff’s mental impairments, the Law Judge evaluated an August 25, 2003 opinion from psychiatrist J. Richard Frazier, M.D. who opined that plaintiff possessed a “significantly limited capacity to make the occupational, performance, and personal-social adjustments that are necessary to maintain gainful employment.” (R. 102.) The Law Judge afforded Dr. Frazier’s opinion “very little weight” on the basis that the psychiatrist’s evidence did not establish that he had ever treated plaintiff and that there were no objective medical findings to support his opinion that she suffered such significant mental limitations. (R. 104.) In assessing plaintiff’s residual functional capacity (“RFC”), the Law Judge was of the opinion that plaintiff maintained the RFC to perform medium exertional work, and that, although she could not return to her past relevant work, there were other positions available to her in the national economy. (R. 103-105.) Thus, ultimately, the Law Judge found that plaintiff was not disabled. (R. 104-105.)

Plaintiff appealed the Law Judge’s September 22, 2003 decision to the Appeals Council and submitted additional evidence consisting of new medical records from Dr. Frazier. (R. 91-94.) On March 20, 2004, the Appeals Council found that Dr. Frazier’s evidence did not warrant remand and affirmed the Commissioner’s September 22, 2003 decision. (R. 91.) Plaintiff then appealed the case to this court. *See Borth v. Barnhart*, Civil Action No. 7:04CV00195.

¹Plaintiff developed an addiction to narcotics which led to drug charges and incarceration until July 2001. (R. 75.)

In a decision entered on January 31, 2005, Magistrate Judge Urbanski found that, although Dr. Frazier determined that plaintiff's current GAF² was vastly more restrictive than what he found her GAF to have been over the past year, the doctor never explained in an "intelligible fashion" how plaintiff's functioning had deteriorated or the basis for his current GAF score. (R. 88.) Moreover, the court found that plaintiff's present GAF score was inconsistent with her statement of daily activities and her testimony at the hearing before the Law Judge. (*Id.*) Judge Urbanski also determined that Dr. Frazier's notes did not suggest that plaintiff's level of functioning would persist for twelve months, and he ultimately found that Dr. Frazier's records before the Appeals Council were "almost entirely illegible," and as such, they could not be deemed material to warrant remand. (R. 88-89.) The Commissioner's September 22, 2003 decision, thus, was affirmed. (R. 90.)

Thereafter, plaintiff protectively-filed second applications for a period of disability, disability insurance benefits, and supplemental security income on February 13, 2006. (R. 8.) At the hearing on June 20, 2007, she amended her alleged onset date to September 23, 2003, the day following the Law Judge's decision on her prior applications. (R. 3, 8.) Plaintiff's insured status ceased on December 31, 1999. (R. 3.) By amending her alleged disability onset date, plaintiff effectively withdrew her claim for disability insurance benefits. (R. 3, 8.)

On August 31, 2007, a Law Judge found that plaintiff had not engaged in substantial gainful activity since her amended alleged disability onset date of September 23, 2003. (R. 12.) The Law Judge further found that plaintiff had the following severe impairments: degenerative

²Global Assessment of Functioning ("GAF") ranks psychological, social, and occupational functioning on a hypothetical continuum of mental illness ranging from zero to 100. Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 32 (Text Revision 4th ed. 2000) (*DSM-IV*).

disc disease/osteoarthritis, depression, adult attention deficit disorder, anxiety disorder, and gastroesophageal reflux disease. (R. 15.) However, the Law Judge determined that these impairments, viewed individually or in combination, were not severe enough to meet or equal any listed impairment. (*Id.*) The Law Judge was of the view that plaintiff's medically determinable impairments could reasonably be expected to produce the alleged symptoms, but her statements concerning the intensity, persistence, and the limiting effects of these symptoms were not entirely credible. (R. 16.) The Law Judge determined that she retained the RFC to perform light exertional work that didn't require more than occasional climbing of ramps/stairs, balancing, stooping, kneeling, crouching, and crawling. (*Id.*) The Law Judge found that this RFC did not preclude plaintiff from returning to her past relevant work as an assembler or machine operator. (R. 18.) Thus, he found that plaintiff was not disabled under the Act. (R. 18-19.)

Plaintiff appealed the Law Judge's August 31, 2007 decision to the Appeals Council, which found no basis in the record or in the reasons advanced on appeal to review the Law Judge's decision. (R. 21-24.) Accordingly, the Appeals Council denied review and adopted the Law Judge's August 31, 2007 decision as the final decision of the Commissioner. (R. 21.) 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 argues that the Law Judge erred by giving "little weight" to the opinions offered by her treating physicians, Dr. Frazier and Jan Pijanowski, M.D. (Pl's Brief, pp. 11-13.) She contends that the Law Judge should have accorded greater weight to her treating physicians' opinions that her mental and physical limitations render her disabled because their opinions are supported by objective medical findings and consistent with substantial evidence in the record. (Pl's Brief, p. 11.) For the reasons that follow, the undersigned disagrees and concludes that there was substantial evidence in the record for the Law Judge to have accorded the weight he did to the opinions offered by Drs. Frazier and Pijanowski.

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). At the same time, 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 v. Barnhart*, 434 F.3d 650, 653 (4th Cir. 2005); *Craig*, 76 F.3d at 589.

Dr. Frazier served as plaintiff's treating psychiatrist from August 13, 2003 through May,

7, 2007. (R. 304-337, 346-350, 442-465.) His treatment notes generally consist of a checklist form from each date of treatment suggesting plaintiff suffered no substance abuse, suicidal ideation, or homicidal ideation and a statement of plaintiff's present GAF and her GAF over the past year. Dr. Frazier's records reveal observed GAF scores ranging between 28³ and 38⁴. However, Dr. Frazier noted in each of these records that plaintiff's GAF over the past year had been 68⁵. (R. 304-331, 444, 446, 448, 451, 454, 457, 459, 464.)

On January 8, 2007, Dr. Frazier completed a form addressing plaintiff's mental capacity to perform work-related activities. (R. 411-415.) He diagnosed plaintiff as suffering attention deficit disorder and major depression, and he opined that plaintiff's impairments or treatment would result in more than three absences from work a month. (R. 415.) Dr. Frazier concluded that these work-related limitations had existed since his initial evaluation on August 13, 2003. (R. 414.)

The Law Judge found that Dr. Frazier's medical notes did little more than document medication management and failed to establish that she suffers disabling mental limitations. (R. 16.) The Law Judge noted that Dr. Frazier's evidence was "largely illegible," as a result of which he chose to credit the opinions of the reviewing psychologists which the Law Judge found

³A GAF of 21 to 30 indicates behavior considerably influenced by delusions or hallucinations; serious impairment in communication or judgment; or an inability to function in almost all areas. *Id.* at 34

⁴A GAF of 31 to 40 indicates some impairment in reality testing or communication; or major impairment in several areas, such as work or school, family relations, judgment, thinking or mood. *Id.*

⁵A GAF of 61 to 70 indicates some mild symptoms; or some difficulty in social, occupational, or school functioning, but generally functioning pretty well, has some meaningful interpersonal relationships. *Id.*

to be consistent and well-supported by the other evidence in the record. (R. 16.) Dr. Frazier's records are largely illegible and, as the Law Judge concluded, are not supported by the objective medical evidence.

Dr. Frazier's treatment records are inconsistent with the other evidence in the record as a whole. For example, Dr. Frazier's notes almost consistently state that plaintiff did not suffer from substance abuse. (R. 304-321, 444, 446, 448, 451, 454, 457, 459, 464.) However, the record demonstrates plaintiff's abuse of Oxycontin, marijuana, and cocaine. (R. 50-53, 284, 289, 292, 383, 410.)

Moreover, Dr. Frazier's treatment notes are internally inconsistent. For example, the January 9, 2006 treatment note suggests an observed GAF of 38 while reporting that her GAF in the past year had been 68. (R. 308.) A wide swing in reported and historical GAF scores are scattered through his reports. (R. 304-331, 444, 446, 448, 451, 454, 457, 459, 464.) Remarkably, however, Dr. Frazier never reported actual GAF scores in the sixties, and there is no legible explanation for these inconsistencies.

The other evidence of record shows a much higher GAF than Dr. Frazier seemed willing to actually report as observed. For example, on March 14, 2006, RoseAnn Holmgren, PA-C found that, although plaintiff suffered from major depressive disorder and polysubstance, she was functioning with a GAF of 55⁶. The record reviews performed by Julie Jennings Ph.D. and Eugenie Hamilton, Ph.D. are also inconsistent with Dr. Frazier's opinion that plaintiff's mental impairments render her disabled. (R. 366-383, 393-410.) The psychologists opined that

⁶A GAF of 51 to 60 indicates moderate symptoms or moderate difficulty in social, occupational, or school functioning. *Id.*

plaintiff's alleged symptoms were only "partially credible" and that she retained the mental functional capacity to perform simple, unskilled work. (R. 383, 410.)

During oral argument before the undersigned and during her June 20, 2007 hearing before the Law Judge, plaintiff's counsel suggested that a consultative psychological evaluation was necessary. (R. 59, 67.) Counsel also has suggested here, as she did before the Law Judge, that Dr. Frazier's illegible notes compel an independent psychological evaluation.⁷ The undersigned disagrees and finds that the substantial evidence in the record supports the Law Judge's finding that plaintiff's mental impairments do not disable her from her past relevant work.

As to plaintiff's physical impairments, treatment notes from Dr. Pijanowski reveal a June 14, 2007 physical capacities evaluation in which the doctor limited plaintiff's ability to lift and/or carry less than ten pounds occasionally and frequently, stand and/or walk two hours in an eight-hour workday, and sit two hours in an eight-hour workday. (R. 479-482.) Here again, the other evidence of record is inconsistent with Dr. Pijanowski's assessment that plaintiff's physical impairments preclude her from performing substantial gainful activity. For example, two State Agency evaluators found plaintiff could perform light work. (R. 357-365, 384-389.) Furthermore, a physician with the Virginia Department of Rehabilitative Services determined that plaintiff could perform light work. (R. 351-354.)

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

⁷Interestingly, in her pre-hearing brief to the Law Judge, plaintiff's counsel represented that a consultative examination was not necessary. (R. 268-269.)

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 (10) 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 send a certified copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date