

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

JOYCE T. KING,
Plaintiff,

v.

JO ANNE B. BARNHART,
Commissioner of Social Security,
Defendant.

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Case No. 6:04cv00053

By: Hon. Michael F. Urbanski
United States Magistrate Judge

REPORT AND RECOMMENDATION

Plaintiff Joyce T. King brought this action pursuant to 42 U.S.C. § 405(g) for a review of the final decision of the Commissioner of Social Security denying her claim for disability insurance benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. This case was referred to the undersigned magistrate judge on May 23, 2005 for report and recommendation. Oral argument was held on October 3, 2005. Having reviewed the record and after briefing and oral argument, the case is now ripe for decision.

Plaintiff claims disability based on lupus, fibromyalgia, bilateral carpal tunnel syndrome, fatigue and depression. Plaintiff disputes the administrative law judge’s (“ALJ”) finding that she retains the residual functional capacity (“RFC”) for a full range of light work, including her past relevant work. However, the record contains no opinions from medical doctors to support plaintiff’s claim that she can only work at the sedentary level. As plaintiff merely presents evidence of subjective complaints unsupported by medical opinions, the Commissioner’s decision is supported by substantial evidence. It is recommended therefore that the Commissioner’s motion for summary judgment be granted.

STANDARD OF REVIEW

The court's review is limited to a determination as to whether there is substantial evidence to support the Commissioner's conclusion that plaintiff failed to meet the conditions for entitlement established by and pursuant to the Act. If such substantial evidence exists, the final decision of the Commissioner must be affirmed. Hays v. Sullivan, 907 F.2d 1453, 1456 (4th Cir. 1990); Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966). Stated briefly, substantial evidence has been defined as such relevant evidence, considering the record as a whole, as might be found adequate to support a conclusion by a reasonable mind. Richardson v. Perales, 402 U.S. 389, 401 (1971).

FACTUAL AND ADMINISTRATIVE HISTORY

Plaintiff was born on October 11, 1943 and has a tenth grade education. (Administrative Record, hereinafter "R.," at 43, 86, 299) Plaintiff's previous work includes that of a cashier and assembly line worker. (R. 13) Plaintiff filed an application for DIB on November 21, 2002, alleging she became disabled on June 24, 2002 due to subacute cutaneous lupus, bilateral carpal tunnel syndrome, and depression. (R. 13, 80) Plaintiff's claims were denied by the State Agency. (R. 12, 34) Plaintiff testified at an administrative hearing before an ALJ on June 21, 2004. (R. 12, 295-317) Following the hearing, the ALJ denied plaintiff's claims for DIB, finding plaintiff has the RFC for a full range of light work and can perform her past relevant work as a cashier. (R. 17) The ALJ's decision became final for the purposes of judicial review under 42 U.S.C. § 405(g) when the Appeals Council denied plaintiff's request for review. (R. 4-7) Plaintiff then filed this action challenging the Commissioner's decision.

Plaintiff's last date of work was June 28, 2002 when she worked as a cashier at Wal-Mart on the third shift. (R. 300-301) Complaining of leg pain and fatigue, plaintiff obtained a two week work excuse from her treating physician, Leah Hinkle, M.D. (R. 15, 80, 129) No medical records suggest that plaintiff had a severe or acute medical problem at the time she obtained the two weeks of medical leave. (R. 15) When she returned to work, no day shift position was available and plaintiff was laid off. (R. 15) Plaintiff applied for and received unemployment benefits and actively searched for work. (R. 301-303)

Plaintiff's medical records document her complaints of various physical and mental ailments. On December 5, 2001, plaintiff complained to Dr. Hinkle of right leg pain. (R. 132) In April 2002, plaintiff said she suffered from right leg pain on a daily basis, as well as fatigue. (R. 130) Unable to diagnose a problem after examining plaintiff's leg, Dr. Hinkle ordered a CT scan of the lumbar spine. (R. 130) The CT scan "didn't really show anything;" there was no identifiable herniated disc and only mild degenerative change was noted. (R. 131, 135) Dr. Hinkle prescribed Prednisone for plaintiff's leg pain and attributed plaintiff's fatigue to poor appetite and poor motivation to do anything outside of the home. (R. 130) As a result, Dr. Hinkle prescribed Celexa for depression. (R. 130) One month later, Dr. Hinkle notes both plaintiff's leg pain and depression were improving. (R. 130)

On June 24, 2002, plaintiff contacted Dr. Hinkle's office complaining again of leg pain and asking for an order for lighter work. (R. 129) Four days later, plaintiff saw Dr. Hinkle who remarked the examination remained essentially unchanged from plaintiff's last visit. (R. 129) Nevertheless, Dr. Hinkle's treatment notes indicate a willingness to try to get plaintiff on the first work shift. (R. 129)

In August 2002, plaintiff returned to Dr. Hinkle citing fatigue and low blood sugar. (R. 128) Plaintiff's EKG was normal and showed no acute changes. (R. 128) A stress echo test was also negative and observed plaintiff's good exercise tolerance, lack of chest pain during exercise, and normal blood pressure response to exercise. (R. 134)

Plaintiff then sought treatment from Androniki Bili, M.D., a rheumatologist. Dr. Bili's notes of August 29, 2002 reveal plaintiff claims pain in her hands, wrists, shoulder and legs. (R. 159) Plaintiff also complained of fatigue. (R. 159) Plaintiff was diagnosed with fibromyalgia in a follow-up visit on September 5, 2002 and was provided with an exercise regimen. (R. 154) Dr. Bili also suspected plaintiff might suffer from Sjogren's syndrome and ordered a lip biopsy. (R. 154) On October 7, 2002 plaintiff returned to Dr. Bili, complaining of sleeplessness, sweating, and dry mouth. (R. 149) Dr. Bili diagnosed plaintiff with Sjogren syndrome despite the negative lip biopsy. (R. 149, 167) Dr. Bili also noticed plaintiff's fibromyalgia was improving with exercise and that plaintiff has been walking every day, up to nine miles per week. (R. 149)

In 1999, plaintiff was diagnosed with subacute cutaneous lupus, or "lupus of the skin," which has a fifty percent chance of developing into lupus. (R. 158-9, 197) Treatment notes from March 28, 2003 indicate plaintiff periodically "gets little raised itchy spots and bumps" as a result of her cutaneous lupus but it is "never very bad." (R. 197) During this examination in March 2003, Allison Divers, M.D., found no evidence consistent with cutaneous lupus. (R. 198) Additionally, Dr. Hinkle remarked plaintiff did not have active lupus at the time of her December 5, 2001 examination (R. 132), and Dr. Bili noted no symptoms of lupus on September 5, 2002.

Plaintiff indicates she suffers from bilateral carpal tunnel syndrome. (R. 80) In 1980 and 1993, plaintiff underwent surgery for carpal tunnel. (R. 87, 154, 307) Dr. Bili noticed decreased grip strength in both hands and mild tenderness to pressure in both wrists without evidence of swelling. (R. 157) Although Dr. Bili notes possible osteoarthritis of the hands, an x-ray of plaintiff's hands proved to be normal. (R. 155, 158, 165) There were no focal bone erosions, and a tiny cystic lesion at the metacarpal head of the right hand was deemed clinically insignificant. (R. 165)

Plaintiff says she also suffers from depression. (R. 308) Dr. Hinkle prescribed Celexa in April 2002 (R. 130) and in June of the same year indicated plaintiff's depression was "stable." (R. 129) A psychiatric review conducted on April 29, 2003 by state agency consultant Howard Leizer, Ph.D., observed plaintiff had no severe impairments. (R. 210) It was also noted that plaintiff's ability to function is not significantly affected by a mental impairment. (R. 14, 224) Plaintiff has had no psychiatric treatment or hospitalizations, (R. 14, 224), and is working towards earning a GED. (R. 299-300)

At her hearing, plaintiff complained of severe fatigue and pain in her lower back, shoulders, and hands. (R. 303, 306-07) She stated she cannot sit for more than 30 to 45 minutes before she needs to get up and walk around for 10 to 15 minutes. (R. 303-04) Plaintiff indicated she is able to stand for approximately one hour before needing to sit or walk around; plaintiff also must lie down and rest for one hour each day. (R. 304-05)

ANALYSIS

The issue in this case is whether there is substantial evidence to support the Commissioner's decision that the claimant retains the residual functional capacity to return to

her past relevant work. Under the Act, a claimant for disability benefits has the burden of proving that she cannot work. See 42 U.S.C. §§ 423(d)(5), 1382c(a)(3)(H)(I); see also Blalock v. Richardson, 483 F.2d 773, 774 (4th Cir. 1972) (noting that a claimant has the burden of proving disability).

Having reviewed the record and applicable case law, this court reaches the conclusion that plaintiff has not met her burden of proving that she is disabled. There is substantial evidence to support the ALJ's finding that the plaintiff retains the residual functional capacity to perform her past relevant work as a cashier. (See R. 14) Plaintiff argues the ALJ erred by not applying the Medical Vocational Rules at the sedentary level of employment, which she argues direct a finding of disability under Rule 201.01. 20 C.F.R. § 404, Subpart P, Appx. 2. Plaintiff cites her limited ability to stand and her need to walk around in support of her position.

Plaintiff testified at her hearing that she can only sit for 30 to 45 minutes before she must get up and move around. (R. 303-304) Additionally, she must lie down and rest each day for approximately one hour, according to her testimony. (R. 305) Yet, no medical opinions support these limitations. No doctor opined that plaintiff needs to walk after sitting for 30 minutes or take naps during the day. Plaintiff's own testimony contradicts her self-diagnosed limitations. Plaintiff testified she is able to sit in the car for two hours before needing to stop and move around. (R. 300) Plaintiff also stated that she is able to stand for up to one hour at a time. (R. 304)

Plaintiff argues the medical evidence fully supports her testimony regarding her residual functional limitations. (Mem. Support. of Pl.'s Mot. Summ. J. 2.) Yet she fails to cite any specific medical record to support her subjective claims of limitation. (Mem. Support. of Pl.'s

Mot. Summ. J. 2.) Plaintiff states the medical evidence confirms that she suffers from lupus, bilateral carpal tunnel syndrome, fibromyalgia, and depression. (Mem. Support of Pl.'s Mot. Summ. J. 1.) Under the regulations, however, mere diagnosis is not enough to establish disability. See Gross v. Heckler, 785 F.2d 1163, 1165 (4th Cir. 1986); Wagner v. Apfel, 1999 U.S. App. LEXIS 29887, at *11 (4th Cir. Nov. 16, 1999).

Plaintiff makes vague complaints of pain in the legs, hands, shoulders and back, as well as depression, fatigue, and sleeplessness. It is clear under the law that “[p]ain is not disabling per se, and subjective evidence of pain cannot take precedence over objective medical evidence or lack thereof.” Gross, 785 F.2d at 1166; 20 C.F.R. § 404.1529. Plaintiff’s statements to physicians by way of history or complaint do not constitute objective medical evidence, and the recording of a claimant’s complaints by a physician does not transform those complaints into objective clinical evidence. Craig v. Chater, 76 F.3d 585, 590 n.2 (4th Cir. 1984). An individual does not have to be pain-free in order to be found not disabled. Hays v. Sullivan, 907 F.2d 1453, 1458 (4th Cir. 1990). Plaintiff must demonstrate through medical evidence, including objective observations, support for the notion that pain is disabling. Plaintiff in this case has failed to meet her burden in this regard.

Although plaintiff claims leg pain, a CT scan of the lumbar spine identified no herniated disc and only mild degenerative changes. (R. 135) After prescribing Prednisone, Dr. Hinkle noted plaintiff’s pain was improving. (R. 130) Dr. Bili diagnosed plaintiff with fibromyalgia but said her condition was improving with exercise. (R. 149, 154) Plaintiff also suffers from subacute cutaneous lupus, which results in periodic rashes following exposure to the sun. (R. 158-9, 197) No doctor has found evidence of active lupus. Plaintiff states she has carpal

tunnel syndrome as well; yet an x-ray of her hands was negative aside from one insignificant cystic lesion. (R. 165) Plaintiff further complains of depression, but has never been hospitalized or had psychiatric treatment of any kind. (R. 14, 224)

In addition, plaintiff's daily activities do not lend weight to her claim that she is disabled. Plaintiff walks up to nine miles a week. (R. 149) She also indicates she grocery shops with her husband, cooks meals, and does housework including laundry, ironing, dusting, and vacuuming. (R. 101-102) She attends church on Sundays, visits friends and relatives, and talks on the phone. (R. 99, 105) Plaintiff also states she reads 30 minutes to an hour each day. (R. 103) Plaintiff has been working towards earning her GED. (R. 299-300) These daily activities are inconsistent with plaintiff's complaints of disabling physical and mental impairments.

It appears the ALJ evaluated plaintiff's complaints regarding her pain properly. An ALJ evaluates the "intensity and persistence of the claimant's pain, and the extent to which it affects [her] ability to work." See Craig, 76 F.3d at 595. The ALJ considered the objective medical evidence of pain, medical treatments taken to alleviate the pain, specific descriptions of the pain, and the claimant's activities in this case. See 20 C.F.R. §§ 404.1529(c), 416.929(c). The ALJ noted that while connective tissue disorder may be considered a severe impairment under the regulations, claimant is able to perform light work and is able to perform her past relevant work as a cashier. (R. 14, 16) The ALJ found plaintiff to be free of any severe mental impairments that significantly limit her ability to function. (R. 13-14) Once plaintiff was laid off from her work at Wal-Mart, she drew unemployment benefits while she simultaneously pursued an application for Social Security disability. (R. 15) As the ALJ indicates, the two pursuits are incompatible; to receive unemployment benefits, the claimant must prove that she is ready,

willing and able to work. (R. 15-16) Furthermore, none of the updated medical records received by the ALJ after the administrative hearing warranted a different decision. (R. 14) Based on the medical evidence provided, as well as plaintiff's admitted willingness to actively pursue work after being laid off from her Wal-Mart job in 2002, the ALJ concurred with the state agency's decision that plaintiff is able to perform a full range of light work.

Given the deferential standard of review provided under 42 U.S.C. § 405(g), the court must affirm the decision of the ALJ, as there is substantial evidence to support the conclusion that plaintiff was not disabled as defined under the Social Security Act. See Pierce v. Underwood, 407 U.S. 552, 565 (1988); King v. Califano, 599 F.2d 597, 599 (4th Cir. 1979). As such, it is recommended that defendant's motion for summary judgment be granted.

CONCLUSION

In making this recommendation, the undersigned does not suggest that plaintiff is totally free of all pain and subjective discomfort. The objective medical record simply fails to document the existence of any condition which would reasonably be expected to result in total disability for all forms of substantial gainful employment. It appears that the ALJ properly considered all of the objective and subjective evidence in adjudicating plaintiff's claim for benefits. It follows that all facets of the Commissioner's decision in this case are supported by substantial evidence. It is recommended, therefore, that defendant's motion for summary judgment be granted.

The Clerk is directed immediately to transmit the record in this case to the Hon. Norman K. Moon, United States District Judge. Both sides are reminded that pursuant to Rule 72(b) they are entitled to note any objections to this Report and Recommendation within ten (10) 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 of the Court is hereby directed to send a certified copy of this Report and Recommendation to all counsel of record.

ENTER: This 16th day of November, 2005.

/s/ Michael F. Urbanski
 United States Magistrate Judge