

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

TONY J. FLIPPEN,)	CASE NO. 7:10CV00537
)	
Plaintiff,)	
v.)	<u>REPORT AND RECOMMENDATION</u>
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	By: B. Waugh Crigler
)	U. S. Magistrate Judge

This challenge to a final decision of the Commissioner which denied plaintiff's June 12, 2007 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 to the Commissioner for further proceedings.

In a decision issued on June 3, 2009, an Administrative Law Judge ("Law Judge") found that plaintiff had not engaged in substantial gainful activity since March 26, 2007, his alleged disability onset date, and that he remained insured through December 31, 2011. (R. 14.) The Law Judge determined plaintiff suffered the following severe impairments: alcoholic pancreatitis; alcoholic hepatitis/liver disease; alcoholism in self-reported remission since March

26, 2007; Crohn's disease; Barrett's esophagus; hypertension; and hernia status post surgical repair. (*Id.*) The Law Judge found that that he did not suffer an impairment or combination of impairments which met or equaled a listed impairment. (R. 16.) The Law Judge further found that plaintiff retained the residual functional capacity ("RFC") to perform light work, except as follows: lift, carry, push and/or pull ten pounds frequently and twenty pounds occasionally; sit, stand or walk for six hours in an eight hour workday; occasionally balance, stoop, kneel, crouch, crawl and climb ramps and stairs; and not even moderate exposure to hazardous machinery, unprotected heights, or ladders, ropes, or scaffolds. (R. 19.) The Law Judge concluded that plaintiff could return to his past relevant work as a night watchman. (R. 21.) Thus, the Law Judge ultimately found plaintiff was not disabled. (*Id.*)

Plaintiff appealed the Law Judge's June 3, 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 his motion for summary judgment, plaintiff initially argues that the Law Judge erred by failing to give proper deference to his treating gastroenterologist Robert V. Benish, M.D. (Pl's Brief, pp. 7-11.) Specifically, plaintiff contends that the two bases upon which the Law Judge discredited Dr. Benish's opinions are both legally and factually flawed. (Pl's Brief, p. 7.) Plaintiff believes that, at a minimum, remand is warranted to further assess the weight accorded to Dr. Banish's opinion. (R. 10.) The undersigned agrees.

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.

Dr. Benish, plaintiff's treating source for his numerous gastrointestinal impairments, completed a functional assessment on February 20, 2008. (R. 343-347.) The physician noted

that plaintiff's symptoms included muscle and joint pain, abdomen pain, fatigue, memory loss, nervousness, and acid reflux. (R. 343.) Dr. Benish opined that plaintiff's pain or other symptoms were frequently severe enough to interfere with attention and concentration needed to perform even simple work tasks. (R. 344.) The physician noted that plaintiff's chronic abdomen pain and muscle and joint weakness with numbness rendered him incapable of handling even "low stress" jobs. (*Id.*) Dr. Benish opined that plaintiff could walk only a half block without resting or experiencing severe pain. (*Id.*) He further opined that plaintiff could sit at one time for only twenty minutes and could stand at one time for only fifteen minutes. (*Id.*) Dr. Benish revealed that plaintiff could rarely lift and carry less than ten pounds and could sit or stand/walk for less than two hours in an eight-hour workday. (R. 345.) The physician believed plaintiff would often need to take unscheduled breaks during an eight-hour workday and that plaintiff's impairments were likely to produce "good days" and "bad days." (R. 345-346.) Finally, Dr. Benish opined that plaintiff's impairments or treatment would render him absent from work more than four days per month. (R. 346.) On January 5, 2009, Dr. Benish noted that plaintiff continued to suffer the limitations set forth in his February 20, 2008 assessment. (R. 342.)

The Law Judge declined to accord controlling weight to Dr. Benish's opinion and determined that it was not persuasive for two reasons. (R. 20.) First, the Law Judge discredited Dr. Benish's opinion on the basis that "only Benish's nurse practitioner [Cynthia Reynolds, FNP] has seen the claimant recently." (*Id.*) Second, the Law Judge concluded that Reynolds' and Dr. Benish's prior notes reflected plaintiff's denial of suffering anxiety and depression, and thus, their assessment that plaintiff suffered severe anxiety and depression was not supported by the evidence. (*Id.*)

The undersigned concludes that the reasons given by the Law Judge for discrediting Dr. Benish's opinions are not supported by substantial evidence. First, the Law Judge failed to apply proper authority in this Circuit which provides that consideration must be given evidence provided by staff members of a clinic or office practice which treated the plaintiff. *See Wooldridge v. Bowen*, 816 F.2d 157, 160 (4th Cir. 1987) (providing that a medical opinion based largely on a claimant's medical history was properly considered where the physician that provided the opinion was a member of the staff of the clinic where the claimant was treated.) It is apparent to the undersigned that the Law Judge's entire decision was colored by this misapplication of the decisional authorities.¹

The question now becomes whether the Commissioner should be given an opportunity to reexamine the claim. While the plaintiff seeks reversal on this record, which the undersigned is tempted to recommend, the better course would be to remand the case to the Commissioner with direction to conduct further proceedings. For this reason, it is RECOMMENDED that an Order enter GRANTING the plaintiff's motion for summary judgment and REMANDING the case to the Commissioner for further proceedings pursuant to Sentence Four of 42 U.S.C. § 405(g).

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

¹The undersigned is of the view that a patient's denial of suffering emotional effects of his/her impairments, alone, is not sufficient to discredit a treating physician's diagnosis. This is a matter that can be more fully developed on remand.

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: _____
U.S. Magistrate Judge

Date