

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

<b>CATHY A. STRICKLAND,</b>	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 6:05cv00019</b>
	)	
<b>JO ANNE B. BARNHART,</b>	)	
<b>COMMISSIONER OF SOCIAL SECURITY,</b>	)	<b>By: Hon. Michael F. Urbanski</b>
<b>Defendant.</b>	)	<b>United States Magistrate Judge</b>
	)	

**REPORT AND RECOMMENDATION**

Plaintiff Cathy A. Strickland (“Strickland”) 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 claims for disability insurance benefits (“DIB”) and Social Security Income (“SSI”) under Titles II and XIV of the Social Security Act, 42 U.S.C. §§ 401-433, 1381-1383. This case was referred to the undersigned Magistrate Judge on June 24, 2005 for report and recommendation. Having reviewed the record, and after briefing and oral argument, the case is now ripe for decision. As set forth in the opinion below, it is recommended that this case be remanded to the Commissioner under sentence four of 42 U.S.C. § 405(g) for consideration of Dr. Banks’ opinion.

**I**

Plaintiff was born on March 1, 1972, and completed the ninth grade. (Administrative Record, hereinafter “R.” at 14, 55, 72, 412) Plaintiff’s previous work includes that of a cashier, pet groomer and housekeeper. (R. 14, 67) Plaintiff last worked full time for Superior Services providing cleaning services for fire and water damage, (R. 413), and then worked part time at the Village Family Restaurant as a dishwasher. (R. 435) Plaintiff filed applications for DIB and SSI

on August 18, 2003 alleging she became disabled on November 2, 2002, due to a back condition and an affective disorder. (R. 13, 14, 66) Plaintiff's claims were denied at both the initial and reconsideration levels of administrative review, (R. 13), and an administrative hearing was held before an administrative law judge ("ALJ") on January 26, 2005. (R. 407-54) On March 22, 2005, the ALJ issued a decision denying plaintiff's claims for DIB and SSI, finding plaintiff retained the residual functional capacity ("RFC") to perform a significant range of light work. (R. 22) The ALJ found plaintiff capable of lifting and carrying twenty (20) pounds occasionally, and ten (10) pounds frequently; standing, walking and sitting six (6) hours out of an eight (8) hour workday, without repetitive head turning to either side, and with the ability to read, but not aggressively, throughout the workday. (R. 22)

The ALJ's decision became final for the purposes of judicial review under 42 U.S.C. § 405(g) on May 17, 2005, when the Appeals Council denied plaintiff's request for review. (R. 4-6) Plaintiff then filed this action challenging the Commissioner's decision.

## II

Plaintiff first argues that the ALJ erred by improperly evaluating her depression and anxiety. Second, plaintiff contends that the ALJ erred in failing to give controlling weight to the opinions of the plaintiff's treating physician Dr. Banks. Specifically, plaintiff asserts Dr. Banks' opinions regarding her headaches are supported by the medical records and thus should have been accorded greater weight by the ALJ. Finally, plaintiff alternatively requests that the court remand this case to the Commissioner for consideration of new evidence under sentence six of 42 U.S.C. § 405(g).

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).

The court is persuaded by plaintiff's second argument and believes the opinion of Dr. Banks should have been accorded greater weight by the ALJ. Because the undersigned recommends this case be remanded to the Commissioner for proper consideration of Dr. Banks' opinion that plaintiff's headaches render her incapable of work, the court need not address plaintiff's other arguments.

### III

Plaintiff contends that the ALJ failed to give controlling weight to her treating physician Dr. Banks' opinion regarding limitations caused by her headaches. Dr. Banks saw plaintiff a total of six times from December of 2003 to November of 2004. On December 2, 2003, plaintiff presented to Dr. Banks with complaints of persistent headaches and neck pain. (R. 156) She reported medication for her headaches and muscle spasms had not helped, and that she was having trouble sleeping, caring for her children and performing daily activities. (R. 156) In addition to her existing problems of migraines, depression, muscle spasms, and cervical strains,

Dr. Banks diagnosed her with dystonia,<sup>1</sup> TMJ,<sup>2</sup> spasmodic torticollis,<sup>3</sup> and dental caries (cavities). (R. 159) Dr. Banks referred plaintiff for an MRI/MRA and stated she should apply for disability. (R. 159)

A survey film showing a lateral view of the C-spine was taken on December 9, 2003, which revealed posterior spurring at the C5-6 level. (R. 152) An MRA of the head showed antegrade flow in both distal vertebral arteries, with no evidence of aneurysm or stenosis. (R. 153) An MRI of the brain revealed no enlargement of the ventricles or subarachnoid spaces, and no evidence of acute territorial infarction, parenchymal hemorrhage, shift of midline structures, enhancing lesions or fluid collection. The image showed a retention cyst or polyp in the inferior right maxillary sinus and mild left sphenoid sinus disease. (R. 154) An MRI of the cervical spine revealed mild spondylosis, most severe at C5-6. (R. 155) A mild disk bulge was apparent at C5-6, but there was no significant stenosis. (R. 155)

On December 22, 2003, Dr. Banks filled out a headaches residual functional capacity questionnaire. (R. 252-56) He diagnosed plaintiff with chronic daily headaches and superficial migraines, dystonia, torticollis, muscle spasms, TMJ, carpal tunnel syndrome, and dental carries.

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<sup>1</sup> Dystonia is a group of neurological conditions generally characterized by involuntary muscle contractions that force the body into abnormal, sometimes painful, movements and positions. See <http://www.webmd.com/hw/parkinsons/nord31.asp>.

<sup>2</sup> TMJ, or temporomandibular joint disorder, occurs as a result of problems with the jaw, jaw joint, and surrounding facial muscles that control chewing and moving the jaw. Common symptoms include pain or tenderness in the face, jaw, neck or shoulders; limited ability to open mouth wide; jaws that lock in position; toothaches; headaches; neckaches; dizziness; and earaches. See <http://www.webmd.com/content/article/66/79637.htm>.

<sup>3</sup> Spasmodic torticollis is a form of dystonia characterized by intermittent spasms of neck muscles resulting in involuntary rotation and tilting of the head. These movements are frequently painful. See [http://www.webmd.com/hw/brain\\_nervous\\_system/nord213.asp](http://www.webmd.com/hw/brain_nervous_system/nord213.asp).

(R. 252) Dr. Banks noted plaintiff suffers from daily, continuous headaches, waxing and waning in severity but never with complete relief. (R. 253) He also noted plaintiff suffers from vertigo, nausea, photosensitivity, visual disturbances, and mood changes as a result of her headaches, (R. 252), and that nothing provides relief. (R. 253) Dr. Banks observed objective signs of Strickland's headaches in her tenderness, impaired sleep, impaired appetite, degenerative C-spine changes and mild disc changes, (R. 253), and said plaintiff was not a malingerer. (R. 254) Dr. Banks stated plaintiff's treatment had been limited, as she could not afford treatment, and pharmacologic treatments provided limited success. (R. 254) Dr. Banks further opined that plaintiff was unable to work and was incapable of even low stress jobs. (R. 255) He anticipated plaintiff would need to be absent from work more than three times per month. (R. 255) Dr. Banks categorized her prognosis as fair, expecting Strickland to have a protracted period of disability as a result of her multiple co-morbidities and lack of financial means for therapy. (R. 255) Dr. Banks also stated plaintiff was limited in using her arms above her shoulders for more than a few minutes, looking up or down for extended periods of time, repeatedly rotating her head left or right, lifting more than ten pounds, and performing repetitive tasks with her hands or wrists. (R. 256)

Plaintiff reported to Dr. Banks at the Headache Clinic for a follow-up visit on February 2, 2004. (R. 260) Plaintiff complained of stress, but stated her headaches had decreased to low grade migraines. (R. 260) She reported not having had a severe headache for over two weeks, with only three since she last met with Dr. Banks. (R. 260) Plaintiff also reported numbness in her tongue, (R. 260), though Dr. Banks opined her alleged symptoms made no physiological

sense, other than topical irritation. (R. 262) Dr. Banks continued plaintiff on Valium and Darvocet, and encouraged her to do home exercises and reapply for disability. (R. 262)

Plaintiff saw Dr. Banks again on March 30, 2004, complaining of a headache for the past two days, worsening muscle spasms and feeling weaker. (R. 281) She rated her pain as a ten on a scale of ten, and described her headaches as a “rollercoaster.” (R. 281) She stated her pain varied from day to day and hour to hour. (R. 281) She said she cannot really function but is forced to because of her children. (R. 281) Dr. Banks noted that plaintiff’s disability had been denied, and that she appeared depressed and tearful. (R. 283) He assessed her existing problems of migraines, depression, spasmodic torticollis, TMJ, dystonia and muscle spasms as “deteriorated.” (R. 283) Dr. Banks injected plaintiff’s multiple trigger points and performed nerve blocks. (R. 283)

Two months later, plaintiff visited Dr. Banks again on June 1, 2004. (R. 270-75) Plaintiff complained of continuing daily headaches, dystonia, and muscle spasms. (R. 272) Plaintiff complained about the effects of certain medications and stated the nerve blocks performed at the last visit made her worse. (R. 272) Plaintiff reported having tried to work for four days as a dishwasher but quitting because she was “knotted up.” (R. 272) Dr. Banks assessed her problems of spasmodic torticollis, depression, tobacco use disorder, and migraines as “unchanged.” (R. 274) On August 13, 2004, plaintiff saw Dr. Banks again. (R. 300) Plaintiff complained of daily head and neck pain, with a great deal of myofascial pain, as well as a rash that appeared suddenly. (R. 300) Dr. Banks noted all of her existing problems remained unchanged. (R. 301-02) At a follow up visit on November 15, 2004, plaintiff reported a left side

headache beginning that morning, with a pain level of two on a scale of ten. (R. 365) Plaintiff also reported having gained thirty pounds. (R. 365)

The Fourth Circuit gives great weight to the opinion of a treating physician, for such opinion reflects expert judgment based on continuous observation of a patient's condition over a prolonged period of time. Smith v. Schweiker, 795 F.2d 343, 345-46 (4th Cir. 1986); Mitchell v. Schweiker, 699 F.2d 185, 187 (4th Cir. 1983). However, the Commissioner is not bound by a treating physician's opinion. Mitchell, 699 F.2d at 187. The treating physician rule does not require that the testimony of a treating physician be given controlling weight. Hunter v. Sullivan, 993 F.2d 31, 35 (4th Cir. 1992) (citing Campbell v. Brown, 800 F.2d 1247, 1250 (4th Cir. 1986)). The ALJ may choose to give less weight to the testimony of a treating physician if there is persuasive contrary evidence in the record. Foster v. Heckler, 780 F.2d 1125, 1127 (4th Cir. 1986). If a physician's opinion is not supported by clinical evidence or if it is inconsistent with other substantial evidence, it should be accorded significantly less weight. Craig v. Chater, 76 F.3d 585, 590 (4th Cir. 1996).

In his decision, the ALJ found Dr. Banks' opinion to be inconsistent with other evidence in the record, including plaintiff's own account of her daily activities. (R. 17) The ALJ accorded the opinion little weight, finding Dr. Banks' report to be unsupported by clinical findings of record and plaintiff's admitted capabilities. (R. 20) Plaintiff contends there is no persuasive contrary evidence in the record to allow the ALJ to disregard Dr. Banks' opinion. (Pl.'s Br. 10) The undersigned agrees.

Though Dr. Banks filled out the headaches residual functional capacity questionnaire after having met and examined plaintiff only once before, he never retracted his opinion that she

is disabled over the next year of treatment, or in any way stated that she was capable of working. In fact, he repeatedly encouraged her to apply, and then reapply, for disability benefits. (R. 159, 262) Furthermore, medical evidence in the record corroborates plaintiff's complaints to Dr. Banks of debilitating headaches and pain. Before she was even referred to Dr. Banks at the Headache Clinic, plaintiff complained to her healthcare professionals of headaches and neck pain countless times. (R. 116, 141, 145, 161, 164, 167, 170, 182, 188, 191, 193, 196, 199, 201) Reports from nearly every office or emergency room visit plaintiff has made since November of 2002 note her severe, continuous neck and head pain.

Dr. Hansel saw plaintiff a number of times prior to her treatment with Dr. Banks, and he assessed her migraines as deteriorated, (R. 194, 202), and diagnosed her with cervical root impingements, (R. 183, 189, 192, 194), and acute low back pain, (R. 177, 181). The record also documents plaintiff's numerous attempts to ease her pain through manipulation therapy. (R. 292, 307, 310, 313, 325, 328, 331, 335, 342, 345, 353, 356, 359, 362, 369) An MRI of her cervical spine showed mild to moderate degenerative disc disease at C5-6 with small focal right foraminal disc protrusion at that level. (R. 186) Dr. Vascik opined plaintiff needed long-term therapy lasting three to four weeks and/or chiropractic treatment. (R. 114-15) Additionally, Dr. Simonds stated she had chronic neck pain syndrome, with a definitive myofascial component that is quite severe and reproducible. (R. 388) He also recommended plaintiff see a physical medicine and rehab specialist. (R. 388) Yet plaintiff is unable to afford therapies. (See R. 254-56, 262) The ALJ found plaintiff's daily activities to be contrary to a sedentary lifestyle, specifically her ability to care for her two children. (R. 19) However, plaintiff stated that she was unable to really function but was forced to because of her children. (R. 281) Plaintiff's

financial circumstances simply leave her no choice but to attempt to care for her family. Her function as a care provider for her children does not amount to sufficient evidence to allow the ALJ to disregard Dr. Banks' findings that plaintiff does not have the capacity for work.

There is no evidence of record that contradicts the findings of Dr. Banks. No physician has opined that plaintiff is not disabled. While the state agency physicians found plaintiff to be capable of occasionally lifting or carrying twenty pounds, frequently lifting or carrying ten pounds, and sitting/standing/walking about six hours in an eight hour workday, that opinion was formulated on October 14, 2003, before Dr. Banks had ever seen Strickland or given any statement regarding her disability. (R. 118-125) Thus, on their records review, the state agency physicians did not have the benefit of Dr. Banks' treatment notes and opinion.

While a disability determination is a decision ultimately reserved to the Commissioner, 20 C.F.R. §§ 404.1527(e)(1), 416.927(e)(1), an opinion by a treating physician that a plaintiff is disabled should be given great weight. In this case, Dr. Banks clearly was a treating physician, and the record does not appear to provide persuasive contradictory evidence that would allow the ALJ to completely disregard Dr. Banks' opinion. The ALJ admittedly accorded great weight to the opinions of the state agency physicians, (R. 20), which did not take into account Dr. Banks' reports because those findings were not yet part of the record. (See R. 118-125) Reliance on a state agency physician's medical record review does not constitute substantial evidence in this case, as the review done by the state agency physicians predated the treatment of Dr. Banks. As a result, the undersigned recommends that this case be remanded to the Commissioner under sentence four of 42 U.S.C. § 405(g) for proper consideration of Dr. Banks' opinion, as a treating physician, that plaintiff is disabled from all work. 42 U.S.C. § 405(g) ("The court shall have the

power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.”).

#### IV

Therefore, it is recommended that this case be remanded to the Commissioner for proper consideration of Dr. Banks’ opinion. 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 hereby is directed to send a certified copy of this Report and Recommendation to all counsel of record.

**ENTER:** This 1<sup>st</sup> day of May, 2006.

/s/ Michael F. Urbanski  
United States Magistrate Judge