

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

STARR JEANETTE CUMMINGS,)	CASE NO. 7:10CV00461
)	
Plaintiff,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
MICHAEL J. ASTRUE,)	
Commissioner, and his successors,)	
Social Security Administration,)	
)	
Defendant.)	By: B. Waugh Crigler U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's November 13, 2007 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 GRANTING the plaintiff's motion for summary judgment and REMANDING the case pursuant to Sentence Four of 42 U.S.C. § 405(g) to the Commissioner for further proceedings.

In a decision issued on August 31, 2009, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since November 9, 2007, her alleged disability onset date, and that she remained insured through December 31, 2012. (R. 16.) The Law Judge determined plaintiff suffered the following severe impairments: obesity, Sjögren's syndrome with a history of rheumatoid arthritis/polyarthralgias and fibromyalgia, obstructive sleep apnea,

anxiety and depression. (*Id.*) The Law Judge further determined that plaintiff did not have an impairment or combination of impairments which met or equaled a listed impairment. (R. 17.) The Law Judge found that plaintiff retained the residual functional capacity ('RFC') to perform medium work as follows: lift, carry, push and/or pull twenty-five pounds frequently and fifty pounds occasionally and sit, stand and/or walk for six hours in an eight-hour workday. (R. 22.) Plaintiff's moderate reduction in social functioning and concentration further limited her to the performance of simple, routine, repetitive, unskilled tasks with only occasional interaction with the general public. (*Id.*) 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. 24-25.) Ultimately, the Law Judge found plaintiff was not disabled under the Act. (R. 26.)

Plaintiff appealed the Law Judge's August 31, 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 she submitted new and material evidence to the Appeals Council which warrants remand. (Pl's Brief, pp. 2-8.) Further, citing *Alexander v. Apfel*, 14 F. Supp.2d 839 (W.D. Va. 1998) and *Deloatche v. Heckler*, 715 F.2d 148 (4th Cir. 1983), plaintiff contends that the Appeals Council erred by failing to provide an adequate explanation for its decision not to review the new evidence. (Pl's Brief, p. 6.) For the reasons set forth below, the undersigned agrees that a remand is warranted.

"The Appeals Council must consider evidence submitted with the request for review in deciding whether to grant review "if the additional evidence is (a) new, (b) material, and (c) relates to the period on or before the date of the [Law Judge's] decision." *Wilkins v. Secretary of Health and Human Services*, 953 F.2d 93, 95-96 (4th Cir. 1991) (quoting *Williams v. Sullivan*, 905 F.2d 214, 216 (8th Cir. 1990)); *Stevens v. Astrue*, No. 6:09-cv-41, 2011 WL 560927, at *5 (W.D.Va. February 8, 2011). Evidence is new if it is "not duplicative or cumulative," and material "if there is reasonable possibility that the new evidence would have changed the outcome." *Wilkins*, 953 F.2d at 96. When a plaintiff seeks to present new evidence to the Appeals Council, she is not required to show good cause for failing to present the evidence earlier. *Id.* n.3.

On August 25, 2010, the Appeals Council denied plaintiff's request for review. The Appeals Council stated:

In looking at your case, we considered the reasons you disagree with the decision and the additional evidence listed on the enclosed Order of Appeals Council.

We found that this information does not provide a basis for changing the Administrative Law Judge's decision.

(R. 1-2.) Since the Appeals Council denied plaintiff's request for review, the Law Judge's decision became the final decision of the Commissioner. 20 C.F.R. § 404.981. As such, this court must 'review the record as a whole, including the new evidence, in order to determine whether substantial evidence support[ed] the [Commissioner's] findings.' *Wilkins*, 953 F.2d at 96.

Here, the new evidence consists of a medical assessment from plaintiff's treating rheumatologist John Pendleton, M.D. (R. 732-734.) In the January 3, 2010 assessment, Dr. Pendleton noted that plaintiff suffered with Sjögren's syndrome, fibromyalgia and depression. (R. 732.) He opined that plaintiff met the current "Criteria for the Classification of Sjögren's Syndrome by the American College of Rheumatology" (*Id.*) Dr. Pendleton further opined that plaintiff's impairments combined were at least equal in terms of medical severity to the Listing 14.10¹, the listing for Sjögren's syndrome. (R. 734.) Dr. Pendleton did not respond to the question regarding whether his opinions related back to February 27, 2008, the date the physician saw plaintiff, when her test results for Sjögren's syndrome were positive. (*Id.*) Finally, Dr. Pendleton concluded that plaintiff's prognosis was poor. (*Id.*)

¹ Listing 14.10, the listing for Sjögren's syndrome, provides:

A. Involvement of two or more organs/body systems, with:

1. One of the organs/body systems involved to at least a moderate level of severity; and
2. At least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss).

or

B. Repeated manifestations of Sjögren's syndrome, with at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss) and one of the following at the marked level:

1. Limitation of activities of daily living.
2. Limitation in maintaining social functioning.
3. Limitation in completing tasks in a timely manner due to deficiencies in concentration, persistence, or pace.

The Appeals Council did not provide a detailed written explanation of the weight, if any, it accorded the new evidence, though its summary denial of review certainly hints at its giving no weight at all to any of it. As the Commissioner concedes, there is a disagreement among the decisional authorities as to whether the Appeals Council is required to provide detailed reasons for denying review. *See Boggs v. Astrue*, No. 5:07CV10, 2008 WL 467386, *10 (N.D.W.Va. February 19, 2008) (the Appeals Council is not required to explain its determination); *Davis v. Barnhart*, 392 F. Supp.2d 747, 751 (W.D.Va. 2005) (the Appeals Council was not obligated to provide reasons); *Riley v. Apfel*, 88 F.Supp.2d 572, 580 (W.D.Va. 2000) (the Appeals Council must provide more than a “scant discussion” of the evidence); *Ridings v. Apfel*, 76 F. Supp.2d 707, 709 (W.D.Va. 1999) (the Appeals Council is not required to state its rationale for denying review); *Alexander v. Apfel*, 14 F. Supp.2d 839, 843 (W.D.Va. 1998) (finding the Appeals Council must provide reasoning for its determination).

Here, there is a compelling reason, and its source is the Commissioner’s own regulations. The new evidence was authored by plaintiff’s treating source who also is a specialist. For this reason, his evidence should have been accorded greater weight. *See Hines v. Barnhart*, 453 F.3d 559, 563 (4th Cir. 2006) (providing that courts typically accord greater weight to the opinion of a treating physician) (quoting *Johnson v. Barnhart*, 434 F.3d 650, 654 (4th Cir. 2005); 20 C.F.R. § 404.1527(d)(5)) (“We generally give more weight to the opinion of a specialist [.]”). The regulations further provide that should the Law Judge or Commissioner decide not to accord such weight to the evidence of a treating source, “We will always give good reasons . . . for the weight we give your treating source’s opinion.” *See* 20 C.F.R. § 414.1527(d)(2). While “detailed” reasons may not be

required by the Commissioner's own regulations, no reason is not "good" reason. Good cause has been shown to remand this case for further proceedings.

For all these reasons, it is RECOMMENDED that an Order enter GRANTING the plaintiff's motion for summary judgment and REMANDING the case pursuant to Sentence Four of 42 U.S.C. §405(g) 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)(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