

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

PATRICIA STORY,)	CIVIL ACT. NO. 3:99CV000113
)	
Plaintiff,)	
)	
v.)	<u>FINAL ORDER</u>
)	
WILLIAM A. HALTER,*)	
Commissioner of Social Security,)	
)	
Defendant)	JUDGE JAMES H. MICHAEL, JR.

The above captioned civil action was referred to the presiding United States Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* 28 U.S.C. § 636 (b)(1)(B). The Magistrate Judge returned his Report and Recommendation, recommending that the court affirm the final decision of the Commissioner. The plaintiff timely filed objections thereto, and the court has performed a *de novo* review. *See id.* § 636 (b)(1)(B). For the reasons stated in the accompanying Memorandum Opinion, it is accordingly this day

ADJUDGED, ORDERED, AND DECREED

as follows:

(1) The Report and Recommendation of the Magistrate Judge, filed May 24, 2000, shall be, and hereby is, ADOPTED.

* William A. Halter became Acting Commissioner of Social Security, effective January 20, 2001, to succeed Kenneth S. Apfel. Under Fed. R. Civ. P. 25(d)(1) and 42 U.S.C. § 405(g), William A. Halter is automatically substituted as the defendant in this action.

(2) The plaintiff's Objections to the Report and Recommendation, filed June 7, 2000, shall be, and hereby are, OVERRULED.

(3) The defendant's Motion for Summary Judgment, filed March 10, 2000, shall be, and hereby is, GRANTED.

(4) The final decision of the Commissioner in this matter shall be, and hereby is, AFFIRMED.

(5) This case shall be stricken from the docket of the court.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and all counsel of record.

ENTERED:

Senior United States District Judge

Date

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FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

PATRICIA STORY,)	CIVIL ACT. NO. 3:99CV000113
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
WILLIAM A. HALTER,**)	
Commissioner of Social Security,)	
)	
Defendant)	JUDGE JAMES H. MICHAEL, JR.

This case presently is before the court on the Plaintiff's objections to the Report and Recommendation of the presiding United States Magistrate Judge. The matter was referred to the Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. See 28 U.S.C. § 636 (b)(1)(B). The Magistrate Judge returned his Report and Recommendation on the May 24, 2000, recommending that the court affirm the final decision of the Commissioner. Having performed a de novo review, the court shall accept the Magistrate Judge's Report and Recommendation and affirm the final decision of the Commissioner.

I.

The plaintiff previously worked as a staff assistant and a legal secretary. On April 1, 1996, the plaintiff applied to the Social Security Administration for a period of disability and disability insurance benefits under sections 216(i) and 223 of the Social Security Act ("the Act"),

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see 42 U.S.C.A. §§ 416, 423 (West 1991 & Supp. 2000), alleging that she became disabled and unable to work on August 3, 1995 due to fibromyalgia, carpal tunnel syndrome, thoracic outlet syndrome, asthma, migraines, and acute depression. (R. at 14) Under the Act, an individual is entitled to benefits if he or she is insured for disability insurance benefits, has not attained retirement age, has filed an application for disability insurance benefits, and is under a disability. *See id.* § 423(a). “Disability” is defined as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” *Id.* § 423(d)(1)(A) (West Supp. 2000). The plaintiff’s application was denied initially and upon reconsideration, and the plaintiff requested an administrative hearing.

Following an administrative hearing on March 28, 1998, in a decision eventually adopted as the final decision of the Commissioner, an Administrative Law Judge (“ALJ”) found that the plaintiff met the requirements for insured status from the date of her alleged disability onset through August 2, 1997. The ALJ proceeded to determine whether the plaintiff was disabled during the relevant period, pursuant to the sequential five-step process outlined in the Code of Federal Regulations. *See* 20 C.F.R. § 416.920 (1999). Under the regulations, an ALJ must consider, in sequence, whether a claimant: (1) is working, (2) has a severe impairment, (3) has a listed impairment that makes her disabled as a matter of law, (4) can return to her past work, and if not, (5) retains the capacity to perform specific jobs that exist in significant numbers in the national economy. *See id.* §§ 404.1520, 416.920. The claimant bears the burden of production and proof during the first four steps of the inquiry. *See Hunter v. Sullivan*, 993 F.2d

31, 35 (4th Cir. 1992) (per curiam). At the fifth step, the burden shifts to the Commissioner to prove that other jobs exist in the national economy that the claimant can perform. *See id.* In this case, the parties do not dispute the plaintiff's *prima facie* showing of disability. Thus, the burden shifted to the Commissioner to come forward with proof of the plaintiff's capacity to perform alternative work.

Based on the testimony presented at the hearing, including that of a vocational expert, the ALJ concluded that the plaintiff retained the residual functional capacity for a wide range of light work and that jobs were available to her in the national market in significant numbers. Accordingly, the ALJ found that the plaintiff was not disabled under the Act, and not entitled to the benefits sought. The plaintiff appealed to the Social Security Administration's Appeals Council, which denied the plaintiff's request for review of the ALJ's decision. This denial became the Commissioner's final decision, *see* 20 C.F.R. §§ 440.981, 416.1481 (1999), which was appealed to this court pursuant to title 42, United States Code, section 405(g).

The matter was referred to the Magistrate Judge to set forth findings, conclusions, and recommendations for disposition. *See* 28 U.S.C.A. § 636(b)(1)(B) (West 1993 & Supp. 2000). On May 24, 2000, the Magistrate Judge found that the ALJ's decision was supported by substantial evidence, in part, recognizing that when confronted with the conflicting testimony of two non-treating physicians, the ALJ reserves the right to place greater credence in the testimony of the physician whose testimony is most consistent with the record. The Magistrate Judge recommended that the court affirm the Commissioner's final decision.

The plaintiff raises two sets of objections to the Magistrate Judge's Report and Recommendation, pursuant to the Federal Rule of Civil Procedure 72(b). First, the plaintiff

contends that the Commissioner did not satisfy the requirements at Step Five of the sequential evaluation process. Second, the plaintiff avers that the Commissioner failed to address the weight given to specific evidence and testimony related to the plaintiff's residual functional capacity. These objections shall be addressed in turn.

II.

The court subjects the proposed findings and recommendations of the Magistrate Judge to *de novo* review. *See* 28 U.S.C.A. § 636(b)(1) (West 1993); Fed. R. Civ. P. 72(b). The court must determine whether the Commissioner's findings are supported by substantial evidence, and whether the correct legal standards were applied. *See* 42 U.S.C.A. § 405(g) (West Supp. 2000); *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990). As the presiding officer at the administrative hearing, the ALJ makes factual determinations and resolves evidentiary conflicts, including inconsistencies in the medical evidence. *See Hines v. Bowen*, 872 F.2d 56 (4th Cir. 1989). The court gives great deference to the ALJ's factual determinations and reviews them only for clear error. *See Estep v. Richardson*, 459 F.2d 1015, 1017 (4th Cir. 1972). Nonetheless, the court is not restrained by deference to the administrative decision in determining whether the correct legal standards were applied--a *de novo* determination of legal issues is obligatory. *See Hines*, 872 F.2d at 58; *Meyers v. Califano*, 611 F.2d 980, 982 (4th Cir. 1980). Determining whether substantial evidence supports the ALJ's decision is a question of law and, therefore, will be considered anew.

Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "consists of

more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is ‘substantial evidence.’” *Hays v. Sullivan*, 907 F.2d 1453, 1456 (4th Cir. 1990) (quoting *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966)). The court must consider evidence that both supports and detracts from the Commissioner’s conclusion; it may not affirm by isolating a specific quantum of supporting evidence. See *NLRB v. Consolidated Diesel Elec. Co.*, 469 F.2d 1016, 1021 (4th Cir. 1972); see also *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985). The Commissioner’s decision, “if supported by substantial evidence [in the record as a whole] must be affirmed even though the reviewing court believes the substantial evidence also supports a contrary result.” *Estep v. Richardson*, 459 F.2d 1015, 1017 (4th Cir. 1972). In making his decision, the ALJ must “explicitly indicate the weight given to all the relevant evidence.” *Gordon v. Schweiker*, 725 F.2d 231, 235 (4th Cir. 1984); see also *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186,190 (4th Cir. 2000) (“ALJ’s have a duty to analyze ‘all relevant evidence’ and to provide a sufficient explanation for their ‘rationale in crediting certain evidence.’” (quoting *Millburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998))). When reached by means of an improper standard or misapplication of the law or in the event that substantial evidence does not support the Commissioner’s decision, factual findings made by the ALJ are neither conclusive nor binding. See *Coffman v. Bowen*, 829 F.2d 514, 517 (4th Cir. 1987); *Meyers v. Califano*, 611 F.2d 980, 982 (4th Cir. 1980). With these principles in mind, the court turns to the plaintiff’s objections in this case.

III.

The plaintiff's central objection is that the Commissioner's decision was not supported by substantial evidence. Story alleges that the requirements at Step Five of the Code of Federal Regulations's sequential evaluation process, were not satisfied. At that stage in the proceedings, if the ALJ determines that the claimant cannot return to her prior employment due to a "severe impairment," the ALJ "will consider [the claimant's] residual functional capacity [as well as her] age, education, and past work experience" to gauge whether there is other work, found in substantial numbers in the national economy, which the claimant can perform. 20 C.F.R. § 404.1520 (2000); *see also Hall v. Harris*, 658 F.2d 260, 264 (4th Cir. 1981). If the ALJ concludes that the claimant is incapable of finding alternative employment as a result of her impairment, the claimant will be found to be disabled. 20 C.F.R. § 404.1520 (2000)

The plaintiff further contends that the ALJ subjectively used treating versus non-treating physician's testimony, alleging that the former was ignored in favor of the latter. (Pl. Obj. at 10) Because this supposition falls within the ambit of the plaintiff's "substantial evidence" claim, it is necessary briefly to articulate the Fourth Circuit's case law regarding the weight to be accorded the testimony of both treating and non-treating physicians.

Our circuit has held that the testimony of a treating physician is entitled to be given more weight than that of a non-treating physician, "because it reflects an expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." *Mitchell v. Schweiker*, 699 F.2d 185, 187 (4th Cir. 1983). But this rule is not absolute, and the testimony of a non-treating physician may bear relevance, particularly when weighed in light of conflicting treating physician testimony. *See Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1993) (citing *Campbell v. Bowen*, 993 F.2d 1247, 1250 (4th Cir. 1986)) ("Although the treating

physician rule requires a court to accord greater weight to the testimony of a treating physician, the rule does not require that the testimony be given controlling weight.”). Conversely, non-treating physician testimony should be disregarded when there is “totally” contradictory evidence in the record. *See Gordon v. Schweiker*, 725 F.2d 231, 235 (4th Cir. 1984).

In the present case, the ALJ has been presented with conflicting, yet similarly persuasive, medical testimony. When confronted with this type of situation, the ALJ has the discretion to rely on the testimony of the non-treating physician, provided that such testimony is supported by the record. *See* 20 C.F.R. §416.927(c)(1) (“If all of the evidence the [ALJ] receive[s], including *all* medical opinion(s), is consistent, and there is sufficient evidence for [the judge] to decide whether you are disabled, [the ALJ] will make [his] determination or decision based on that evidence.” (emphasis added))

The plaintiff refers the court to apparently supportive testimony proffered by a number of treating and non-treating physicians indicating that Story suffered from severe depression to such an extent so as to render her incapable of engaging in any substantive employment. (Pl. Obj. at 8-11.) Although the court agrees that the plaintiff suffered from a non-exertional impairment, the court finds that 1) there was substantial evidence in the record to support the ALJ’s finding that the plaintiff retained the residual functional capacity to engage in light sedentary work; and 2) the ALJ sufficiently articulated the weight he accorded the medical evidence presented to him.

A.

The ALJ reached his determination that the plaintiff had the residual capacity to engage in light sedentary work, by making use of all available evidence, including treating and

non-treating physician testimony, as well as vocational expert (“VE”) testimony. In so finding, the ALJ found moderate limitations and an inability to carry out complex tasks. He posed these limitations to the VE, who found that there was a substantial number of jobs in the national economy available to the plaintiff. On cross examination, the plaintiff’s attorney questioned the VE on whether a person who “often had problems with concentration” could perform the jobs which the VE had testified were available to the plaintiff. After some discussion as to the meaning of the term “often,” the VE opined that the aforementioned jobs would not be available to a person who, among other limitations, “often had problems with concentration.”

The plaintiff essentially argues that the concession by the VE is dispositive in finding that the Commissioner did not meet his burden of establishing that there are a significant number of jobs available to a person with the plaintiff’s limitations. Support for the plaintiff’s hypothetical encompassing “often” problems with concentration is found in the evaluation of the plaintiff completed by Michelle Eabon, PhD., a non-treating psychiatrist. When rating the plaintiff’s deficiencies in concentration, Dr. Eabon opined that the plaintiff’s limitations affected her often. However, the ALJ was entitled to reject the VE testimony in response to the plaintiff’s hypothetical if the hypothetical overstated the plaintiff’s limitations. *See English v. Shalala*, 10 F.3d 1080, 1083 (4th Cir. 1993) (response to improper hypothetical is not substantial evidence).

Although Dr. Eabon found that the plaintiff “often had deficiencies of concentration,” (R. at 147), the term “often,” as it is used in the Rating of Impairment Severity, actually falls in the middle range of a potential claimant’s Degree of Limitations.¹ Further, several treating physicians

¹ The Degree of Limitations listings which range from least to greatest severity are : Never, Seldom, Often, Frequent, and Constant.

found the plaintiff's concentration deficiencies to be less severe than found by Dr. Eabon and posed in the plaintiff's hypothetical to the VE. For Example, Dr. S. Martel Pitts, a doctor with whom the plaintiff visited once a week from May 1995 through May 1996, found that although Story had "some problems with concentration and staying on task," (R. at 166), her memory and ability to perform calculations and abstract reasoning was "intact." (R. at 165-166.) Treating physician George Stergis found that the plaintiff had "normal . . . attention, and memory." (R. at 176) On the other hand, consultative psychologist Dana Blackmer's evaluation that the plaintiff's short-term memory was fair to poor. (R. at 176.)

The ALJ was faced with multiple evaluations of the plaintiff's ability to concentrate, and placed more weight on the evaluations of two treating physicians, Drs. Pitts and Stergis. The opinions of Drs. Pitts and Stergis satisfy the requirements of substantial evidence. Furthermore, it was reasonable for the ALJ to place less weight on Dr. Eabon's evaluation that the plaintiff often had deficiencies in concentration because (1) Dr. Eabon was a non-treating examiner whose testimony on concentration was somewhat inconsistent with that of the treating physicians, and (2) Dr. Eabon's evaluation could be seen as internally inconsistent.² Thus, the ALJ's had the authority to reject the VE's response to the plaintiff's hypothetical, which relied on Dr. Eabon's concentration evaluation. The ALJ's determination that the plaintiff suffered from moderate limitations with respect to her non-exertional impairments, and the VE's corresponding identification of jobs available to a person with moderate limitations, is substantial evidence that the Commissioner discharged his burden at the fifth step of the sequential inquiry.

² Although Dr. Eabon found certain deficiencies, Dr. Eabon also opined that the plaintiff's residual functioning capacity was "unlimited." (R. at 151.)

B.

The plaintiff also argues that the ALJ did not articulate sufficiently the weight certain medical evidence was accorded. The court disagrees and finds that the ALJ acted in a manner commensurate with his responsibilities. The ALJ determined Story's residual functional capacity by evaluating the evidence implicit in her medical records. The ALJ found that although the plaintiff alleged disability due to pain and depression, "the medical evidence shows very limited treatment for these complaints during the time she alleges disability." (R. at 19.) Further, the plaintiff "was not undergoing treatment for her alleged symptoms and no treating or examining physician reported that [Story] was disabled or limited in her ability to work." (R. at *Id.*)

The ALJ conceded that "[the plaintiff's] capacity for light work is diminished by significant non-exertional limitations which make it impossible for her to perform tasks requiring bilateral manual dexterity greater than that required of . . . a cashier." (R. at *Id.*) Cognizant of these restrictions, the ALJ, reliant on the testimony of a vocational expert, found a number of jobs in the national economy that the plaintiff could perform, including: stock clerk, machine operator, and inspector/checker. (R. at 20) Based upon this evidence, and crediting only that evidence which was consistent with the record, the ALJ found that the plaintiff was "not disabled within the meaning of the Social Security Act." (R. at *Id.*)

IV

For the foregoing reasons, the Magistrate Judge's Report and Recommendation shall be accepted and the final decision of the Commissioner shall be affirmed. An appropriate

order shall this day enter.

ENTERED: _____
Senior United States District Judge

Date