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

LOREE L. LESTER,	)	
	)	
Plaintiff,	)	**Civil Action No. 7:09cv00016**
	)	
v.	)	
	)	
MICHAEL J. ASTRUE,	)	**By: Michael F. Urbanski**
Commissioner of Social Security,	)	**United States Magistrate Judge**
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

Plaintiff Loree L. Lester ("Lester") brings this action for review of the Commissioner of Social Security's ("Commissioner") decision denying her claim for disability insurance benefits and supplemental security income benefits under the Social Security Act (the "Act"). On appeal, Lester contends, inter alia, that the Administrative Law Judge ("ALJ") erred by failing to properly consider the opinion of her long time treating specialist that her multiple sclerosis is disabling.

Having reviewed the record, the undersigned finds that reversal is warranted in this case. On no less than three occasions, Lester's treating specialist opined that her multiple sclerosis condition, which was objectively documented by MRIs revealing brain and spinal lesions, prevented her from working. The ALJ's conclusory rejection of the opinions of Lester's treating physician violated both the Commissioner's own regulations and case law. As such, the Commissioner's decision is not supported by substantial evidence. Therefore, the undersigned **RECOMMENDS** that this case be **REVERSED** and **REMANDED** for calculation of payment of benefits.

I

Section 405(g) of Title 42 of the United States Code authorizes judicial review of the Social Security Commissioner's denial of social security benefits. Mastro v. Apfel, 270 F.3d 171, 176 (4th Cir. 2001). "'Under the Social Security Act, [a reviewing court] must uphold the factual findings of the [ALJ] if they are supported by substantial evidence and were reached through application of the correct, legal standard.'" Id. (alteration in original) (quoting Craig v. Chater, 76 F.3d 585, 589 (4th Cir. 1996)). "Although we review the [Commissioner's] factual findings only to establish that they are supported by substantial evidence, we also must assure that his ultimate conclusions are legally correct." Myers v. Califano, 611 F.2d 980, 982 (4th Cir. 1980).

The court may neither undertake a de novo review of the Commissioner's decision nor re-weigh the evidence of record. Hunter v. Sullivan, 993 F.2d 31, 34 (4th Cir. 1992). Judicial review of disability cases is limited to determining whether substantial evidence supports the Commissioner's conclusion that the plaintiff failed to satisfy the Act's entitlement conditions. See Laws v. Celebrezze, 368 F.2d 640, 642 (4th Cir. 1966). Evidence is substantial when, considering the record as a whole, it might be deemed adequate to support a conclusion by a reasonable mind, Richardson v. Perales, 402 U.S. 389, 401 (1971), or when it would be sufficient to refuse a directed verdict in a jury trial. Smith v. Chater, 99 F.3d 635, 638 (4th Cir. 1996). Substantial evidence is not a "large or considerable amount of evidence," Pierce v. Underwood, 487 U.S. 552, 565 (1988), but is more than a mere scintilla and somewhat less than a preponderance. Perales, 402 U.S. at 401. If the Commissioner's decision is supported by substantial evidence, it must be affirmed. 42 U.S.C. § 405(g); Perales, 402 U.S. at 401.

"Disability" is 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." 42 U.S.C. § 423(d)(1)(A). The "[d]etermination of eligibility for social security benefits involves a five-step inquiry." Walls v. Barnhart, 296 F.3d 287, 290 (4th Cir. 2002). This inquiry asks whether the claimant (1) is working; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements of a listed impairment; (4) can return to his or her past relevant work; and if not, (5) whether he or she can perform other work. Heckler v. Campbell, 461 U.S. 458, 460-462 (1983); Johnson v. Barnhart, 434 F.3d 650, 654 n.1 (4th Cir. 2005) (citing 20 C.F.R. § 404.1520). If the Commissioner conclusively finds the claimant "disabled" or "not disabled" at any point in the five-step process, he does not proceed to the next step. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). Once the claimant has established a prima facie case for disability, the burden then shifts to the Commissioner to establish that the claimant maintains the residual functional capacity ("RFC"),[1] considering the claimant's age, education, work experience, and impairments, to perform alternative work that exists in the local and national economies. 42 U.S.C. § 423(d)(2)(A); Taylor v. Weinberger, 512 F.2d 664, 666 (4th Cir. 1975).

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[1] RFC is a measurement of the most a claimant can do despite his limitations. See 20 C.F.R. §§ 404.1545(a), 416.945(a). According to the Social Security Administration:

> RFC is an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis. A 'regular and continuing basis' means 8 hours a day, for 5 days a week, or an equivalent work schedule.

Social Security Regulation (SSR) 96-8p. RFC is to be determined by the ALJ only after he considers all relevant evidence of a claimant's impairments and any related symptoms (e.g., pain). See 20 C.F.R. §§ 404.1529(a), 416.929(a).

II

Lester has suffered from relapsing-remitting multiple sclerosis ("MS") for a number of years. Beginning in 2001, when she was 25 years old, Lester began to have difficulty stuttering and with balance. (R. 339.) Lester complained of left arm pain, feeling clumsy, falling and dragging her left foot. (R. 339.)

Since 2002, Lester has been treated by Dr. Douglas R. Jeffery, a specialist at the Multiple Sclerosis Clinic at the Wake Forest University Baptist Medical Center in Winston-Salem. In her first visit, Dr. Jeffery noted that Lester "complains of extreme fatigue. She complains of urinary urgency intermittently, tingling in her feet, a deep ache in the muscles of her lower extremities, blurry vision, and difficulty with concentration and memory. She also complains of marked heat sensitivity." (R. 339.) Lester's MS is objectively determined by a number of brain and spine MRIs taken over the years, which show multiple periventricular white matter lesions compatible with MS.[2] (R. 337, 357.)

Since her first visit to Dr. Jeffery in 2002, Lester's medical records reflect a myriad of physical problems associated with her MS, including increased spasms and occasional burning sensations in the back of her head, (May, 2003, R. 337); fatigue and irritability, (June, 2003, R. 332); weakness in her left leg and visual problems, (July, 2005, R. 326); left side weakness and headache, (August, 2005, R. 324); left hip and constant foot pain, causing her to be somewhat unsteady on her feet, (February, 2006, R. 320); continued fatigue and confusion, (February, 2006, R. 319).

Despite the onset of her MS, Lester continued to work, first as a florist until 2004, and then as a legal assistant. By February 2006, Dr. Jeffery reported that "[s]he continues to have great difficulty working. She has continued problems with fatigue and confusion. She is having

[2] The ALJ's decision makes no mention of these lesions, which objectively confirm Lester's multiple sclerosis.

problems transposing numbers. She also has a variety of other symptoms including urgency of bladder function and pain. As a result of these problems, she is currently 100% disabled from any occupation." (R. 319.)

On two subsequent occasions, Dr. Jeffery opined that she is incapable of performing any work. On September 6, 2006, he wrote:

> Ms. Lester is a patient who is under my care for relapsing remitting multiple sclerosis. She is 100% disabled secondary to MS. Her symptoms which can be intermittent at times include significant fatigue, foot pain, ambulation problems, blurred vision, spasms of legs and pain and numbness in hands and legs. She has lesions compatible with multiple sclerosis on her cervical spine and brain MRI.
>
> Due to these deficits she is unable to lift greater than 10 pounds, stand, sit or walk for long periods and needs to rest during the day due to her fatigue. She also would be unable to handle the stress of work activity or maintain concentration for sustained periods of time.
>
> She is unable due to her deficits to perform her work duties in the current position or alternate position.

(R. 313.)

Dr. Jeffery's July 27, 2007, disability opinion again noted Lester's physical problems caused by the MS, but highlighted the fact that "[p]robably of greater importance is the fact that she has significant and substantial cognitive dysfunction due to her multiple sclerosis." (R. 357.) Dr. Jeffrey concluded:

> It is my firm opinion as her treating physician that Mrs. Lester is completely and 100 percent disabled from any occupation due to:
>
> 1. Frequent MS relapses requiring treatment with steroids.
>
> 2. Cognitive dysfunction directly due to her multiple sclerosis.
>
> 3. Chronic pain requiring treatment which interferes with her capability to work.

4. Fatigability of strength, directly related to her multiple sclerosis.

5. Severe fatigue and lassitude, also directly related to her multiple sclerosis.

(R. 357.)

The ALJ summarily dismissed these treating specialist opinions, concluding that "the physician's office notes are not consistent with his opinions." (R. 23.) In support of this conclusion, the ALJ makes reference to only one office visit in October, 2005, which he summarized as follows: "For example, in October 2005 the examination was normal; claimant's MS was stable; and her energy okay. Remaining examinations after October 2005 have all been normal." (R. 23.)

The ALJ's characterization of Dr. Jeffery's examinations of Lester beginning in October, 2005 as "normal," is not particularly apt. Rather, a close reading of the October, 2005 visit reflects only that Lester's MS was "back to her baseline," (R. 322), following a significant relapse four months earlier. The notes from her next visit, in February, 2006, state that although her recent relapse seemed to resolve quite well, "[s]he has unfortunately continued to have pain in both feet, worse with walking. This pain is fairly constant, does not worsen at night when she goes to bed, and feels like a band around both feet. She also describes a tingling type sensation with that. She also has some occasional left hip pain. Mrs. Lester is concerned that this pain is making her somewhat unsteady on her feet and is interested in having it treated today." (R. 320.) On the same day of this visit, Dr. Jeffery opined that she could not work in any occupation, describing Lester's aggressive relapsing-remitting MS. (R. 319.)

The ALJ's terse rejection of the treating specialist's opinions falls far short of what is required by case law and the Commissioner's own regulations. The opinion of a treating

physician regarding the nature and severity of the claimant's impairments is given controlling weight if the ALJ finds that the treating source's opinion is well supported by the objective evidence of record and is not inconsistent with the other substantial evidence in the case record. Mastro v. Apfel, 270 F.3d 171, 178 (4th Cir. 2001); 20 C.F.R. §§ 404.1527(d), 416.927(d). The ALJ is to consider a number of factors which include the diagnostic and clinical support for the opinion, the opinion's consistency with the record, and whether the physician is a specialist. 20 C.F.R. §§ 404.1527(d), 416.927(d). A treating physician's opinion cannot be rejected absent "persuasive contrary evidence," and the ALJ must provide his reasons for giving a treating physician's opinion certain weight or explain why he discounted a physician's opinion. Mastro, 270 F.3d at 178; 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) ("We will always give good reasons in our notice of determination or decision for the weight we give to your treating source's opinion.").

Given the strength of Dr. Jeffery's opinions and his status as Lester's long time treating MS specialist, it is not sufficient for the ALJ to simply state that his notes are not consistent with his opinions. Rather, the ALJ must provide persuasive contrary evidence to support that conclusion, which is plainly lacking here.

There is no persuasive evidence contrary to the opinions of Dr. Jeffery, and both case law and the regulatory framework require the Commissioner to accord greater weight to Lester's long-term treating specialist's disability opinion. The multiple MRIs in the record, which reveal spinal and brain lesions consistent with MS, objectively support Dr. Jeffery's opinion. Further, the record contains no opinion by any physician who examined Lester that concludes that she is able to work. The only support for the ALJ's decision are the forms completed by the state agency physicians, based only on a limited review of Lester's medical records. Of significance,

the state agency reviewing physicians did not have the benefit of any of Dr. Jeffery's disability opinions, and thus did not have the ability to comment on them.[3] Certainly, after receiving Dr. Jeffery's opinions, the ALJ could have sought further input from the state agency doctors or obtained the views of an consulting examining physician, but he chose to do none of these things, opting instead to simply disagree with Dr. Jeffrey's opinions. Dr. Jeffery's opinions are amply supported by objective evidence, and there is no persuasive contrary evidence. Plainly, Lester has met her burden of proving disability as of February 8, 2006, the date of Dr. Jeffery's first disability opinion. On this record, it is clear that the ALJ's rejection of the treating specialist's firmly held disability opinions lacks substance and must be reversed.

As such, it is **RECOMMENDED** that this case be **REVERSED** and **REMANDED** to the Commissioner for payment of benefits as of February 8, 2006.[4]

III

The Clerk is directed to transmit the record in this case to Samuel G. Wilson, United States District Judge and to provide copies of this Report and Recommendation to counsel of record. Both sides are reminded that pursuant to Rule 72(b), they are entitled to note any objections to this Report and Recommendation within fourteen (14) days hereof. Any adjudication of fact or conclusion of law rendered herein by the undersigned that is 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

[3] It appears from the text of the state agency RFC opinion dated November 2, 2005 that the state agency physician only had medical records through August, 2005. (R. 207.) Dr. Jeffery first opined as to Lester's disability in February, 2006. (R. 319.)

[4] Lester also argues that the ALJ erroneously concluded that she did not meet Listings 11.08 and 11.09, discounted her non-exertional problems and failed to consider the non-exertional requirements of her past relevant work. Were this a close case, the undersigned would address those arguments. But this is not a close case. Indeed, because the ALJ's decision plainly violated the treating physician rule requiring reversal and an award of benefits, these aspects of Lester's argument need not be addressed herein.

recitations or findings as well as to the conclusion reached by the undersigned may be construed by any reviewing court as a waiver of such objection.

ENTER: This 21st day of January, 2010.

/s/ Michael F. Urbanski
United States Magistrate Judge