

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

REBECCA TROUTMAN-HENSLEY,

Plaintiff,

v.

MICHAEL J. ASTRUE, COMMISSIONER OF
SOCIAL SECURITY,

Defendant

CIVIL No. 3:07CV00058

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court upon the parties' cross motions for summary judgment (docket entry no. 15, 16), the Report and Recommendation of the U.S. Magistrate Judge (docket entry no. 18), the defendant's objections thereto (docket entry no. 19), and the plaintiff's response to defendant's objections (docket entry no. 20). I referred this matter to the Honorable B. Waugh Crigler, U.S. Magistrate Judge, for proposed findings of fact and a recommended disposition pursuant to 28 U.S.C. §§ 636(b)(1)(B) & (C). The Magistrate filed his Report and Recommendation ("Report") on July 22, 2008, recommending that this Court enter an order granting plaintiff's motion for summary judgment and remanding the case to the Commissioner for further proceedings pursuant to 42 U.S.C. § 405(g). The defendant timely filed objections to the Report on July 23, 2008, obligating the Court to undertake a de novo review of those portions of the Report to which objections were made. 28 U.S.C. § 636(b) (2006); *Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir. 1982). After a thorough examination of the defendant's objections, plaintiff's response, the applicable law, and the documented record, I hereby decline to follow the Report of the Magistrate Judge and will grant the defendant's motion for summary judgment.

I. BACKGROUND

The plaintiff, Rebecca Troutman-Hensley, protectively filed a Title II application for a period of disability and disability insurance benefits, and a Title XVI application for supplemental security income on January 23, 2006, alleging a disability onset date of November 28, 2004 in both applications. (R. 14.) The claims were initially denied on May 22, 2006 and denied again on reconsideration on October 30, 2006. *Id.* Thereafter, Troutman-Hensley timely requested a hearing before an administrative law judge (“ALJ”), which was held on May 15, 2007. *Id.*

In a decision ultimately adopted as the final decision of the Commissioner, the ALJ concluded that while Troutman-Hensley suffered from several severe impairments (disorder of the back, lower extremity pain, and migraine headaches) (R. 16), those impairments did not meet or equal the criteria for a listed impairment when viewed individually or in combination with one another. (R. 19.) Based on evidence of her day-to-day activities, chores, and child-rearing duties, the ALJ concluded that Troutman-Hensley’s statements concerning the intensity, persistence, and limiting effects of her symptoms were not entirely credible. (R. 21-22.) The ALJ determined that Troutman-Hensley could perform past relevant work as a bottle inspector because she retained the residual functional capacity (“RFC”) to perform unskilled, sedentary work. (R. 22.) In light of these conclusions, the ALJ found that Troutman-Hensley was not disabled under the terms of the Social Security Act, and thus not entitled to disability, disability insurance benefits, or supplemental security income. (R. 22.)

Troutman-Hensley timely appealed the ALJ’s decision to the Appeals Council and submitted additional evidence—medical records from Dr. Jerome Hotchkiss, M.D., and from the Augusta Medical Center. (R. 5-8, 395-418.) On September 27, 2007, the Appeals Council issued a notice denying Troutman-Hensley’s request for review, stating that the additional evidence did

not provide a basis for changing the ALJ's previous decision. (R. 5-8.) The ALJ's decision was accordingly adopted as the final decision of the Commissioner, and Troutman-Hensley timely filed the instant action on October 29, 2007.

The parties filed cross-motions for summary judgment, and the Magistrate recommended that this Court enter an order granting Troutman-Hensley's motion for summary judgment and remanding the case to the Commissioner for further proceedings pursuant to 42 U.S.C. § 405(g). The Magistrate found that the Commissioner's decision was not supported by substantial evidence because the Appeals Council failed to properly consider Dr. Hotchkiss's July 20, 2007 evaluation, which was "new" and "material" evidence that might have impacted the ALJ's final decision that Troutman-Hensley retained the RFC to perform past relevant work as a bottle inspector. Defendant's objections argue that the case should not be remanded because Hotchkiss's evaluation was not "material," as the information contained in it would not have affected the ALJ's determination that Troutman-Hensley retained the RFC to perform her past relevant work.

II. STANDARD OF REVIEW

This Court must uphold the Commissioner's factual findings if they are supported by substantial evidence and were reached through application of the correct legal standard. *See* 42 U.S.C. § 405(g) (2000); *Craig v. Chater*, 76 F.3d 585, 589 (4th Cir. 1996). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Mastro v. Apfel*, 270 F.3d 171, 176 (4th Cir. 2001) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)), and consists of "more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Laws v. Celebrezze*, 368 F. 2d 640, 642 (4th Cir. 1966). In determining whether the Commissioner's decision was supported by substantial evidence, the

Court may not “re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of the Secretary.” *Craig*, 76 F.3d at 589.

III. DISCUSSION

A. The Additional Evidence Submitted By Troutman-Hensley Is Not Material

After the ALJ has made a decision, the Appeals Council’s ability to consider additional evidence is limited. Such evidence may only be considered if it is (1) new, (2) material, and (3) relates to the period on or before the ALJ made his decision. 20 C.F.R. §§ 409.970 (2008); *Davis v. Barnhart*, 392 F.Supp.2d 747, 750 (W.D. Va. 2005). Evidence is deemed “new” if it is neither duplicative nor cumulative, and it is “material” if there is a reasonable probability that the evidence would have changed the outcome in the case. *Wilkins v. Sec’y, Dep’t of Health & Human Servs.*, 953 F.2d 93, 96 (4th Cir. 1991); *Davis*, 392 F.Supp.2d at 750. While the additional evidence submitted by Troutman-Hensley to the Appeals Council was “new” and related to the relevant time period, it was not “material.”

The additional evidence submitted to the Appeals Council relates to the relevant time period on or before the ALJ’s decision of May 15, 2007 because the physical capacities evaluation form covers the time period of before November 28, 2004 up until the hearing (R. 408.) and the other additional medical records date back to 2006. (R. 395-418.) The additional evidence is also “new” because it is neither duplicative nor cumulative of the other evidence in the record. As noted by the Magistrate, the record does not contain any other similar functional assessments that specifically address the limitations caused by Troutman-Hensley’s physical conditions and the extent to which those limitations impact her ability to work.

None of the additional evidence submitted to the Appeals Council, however, is “material.” While the information contained in the additional medical records and Dr.

Hotchkiss's evaluation form may have been different from the other information in the record, there is no reasonable probability that the information would have changed the ALJ's ultimate decision. The ALJ's decision to deny Troutman-Hensley's claim was grounded in the belief that she could still perform past relevant work as a bottle inspector despite her physical limitations. (R. 22.) A careful examination of the additional evidence would do nothing to change that conclusion. The evaluation states that Troutman-Hensley can: sit for five to six hours of an eight hour work day as long as she changes positions every one to five minutes¹; lift up to five pounds occasionally throughout a work day; use her hands for repetitive simple grasping and fine manipulation; and occasionally work with her arms extended at the waist or shoulder level. (R. 408.) These limitations would do nothing to change the ALJ's determination that Troutman-Hensley has the RFC to perform her past relevant work as a bottle inspector. The job was sedentary and required Troutman-Hensley, while sitting or standing, to check the printing on empty bottles to make sure the ink was correctly applied. (R. 429.) None of the new information noted in the evaluation or the additional records would preclude Troutman-Hensley from performing this past relevant work. While the evaluation also states that Troutman-Hensley cannot stand or walk for more than one hour out of an eight hour workday, use her feet for repetitive movements, or stoop, squat, crawl, climb, or reach above shoulder level, there is no indication in the record that any of these activities would be required for the performance of her past relevant work.

There is no reasonable probability that the evidence of the additional medical records and Dr. Hotchkiss's evaluation would change the outcome of the ALJ's decision. While this evidence

¹ Notably, the evaluation form generated by Troutman-Hensley's counsel only provided a checklist for Dr. Hotchkiss to assess Troutman-Hensley's ability to sit and stand during an eight-hour workday. Five to six hours was the maximum amount of time provided on the checklist for the assessment of an eight-hour day. Since counsel did not provide a box to check for seven to eight hours, it is not known whether Troutman-Hensley's ability to sit for an eight hour workday is actually limited to six hours.

is “new” and relates to the relevant time period at issue, it is not “material.” Because the Commissioner’s final decision was reached through the application of the correct legal standard, the additional evidence need not be sent back to the ALJ for consideration.

B. The Commissioner’s Decision That Troutman-Hensley Is Not Disabled Is Supported By Substantial Evidence

The district court must consider the record as a whole, including newly submitted evidence, when determining whether the decision of the ALJ was supported by substantial evidence. *Wilkins*, 953 F.2d at 96. This review is difficult, however, given that it is the role of the ALJ, and not the reviewing court, to resolve conflicts in the evidence. *Smith v. Chater*, 99 F.3d 635, 638 (4th Cir. 1996). The district court is thus forced to reconcile its duty to review the entire record, including new evidence, with its duty to abstain from making credibility determinations or resolving conflicts in the evidence. *Davis v. Barnhart*, 392 F.Supp.2d 747, 751 (W.D. Va. 2005). The court cannot weigh the additional evidence, but can merely determine whether it is contradictory, calls into doubt any decision grounded in the prior medical reports, or presents material competing testimony. *Id.*

The evidence shows that Troutman-Hensley suffers from disorder of the back, lower extremity pain, and migraine headaches, but that none of those conditions render her unable to work under the Social Security Act. Nothing in the record, including the additional evidence submitted to the Appeals Council, precludes a finding by the ALJ that Troutman-Hensley has the RFC to perform past relevant work as a bottle inspector. As noted by the ALJ, the record indicates that Troutman-Hensley engages in many normal day-to-day activities and tasks, including child care, light housekeeping, attending church, and driving her father to and from work. (R. 103-08.) And although her right foot impairment was the reason she first made a claim for disability, the pain has been significantly resolved with treatment. (R. 21.) Furthermore, the

additional evidence does not contradict or call into doubt the ALJ's final decision, which was based upon the medical records originally submitted by Troutman-Hensley. The physical capacities evaluation form synthesizes medical opinion into an assessment of Troutman-Hensley's ability to perform work-related tasks, but it does not specifically contradict or call into question anything grounded in the medical records originally submitted to the ALJ. Similarly, the additional medical records submitted to the Appeals Council fail to contradict or call into question any of the other records originally considered by the ALJ. In sum, the Commissioner's decision, based on the evidence originally submitted as well as the evidence later submitted to the Appeals Council, is supported by substantial, relevant evidence that could lead a reasonable mind to conclude that Troutman-Hensley is capable of performing past relevant work and is not disabled.

IV. CONCLUSION

After a thorough examination of the defendant's objections, plaintiff's response, the applicable law, the documented record, and the Magistrate's Report, the Court grants defendant's objections. The Commissioner's decision that Troutman-Hensley is not disabled because she is capable of performing past relevant work is supported by substantial evidence. The additional medical evidence submitted to the Appeals Council is not material because there is no reasonable probability that the information contained therein would change the outcome of the ALJ's decision. Accordingly, I decline to adopt the Report and Recommendation of the U.S. Magistrate Judge filed July 22, 2008. Instead, I hereby GRANT the defendant's motion for summary judgment (docket entry no. 16), AFFIRM the Commissioner's decision to deny benefits, and ORDER that the Clerk of this Court DISMISS this case and STRIKE it from the Court's docket.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTER: This _____ day of September, 2008.



NORMAN K. MOON
UNITED STATES DISTRICT JUDGE