

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

ROBIN ELIZABETH WRIGHT,) CASE NO. 7:10CV00126
)
Plaintiff,)
v.) REPORT AND RECOMMENDATION
)
MICHAEL J. ASTRUE,)
)
Defendant.) By: B. Waugh Crigler
) U. S. Magistrate Judge
)

This challenge to a final decision of the Commissioner which denied plaintiff's March 28, 2007 applications for a period of disability, disability insurance benefits, and supplemental security income ("SSI) 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 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 March 24, 2009, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since August 24, 2005, her amended alleged disability onset date, and that she remained insured through December 31, 2008¹. (R. 12-

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, 2008. See 20 C.F.R. § 404.131(a). Therefore, any evaluation of the plaintiff's disability following that date relates solely to her claim for SSI benefits.

13.) The Law Judge determined plaintiff suffered the following severe impairments: hypertension, diabetes mellitus, bilateral osteoarthritis of the knees and right shoulder, coronary artery disease with stenting, history of pulmonary embolism and obesity. (R. 13.) The Law Judge further determined that plaintiff did not have an impairment or combination of impairments which met or equaled a listed impairment. (R. 16.) The Law Judge found that plaintiff retained the residual functional capacity ('RFC') to perform light exertional work consisting of lifting/carrying twenty pounds occasionally and ten pounds frequently, standing/walking six hours out of an eight-hour workday, and sitting six hours out of an eight-hour workday. (R. 16.) She further found that plaintiff could occasionally climb ramps and stairs, balance, kneel, crawl, stoop, crouch, reach and engage in work that allows her to avoid extreme exposure to excessively polluted environments, respiratory irritants, extreme temperature changes and does not require working around hazardous machinery at unprotected heights, climbing ladders, ropes, scaffolds, or working on vibrating surfaces. (R. 16-17.) The Law Judge determined that this RFC precluded plaintiff from performing her past relevant work, but that other jobs exist in substantial numbers in the national economy that she could perform. (R. 25-26.) Ultimately, the Law Judge found plaintiff was not disabled under the Act. (R. 27.)

Plaintiff appealed the Law Judge's March 24, 2009 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 failing to accord controlling weight to the evidence from her primary treating source, D. Daniel Bradley, M.D. (Pl's Brief, pp. 3-8.) Further, plaintiff argues that the Law Judge erred by disregarding the opinions offered by Dr. Bradley and, instead, by relying on the opinions offered by the State agency record reviewing physicians. (Pl's Brief, p. 4.)

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.

Plaintiff's argument rests on a checklist functional assessment submitted by Dr. Bradley under date of January 16, 2009. (R. 360-361.) There, Dr. Bradley opined that plaintiff suffers chronic pain and neuropathy. (R. 360.) He assessed that plaintiff could sit or stand/walk for less than two hours in an eight-hour workday. (*Id.*) The physician further determined that plaintiff could occasionally lift and carry less than ten pounds and could never lift ten pounds or more. (*Id.*) Dr. Bradley concluded that plaintiff suffered from diabetic neuropathy and that the condition impacted her lower extremities to the extent that she would be limited in her ability to stand and that the neuropathy also significantly limited the use of her hands. (R. 360-361.) Finally, he opined that plaintiff's pain or other symptoms were often severe enough to interfere with her attention and concentration, and her impairments were likely to cause her to experience "good days" and "bad days." (R. 361.)

The Law Judge gave Dr. Bradley's opinion regarding plaintiff's functional limitations "little weight" because she did not believe Dr. Bradley's opinions were supported by his treatment notes. (R. 23.) Specifically, the Law Judge believed that Dr. Bradley's notes reflect a rather consistent finding that plaintiff's conditions were stable and her physical exams relatively normal with a very consistent treatment regimen throughout the relevant time period. (*Id.*) Finally, the Law Judge noted that the physician's checklist conclusions were inconsistent with other substantial evidence in the record. (*Id.*) For the reasons that follow, the undersigned is of the view that the Law Judge's decision to accord Dr. Bradley's opinion "little weight" is supported by substantial evidence.

The Law Judge noted that, although Dr. Bradley's January 16, 2009 assessment indicated plaintiff suffered severe, debilitating diabetic neuropathy, the physician's medical notes do not suggest any diagnosis of diabetic neuropathy. (R. 22.) In fact, none of Dr. Bradley's medical records commencing in 2008 suggest or present plaintiff as suffering diabetic neuropathy. (R. 319-342.) The only diagnosis of a diabetic neuropathy the undersigned has found is in a treatment note dated September 28, 2007. It reveals only that plaintiff's bilateral lower extremity pain and right shoulder pain were related to a "possible" diabetic neuropathy. (R. 337.)

The Law Judge also noted that, despite complaints of disabling pain, plaintiff worked for seven months during the relevant time period caring for two small children. (R. 24-25.) The Law Judge's consideration of plaintiff's work during the relevant time period was permissible under the regulations. *See* 20 C.F.R. §404.1571, 416.971 (Even if the work you have done was not substantial gainful activity, it may show that you are able to do more work than you actually did.)

The opinions offered by the State agency record reviewing physicians also support the Law Judge's decision to accord "little weight" to Dr. Bradley's opinion. On August 3, 2007, Michael Hartman, M.D. reviewed plaintiff's medical records and found that she could frequently balance and occasionally stoop, knee, crouch, and crawl. (R. 244.) He found that plaintiff could occasionally use ramps and climb stairs, but that she should never climb ladders, ropes or scaffolds. (*Id.*) Dr. Hartman believed plaintiff suffered no manipulative, visual or communicative limitations. (R. 244-245.) Ultimately, Dr. Hartman opined that she could perform a range of light exertional work. (R. 242-248.) On February 4, 2008, Robert McGuffin, M.D. reviewed plaintiff's medical records. He also concluded that she could perform a range of light exertional work. (R. 270-276.) Such evidence provides a substantial basis for the Law Judge's findings.

Next, plaintiff argues that the Law Judge erred in finding that she was not credible. (PFs Brief, pp. 4-8.) Plaintiff contends that her herniated disk with radiculopathy is a medically determinable impairment which reasonably could cause the pain she alleged. (PFs Brief, pp. 5-6.) She argues that the Law Judge's finding to the contrary is not supported by substantial evidence. (*Id.*)

A claimant's subjective complaints of pain must be supported by the objective medical evidence. *Craig*, 76 F.3d at 591; *Johnson*, 434 F.3d at 657. Specifically, the evidence needs to show the existence of a medical impairment which could reasonably be expected to produce the amount and degree of pain alleged. *Craig*, 76 F.3d at 591; *Johnson*, 434 F.3d at 657.

Social Security Ruling (SSR) 96-7p establishes a two-step process for evaluating or assessing a claimant's statements about his or her symptoms. Initially, the Law Judge must determine whether there is an underlying medically determinable impairment which could be expected to produce the symptoms alleged by the claimant. Once such an underlying medically determinable impairment has been found, the Law Judge must evaluate the intensity, persistence, and limiting effects of the claimant's symptoms to determine the extent to which the symptoms limit the claimant's ability to perform basic work activities. When the claimant's statements about the intensity, persistence, or functionally limiting effects of the symptoms are not supported by substantial objective medical evidence, the Law Judge must evaluate the claimant's credibility based on the entire record.

Here, the Law Judge believed that plaintiff's statements concerning her impairments and their impact on her ability to work were "not entirely credible," in light of: (1) the degree of medical treatment required, (2) discrepancies between the plaintiff's assertions and the information

contained in the documentary report; (3) her medical history; (4) the findings made on examination; (5) plaintiff's assertions concerning her ability to work; and (6) the reports of reviewing, treating and examining physicians. (R. 24.) He further noted plaintiff's inconsistent statements made in the claims process. (*Id.*) For instance, in her application for Disability Insurance Benefits plaintiff claimed that she became unable to work due to her disabling condition on January 13, 2004. (R. 116.) However, the record reveals that the facility where plaintiff was working closed on the very date she claims to be the date of disability onset. (R. 31, 33.) In addition, plaintiff testified that she last worked in January 2004 (R. 33), but she later admitted caring for two small children for seven months during 2006. (R. 34). Finally, the State agency record reviewing physicians both opined that plaintiff's statements were only "partially credible." (R. 248, 275.) All this provides a substantial basis for the Law Judge to not have fully credited her statements.

Plaintiff next contends that she cannot perform either of the jobs identified by the Law Judge or any other jobs. (Pl's Brief, pp. 8-10.) Specifically, plaintiff argues that she could not perform work as an inspector because it is a specific vocational preparation ("SVP"² level two, and because the packager job is medium exertional work, requiring the use of her hands. (Pl's Brief, pp. 8-9.) Plaintiff contends that when the vocational expert ("VE") was asked to consider the limitations found by Dr. Bradley, he opined that plaintiff would be precluded from all work. (Pl's Brief, p. 9.)

² SVP is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. *Dictionary of Occupational Titles*, App. C.

The broader issue raised by the plaintiff relating to the use of vocational evidence is grounded in the prevailing decisional authority that “[i]n order for a vocational expert's opinion to be relevant or helpful, it must be based upon a consideration of all other evidence in the record.” *Johnson*, 434 F.3d at 659 (quoting *Walker v. Bowen*, 889 F.2d 47, 50 (4th Cir. 1989)). When the Law Judge posed hypothetical questions to the VE incorporating his RFC finding, the VE responded that plaintiff was precluded from returning to her past relevant work, but that other jobs were available to her. (R. 50-51.) Specifically, the VE opined that plaintiff would be able to perform work as a food service worker, packager, and inspector. (R. 51-52.) The RFC found by the Law Judge is supported by substantial evidence. Accordingly the VE's opinion based on that RFC, likewise, has substantial evidentiary support.

Plaintiff's argument that she could not perform work as an inspector because it has a SVP level of two also fails. The only mention in the record of SVP levels was by the VE in connection with plaintiff's past relevant work. (R. 50.) Without an explanation of the subject by one having an expertise in the field, the court has no way of critiquing the VE's testimony as plaintiff contends. Here, there simply is no such evidence.

Plaintiff's argument that she couldn't perform work as a packager because it is medium exertional and requires the use of her hands also lacks merit. As noted, the Law Judge found that plaintiff could perform a range of light exertional work, and the VE testified that there are inspector jobs available at the light exertional level. (R. 51-52.) Moreover, the Law Judge chose not to credit Dr. Bradley's opinion that plaintiff suffered diabetic neuropathy in her hands, a condition Dr. Bradley opined would significantly limit the use of plaintiff's hands. (R. 22.) Having concluded that substantial evidence supports the Law Judge's decision to give “little weight” to Dr. Bradley's

assessment, the hypothetical questions posed to the VE based on that finding were not fatally flawed.

Finally, plaintiff argues that the Law Judge erred in discounting the severity of her impairments on the basis that she failed to receive treatment beyond that provided by Dr. Bradley. (Pls Brief, pp. 10-12.) In support of this contention, plaintiff proffers to the court that she was unable to seek additional treatment because she lacked insurance or adequate funds to secure it. (Pls Brief, p. 12.)

It has been recognized by the Fourth Circuit that “[i]t flies in the face of the patent purposes of the Social Security Act to deny benefits to someone because he is too poor to obtain medical treatment that may help him.” *Gordon v. Schweiker*, 725 F.2d 231, 237 (4th Cir. 1984). Nevertheless, a claimant must exhibit that they have exhausted all free or subsidized treatment sources in order to establish a claim of inability to pay as good cause for a claimant’s failure to follow prescribed medical treatment. *Id.*

There are only two instances plaintiff cites where she was referred for medical treatment beyond that provided to her by Dr. Bradley but she could not afford the treatment. First, Dr. Bradley’s medical note dated March 17, 2008 indicates that plaintiff had not seen an eye doctor since 2003 because she lacked the funds at the time. (R. 329.) Second, Chunxiao “Belinda” Zhang, M.D., a neurologist, referred plaintiff for a surgical evaluation of her cervical radiculopathy. (R. 215-216.)

Plaintiff proffers that she lacked the funds and/or insurance to receive additional treatment. (R. 44, 362-363.) No other report or evidence corroborates any notion that plaintiff sought and was denied medical care of any cost because of an inability to pay.

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 copy of this Report and Recommendation to all counsel of record.

ENTERED: _____
U.S. Magistrate Judge

Date